LEGISLATIVE REVIEW – PHASE II

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MANDATE:

You have requested our advice and comments with respect to the Consultants' Report entitled "Comprehensive Review of the New Brunswick Workers' Compensation Legislation – Phase II". For convenience, we will refer to this as the "Phase II Consultants' Report".

INTRODUCTION:

The Phase II Consultants' Report cannot be viewed in isolation.

The Department of Post-Secondary Education, Training and Labour (the "Department"), in collaboration with WorkSafeNB, is engaged in a multi-stage legislative review of workers' compensation. The three-phase review began in 2013. Prior to this review process, the legislation governing workers' compensation in New Brunswick has not undergone a thorough review in more than 20 years.

According to the Department website, the objective of the review is:

> • to ensure that the New Brunswick workers' compensation system appropriately addresses the needs and realities of current and future workplaces,
>
> • to strike the right balance between adequate compensation for injured workers and employers' financial interests, and
>
> • to modernize the Act with plain language to ensure that those impacted by its legislation are able to fully understand its implications and what it means to them.

Phase I of the review process saw the proclamation of new legislation that came into force on April 1, 2015. This legislation made the Workers' Compensation Appeals Tribunal external, separate and independent from WorkSafeNB.

Phase II of the review is intended to examine the governance structure of WorkSafeNB, the Workers' and Employers' Advocates Services, and Section 38 of the Workers' Compensation Act which governs benefits.

Phase III of the review will involve a cleanup of issues that do not fit into Phase I or Phase II and may include a modernization of the Workers' Compensation Act.

A Steering Committee was established to oversee the review process consisting of:

- The President/Chief Executive Officer of WorkSafeNB,

- the General Counsel of WorkSafeNB,

- the Deputy Minister of the Department of Post-Secondary Education, Training and Labour, and

- the Assistant Deputy Minister of the Department of Post-Secondary Education, Training and Labour.

THE PHASE II CONSULTATION PROCESS:

On July 10, 2015, the Department began the Phase II consultation process with the news release inviting stakeholders and individuals to submit their ideas and feedback online. At the same time, the Department released a series of discussion papers entitled:

- Governance of WorkSafeNB,

- Workers' and Employers' Advocates Services in New Brunswick, and

- Review of Section 38 (Benefits) – Workers' Compensation Act.

These discussion papers formed the foundation of the public consultation process. The Department contacted key stakeholders and invited them to submit their comments and/or to meet with a Consultation Panel consisting of Rachel Bard, Ellen Barry and Brian D. Bruce. The Consultation Panel received 30 written submissions from workers, employers and associations including injured workers. In addition, they held 22 stakeholder meetings with approximately 44 individuals in five regions of New Brunswick. The Phase II Consultants' Report was presented to the Steering Committee in November 2015.

OUR APPROACH:

In developing recommendations for legislative change, we have relied on the Phase II Consultants' Report as a resource to inform us as to the goals and aspirations of various stakeholder groups. However, while Phase II Consultants' Report summarizes the comments and recommendations received from stakeholders on topics identified for discussion in Phase II, it does not contain any recommendations of its own. Therefore, we have relied upon other sources to inform our recommendations including:

- the founding principles of Workers' Compensation,

- legislation and policy in other provinces and territories, and

- recommendations from the WorkSafeNB Board of Directors.

It is, perhaps, useful to comment on each of the points noted above.

Founding Principles of Workers' Compensation

There are five founding principles of Workers' Compensation, known as the Meredith Principles[1]. They are:

1. No-fault compensation (workers are paid benefits regardless of how the injury occurred),

2. Security of benefits (benefits are guaranteed by government),

3. Collective liability (all covered employers share liability for workplace injury insurance),

4. Independent administration (the administration of workers' compensation is separate from government), and

5. Exclusive jurisdiction (workers' compensation organizations determine entitlement to compensation).[2]

These principles represent a historic compromise in which employers agreed to fund the entire cost of the workers' compensation system and injured workers in turn gave up their right to sue their employer for their injuries. To paraphrase Sir William Meredith, the goal of any workers' compensation program is to ensure that the burden between the employer and worker is fair.

Legislation and Policy In Other Provinces and Territories

While all provinces and territories adhere, more or less, to the Meredith principles, legislation, policy and practice varies across Canada. It would be inappropriate to suggest that the workers' compensation program in one jurisdiction is preferable to the program in another jurisdiction. However, there are approaches to workers' compensation that have been introduced in some jurisdictions and followed with a degree of acceptance and success in other jurisdictions. To that extent, there may be a developing consensus around certain concepts which might be described as "best practices". We will provide our comments on these trends where appropriate.

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[1] Named after the Hon. Sir William Meredith who was the author of a report known as the *Final Report on Laws Relating to the Liability of Employers,* 1913, Toronto

[2] Association of Workers' Compensation Boards of Canada

Recommendations from the WorkSafeNB Board of Directors

The Board of Directors of WorkSafeNB is comprised of representatives of workers and employers together with a neutral chair and vice chair. They are responsible for the administration of the workers' compensation program and must balance the rights of injured workers to receive compensation for their injuries against the obligations of employers to fund the cost of the program. They have access to the administration of WorkSafeNB including the Policy Branch which can analyze local conditions and trends. They are in a unique position to make recommendations on legislative amendment. In the writer's view, the recommendations of the WorkSafeNB Board of Directors deserve careful consideration.

PART I - GOVERNANCE STRUCTURE OF WORKSAFENB

WorkSafeNB is a Crown corporation responsible for the administration of the *Workers' Compensation Act* (the "WC Act") and a number of related pieces of legislation.[3] WorkSafeNB is administered by a board of directors consisting of a chair, a vice-chair and an equal number of worker and employer representatives[4]. The President and Chief Executive Officer is a non-voting member of the Board of Directors[5]. The President and Chief Executive Officer is appointed by the Board of Directors with the approval of the Lieutenant-Governor in Council.[6]

The Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act (the "WHSCC Act") specifies that the Lieutenant-Governor in Council must appoint the following members to the Board of Directors:

- A Chairperson of the board of directors who is not representative of either workers or employers,
- A Vice-Chairperson of the board of directors who is not representative of either workers or employers,
- Four or more persons who are representative of workers, and
- Four or more persons who are representative of employers.[7]

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[3] *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.*

[4] s. 8(1) of the Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act (hereinafter "the WHSCC Act")

[5] s. 8(1.2) of the WHSCC Act

[6] s. 10(2) of the WHSCC Act

[7] s. 8(1) of the WHSCC Act

The number of directors who are representative of workers and the number of directors who are representative of employers must be equal.[8] Currently, there are four directors who are representative of workers and four directors who are representative of employers.[9]

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.[10]

The Phase II Consultants' Report considers the issue of governance under the following subheadings:

- Board Size and Composition,
- Board Appointments and Terms, and
- Effectiveness/Functionality.

We will follow the same approach.

Board Size and Composition

The Phase II Consultants' Report indicates that the majority of stakeholders believe that the current size of the Board of Directors is appropriate. There appears to be a consensus that the size of the current board should not be allowed to increase and the words "or more" should be deleted from the WHSCC Act.[11] The current Board of Directors of WorkSafeNB also made this recommendation.[12]

The Phase II Consultants' Report indicates that there was some support to attempt to make the board more representative by including on the board individuals such as:

- An injured worker,[13]
- Non-unionized workers,[14] and
- Individuals who were free from political influence.[15]

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[8] s. 8(1.1) of the WHSCC Act
[9] Association of Workers' Compensation Boards of Canada – 2015
[10] Legislative Review of Workers' Compensation Discussion Paper, Governance of WorkSafeNB, May 2015
[11] Phase II Consultants' Report, November 2015, paragraph 20
[12] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 3
[13] Phase II Consultants' Report, November 2015, paragraph 21
[14] Phase II Consultants' Report, November 2015, paragraph 22 and 23
[15] Phase II Consultants' Report, November 2015, paragraph 25

There was reportedly no support for a legislative requirement that certain individuals have actuarial, medical or other specified expertise.[16]

The Board of Directors of WorkSafeNB recommended repealing subsection 8(1.2) of the WHSCC Act which requires the President and Chief Executive Officer of the Commission to be a non-voting member of the Board of Directors. The Board felt that removing this section would help clarify roles and responsibilities ensuring that the Board was responsible for creating the vision, direction and policies for WorkSafeNB and the President and CEO was responsible for managing day-to-day operations. The Board of Directors of WorkSafeNB also recommended that the WHSCC Act be amended to remove the requirement that the Lieutenant-Governor in Council must approve the Board's hiring of the President and Chief Executive Officer.[17]

On reviewing the size and composition of the boards in each province and territory we note the following:

- Boards of Directors range in size from 5 to 15.[18]

- Six provinces and territories have what is referred to as a "bipartite" structure comprised of representatives of workers and employers.[19]

- Five provinces and territories have what is referred to as a "tripartite" structure with the Board of Directors comprised of representatives of workers, employers and the general public.[20]

- Nine of the provinces and territories have the President and/or Chief Executive Officer as a member of the Board of Directors. In most instances, the President and/or Chief Executive Officer is a non-voting member of the Board.[21]

[16] Phase II Consultants' Report, November 2015, paragraph 20
[17] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 9
[18] source: Association of Workers' Compensation Boards of Canada – 2015
[19] Prince Edward Island, Nova Scotia, New Brunswick, Québec, Saskatchewan, and Yukon.
[20] Newfoundland, Manitoba, Alberta, British Columbia and the Northwest Territories.
[21] source: Association of Workers' Compensation Boards of Canada – 2015

Board Appointments and Terms

Currently, the Chairperson and Vice Chairperson of the Board of Directors are eligible to be appointed for a term of up to four years.[22] Directors who are representative of workers and representative of employers are appointed for a term of four years.[23] The Chairperson is eligible for reappointment for one additional term, but only with the approval of the Board of Directors.[24] Directors who are representative of workers and representative of employers are eligible to be reappointed for one additional term.[25]

There is no provision in the WHSCC Act which permits directors to continue to hold office until their successors are appointed.

The Phase II Consultants' Report indicates that many stakeholders did not believe there was any need to change the length of appointments.[26]

The Federation of Labour recommended allowing the current Board members to continue to serve following the expiry of their term until a replacement has been appointed. Apparently, the timeliness of appointments has been an issue in the past.[27]

There were also stakeholder recommendations with respect to staggering of appointments[28] and nomination of directors by stakeholder groups.[29]

The Board of Directors of WorkSafeNB recommended that:

> • board members be appointed by the Lieutenant-Governor in Council on the recommendation of WorkSafeNB.[30]
>
> • the legislation be amended so that the first term of office for a member would be five years and, if reappointed, the second term would be three years. The rationale for this proposed amendment is the "steep learning curve" facing new members of the Board of Directors.[31]

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[22] ss. 9(1) and 9(1.1) of the WHSCC Act
[23] s. 9(5) of the WHSCC Act
[24] s. 9(1) of the WHSCC Act
[25] s. 9(5) of the WHSCC Act
[26] Phase II Consultants' Report, November 2015, paragraph 27
[27] Phase II Consultants' Report, November 2015, paragraph 29; WorkSafeNB 2014 Annual Report p. 15
[28] Phase II Consultants' Report, November 2015, paragraph 31
[29] Phase II Consultants' Report, November 2015, paragraphs 32 and 33
[30] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 5
[31] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 6

- the legislation include a requirement for staggered terms.[32]

- the legislation be amended to allow board members to continue to serve on the board following the expiry of their term until a replacement has been appointed.[33]

- the legislation be amended to ensure that all members of the Board of Directors are permanent residents of New Brunswick.[34]

On reviewing the terms of board members in other Canadian jurisdictions we note that the Chairperson is typically appointed for a term of 3 to 5 years as follows:

- Nova Scotia, Québec, Saskatchewan and British Columbia have a term of five years.

- New Brunswick and Manitoba have a term of four years.

- Prince Edward Island, Ontario, Alberta, Yukon and the Northwest Territories have a term of three years.[35]

With respect to members of the Board of Directors, the term of office is generally three or four years.[36] Most jurisdictions do not have a maximum number of terms. The exceptions to this are New Brunswick which has a maximum of 2 four-year terms, and Alberta which has a maximum of 3 three-year terms.[37]

With respect to the President and/or Chief Executive Officer, eight provinces and territories permit the Board of Directors to make this appointment.[38] Of the eight provinces that permit the Board of Directors to appoint the President and/or Chief Executive Officer, only three required the approval of the Lieutenant-Governor in Council. The remaining five provinces/territories permit the Board of Directors to appoint the President and/or Chief Executive Officer without approval from the Lieutenant-Governor in Council.[39]

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[32] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 7

[33] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 8

[34] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 10

[35] Association of Workers' Compensation Boards of Canada – 2015

[36] One exception to this is the province of Québec where the term of office is two years.

[37] Association of Workers' Compensation Boards of Canada – 2015

[38] The exceptions are Prince Edward Island, Ontario and Yukon. In Ontario the Lieutenant-Governor in Council must consult the Board of Directors prior to appointing a CEO. In the Yukon the appointment is made on the recommendation of the Board of Directors subject to approval of the Public Service Commission.

[39] That includes Nova Scotia, Manitoba, Saskatchewan, British Columbia and the Northwest Territories.

Effectiveness/Functionality

It is interesting to note that there appears to be a consensus among stakeholders regarding the effectiveness and functionality of the Board of Directors of WorkSafeNB. The following quotations from the Phase II Consultants' Report illustrate the point:

> "... the importance of WorkSafeNB maintaining its independence from government was stated by several stakeholders. The Federation of Labour stated in its submission that WorkSafeNB '...must be structured to be a stakeholder driven organization with employers and workers being the two key stakeholder groups'. It went on to state that '...it is imperative that both play a major role in the decision-making and, insofar as possible, decision-making be by consensus.'"[40]
>
> "The Coalition of New Brunswick Employers stated that '...it is inappropriate for government to make decisions that impact the organization (and its financial stability) without the approval of the stakeholders' and that 'Good decision making at the Board level requires a full discussion and consensus by the stakeholders.'" ...[41]

These comments are reflective of the fact that employers fund the entire cost of the system and injured workers gave up their right to sue their employer. Together, these two stakeholders are the "owners" of the compensation system. An effective and functional Board of Directors is key to maintaining the confidence of these key stakeholder groups.

In the writer's opinion, the Board of Directors of WorkSafeNB should be the trustees of the workers' compensation program. The legislation should ensure that the Board of Directors are the stewards of the WC Act with real autonomy and control over the program. The Board of Directors should approve and supervise the policies and direction of WorkSafeNB. As will be seen by the writer's comments below, there are many difficult issues facing WorkSafeNB that can only be resolved through compromise which must be expressed in the form of policy from the Board of Directors. This will include issues such as deemed earning capacity, non-work related conditions and determining what constitutes a supplement to income. These difficult issues will require an active and effective Board of Directors that can work collaboratively to develop nuanced compromises.

The Board of Directors must approve policies respecting compensation, rehabilitation, assessment, prevention and investment of the Accident Fund. Those policies must be consistent with the governing legislation and, once enacted, should be binding on the

[40] Phase II Consultants' Report, November 2015, paragraphs 36
[41] Phase II Consultants' Report, November 2015, paragraphs 37

Appeals Tribunal. The Appeals Tribunal should be determining individual rights on specific claims and not creating policy. The Board of Directors should have final authority on whether or not any particular interpretation of the governing legislation or its policy is correct.

If the Board of Directors is comprised solely of representatives of employers and representatives of workers there is a risk of gridlock and dysfunction. That has been the experience in other provinces. There is a trend toward a tripartite Board of Directors.

Recommendation #1 We recommend that Board of Directors consists of

- a chairperson,
- three members representative of workers,
- three members representative of employers,
- three members representative of the public interest, and
- all members of the Board of Directors should be permanent residents of the province of New Brunswick.

Given the responsibilities of an effective and functional Board of Directors, it is important that individuals be appointed who have the confidence of the two key stakeholders; namely employers and workers. This goal can be achieved either through a statutory obligation to consult or an obligation to appoint board members from lists submitted by stakeholder groups.

We note that consultation on appointments is an increasingly common trend across Canada. In British Columbia and Saskatchewan, the Lieutenant-Governor in Council must appoint worker and employer representatives to the Board of Directors from a list prepared by worker organizations or employer organizations respectively.[42] Saskatchewan has a further requirement to consult with stakeholder groups on reappointments.[43] Manitoba has a statutory duty to consult with:

- employer organizations prior to the appointment of board members representative of employers,
- worker organizations prior to the appointment of board members representative of workers, and

[42] Workers' Compensation Act of British Columbia, s. 81.; Workers' Compensation Act Saskatchewan s. 9(4)
[43] Workers' Compensation Act Saskatchewan s. 9(4)

- both employer organizations and worker organizations prior to the appointment of board members representative of the public interest.[44]

In Newfoundland, one of the three board members representative of employers must be recommended by the Newfoundland and Labrador Employers' Council Inc. and one of the three board members representative of workers must be recommended by the Newfoundland and Labrador Federation of Labour.[45]

In the Northwest Territories, the Minister must use his or her "best efforts" to consider any recommendations for appointment to the Board of Commissioners received from labour or industry groups.[46]

In the writer's opinion, the Chairperson of the Board of Directors should, wherever possible, be a labour arbitrator/mediator who would be respected by both industry and labour.

Accordingly, we think the legislation should contain a requirement that on any future appointments, the Minister must consult with workers and employers prior to making any appointments to the Board of Directors and the Appeals Tribunal.

Recommendation #2 — We recommend that the legislation contain a requirement that when making appointments, the Minister responsible for the WC Act must consult with:

- employer organizations regarding the appointment of persons representative of employers,
- worker organizations regarding the appointment of persons representative of workers,
- both employer and worker organizations regarding the appointment of the Chairperson, members of the Appeals Tribunal and persons representative of the public interest, and
- the consultation process should apply to both new appointment and renewals.

If board members are appointed by the Lieutenant-Governor in Council after consultation with employer organizations and worker organizations, we see no requirement for a maximum number of terms. Term limits are intended to ensure board

[44] Workers' Compensation Act Manitoba, s. 50.1
[45] Workplace Health, Safety and Compensation Act of Newfoundland and Labrador; s. 4(2)
[46] Workers' Compensation Act of the Northwest Territories, s. 84(3)

renewal.[47] However, if the board members continue to maintain the confidence of their stakeholder organizations one might question the usefulness of term limits.

Recommendation #3 — We recommend that the legislation be amended to eliminate term limits.

Currently, about half of the jurisdictions across Canada, including New Brunswick, have a vice chair of the corporate board. We see no particular advantage to this practice and there may be some disadvantages insofar as it increases the size of the board and may "unbalance" the tripartite nature of the board.

Recommendation #4 — We recommend that the WHSCC Act be amended by eliminating the requirement for a Vice-Chairperson of the Board of Directors. This can be replaced with a provision that states that the Board of Directors may, by resolution, appoint one of its members to act as chairperson during the temporary absence of the chairperson.

In private corporations, staggered board terms are going out of fashion because they are seen as a device that "entrenches" the board, unduly protecting the board from shareholder influence.[48] This logic does not apply to public corporations like WorkSafeNB. Public corporations are interested in stability and continuity of leadership to make long-term decisions. Staggered terms promote continuity and stability in the boardroom.

We think staggered board terms are beneficial to public corporations like WorkSafeNB. From a legal drafting perspective, formal staggered terms can become technical and detailed and are not well-suited to a statute like the WHSCC Act. For this reason, we would recommend the statute be amended to include a provision encouraging the Lieutenant-Governor in Council to stagger appointments.

Recommendation #5 — To facilitate the staggering of terms, we would recommend that the WHSCC Act be amended to provide that members of the Board of Directors be appointed for fixed terms, which must not exceed four years. We recommend that the WHSCC Act be amended to include a provision that when making the appointments, the Lieutenant Governor in Council may have regard to the length of the terms so that no more than one-third of the appointments expire in any year.

Further, it has been our experience that in many jurisdictions there can be delays before the Lieutenant-Governor in Council fills a vacancy after a board member's term of office has expired. This creates risks to the governance of the organization in terms of loss of

[47] Institute of Corporate Directors of Canada
[48] The New York Times, March 20, 2012 "The Case Against Staggered Boards"; Harvard Business Review, March 2015 issue "Corporate Governance 2.0"

quorum and stability in decision-making. For this reason, most Workers' Compensation Acts contain a provision that a member of the Board of Directors whose term has expired continues to hold office until his or her successor is appointed.

Recommendation #6 — We recommend that the WHSCC Act be amended to include a provision that a member of the Board of Directors whose term of office has expired continues to hold office until reappointed or a successor is appointed, or until the appointment is revoked.

Currently, the WHSCC Act provides very little guidance as to the role and function of the Board of Directors. Section 7 of the WHSCC Act describes the responsibilities of the Commission but does not specify which functions belong specifically to the Board of Directors and which functions belong to the administration of WorkSafeNB. Other than the requirement to meet at least six times each year,[49] to report to the Lieutenant-Governor in Council,[50] and to meet with the Appeals Tribunal twice per year,[51] the role of the Board of Directors is not well defined in legislation. The role and function of the Appeals Tribunal is much better defined.[52]

There is no express provision indicating that the Board of Directors is responsible to make policies for the governance of the compensation system.[53]

According to the 2014 Annual Report of WorkSafeNB there are currently four committees of the board described as follows:

- WorkSafe Services Evaluation Committee
- Financial Services Evaluation Committee
- Fatality Review Committee
- Appeals Tribunal Evaluation Committee[54]

We have reviewed the terms of reference for the first three committees noted above. When considering the role and function of the Financial Services Evaluation Committee, it has the responsibilities one would normally associate with a Finance Committee (recommending an operating budget and reviewing the financial performance of WorkSafeNB). It also has the role one would normally associate with an Audit Committee (dealing with the internal and external auditors). There is a body of literature

[49] WHSCC Act, s. 13(1)
[50] WHSCC Act, s. 17
[51] WHSCC Act, s. 25.2
[52] WHSCC Act, ss. 19.1 - 28
[53] This is, however, implied by the requirement in s. 7 that the Commission must establish policies not inconsistent with the WHSCC Act and s. 21(9) of the WHSCC Act which indicates that the Appeals Tribunal is bound by policies approved by the Commission.
[54] The Appeals Tribunal Evaluation Committee was disbanded when the new WCAT was created.

outlining the difference between an Audit Committee and a Finance Committee,[55] and suggesting that these roles should be kept separate. The Finance Committee oversees the budget pertaining to the day-to-day operation of the organization. The Audit Committee oversees the organization's internal and external controls including management compliance. To some extent, the Audit Committee may be required to review the work of the Finance Committee. This underscores the importance of ensuring the Audit Committee is completely independent.

Finally, in reviewing the current committee structure at WorkSafeNB, it should be noted that the roles and functions of these committees are not defined in the legislation and, therefore, can be amended by the Board of Directors by simple resolution. This may be viewed as insufficient to create a truly independent Audit Committee.

Most Workers' Compensation Acts contain some sort of corporate governance structure. Generally, this includes a requirement that the Board of Directors operate on the basis of the committee system.

For example, in Alberta, there is a requirement that the Chair is a member of all committees of the Board of Directors.[56] There is also a requirement for the board to have an Audit Committee to perform the functions expected of an Audit Committee under the Business Corporations Act of Alberta.[57]

The Workers' Compensation Act of Manitoba mandates at least four committees including: a Policy and Planning committee, an Audit Committee, an Investment Committee, and Prevention Committee.[58] The functions and responsibilities of each board committee are detailed in the legislation.[59] For the Audit Committee and the Investment Committee, the Board of Directors may appoint other individuals - that is non-board members - to add special subject area expertise to the committee.[60]

In Nova Scotia, the Chair of the Board of Directors has the authority to establish committees and designate members of the Board of Directors to sit on those committees.[61] In the Northwest Territories, the legislation provides that the Governance Council must establish an Audit Committee and may establish such other committees as it considers appropriate.[62]

In 2002, following a series of high-profile business failures, the United States enacted the Public Company Accounting Reform and Investor Protection Act which established certain principles of corporate governance. The principles underlying this legislation are now widely accepted. In Canada, the Office of the Superintendent of Financial

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[55] See for example, the National Council of Non-profits which is a prominent US-based organization.
[56] Workers' Compensation Act of Alberta, s. 5(4)
[57] Workers' Compensation Act of Alberta, s. 93(1)
[58] Workers' Compensation Act of Manitoba, s. 51.1(2)
[59] Workers' Compensation Act of Manitoba, s. 51.1
[60] Workers' Compensation Act of Manitoba, s. 51.1(4)
[61] Workers' Compensation Act of Nova Scotia, s. 157(5)
[62] Workers' Compensation Act of the Northwest Territories, s. 84(7) and 84(8)

Institutions has adopted a series of guidelines dealing with corporate governance. The emphasis of these guidelines is to clearly define corporate governance with a particular emphasis on board responsibilities, oversight of senior management, separation of roles and responsibilities and the establishment of an Audit Committee separate and apart from senior management.

Recommendation #7 — We recommend that the legislation be amended to define the functions and responsibilities of the Board of Directors. At a minimum, those responsibilities should include:

- approval of all policies respecting compensation, assessment, rehabilitation and occupational health and safety,
- approval of all capital and operating budgets,
- approving the investment of funds,
- appointment and evaluation of the President and CEO,
- future planning, and
- development of a prevention strategy.

Recommendation #8 — We recommend that the legislation be amended to provide for the creation of board committees including, at a minimum, a Policy Committee, an Audit Committee and an Investment Committee. These will be referred to as statutorily mandated Board Committees.

Recommendation #9 — We recommend that the legislation be amended to permit the creation of such other Board Committees as the Board of Directors may deem appropriate.

Recommendation #10 — We recommend that each Committee should be composed of the Chairperson and an equal number of members of the Board of Directors representative of workers, employers and public interest.

Recommendation #11 — We recommend that the President and CEO be the senior officer of WorkSafeNB reporting to each Board Committee (except the Audit Committee).

Recommendation #12 — We recommend that the legislation allow for the appointment of up to two additional persons who are not members of the Board of Directors who have subject matter expertise to each of the Audit Committee and the Investment Committee.

Recommendation #13 We recommend that the legislation set out the functions and responsibilities of each of the statutorily mandated Board Committees.

One of the key roles of any corporate board is to appoint a Chief Executive Officer. If the Board of Directors of WorkSafeNB is to be truly effective, it must be solely responsible for the appointment of the Chief Executive Officer. It must be clear that the CEO is responsible first and foremost to the Board of Directors. This does not eliminate government from being an important player in the process. The government is still responsible for appointing the Board of Directors and, therefore, should not be concerned it will lose all control of the program.

Recommendation #14 We recommend that the legislation be amended to eliminate the requirement that the appointment of the President and CEO be approved by the Lieutenant-Governor in Council. The President and CEO should hold office for a term to be determined by the Board of Directors and should continue to hold office at the pleasure of the Board of Directors.

The trend for Workers' Compensation Boards in Canada is for the President and CEO to be a non-voting member of the Board of Directors. If the President and CEO is appointed by the Board of Directors and holds office at the pleasure of the Board of Directors, there should be no confusion as to roles.

Recommendation #15 We recommend that the President and CEO continue to sit as a non-voting member of the Board of Directors.

The recommendations noted above deal with the structure and function of the Board of Directors. For the Board of Directors of WorkSafeNB to be effective, however, it must establish control over the compensation system. In the context of workers' compensation, the Board of Directors typically asserts control through appointment of the Chief Executive Officer, approval of operating budgets and establishing policies respecting compensation, rehabilitation assessment and management of the investments. It should be the role of the Board of Directors to interpret the WC Act and to implement policies respecting payments to workers and assessments against employers. In many respects, the Workers' Compensation Act of any province or territory is merely enabling legislation. For example, in New Brunswick, as in most other provinces and territories, the entire rehabilitation branch of the workers compensation

system is based upon enabling legislation with very few restrictions or directions.[63] The same can be said of medical aid.[64]

The intent is that the Board of Directors should flesh out these enabling provisions so as to provide programs and services that are in the interests of workers and employers. The Board of Directors should be the final arbiter of what is in the best interest of injured workers and the Accident Fund.

At the present time, it could be argued that the role of the Board of Directors of WorkSafeNB is not the final arbiter as to what is in the best interests of injured workers and the Accident Fund.

Currently, the WHSCC Act provides that the commission, and, therefore, presumably the Board of Directors, shall

> "establish policies not inconsistent with this Act, the Workers' Compensation Act, the Firefighters' Compensation Act and the Occupational Health and Safety Act to promote workers' health, safety and compensation."[65] (Emphasis added)

There is no dispute that policies of the Board of Directors must be consistent with the applicable workers' compensation legislation. The issue is who determines whether a policy is consistent with the WC Act. In the writer's view, that obligation should rest with the Board of Directors.

Presently, in New Brunswick, under the WHSCC Act, the Appeals Tribunal is required to apply any policy approved by the Commission:

> "to the extent that the policy is not inconsistent with this Act, the Workers' Compensation Act, the Firefighters' Compensation Act or the Occupational Health and Safety Act".[66] (Emphasis added)

Because the Appeals Tribunal is the final level of appeal, this effectively gives the Appeals Tribunal final determination on whether or not any policy is inconsistent with the WC Act.[67] Further, if the Appeals Tribunal determines that a policy of the Board of Directors is inconsistent with the WC Act, the decision of the Appeals Tribunal binds the

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[63] s. 43 of the WC Act simply states as follows: "To aid in getting injured workers back to work and to assist in lessening or removing any handicap resulting from their injuries, the Commission may take such measures and make such expenditures as it may deem necessary or expedient, and the expense thereof shall be borne and may be collected in the same manner as compensation or expenses of administration."

[64] s. 41(3) of the WC Act states: "All questions as to the necessity, character and sufficiency of any medical aid furnished or to be furnished shall be determined by the Commission."

[65] WHSCC Act, s. 7 (f.1)

[66] WHSCC Act, s. 21(9)(b)

[67] WHSCC Act, s. 21(12)

Commission in respect of any other matter before the Commission.[68] If the Board of Directors disagrees with the Appeals Tribunal on whether or not one of its policies is inconsistent with the WC Act, it must appeal the matter to the Court of Appeal.[69] On appeal, the correctness of a Commission policy would be considered a question of law and, therefore, the Court of Appeal would be the body that ultimately decides whether or not any Commission policy was inconsistent with the WC Act.[70]

Thus, the Board of Directors of WorkSafeNB finds itself in a situation where its policies can be reviewed by the Appeals Tribunal and the Court of Appeal to determine whether or not those policies are consistent with the applicable legislation. This undermines the Board of Directors' ability to establish control over the compensation system. In the writer's opinion, this is not desirable. The Board of Directors is representative of the key stakeholders. The Board of Directors is in a unique position to evaluate policy options and determine what is in the best interests of the compensation system, including both workers and the Accident Fund.

Most other WCBs have attempted to limit the role of the Appeals Tribunal and the courts respecting the interpretation of WCB policy. Like New Brunswick, all other provinces and territories that have an independent Appeals Tribunal have legislation stating that the Appeals Tribunal is bound to apply WCB policy.[71] However, most provinces and territories differ from New Brunswick when it comes to how to determine whether or not policy is consistent with the applicable Workers' Compensation Act.

For example, in British Columbia, the Appeals Tribunal 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".[72] If the Appeals Tribunal in British Columbia reaches the conclusion that a policy is patently unreasonable, there is a complex process whereby the appeal proceedings are suspended and the matter is referred to the Board of Directors for a determination.[73] After going through a mandated process, the Board of Directors will determine whether the Appeals Tribunal may refuse to apply the policy[74] and the Appeals Tribunal is bound by that determination.[75]

In Manitoba, if the Board of Directors believes that the Appeal Commission has not properly applied a policy the Board of Directors may stay the decision of the Appeal

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[68] WHSCC Act, s. 21(12.2)
[69] WHSCC Act, s. 21(12); WHSCC Act, s. 23(7)
[70] *D.W. v. New Brunswick (Workplace Health, Safety and Compensation Commission)* 2005 NBCA 70
[71] Workers' Compensation Act of British Columbia, s. 250(2); Workers' Compensation Act of Alberta, s. 13.2(6)(b); Workers' Compensation Act of Manitoba, s. 60.8(6); Workplace Safety and Insurance Act of Ontario, s. 126; Workers' Compensation Act of Nova Scotia, s. 183(5A); Workplace Health, Safety and Compensation Act of Newfoundland and Labrador s. 26.1; Workers' Compensation Act of the Northwest Territories, s. 130(2); Workers' Compensation Act of Yukon, s. 64(3)
[72] Workers' Compensation Act of British Columbia, s. 251(1)
[73] Workers' Compensation Act of British Columbia, s. 251(2) - (6)
[74] Workers' Compensation Act of British Columbia, s. 251(7)
[75] Workers' Compensation Act of British Columbia, s. 251(8)

Commission and refer the matter back to a new panel or may decide to hear the matter itself.[76]

In Ontario, if the Appeals Tribunal concludes that a board policy is inconsistent with the Act, the Appeals Tribunal must refer the policy to the board for its review and the board issues a direction to the Appeals Tribunal.[77]

The fact that the New Brunswick Court of Appeal is the final arbiter of the meaning and intent of the WC Act can have a profound impact. In a 2005 decision, the New Brunswick Court of Appeal stated "[i]t is trite law that Commission policies are non-binding and it is the responsibility of the Appeals Tribunal, and ultimately this court, to rule on the proper interpretation of the Act".[78]

Compare this outcome to a recent decision of the Manitoba Court of Appeal dealing with a policy of the Manitoba WCB. The Manitoba Court of Appeal stated:

> "All the Board's actions and decisions taken under Part I of the Act are protected by a strong privative clause, and one of the functions of the Board is to set and approve policies, including policies respecting compensation. The Board has the exclusive jurisdiction to determine the loss of earning capacity resulting from an accident. Thus, the Policy relating to compensation and how the loss of earning capacity of apprentices is to be determined are subject to the privative clause.
>
> Moreover, the Legislature has given the Board the ability to supervise the application of its own policies, and this supervisory function shows that the Legislature intended that the Board's policies would be subject to deference from the courts. The question of the validity of the Policy is at the heart of the specialized jurisdiction of the Board, which has particular experience and expertise with respect to determining policy respecting workers' compensation.
>
> ...
>
> In my opinion, the foregoing analysis leads to the conclusion that a reasonableness standard applies to all aspects of the question, including the issue of whether the Policy is inconsistent with the Act."[79]

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[76] Workers' Compensation Act of Manitoba, s. 60.9(1)
[77] Workplace Safety and Insurance Act of Ontario, s. 126(4)
[78] *D.W. v. New Brunswick (Workplace Health, Safety and Compensation Commission)* 2005 NBCA 70 [cited with approval in *J.D. Irving, Ltd. (Sussex Sawmill) v. Wayne Douthwright and Workplace Health, Safety and Compensation Commission*, 2012 NBCA 35]
[79] *Sciberras v. Manitoba (Workers Compensation Board)* 2011 MBCA 30

As can be seen, with legislation that clearly indicates that it is the Commission's responsibility to create and supervise the implementation of policy and a strong privative clause, the courts will defer to the expertise of the WCB on whether or not a particular policy is consistent with the Act.

Recommendation #16 — We recommend that the WHSCC Act contain a clear and concise statement that the Appeals Tribunal is bound by the policies of the Board of Directors.

Recommendation #17 — We recommend that where the Board of Directors concludes that the Appeals Tribunal has not properly applied the WC Act, regulations or a policy of the Board of Directors, it may stay the decision of the Appeals Tribunal upon issuing written reasons identifying the error of law.

Recommendation #18 — We recommend that where the Board of Directors issues written reasons identifying an error of law in a decision of the Appeals Tribunal, it may direct that a new panel of the Appeals Tribunal rehear the matter or rehear the matter itself.

Finally, in most provinces and territories the Workers' Compensation Board and/or the Appeals Tribunal have exclusive jurisdiction to determine all claims for compensation and all assessment matters and there is no appeal to the courts.[80] Decisions are protected by a strong privative clause and, under established case law, the only recourse to the courts is on the basis of judicial review where the onus is on the person attempting to set aside a decision of the Workers' Compensation Board and/or the Appeals Tribunal to establish that the decision was demonstrably unreasonable.[81] New Brunswick has historically allowed any decision, order or ruling of WorkSafeNB, and now the Appeals Tribunal, to be appealed to the Court of Appeal on any questions of law or jurisdiction.[82] This has resulted in a high volume of appeals to the courts in New Brunswick. We would submit that this erodes the intention of Justice Meredith that cases should be decided in a cost-effective method by an independent commission enjoying exclusive jurisdiction to determine all rights to compensation.

Recommendation #19 — We recommend that the WHSCC Act be amended to eliminate the right to appeal a decision of the Appeals Tribunal to the Court of Appeal.

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[80] The exceptions are Alberta, Nova Scotia, New Brunswick, and Prince Edward Island when decisions may be appealed to the court on questions of law or jurisdiction.
[81] *Dunsmuir v. New Brunswick*, 2008 SCC 9
[82] see for example s. 21(12) of the WHSCC Act

WORKERS' AND EMPLOYERS' ADVOCATES SERVICES

The WC Act establishes the position of a Workers' Advocate to assist workers or their dependents in respect of any claim for compensation.[83] Similarly, the WC Act creates an Employers' Advocate to assist employers in respect of any claim being advanced for compensation by one of their workers or "any related concerns of the employer in respect of assessment, charges and similar matters".[84]

Worker advocates and employer advocates enjoy a degree of independence because they report to the Department of Post-Secondary Education, Training and Labour and not to WorkSafeNB.

Most jurisdictions in Canada have some form of worker advocate/advisor services.[85] Only five jurisdictions provide advocate services for employers.[86]

According to the Discussion Paper:

> • There are 10 Workers' Advocates located in six offices throughout New Brunswick,
>
> • There are four Employers' Advocates working out of four locations in New Brunswick,
>
> • About 80% of the appeals brought by workers are assisted by Workers' Advocates,[87]
>
> • About 24% of employers use the services of Employers' Advocates in their appeals, and
>
> • There have been a number of enhancements to Advocate Services introduced in the last fiscal year and more enhancements are contemplated in the current year.[88]

Most of the issues identified in the Discussion Paper and the Phase II Consultants' Report are administrative or operational issues that are outside of the writer's expertise.

The Phase II Consultants' Report notes that most stakeholders acknowledge the value of the services as well as the professionalism and dedication of those who perform the work. Given the difficult work facing worker and employer advocates this is high praise.

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[83] WC Act, s. 83.1(1)
[84] WC Act, s. 83.2(1)
[85] Discussion Paper, page 4
[86] Discussion Paper, page 5
[87] Discussion Paper, page 3
[88] Discussion Paper, page 6

The comments from stakeholders tended to focus on a desire for additional advocates for both workers and employers.

The Phase II Consultants' Report noted that the workload of the Workers' Advocates Services has been strained due to the number of injured workers having to go through the Appeal Process.[89] The New Brunswick Building Trades Union (NBTU) recommended a review of the claim processing system within WorkSafeNB to decrease the rejection rate of valid claims, which will also result in a reduction of appeals, thereby easing the burden on the existing advocates.[90]

It is self-evident that the goal of any successful workers' compensation system is to ensure prompt payment to workers who are entitled to benefits. Backlogs and delays in the appeal process are not in the interests of workers, employers or the Accident Fund. Disputes regarding entitlement inevitably leads to delay, including delay in returning to work. While Workers' Advocates provide a useful service, it is always preferable if decisions can be made without the involvement of advocates for either workers or employers. Any trend towards encouraging a more adversarial approach in determining entitlement to compensation should be avoided.

Accordingly, we are not inclined to recommend changes in the Advocates Program. Certainly, we do not believe it is unreasonable for there to be more worker advocates than employer advocates. Many Workers' Compensation Acts do not provide funding for employer advocates because they do not wish to encourage employers to appeal entitlement decisions thus increasing an adversarial approach which is not helpful to the compensation system.

Instead of focusing on advocacy as a solution, we recommend focusing on quality control in decision-making. This can be achieved, in part, by ensuring that decisions made by WorkSafeNB are of the highest possible calibre. This is typically done through a three-step appeals process. The first step is the decision of the case manager; this is typically nothing more than a letter setting out a decision. The second step is usually a decision by a statutorily created internal committee called either the "Review Committee", the "Internal Review Office" or the "Appeal Resolution Office". The role of internal review is to ensure that all the necessary evidence has been gathered, all the proper investigations have been completed and that the correct policies have been identified so the correct decision can be made. The Internal Review Committee is typically staffed by experienced and knowledgeable staff members. In the writer's experience, internal review decisions are much more thorough than the decisions of the case manager. The internal review decision may confirm, vary or reverse the decision of the case manager. It is important that decisions being appealed to the Appeals Tribunal have been thoroughly investigated, that they represent the final position of WorkSafeNB and that the issues have been well defined.

[89] The Phase II Consultants' Report, page 15
[90] The Phase II Consultants' Report, page 15

The concept of an internal review is not new to New Brunswick. The WorkSafeNB 2014 Annual Report states as follows:

> Following best practice, WorkSafeNB will provide a process for claim-related decisions to be reviewed when clients disagree with the original decision. This is separate from a formal Appeals Tribunal hearing and gives WorkSafeNB an opportunity to resolve differences, while maintaining a fair compensation system - one where injured workers receive the benefits they are entitled to through legislation and policy, and employers pay for those benefits when injuries and illnesses are work-related.[91]

As can be seen, WorkSafeNB has recognized the advantages of an internal review process. However, there is no reference to an internal review process in the legislation.

Currently, every jurisdiction in Canada except Saskatchewan[92] and New Brunswick has a statutorily created internal review process. In some provinces, the legislation contains a detailed three-step appeals process including initial adjudication, a Review Committee and in Appeals Tribunal.[93] In other provinces, the legislation provides for a three-step appeal process with an internal review but leaves it up to the Board of Directors to develop the internal review process.[94] In the absence of a statutorily created three-step appeals process, it is difficult to ensure that every issue being considered by the Appeals Tribunal has first been considered by the Internal Review Committee.

Recommendation #20	We recommend that the legislation be amended to create a clear three-step appeal process for both claims decisions and assessment decisions.
Recommendation #21	In the case of claims decisions, the three-step procedure would be initial adjudication, review officer and Appeals Tribunal.
Recommendation #22	In the case of assessment decisions, the three-step appeal procedure would be assessment decision, Assessment Review Committee and Appeals Tribunal.

[91] WorkSafeNB Annual Report 2014

[92] Saskatchewan has a three-step appeal process but it is contained in Policy, not legislation.

[93] See Workers' Compensation Act of British Columbia, s. 96.2; the Workers' Compensation Act of Alberta s. 46 (claims) and s. 119 (assessments); the Workplace Safety and Insurance Act of Ontario s. 120; the Workers' Compensation Act of Nova Scotia s. 197

[94] See the Workers' Compensation Act of Manitoba s. 60.1(2); the Workers' Compensation Act of Prince Edward Island s. 56(4); the Workplace Health, Safety and Compensation Act of Newfoundland and Labrador, s. 26(1)

Recommendation #23 We recommend that the legislation be amended to ensure that the Appeals Tribunal cannot consider an issue on appeal unless that issue has first been considered and determined by the Claims Review Office or the Assessment Review Committee.

SECTION 38 OF THE WORKERS' COMPENSATION ACT (BENEFITS)

The Phase II Consultants' Report concisely summarizes the key benefits issues as follows:

> The Discussion Paper notes that the core benefits and entitlements available to injured workers are found within section 38 of the WC Act. The questions related to section 38 that are identified for discussion during this Phase II review include the following:
>
> • How well does WorkSafeNB compare to other Canadian jurisdictions in terms of type and number of benefits provided in section 38?
>
> • How can section 38 be redrafted to make it more readable?
>
> • Does section 38 strike the necessary and appropriate balance between adequate compensation for injured workers and employers' fiscal interests?
>
> • Does section 38 adequately address the issues raised in the Court of Appeal's decision in the matter of *J.D. Irving Ltd. (Sussex Sawmill) v. Wayne Douthwright and Workplace Health, Safety & Compensation Commission*, 2012 NBCA 35?
>
> Stakeholders were also asked in the Discussion Paper to make input on the following specific topics that are addressed in section 38:
>
> • Loss of earnings benefit
>
> • Spousal dependent benefits
>
> • Three-day waiting period

- Collateral benefits (top-ups)
- Annuity or pension benefits paid at age 65
- Permanent physical impairment
- Estimated capable earnings (Deeming)[95]

We will attempt to address each of these issues, but not necessarily in the order outlined in the Phase II Consultants' Report. We believe that our comments and recommendations will be easier to understand if we start with some fundamental issues and then work towards specific legislative changes.

How can section 38 be redrafted to make it more readable?

Section 38 comprises 33 pages of legislation. It describes wage loss benefits and fatal accident benefits payable to injured workers and their families. It is, unquestionably, one of the most difficult to interpret benefit provisions in any Workers' Compensation Act in Canada.

This section has been the subject of incremental amendments over the years with significant benefit changes in 1982, 1992 and 1998. All of the out of date benefit provisions remain in the WC Act. The various Section 38 provisions are not arranged sequentially, making them even more difficult to interpret.

In the writer's opinion, it is not possible to make Section 38 more readable by attempting any further incremental amendments. This will only make the problem worse. The solution, in the writer's view, is to proceed as follows:

Recommendation #24 — Repeal Section 38 in its entirety. A transition provision can be included to make it clear that accidents occurring on or before the effective date of the new legislation will be governed by the former legislation.

Recommendation #25 — Replace Section 38 with a loss of earnings benefit based on the following simple formula:

A - B x 85% = C
where:
A is the net amount the worker is capable of earning before the accident;
B is the net amount the worker is capable of earning after the accident; and
C is the amount of compensation payable.

[95] Phase II Consultants' Report, November 2015, paragraphs 68 and 69

Recommendation #26	Plain language should be used wherever possible; but not at the risk of creating uncertainty.
Recommendation #27	Where appropriate, the legislation should be enabling rather than prescriptive. Complex details should be in regulation or policy.

Loss of Earnings Benefit

We agree with the comments in the Phase II Consultants' Report that there are two important criteria to consider in comparing the loss of earnings benefit in workers' compensation legislation in the various Canadian jurisdictions. Those two criteria are:

1. The percentage of the estimated loss of earnings that are compensable; and
2. The maximum annual earnings that are insured [96].

We will comment on each item separately.

1. The percentage of the estimated loss of earnings that are compensable

Since 1998, the compensation to an injured worker in New Brunswick has been an amount equal to 85% of his or her net loss of earnings[97].

With the exception of the Yukon, all provinces and territories in Canada calculate loss of earnings benefits based upon the workers net earnings before the accident.[98] Net earnings generally refers to the worker's earnings after deduction for income taxes, CPP premiums and EI premiums.

In the Western jurisdictions and in Québec, the loss of earning benefit is 90% of net. In Ontario, PEI and New Brunswick the benefit is 85% of net[99]. In Newfoundland and Labrador, the benefit is 80% of net. Nova Scotia pays 75% of net for the first 26 weeks and 85% of net thereafter.[100]

The Phase II Review Committee reports that employer stakeholders "almost unanimously" supported maintaining the compensation rate at 85% of net loss of earnings.[101] Most worker stakeholders, including the New Brunswick Federation of

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[96] Phase II Consultants' Report, November 2015, paragraph 73

[97] It should be noted that the concept of 85% of net loss of earnings is somewhat of an illusion. Workers who are on compensation for part of the year and are employed for the other part of the year may find that their combined income from employment and compensation benefits may exceed 85% of their earnings because their employment earnings are taxed at a lower rate. This is related to the progressive nature of income tax in Canada. The details of this issue are beyond the scope of this report.

[98] Source: Association of Workers' Compensation Boards of Canada – 2015

[99] Prior to 1993 the compensation rate in New Brunswick was 90% of the estimated loss of earnings.

[100] Source: Association of Workers' Compensation Boards of Canada – 2015

[101] Phase II Consultants' Report, November 2015, paragraph 74

Labour, supported increasing the loss of earning benefit to 90%.[102] The Board of Directors of WorkSafeNB recommended that the compensation rate remain at 85% of net loss of earnings.[103]

There is, in the writer's experience, no private or public disability insurance in Canada that pays a loss of earning benefit equal to 100% of net loss of earnings.[104] This is based on the insurance concept of the "moral risk" of creating a disincentive to return to work. Generally, the data supports the notion that if there is no incentive to return to work, claims durations will increase as will the associated costs of insurance.

There appears to be a clear consensus in the legal literature and in the medical literature that the goal of any disability insurance plan should be early and safe return to work. This is accepted as being best for the worker, the employer and the insurer.

In our opinion, there is no "best practice" with respect to the percentage of earnings that are compensable. Most jurisdictions are either at 85% or 90%, but there is no clear trend. In considering the situation in New Brunswick, is also worth noting that after two years the WC Act requires that an additional amount of 10% be set aside to purchase an annuity for the worker at age 65. This amount is relatively generous compared to other jurisdictions.[105]

In the circumstances, we make no recommendation respecting the percentage of loss of earning capacity that should be compensable.

2. The maximum annual earnings that are insured

Currently, the statutory maximum annual earnings that are insured is an amount equal to one one-half times the New Brunswick Industrial Aggregate Earnings.[106] In 2016, this equates to maximum average earnings of $61,800.[107] According to the most recent information available to us, 9% of New Brunswick workers have earnings that are above WorkSafeNB's maximum annual earnings.[108] Put another way, 9% of New Brunswick workers are not fully insured by the current statutory maximum. For this 9% of New Brunswick workers, their loss of earnings benefit will, therefore, be less than 85% of net pre-accident earnings[109].

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[102] Phase II Consultants' Report, paragraph 75

[103] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review, September 24, 2015, page p. 21

[104] Some employers "top up" disability insurance payments to their injured workers to 100% of net earnings. This is generally done outside of any insurance scheme.

[105] see our comments under the heading "Annuity or Pension Benefits Paid at Age 65".

[106] s. 38.1(3) of the WC Act

[107] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 10

[108] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 10

[109] The Phase II Consultants' Report, November 2015, cites the evidence from the New Brunswick Nurses Union who noted that nurses, who are being paid at the upper range of the nurses' salary, will receive only 70% of their average net earnings. see paragraph 78

Keeping in mind the Meredith principles, one of the goals of the workers' compensation system is to ensure that the burden between the employer and the worker is fair. It is arguable that workers who are earning above the maximum annual earnings are being forced to bear an unfair burden by being compensated with loss of earnings benefits that are proportionately lower than other workers. Increasing insurable earnings and benefits for workers who are earning above the maximum annual earnings will not create a disincentive for those workers to return to work.

The Phase II Review Committee noted very few comments by employer stakeholders relating to the maximum annual earnings issue.[110] The New Brunswick Nurses Union and the Injured Workers' Advisory Committee argued for an increase in the maximum annual earnings. The Board of Directors of WorkSafeNB proposed that the maximum annual earnings be increased from 1.5 to 1.75 of the New Brunswick Industrial Aggregate Earnings. There would appear to be consensus that it would be reasonable to increase the maximum annual earnings.

Recommendation #28 — Increase the maximum annual earnings that are insured from 1.5 to 1.75 times the New Brunswick Industrial Aggregate Earnings.

Spousal Dependent (Survivors') Benefits

Currently, spousal dependent benefits in New Brunswick are extremely complex. At the risk of oversimplification, we will attempt to summarize the benefits as follows:

For the first year, surviving spouses receive 80% of the deceased worker's average net earnings payable for one year or to age 65, whichever occurs first.[111] Within one year after the death, the surviving spouse must elect to receive one of the following two options:[112]

Option 1:

- 85% of the worker's average net earnings less CPP,
- 5% contribution towards a future annuity, and
- benefits are subject to a family means test in the event of remarriage.[113]

Option 2:

- a lump sum payment of 60% of the worker's average net earnings less CPP,
- 60% of the worker's average net earnings less CPP,
- a separate amount for each dependent child, and
- 8% contribution towards a future annuity.[114]

[110] Phase II Consultants' Report, November 2015, paragraph 77
[111] s. 38.51(2) of the WC Act
[112] s. 38.51(3) of the WC Act
[113] s. 38.52 of the WC Act
[114] s. 38.53 of the WC Act

The surviving spouse is entitled to receive independent financial advice before making the election between Option 1 and Option 2[115] but the election is irrevocable.[116]

In the writer's opinion, the benefits payable to a surviving spouse are unnecessarily complex. The two options present the surviving spouse with a very difficult decision to be made within one year of the loss of a spouse. Although there is provision for independent financial advice, it would be difficult for a financial advisor to predict which of these two options is preferable because it will depend, in large part, on whether or not the surviving spouse is likely to remarry and the probable earnings of the new spouse.

The Report of the Phase II Review Committee noted there was "limited input" from stakeholders on this topic. That is not surprising because fatal workplace accidents are relatively rare[117] and therefore this topic may receive less attention than it deserves.

The Board of Directors of WorkSafeNB recommended to the Phase II Review Committee that the WC Act be amended to replace the two benefit plans for surviving spouses with one plan containing the following benefits:

- 85% of the deceased worker's loss of earnings from the beginning of the claim and until the surviving spouse attains age 65, with no family income test, and

- 10% to be set aside for the purchase of an annuity at age 65.[118]

The Board of Directors point out that the amendment noted above would improve the benefit, reduce the uncertainty of choosing between Option 1 and Option 2, and better align with other jurisdictions.[119]

There is, perhaps, no area of Workers' Compensation law where there is greater variation in benefits from one province to another, than the amounts payable to surviving spouses. It is beyond the scope of this report to attempt to review all of the differences between the jurisdictions in Canada.

However, we can safely say, as noted above, that New Brunswick has one of the most complex provisions. In our view, it would be good public policy to simplify the benefits paid to surviving spouses by introducing the improvements proposed by the Board of Directors of WorkSafeNB.

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[115] s. 38.51(4) of the WC Act
[116] s. 38.51(6) of the WC Act
[117] In 2014 there were 3 workplace fatalities in New Brunswick and 10 deaths resulting from injuries in previous years/occupational disease. Source: WorkSafeNB 2014 Annual Report.
[118] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 24
[119] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 24

It should be noted that while loss of earnings benefits payable to injured workers are essentially a form of disability insurance, benefits payable to a surviving spouse are analogous to life insurance. The goal of life insurance is to replace the wages lost by the deceased worker so as to enable the surviving spouse to maintain his or her previous standard of living. As with life insurance, there is no risk that additional benefits to surviving spouses will create a disincentive to return to work.

Recommendation #29 — Eliminate the benefits currently available to a surviving spouse to be replaced by a new benefit that would pay 85% of the deceased worker's net earnings until the surviving spouse attains age 65.

With respect to setting aside funds to purchase an annuity at age 65, we will comment on that issue below under the heading "Annuity or Pension Benefits Paid at Age 65".

Three-Day Waiting Period

Currently, WorkSafeNB has a three-day waiting period before a worker who is injured, or has suffered a recurrence of an injury, is entitled to receive any loss of earnings benefit.[120]

The Discussion Paper describes the current provisions relating to the three-day waiting period as follows:

> 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 2 days in both Prince Edward Island and Nova Scotia.[121]

Subsequent to the publication of the Discussion Paper, the Workers' Compensation Board of Prince Edward Island announced they will be eliminating the two-day waiting

[120] s. 38.11(3) of the WC Act
[121] Legislative Review of Workers' Compensation, Review of Section 38 (Benefits), May 2015, page 3

period.[122] This leaves Nova Scotia and New Brunswick as the only jurisdictions in Canada with a waiting period. New Brunswick is currently the only jurisdiction with a three-day waiting period.

The Report of the Phase II Review Committee states that the majority of the worker stakeholders favoured eliminating the three-day waiting period[123] and that employer stakeholders were "more or less evenly split as to whether the three-day waiting period should be retained or eliminated".[124]

The Board of Directors of WorkSafeNB recommended reducing the waiting period from three days to two days.[125] In its rationale in support of the two-day waiting period, the Board of Directors rely on the fact that both Nova Scotia and Prince Edward Island currently have a two day waiting period. In view of the recent announcement by Prince Edward Island that they were eliminating the two-day waiting period, the Board of Directors of WorkSafeNB may wish to revisit this issue.

In the writer's view, this would be an opportune time to eliminate the waiting period in its entirety. The trend throughout Canada is to pay compensation benefits commencing the day following the injury. Indeed, six jurisdictions actually require the employer to also pay the worker for the day of the injury.[126]

The concept of a waiting period is similar to a deductible in any policy of insurance. A waiting period is not, in itself, inconsistent with the Meredith principles. However, in New Brunswick exceptions have been created for the current three-day waiting period if the worker is:

- admitted to a hospital as an inpatient,[127]
- disabled for more than 20 days,[128] or
- a firefighter or police officer.[129]

In other words, certain workers and workers with serious injuries are exempt from the three-day waiting period. This undermines the notion that the three-day waiting period is a deductible applied equally to all injured workers.

The three-day waiting period could also produce unintended consequences, for example, as follows:

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[122] Source: Association of Workers' Compensation Boards of Canada, October 27, 2015
[123] Phase II Consultants' Report, November 2015, paragraph 88
[124] Phase II Consultants' Report, November 2015, paragraph 90
[125] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 6
[126] Source: Association of Workers' Compensation Boards of Canada, Waiting Periods – Summary
[127] s. 38.11(5) of the WC Act
[128] s. 38.11(8) of the WC Act
[129] s. 38.11(8.1) of the WC Act

- workers who are genuinely disabled for say two weeks, might be reluctant to return to work before 20 days as they would lose their entitlement to benefits for their first three days of lost income[130], and

- workers might be reluctant to attempt to return to work because if they suffer a recurrence, they will have to go through another three-day waiting period.

We also note that workers and employers have an obligation to report all injuries, even if they turn out to be less than three days of time loss. Accordingly, WorkSafeNB still experiences the administration cost associated with opening a claim and paying other expenses, even if the claimant ultimately turns out to be disabled for less than three days. Accordingly, it should not significantly increase the administrative costs of WorkSafeNB to eliminate the three-day waiting period.

The Royal Commission on Workers' Compensation in British Columbia considered the issue of waiting periods in 1999. In their Final Report, the commissioners concluded:

> Waiting periods do not reduce the costs of workplace injuries unless legislation and policies promote conduct by employers and workers that results in a real reduction in the number of injuries and illnesses, or a reduction in frivolous claims which would otherwise have occupied adjudicators' time. If real costs are not being reduced, then waiting periods are simply a means for shifting costs away from the workers' compensation system and onto individual workers, employers, or both. The commission does not consider the latter an appropriate objective or result.[131]

In view of the foregoing, we see no compelling reason to continue the current three-day waiting period.

Recommendation #30 — Eliminate the three-day waiting period. Loss of earnings benefits should be payable commencing the day following the date of injury.

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[130] In 1999, the Royal Commission on Workers' Compensation in British Columbia determined that the limited empirical evidence on waiting periods led them to believe that any cost savings associated with waiting periods due to reductions in claims volume may well be more than offset by increases in the average costs of the remaining compensation claims, due to the extension of work absences beyond the waiting period or beyond the retroactive period.

[131] Final Report Of The Royal Commission On Workers' Compensation In British Columbia, Judge Gurmail S. Gill Commission Chairman, Oksana Exell Commissioner and Gerry Stoney Commissioner 1999 p. 73

Collateral Benefits (Top-Ups)

The issue of collateral benefits appears to have garnered a great deal of attention; perhaps, more than it deserves.

In order to understand this issue, it is necessary to define certain terms. WorkSafeNB pays compensation to injured workers for their loss of earning capacity. For convenience, we will refer to these as "wage loss benefits". Wage loss benefits are based on 85% of net earnings subject to statutory maximum. Any other monies paid to a worker during the period of disability are typically referred to as a "collateral benefits". The types of collateral benefits available could include salary continuation, sick pay, personal disability insurance, employment insurance, CPP disability, accident and sickness benefits, vacation pay, bonuses, profit sharing and the like. WorkSafeNB refers to these latter payments as "supplements to compensation".[132] Some employers pay injured workers the difference between 85% of net earnings and full salary. This is typically referred to as "employer top up" or simply "top up". Top up can be made by direct payment from the employer to the worker in the form of salary or by allowing the worker to utilize banked sick pay at the rate of 15% of one full day for each day of wage loss benefits.

Currently, in New Brunswick, an injured worker is allowed to earn a maximum of 85% of his or her pre-accident earnings through a combination of wage loss benefits and other benefits which may be paid to the worker as a result of the injury. The intent of the legislation is to ensure that workers who are receiving wage loss benefits have an incentive to return to work. At its extreme, if an employer kept a worker on full salary and WorkSafeNB paid the worker full benefits, the worker would be in receipt of 185% of their pre-accident earnings. This would create an obvious disincentive to return to work and would be bad public policy.

Surprisingly, only four jurisdictions do not permit employer top ups. Those jurisdictions are Newfoundland, PEI, Manitoba and New Brunswick. Some provinces, including Ontario, permit employers to continue to advance a worker's full salary and eliminate the possibility of compensation in excess of 100% of pre-accident earnings by arranging for the employer to be reimbursed out of the wage loss benefits payable to the injured worker.

There is one other issue that requires clarification. There are actually two kinds of employer top up:

> 1. Some employers have a number of workers who are earning salary in excess of the statutory maximum. Nurses and first responders are good examples. In these cases, some employers will agree to pay top up to their injured workers to make up the difference between 85% of the statutory maximum [which is paid by WorkSafeNB] and 85%

[132] That phrase may be a misnomer since some of the payments may be unrelated to the compensation.

> of actual net pre-accident earnings. This type of top up has never been prohibited in New Brunswick. This is not considered to be a disincentive to return to work because the worker is still only receiving 85% of their pre-accident earnings.
>
> 2. Other employers pay top up to their injured workers equal to the difference between the wage loss benefits payable by WorkSafeNB [85% of net earnings] and full salary. This is a prohibited payment because it is believed to create a disincentive to return to work.

It is only the second category of top up which is relevant to our current discussion.

The issue of collateral benefits is particularly topical in New Brunswick because of a recent decision of the Court of Appeals Brunswick in *J.D. Irving, Ltd. (Sussex Sawmill) v. Wayne Douthwright and Workplace Health, Safety and Compensation Commission*, 2012 NBCA 35 (the "Douthwright Decision"). Prior to the Douthwright Decision, WorkSafeNB interpreted many different kinds of income as being benefits paid to a worker as a result of the injury. Most notably, WorkSafeNB's former policy #21-215 entitled "Supplements to Compensation" treated CPP retirement benefits as being deductible from wage loss benefits payable to an injured worker. The court found that policy #21-215 contravened the WC Act because CPP retirement benefits are available at age 60 independent of whether one receives employment income or not and that CPP retirement benefits were analogous to a worker's personal savings. The court concluded:

> "I simply cannot conceive how it might have been the intent of the Legislature in enacting s. 38.11(9) to reduce compensation payments when a worker draws on his or her savings, whether it is in the form of money in a savings account, funds held in an RRSP, a vested pension or CPP retirement benefits. None of any such monies drawn would be meant to supplement the 85% of the pre-accident net earnings the worker is entitled to receive under the Workers' Compensation Act, and none would constitute monies received for the same period during which compensation is paid."[133]

The Board of Directors of WorkSafeNB has responded to the Douthwright Decision by enacting a new policy #21-215.

[133] Douthwright Decision at paragraph 62

The new policy states:

> "WorkSafeNB reduces loss of earnings benefits when:
>
> • The remuneration is earned and received by the injured worker for the same period during which compensation is paid,
>
> • The remuneration is from the employer or an employment-related source,
>
> • There is no requirement to reimburse the remuneration, and
>
> • The combination of benefits and remuneration exceeds 85% of the pre-accident net earnings.
>
> All four parts of this test must be satisfied to reduce benefits."

The policy goes on to say that WorkSafeNB shall deduct from compensation benefits:

> • Estimated capable earnings,
>
> • Employment insurance benefits, and
>
> • Employer-sponsored disability benefits (when there is no undertaking to reimburse the insurer)

The new policy also states that remuneration received during the period the worker was receiving compensation, but earned prior to the injury, shall not be deducted from loss of earnings benefits. Examples of this include:

> • Vacation pay,
>
> • Bonuses, and
>
> • Sick leave benefits.

The issue of collateral benefits received a great deal of attention in the Report of the Phase II Review Committee. We think it is safe to say that this is a "hot button" issue. Worker stakeholders felt that the prohibition against top-ups was taking away a benefit that had been "earned" by the injured worker, that it was an interference with the free collective bargaining process and that it penalized workers to the benefit of WorkSafeNB.

Some employer groups felt WorkSafeNB had gone too far in its new policy and that by allowing workers to receive sick leave benefits at the same time they were receiving wage loss benefits from WorkSafeNB was illogical and inappropriate.

The Board of Directors of WorkSafeNB made recommendations to the Review Committee on this issue. The Board of Directors proposed that subsection 38.11(9) should be repealed and the new section should be added to the WC Act to explicitly address those types of remuneration that are to be offset from loss of earnings benefits and considered supplements to compensation. The Board of Directors of WorkSafeNB suggested that the following forms of remuneration should be explicitly listed as supplements to compensation:

- Actual earnings,
- Sick and disability pay,
- Employment insurance,
- Vacation pay, and
- Employer top-ups.

The Board of Directors of WorkSafeNB further suggested that this new section should include a clause providing the Board of Directors with the authority to assess similar types of remuneration and determine whether they should be considered supplements to compensation.

We believe there are sound policy reasons for limiting collateral benefits such as employer top ups. The literature supports the fact that duration of claims will increase if income from all sources exceeds or is equal to the income earned prior to the accident. We are aware of no private disability insurance plan that permits a disabled person to receive more income while disabled than they were receiving prior to the onset of disability. In the private sector, disability insurance policies typically contain what is referred to as an "all sources" clause limiting income from all sources so as to prevent individuals from collecting on more than one policy or from more than one source thus creating a "moral risk" that the individual will be better off on disability and be disinclined to return to employment. The current provisions in subsection 38.11(9) of the WC Act are, in effect, an all sources clause. In the writer's opinion, there is no problem in principle with an all sources clause. The problem, at the present time, is a lack of clarity leading to administrative difficulty.

We have already recommended that s. 38 of the WC Act be repealed in its entirety and replaced with a much clearer and simpler form of legislation. Accordingly, we have no hesitation in agreeing with the first portion of the Board of Directors' recommendations.

Recommendation #31 — We recommend that subsection 38.11(9) be repealed and replaced with legislation that expressly indicates those types of remuneration that are to be offset from loss of earnings

> benefits and considered supplements to compensation. That list would include: any payment from the employer that was not earned prior to the injury, sick pay, vacation pay, employment insurance benefit or a disability benefit from any source.

We have also made several recommendations that the Board of Directors of WorkSafeNB be empowered to create policies to more specifically deal with complex issues. Even if the legislation expressly indicates those types of remuneration that are to be offset from earnings and considered supplements to compensation, it is not always easy to determine what type of payment falls into that category. For example, special policies may be required for employee incentive programs and bonuses in order to provide guidelines as to whether or not they are considered to be earned prior to the injury and thus part of the person's regular compensation. We think the Board of Directors should be given jurisdiction to determine, in particular cases, whether a type of payment is a collateral benefit resulting from injury which ought to be considered as a supplement to income.

Recommendation #32 — We recommend that Board of Directors of WorkSafeNB be given jurisdiction to determine whether any type of payment is a benefit which ought to be considered as a supplement to income.

Annuity or Pension Benefits Paid at Age 65

Since 2009, workers who are on loss of earnings benefits for more than two consecutive years are entitled to an additional amount of 10% to be set aside for the worker to enable him or her to purchase an annuity at age 65.[134] The intent of this provision is to compensate the worker for any anticipated reduction in CPP retirement benefit or private pension plan benefit.[135]

Other provinces and territories have attempted to address the issue of the impact of long-term disability and pensionable earnings in a variety of different ways. There is a good jurisdictional review in the Benefits Discussion Paper which summarizes the issue as follows:

> 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.

[134] s. 38.22 of the WC Act
[135] Benefits Discussion Paper, May 2015, page 4

> 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.[136]

As can be seen, there are many different approaches to this issue, and no one approach can be said to be preferable to the other. New Brunswick is at the higher end of the benefits scale with a contribution of 10%. Some jurisdictions allow workers to contribute some of their wage loss benefits to a pension fund which we do not recommend because it can be complex to administer.

The Phase II Consultants' Report indicates that the majority of stakeholders who provided input on this topic agree that the 10% of an injured worker's benefit eligibility that is set aside for a pension annuity is an appropriate amount.[137] In our view, significant weight should be given to the fact that there appears to be a consensus of opinion on this issue.

Recommendation #33 — We recommend that WorkSafeNB continue with its present practice of setting aside 10% of an injured worker's loss of earnings benefit to provide for a pension at age 65.

WorkSafeNB has a separate annuity plan for surviving spouses. Surviving spouses are entitled to an additional amount of either 5%[138] or 8%[139] of the benefits paid to the surviving spouse depending upon whether they chose Option 1 or Option 2 as noted above under the heading "Spousal Dependent (Survivors') Benefits". We have already noted that benefits payable to dependent spouses in New Brunswick are extremely complex. This only adds to the complexity facing a surviving spouse.

As noted previously, the Board of Directors of WorkSafeNB recommended to the Phase II Review Committee that this benefit be simplified and improved by amending the legislation to require that 10% be set aside for the purchase of an annuity at age 65.[140] We concur with this recommendation.

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[136] Benefits Discussion Paper, May 2015, page 5
[137] Phase II Consultants' Report, page 31
[138] s. 38.54(1) of the WC Act
[139] s. 38.54(2) of the WC Act
[140] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 24

Recommendation #34 We recommend that the WC Act be amended to provide that an additional amount equal to 10% of the benefits payable to a surviving spouse be set aside for the purchase of an annuity at age 65.

The Phase II Consultants' Report goes on to deal with two technical issues that require consideration. Both issues were raised by the Board of Directors of WorkSafeNB. The issues relate to calculation of the rate of return and payment of small annuities. We will deal with each issue separately.

1. Calculation of the Rate of Return

Currently, the WC Act provides that the funds set aside to provide for an annuity at age 65 shall accumulate interest at the same rate of return as is earned by the WorkSafeNB Pension Fund. The WC Act states:

> "Interest shall be assumed to have been paid quarterly on the amount credited to each worker's account in the Pension Fund and the rate of interest payable shall be the average yield rate of the investment portfolio of the Pension Fund during each quarter."[141]

While the intent of this provision appears to be clear, a recent decision of the Appeals Tribunal concluded that this sub-section was drafted in such a way that it does not allow negative rates of return to be considered when calculating an injured worker's pension account. In the writer's opinion, this is an unintended consequence which should be rectified.

Pension funds are typically invested in a balanced portfolio with the intent that they produce a reasonable rate of return over the long term.[142] In the short term, there may be both positive and negative rates of return. The only way of avoiding the risk of negative returns would be to invest solely in income producing investments. This would lower the overall rate of return for the fund over the long-term and would be inconsistent with prudent investing practice.

Workers and dependents who have their annuity/pension benefits invested in the WorkSafeNB pension fund enjoy higher rates of return by virtue of participating in a balanced investment portfolio. They benefit from higher rates of return when the equity markets are improving. They may also be exposed to the risk of occasional negative returns when the equity markets move downward.

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[141] s. 38. 22(9) of the WC Act

[142] WorkSafeNB's current asset mix consists of 21% Canadian bonds, 5% Canadian real return bonds, 16% Canadian equities, 16% U.S. equities, 15% international (EAFE) equities, 4% emerging markets equities, 15% real estate, 1% infrastructure, 5% in a global opportunistic strategy and 2% cash. Source: WorkSafeNB 2014 Annual Report

Further, it would create significant administrative difficulties to attempt to calculate an individual pensioner's rate of return without regard to negative returns.

Recommendation #35 We recommend that the legislation be clarified to make it clear that the rate of return payable on each worker's account in the Pension Fund be equal to the overall rate of return of the Pension Fund including both negative and positive returns.

2. Payment of Small Annuities

As noted previously, there are a number of situations where an injured worker or his or her surviving spouse may become entitled to a retirement annuity or pension at age 65. Funds are set aside to be used, together with interest that accrues on those funds, to provide a pension for the worker at age 65. This benefit is intended to compensate for any reduction of retirement income caused by workplace injury.

In some cases, the amount set aside may be very small and it is not practical to purchase a pension. In those situations, the WC Act provides for the amount set aside, together with interest on that amount, to be paid to the worker as a lump sum.

Subsection 38.22(12) of the WC Act provides as follows:

> "Where the pension to which a worker is entitled under subsection (1) or (2) would be less than five hundred dollars per year, the Commission may, in lieu of that pension, pay to the worker at age sixty-five the accumulated capital and interest."[143]

This equates to a lump sum of approximately $7,200. In other words, an amount less than $7,200 may be paid out to the worker or the spouse as a lump sum. Amounts greater than $7,200 are used to provide a pension.

WorkSafeNB's Board of Directors recommends increasing the lump sum payments for annuities in order to resolve difficulties injured workers have in locating financial providers from which they are able to purchase annuities of smaller amounts.[144] WorkSafeNB recommends the minimum lump sum amount which must be converted to a pension should be 50% of the New Brunswick Industrial Aggregate Earnings which would currently equate to any amount greater than $20,308.[145]

We agree that there should be a minimum amount below which the lump sum set aside to purchase an annuity should be paid as a lump sum. There is a cost associated with

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[143] s. 38. 22(12) of the WC Act

[144] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 18

[145] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 18

administering a pension. It is not good policy to create small pensions when the cost of administering the pension is disproportionate to the amount paid.

Ontario, Manitoba, Saskatchewan and Yukon all have minimum annuity amounts that range from approximately $16,000 in Manitoba to approximately $83,000 in Ontario. Accordingly, it seems prudent for WorkSafeNB to increase its minimum annuity amount. Rather than specifically referencing the New Brunswick Industrial Aggregate Earnings, we would recommend that the legislation be amended to allow the Board of Directors to determine the minimum annuity amount by policy.[146] This is consistent with our overall philosophy of providing enabling legislation that authorizes the Board of Directors to make important policy decisions.

Recommendation #36 — We recommend that the legislation be amended to enable the Board of Directors of WorkSafeNB to determine the minimum amount of lump sum that may be converted to a pension.

Finally, there is one further issue relating to pension benefits which we have identified in our review. Currently, if a worker dies before attaining the age of 65, any amount set aside for the purpose of providing a pension at age 65, together with accrued interest, must be divided equally among the surviving dependents of the worker.[147] If there is a surviving spouse having the care of a dependent child, that child's share must be given to the spouse.[148]

The funds are being set aside by WorkSafeNB to enable the worker to purchase an annuity at age 65. They are an asset of the worker and should be treated as such. This means that they should be considered to be a shareable asset under family law and, upon death, the assets should belong to the worker's estate.

In the writer's view, if a worker dies before being able to purchase an annuity, the lump sum should be payable to a beneficiary designated by the worker or, if no beneficiary has been designated, to the worker's estate. This simplifies issues from the point of view of WorkSafeNB. If they are paid to the estate, it is the responsibility of the trustee of the estate to distribute the funds in accordance with the wishes of the deceased worker (if there is a will) or in accordance with provincial law if there is no will.

Recommendation #37 — We recommend that the legislation be amended to indicate that if a worker dies before electing an annuity, WorkSafeNB shall pay the accumulated capital plus interest to a beneficiary designated by the worker or, in the alternative, the estate of the worker.

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[146] In Manitoba the statute provides that the minimum amount "may be determined by the board".
[147] see s. 38.22(13) of the WC Act
[148] see s. 38.22(13) of the WC Act

Recommendation #38

We further recommend that the legislation be amended to indicate that in the event of marriage breakup, the accumulated capital and interest is a family asset under provincial law and is subject to being divided in the manner set forth in provincial pension legislation.

Permanent Physical Impairment

Currently, if a worker suffers a permanent physical impairment as a result of an injury he or she is entitled to a lump sum payment in recognition of his or her loss of opportunity. The amount of the lump sum payment shall be not less than $500 and not more than the maximum annual earnings; currently $61,800. In other jurisdictions, a payment of this nature is commonly referred to as a "noneconomic loss" or an "impairment award".

There was surprisingly little input from stakeholders on this point. The Report of the Phase II Review Committee states that one worker stakeholder favoured increasing the minimum lump sum award from $500 to $1500 which would bring New Brunswick into the general Canadian average. The same worker stakeholder advocated allowing the worker to convert the lump sum impairment award to an annuity if the award was greater than a specified level.

We would recommend against increasing minimum lump sum awards. Impairment awards are noneconomic losses. Under the current program in New Brunswick, a worker with a 1% impairment will receive a lump sum award of $618. In other words, only workers with an impairment of less than 1% are currently affected by the statutory minimum. Workers with a 3% impairment award are already entitled to an award in excess of $1500. In our view, where resources are limited, the emphasis should not be on increasing payments to workers with noneconomic losses or relatively minor injuries, even if those injuries are permanent. Rather, the focus should be on improving benefits to workers with serious or catastrophic injuries.

Further, we would recommend against creating a statutory right allowing workers who are entitled to significant impairment awards to have the ability to convert their lump sum payment into a lifetime pension to be administered by WorkSafeNB. Of course, workers are free to purchase private annuities with their lump sum awards. However, our experience in Manitoba has taught us that administering an annuity creates a heavy administrative burden.

Recommendation #39

We recommend that the WC Act not be amended to increase minimum lump sum awards or to permit larger lump sum awards to be converted to an annuity to be administered by WorkSafeNB.

Estimated Capable Earnings (Deeming)

One of the most difficult issues facing WorkSafeNB, and every other workers' compensation system in Canada, is determining when wage loss benefits should come to an end. In most cases, the injured worker recovers fully, returns to the same job with the same employer, and begins to earn the same salary.

Unfortunately, that is not always the case. In some instances, the worker may recover from his or her injuries but the job is no longer available. In other instances, the worker is left with some residual disability and the employer has no light duties available. In these cases, while the worker has a residual earning capacity, it may be difficult to find available employment. This creates a real dilemma.

The Phase II Consultants' Report notes that employer stakeholders and worker stakeholders are very much divided on what should happen when a worker recovers from his or her injury but is unable to find employment due to limited employment opportunities. Employer groups favour the status quo, arguing that workers' compensation is not an employment insurance program. Worker stakeholders argue that wage loss benefits should only be reduced when a worker is actually able to find employment and begins to earn a salary. The New Brunswick Federation of Labour argued that it was grossly unfair to reduce the benefits of a permanently disabled worker who has been deemed fit for "non-existent jobs".

This has been an issue in New Brunswick for at least 30 years. In 1987, B.E.H. Baxter, Executive Director of the WCB of New Brunswick, published a paper noting as follows:

> "... individuals are deemed at certain levels but there is no meaningful employment for them to return to. For example, we may deem the worker capable of at least minimum wage if he is physically able to perform light or sedentary unskilled work. Because the province is largely made up of primary labour intensive industries, the minimum-wage jobs in fact are those that involve heavy labour and light unskilled work rarely exists."[149]

The 1999 Royal Commission on Workers' Compensation in British Columbia noted that deeming had been recognized as a controversial practice in British Columbia for many years,[150] although it was a common practice throughout Canada.[151] After considering the issue, the Royal Commission concluded as follows:

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[149] see Terence G Ison, Workers Compensation and Canada, 2nd edition, Butterworths, 1989 at page 102

[150] Final Report Of The Royal Commission on Workers' Compensation In British Columbia, Judge Gurmail S. Gill Commission Chairman, Oksana Exell Commissioner and Gerry Stoney Commissioner 1999 p. 24

[151] Final Report Of The Royal Commission on Workers' Compensation In British Columbia, Judge Gurmail S. Gill Commission Chairman, Oksana Exell Commissioner and Gerry Stoney Commissioner 1999 p. 25

> The commission is of the view that deeming is necessary in appropriate and prescribed circumstances. The commission also considers "suitable and reasonably available" and "in the long term" to be appropriate standards by which employability should be measured, given an injured worker's duty to reasonably mitigate his loss.[152]

The Commission went on to point out that while deeming is a "necessary prerogative" of the board, it is important that deeming not occur until after vocational training and/or other appropriate interventions have been completed and assessed.[153]

In the writer's opinion, terminating benefits when a worker is capable of working is consistent with the objects and purposes of workers' compensation. Workers' compensation programs are intended to provide compensation to workers for injuries arising out of and in the course of employment. This is part of the "historic trade-off" by which workers gave up their right to sue their employers but gained the right to compensation for their work-related injuries regardless of who is at fault. Similarly, employers agreed to fund the entire cost of the program but gained immunity from legal action by their workers for work place injuries.[154]

Employers are required to pay for the costs associated with workplace injuries. Workers compensation insures against disability and loss of earning capacity; not against unemployment.

Every jurisdiction has legislation which permits the WCB to deem a worker capable of earning an income even if there is no available employment.

In fact, in many jurisdictions compensation is based on loss of "earning capacity" not loss of earnings.[155]

In New Brunswick, the issue is dealt with in the definition of "loss of earnings" which is set out in the WC Act as follows:

> "loss of earnings" means
>
> (a) average net earnings, less

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[152] Final Report Of The Royal Commission on Workers' Compensation In British Columbia, Judge Gurmail S. Gill Commission Chairman, Oksana Exell Commissioner and Gerry Stoney Commissioner 1999 p. 28

[153] Final Report Of The Royal Commission on Workers' Compensation In British Columbia, Judge Gurmail S. Gill Commission Chairman, Oksana Exell Commissioner and Gerry Stoney Commissioner 1999 p. 29

[154] *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* [1997] S.C.J. No. 74 at paras 23 – 27

[155] see Workers' Compensation Act of Alberta s. 56(6), Workers' Compensation Act of Manitoba, s. 40(1),

> (b) the earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining the injury... (emphasis added)[156]

As can be seen, the only requirement in the WC Act is that the determined occupation must be "suitable". This approach is not unique to New Brunswick. For example, in British Columbia, the operative provision is nearly identical to New Brunswick. The relevant provision in the British Columbia legislation reduces the benefits payable to a worker by:

> "the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury." (emphasis added)[157]

Nova Scotia, on the other hand, requires that the deemed employment be both "suitable" and "reasonably available". The comparable provision in the Nova Scotia Act reads as follows:

> "the net average weekly amount that the Board determines the worker ... is capable of earning in suitable and reasonably available employment,"[158] (emphasis added)

Saskatchewan permits the WCB to terminate or reduce wage loss benefits to a worker only after:

> "...the board has designed and provided to the worker, at the expense of the board, a vocational rehabilitation program, and the worker has been allowed a reasonable time to obtain employment after completing the program."[159]

These variations in wording can have an impact on the administration of claims as it relates to deeming a worker capable of returning to work. However, in the writer's experience, the real solution to this problem is often found in policies enacted by the Board of Directors which interpret the legislation. The policies attempt to balance the interests of workers with the interests of employers by developing guidelines with reference to such issues as:

- Ensuring that there has been appropriate vocational rehabilitation,
- Ensuring the deemed employment is suitable for the particular worker,
- Providing job search assistance,

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[156] s. 38.1(1) of the WC Act
[157] Workers' Compensation Act of British Columbia, s. 30(1)(b)(ii)
[158] Workers' Compensation Act of Nova Scotia, s. 38(b)(ii)
[159] Saskatchewan Workers' Compensation Act, section 101(1)(b)(iii)

- Ensuring deeming is only used as a last resort,

- Placing the onus on the WCB to demonstrate an earning capacity, and

- Ensuring that the worker receives reasonable notice before benefits are reduced.

For example, the Policy in Saskatchewan defines suitable employment to mean work that:

- The worker can do, given their employability assessment and transferable skills analysis,

- The worker can functionally perform, given the restrictions imposed by the work injury and existing at the time of the injury,

- Will not endanger the health and safety of the worker or others, and

- Contributes meaningfully to the operation of the business.[160]

Nova Scotia has, by policy, determined that employment will be said to be "reasonably available" if there are currently employment opportunities within 100 km from the worker's ordinary place of residence, or a greater distance if the worker was travelling a greater distance to work prior to the accident.[161]

In Manitoba, deeming an earning capacity will only be used as a last resort after all reasonable vocational rehabilitation/re-employment options have been exhausted. The Policy also requires that the worker be provided with reasonable job search assistance. The length of job search assistance which will be provided is determined with reference to the unemployment rate in Manitoba for the worker's level of education. For example, a worker with less than high school graduation will be provided with 28 weeks of job search assistance, whereas a worker who has graduated from high school might only receive 12 weeks of job search assistance.[162]

As can be seen, there are significant differences in policies from province to province.

In the final analysis, it would appear that all jurisdictions in Canada permit deeming of an earning capacity in certain circumstances. The solution to this difficult issue lies in a combination of legislation that enables the WCB to determine an earning capacity combined with a careful and detailed policy approach which defines the circumstances under which an injured worker may be deemed to be employable. We believe that the

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[160] Saskatchewan Workers' Compensation Board Policy 4.1.3 "Determination of Long-Term Loss of Earnings"
[161] Workers' Compensation Board of Nova Scotia Policy #3.5.1
[162] Workers' Compensation Board of Manitoba Policy 44.80.30.20, Post Accident Earnings – Deemed Earning Capacity

Board of Directors of WorkSafeNB is in the best position to develop detailed policies that are designed to balance the interests of injured workers with interests of employers. This seems to be the generally accepted approach in Canada.

Recommendation #40	We recommend that WorkSafeNB continue to have jurisdiction to deem workers as having an earning capacity even if they are unable to find employment.
Recommendation #41	We further recommend that the WC Act be amended to provide some limitations on the board's ability to deem earnings to ensure that deeming only occurs as a last resort after providing the worker with reasonable vocational rehabilitation services and a reasonable time to obtain employment.[163]
Recommendation #42	Finally, we recommend that WorkSafeNB's Board of Directors be given express jurisdiction to develop a comprehensive policy respecting deemed earning capacity which defines what constitutes reasonable vocational rehabilitation services and what constitutes a reasonable time to obtain employment. This policy should be developed with respect to the unique regional economic conditions in New Brunswick.

Non-Work-Related Conditions

The Phase II Consultants' Report identifies non-work-related conditions as an issue having a significant impact on the calculation of a worker's entitlement to benefits.

This issue is similar to the issue of deemed earning capacity described above. In both cases, WorkSafeNB is faced with the difficult task of terminating or reducing wage loss benefits because the worker is prevented from returning to work due to a non-work related circumstance. Both cases deal with a fundamental question related to the purpose and intent of the workers' compensation scheme.

If a worker has a personal condition, unrelated to his or her employment, which prevents the worker from returning to employment, is it reasonable to expect WorkSafeNB, and therefore the employer community, to pay for the cost of treatment and loss of income attributable to that personal condition?

There is nothing in the WC Act that specifically deals with this issue. However, it is clear that the intent of the legislation is to compensate workers for employment related injuries. The WC Act was not intended to serve as a general compensation scheme that

[163] Section 101(1) of the Saskatchewan Workers' Compensation Act provides a useful model.

embraces non-occupational injuries[164]. Worker's Compensation is not the scheme of disability insurance which compensates an insured person for all disability, regardless of cause.

The Board of Directors of WorkSafeNB recommended to the Phase II Review Committee adding a new section to the WC Act that would require:

> 1. That non work-related conditions first be accommodated during the rehabilitation of a workplace injury.
>
> 2. If accommodations are not possible, benefits would be suspended until the injured worker is able to resume rehabilitation. In these circumstances, the injured worker is given 30 days' notice before benefits are suspended.
>
> 3. If it is unlikely that the injured worker would resume rehabilitation, or if the non-work-related condition becomes the primary reason that the worker is not able to return to work, WorkSafeNB will pay benefits for the entire work-related injury based on the estimated healing time as recognized by generally accepted medical evidence.[165]

We have a number of concerns with this proposed approach. In our view, the issue is too complex to be dealt with as proposed. Our concerns can be summarized as follows:

> 1. Non-work-related conditions affecting a worker's ability to return to work may be pre-existing conditions or they may arise subsequent to the workplace injury.
>
> 2. If it is a static pre-existing condition, the combined effect of the two disabilities is often far greater than would be expected by the workplace injury alone. Generally, the WCB will be deemed responsible for the entire resulting disability. Most WCB's, including WorkSafeNB, will pay compensation for the full injurious effect of the workplace injury.[166]
>
> 3. If it is a deteriorating pre-existing condition, there will be circumstances where the workplace injury resolves and the worker remains disabled because of the pre-existing condition which is now worsened.

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[164] *D.W. v. Workplace Health, Safety and Compensation Commission and Via Rail Canada Inc.*, 2005 NBCA 70

[165] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 12

[166] In New Brunswick, this is specifically required under s. 7(5) of the WC Act.

4. If a non-work-related condition arises after the workplace injury, it may not necessarily arise in the course of rehabilitation. Such disabilities can arise prior to rehabilitation or in cases involving workers who are not candidates for rehabilitation. By creating an exclusion for non-work-related conditions that arise in the course of rehabilitation, it may be suggested that all other non-work-related conditions continue to be compensable. We do not believe this is the intent.

5. We are also concerned that the proposed amendments perpetuate the conception that a legislative amendment is the appropriate response to difficult adjudicative issues. The legislation can never be crafted in such a way that it can anticipate all eventualities. The correct approach, in the writer's view, is to ensure that the legislation specifies that only workplace injuries are compensable and provides clear jurisdiction to enable the Board of Directors to develop policies to define how WorkSafeNB should respond to various kinds of non-work-related conditions that may interfere with a worker's ability to return to work.

In the writer's experience, this issue is dealt with through a series of policies in each jurisdiction. In Manitoba, for example, there are four separate policies to deal with the issue of non-work-related conditions in different circumstances. Those policies are entitled "Vocational Rehabilitation", "Recurring Effects of Injuries", "Pre-Existing Conditions" and "Further Injuries Subsequent to a Compensable Injury". Ontario has a policy entitled "Adjusting Benefits Due to Post-accident, Non-work Related Change in Circumstances". The Ontario Policy covers many non-work related changes in circumstances including:

- Injuries sustained as a result of a non-work-related accident,
- Deterioration of a pre-existing condition,
- Permanent relocation for reasons unrelated to the work-related injury,
- Physical conditions (e.g., pregnancy, cardiac, hernia),
- An urgent family matter requiring the worker to leave the province/country for an extended period of time, and
- Incarceration.[167]

[167] WSIB Operational Policy Manual #15-06-08, Adjusting Benefits Due to Post-accident, Non-work-related Change in Circumstances published December 3, 2012.

In summary, we have concluded that reduction or termination of benefits due to non-work related conditions is an issue that can be best dealt with through legislation that enables the Board of Directors of WorkSafeNB to develop policies to manage this complex and nuanced issue.

Recommendation #43	We recommend that the legislation be amended to state that WorkSafeNB may terminate or reduce payment to a worker for loss of earnings if WorkSafeNB determines that the workers loss of earnings is not related to the effects of the injury.
Recommendation #44	We recommend that the legislation also be amended to give the Board of Directors of WorkSafeNB jurisdiction to develop policies that will define the circumstances under which a worker's loss of earnings are not related to the effects of the injury.

OTHER ISSUES

There were several other issues relating to entitlement to benefits which we have identified in our review.

Presumption

Before determining what benefits are available to an injured worker, WorkSafeNB must consider who is eligible for benefits. The key issues of eligibility are whether someone is a worker, whether the worker was involved in an accident and whether the accident arose out of and in the course of employment.[168] The definition of "worker" and the definition of "accident" in the New Brunswick legislation is fairly typical of workers compensation legislation throughout Canada. We have no comments or concerns in this regard. However, when it comes to determining whether an accident arose out of and in the course of employment, the WC Act is somewhat unique.

Some background information may be of assistance. All Workers' Compensation Acts in Canada provide compensation for injuries "arising out of and in the course of employment". The meaning of the phrase "arising out of the course of employment" has been the subject of significant judicial interpretation that is beyond the scope of this Report. At the risk of oversimplification, the reference to "in the course of employment" generally refers to the time and place of the accident having a relationship to the employment. Arising out of the employment generally connotes that the activity that caused the injury was for the benefit of the employer. This is sometimes a difficult issue to determine. In certain cases, it may be known that the accident occurred "at work" and "during work hours" but it may not be known what activity the worker was engaged in.

[168] s. 7(1) of the WC Act

This may arise, for example, in a case where a worker is found dead at work. How then does WorkSafeNB determine whether a worker's death arose out of the employment? In most cases, this can be determined on autopsy or by other scientific means. However, in some cases there is an absence of clear evidence, in which case entitlement to benefits is usually determined on the basis of the presumption contained in the legislation.

A typical presumption is worded as follows:

> Where the accident arises out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment; and, where the accident occurs in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.[169]

In New Brunswick, the presumption is much more complex. The WC Act states as follows:

> "When the accident arose out of the employment, in the absence of <u>any evidence to the contrary</u>, it shall be presumed that it occurred in the course of the employment, and when the accident occurred in the course of employment, in the absence of <u>any evidence to the contrary</u>, it shall be presumed that it arose out of the employment. (Emphasis added)
>
> Where there is any evidence that an accident did not arise out of or in the course of the employment, the Commission shall weigh all the evidence before it and determine, on a preponderance of evidence, whether the accident arose out of or in the course of the employment, as the case may be."[170]

As can be seen, the presumption in New Brunswick is more restrictive. All that is necessary to rebut the presumption is "any evidence to the contrary". There will almost always be some evidence to the contrary. In those circumstances, the presumption has been neutralized.[171]

It is not often that the presumption is the deciding factor in determining entitlement to benefits; usually, the evidence is quite clear. But in rare cases, particularly in fatal

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[169] see for example: the Workers' Compensation Act of British Colombia, s. 5(4); the Workers' Compensation Act of Alberta, s. 24(4); the Workers' Compensation Act of Saskatchewan, s. 27; the Workers' Compensation Act of Manitoba, s. 4(5); the Workplace Safety and Insurance Act of Ontario, s. 13(2); and the Workers' Compensation Act of Nova Scotia s. 10(4)

[170] s. 7(2) and 7(2.1) of the WC Act.

[171] see *VSL Canada Ltd. v. New Brunswick (Workplace Health, Safety and Compensation Commission)* 2011 NBCA 76 at paragraph 8

accident cases, it is sometimes difficult to determine how the accident occurred and in those cases the presumption can be important in determining whether or not a worker (or his/her dependants) is entitled to benefits.

Recommendation #45 — We recommend that the legislation be amended to state that where an accident occurs in the course of the employment, it shall be presumed that it arose out of the employment unless the contrary can be shown (and vice versa).

Serious or wilful misconduct

Another area where the WC Act also limits entitlement to workers' compensation benefits is in the area of serious or wilful misconduct.

Once again, it is useful to consider some background information. One of the principles of workers compensation is that it is a no-fault system. Workers are entitled to benefits regardless of the fact that they may be entirely to blame for the accident.

There is one exception to this rule. Most workers' compensation acts in Canada exclude coverage where the accident is attributable solely to the serious and wilful misconduct of the worker. Even where there is serious and wilful misconduct, most workers' compensation acts still provide benefits if the injury results in death or serious or permanent injury.

A typical exclusion for serious and wilful misconduct reads as follows:

> Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.[172]

Serious and wilful misconduct should only arise in extraordinary cases. Misconduct must be something more than negligence, imprudence, error in judgment or failure to follow safety rules or regulations. Serious and wilful misconduct exclusions are not intended to introduce the concept of fault back into the workers compensation system. That is why the exclusion clause typically excludes entitlement only to situations where the injury is attributable "solely" to serious and wilful misconduct.

The WC Act has expanded the concept of serious and wilful misconduct. The New Brunswick Act states:

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[172] see for example: the Workers' Compensation Act of British Colombia, s. 5(3); the Workers' Compensation Act of Alberta, s. 24(1); the Workers' Compensation Act of Saskatchewan, s. 30; the Workers' Compensation Act of Manitoba, s. 4(3); the Workplace Safety and Insurance Act of Ontario, s. 17; and the Workers' Compensation Act of Newfoundland and Labrador, s. 43(1)

> "When personal injury or death is caused to a worker by accident arising out of and in the course of his employment in an industry within the scope of this Part, compensation shall be paid to that worker or his dependents, as the case may be, as hereinafter provided, unless the accident was, in the opinion of the Commission, intentionally caused by him, or was wholly or principally due to intoxication or serious or wilful misconduct on the part of the worker and did not result in the death or serious and permanent disability of the worker."[173] (Emphasis added)

The New Brunswick legislation has expanded the concept of misconduct to include injuries that are attributable "wholly or principally" to misconduct. In other words, it is no longer a requirement in New Brunswick that the serious misconduct be the sole cause of the injury. In addition, the New Brunswick legislation has introduced intoxication as an exclusion to entitlement. This expands the concept of fault in what is intended to be a no-fault system of compensation. This can lead to an adversarial approach between workers and WorkSafeNB even before an entitlement decision has been made.

Keeping in mind that the exclusion does not apply to serious and permanent disability, the cost of these claims are usually not high. We question whether the expansion of this fault-based exclusion is useful.

Recommendation #46	We recommend that the legislation be amended to state that entitlement to compensation will be excluded only where the injury is attributable solely to the serious and wilful misconduct of the worker.

Indexing

In their report to the Phase II Review Committee, the Board of Directors of WorkSafeNB recommended that ss. 38.11(12) of the WC Act be amended to require that estimated capable earnings be indexed as part of the annual review. It was noted by WorkSafeNB that although legislation currently requires that average earnings be indexed annually by the percentage change in the Consumer Price Index, this indexation requirement does not apply to estimated capable earnings.[174]

The point being raised by the Board of Directors of WorkSafeNB is important. Compensation should be based upon the difference between:

> A - the net amount the worker is capable of earning before the accident, and

[173] s. 7(1) of the WC Act.
[174] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 16

B - the net amount the worker is capable of earning after the accident

If A is indexed and B is not indexed, this will inevitably result in over compensation. If neither A or B are indexed, this will inevitably result in under compensation. The correct approach, as proposed by the Board of Directors, is to index both A and B.

Recommendation #47 — We recommend that the legislation be amended to make it clear that whenever net earnings before the accident are indexed, WorkSafeNB must also index the net amount workers is capable of earning after the accident.

This raises a larger issue worthy of special consideration. When should compensation benefits be indexed and at what rate should they be indexed? The answer to this question can have a significant impact on the Accident Fund.

Presently, loss of earning benefits are reviewed annually, "as of the anniversary date of the injury or recurrence of the injury."[175] Often, the date of injury and the date that benefits begin are the same. However, at times, the actual loss of earnings (and, therefore, the loss of earnings benefit) may not occur at the same time as the injury; there may be a lapse of weeks or even months before loss of earnings benefits begin. This can result in a situation where benefits are required to be indexed shortly after the loss of earning capacity begins or, in an extreme situation, even before the loss of earning capacity begins. This could not have been the intention of the legislation and should be remedied. The Board of Directors have recommended that this be remedied by amending the legislation to require that the annual review occur on the anniversary date that the loss of earnings benefits began.[176] Subject to our comments that follow, we think this is a reasonable approach.

Recommendation #48 — We recommend that the legislation be amended to require that the annual review of benefits occur on the anniversary date that the loss of earnings benefits began.

We are of the view that when considering this issue, WorkSafeNB should also consider what constitutes an appropriate indexing factor and when indexing should commence.

It is useful to consider what is done in other jurisdictions.

In British Columbia, compensation benefits are indexed as of January 1 of each year. The indexing factor is the Consumer Price Index for Canada less 1%. The indexing factor cannot be greater than 4% or less than 0%. Before a worker becomes entitled to

[175] subsection 38.11(12) of the WC Act
[176] Recommendations from the WorkSafeNB Board of Directors to the Phase II Legislative Review Committee, September 24, 2015, page 15

have his or her benefits indexed, he or she must be receiving periodic payments of compensation for more than 12 months. In other words, if a worker is injured in June they would have to wait 18 months before their benefits would be indexed. The amount of that indexation would be 1% less than the Consumer Price Index.

In Alberta, the legislation enables the Board of Directors to determine cost-of-living adjustments. The Workers' Compensation Act of Alberta states:

> "The Board may by order, for the purpose of maintaining approximate parity with the cost of living, make adjustments in the amounts payable as compensation to persons who are receiving compensation under this Act or any predecessor of this Act in respect of permanent total disability, permanent partial disability or death of a worker."[177] (emphasis added)

Note that the legislation only requires "approximate parity" not full indexation. By policy, the Alberta WCB indexes benefits on the basis of "100% of the change in the Alberta Consumer Price Index less 0.5%."[178]

In Saskatchewan, the worker's loss of earnings is adjusted annually by the percentage increase in the Consumer Price Index.[179] Wage loss benefits are indexed on the first anniversary of the commencement of the worker's loss of earnings resulting from the injury.[180]

In Manitoba, compensation benefits are indexed on the first day of the month following the second anniversary of the accident.[181] In other words, in Manitoba, indexing does not occur until two years after the accident. The indexing factor in Manitoba is the change in the industrial aggregate average weekly earnings for all employees for Manitoba as published by Statistics Canada. There is a cap of 6% with the ability to carry forward into future years if the industrial aggregate average weekly wage exceeds 6%.[182]

In Ontario, there are different indexing factors for different kinds of benefits. Until this year, the general indexing factor applicable to wage loss benefits is one half of the Consumer Price Index less 1%. The indexing factor cannot be less than 0% and not greater than 4%.[183] According to news reports, loss of earnings benefits in Ontario have risen by just 0.5% for each of the past two years.[184] As a result of a recent legislative

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[177] Workers' Compensation Act of Alberta, s. 59(1)
[178] Alberta WCB Policy: 04 – 01 Part II
[179] Workers' Compensation Act of Saskatchewan, s. 69(1)(a)
[180] Workers' Compensation Act of Saskatchewan, s. 69(2)
[181] Workers' Compensation Act of Manitoba, s. 40(2)
[182] Workers' Compensation Act of Manitoba, s. 47
[183] Workplace Safety and Insurance Act of Ontario, s. 49
[184] Toronto Metro News published December 11, 2014

amendment, commencing on January 1, 2018, the indexing factor in Ontario will be increased to an amount equal to the Consumer Price Index for Canada.[185]

In Nova Scotia, the indexing factor is one half of the percentage change in the Consumer Price Index for the preceding year.[186] After a worker has been receiving compensation for more than 12 continuous months, benefits are indexed as of the following January 1st.[187]

In Newfoundland and Labrador, the legislation states that wage loss benefits are adjusted annually on the basis of the Consumer Price Index.[188] In the Northwest Territories, the legislation provides that the Governance Council can establish the percentage that it considers reflects an increase in the cost of living for the previous year.[189]

Currently, in New Brunswick, the WC Act contemplates that compensation will be increased by the "annual percentage increase in the New Brunswick Industrial Aggregate Earnings".[190] By policy, the New Brunswick Industrial Aggregate Earnings are increased annually based upon the Consumer Price Index for Canada.[191] This may create confusion because the industrial average wage is typically different from the Consumer Price Index. Over the long term, the percentage change in industrial average earnings will increase at a rate greater than the Consumer Price Index.[192]

Based on our jurisdictional review, it would appear that:

- Most jurisdictions adjust benefits on the basis of the Consumer Price Index.
- Several jurisdictions adjust benefits based upon the Consumer Price Index less .5% or 1.0%.
- Several jurisdictions have a maximum in the event that the Consumer Price Index exceeds a threshold.
- No jurisdictions index benefits on the first anniversary of the accident. The earliest date used is the first anniversary of the commencement of the loss of earning capacity.

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[185] Statutes of Ontario 2015, c. 38, Sched. 23, s. 2
[186] Workers' Compensation Act of Nova Scotia, s. 70(1)
[187] Workers' Compensation Act of Nova Scotia, s. 70(4)
[188] Workplace Health, Safety and Compensation Act of Newfoundland and Labrador; s. 74.1
[189] Workers' Compensation Act of the Northwest Territories, s. 53(2)
[190] subsection 38.11(12) of the WC Act
[191] WorkSafeNB directive No. 37 – 110.01
[192] Statistics Canada, Hourly Wages and Consumer Price Index, http://www.statcan.gc.ca/pub/71-222-x/2008001/sectionj/j-cpi-ipc-eng.htm

- Many jurisdictions commence the indexation on January 1 of the year following the first anniversary of the accident. Manitoba does not commence indexation until the second anniversary of the accident.

- Only Manitoba and New Brunswick reference the industrial average wage when indexing benefits.

New Brunswick has perhaps the most generous indexing provision in Canada. However, it appears to have resulted in some administrative difficulties. As noted above, there are difficulties associated with indexing benefits on the anniversary date of the accident. We have already recommended that that be amended to refer to the commencement date of the loss of earning capacity. However, we think it might be simpler to index all benefits on January 1 of each year; thus, completely avoiding the issue of anniversary dates and creating a standardized indexing date for all workers in the province. We have also noted the difficulty associated with the difference between the New Brunswick Industrial Aggregate Earnings and the Consumer Price Index. We think this should be clarified.

Recommendation #49	We recommend that the legislation be amended to require that compensation benefits be indexed as of January 1 of each year.
Recommendation #50	We recommend that before a worker becomes entitled to have his or her benefits indexed, he or she must be receiving periodic payments of compensation for more than 12 months.
Recommendation #51	We recommend that the indexing factor be the Consumer Price Index for Canada.
Recommendation #52	We recommend that the indexing factor not be less than 0% or greater than 4%.

Distinctions based upon age

In New Brunswick, as in many other jurisdictions, there are legislative distinctions respecting entitlement to workers compensation benefits based upon the age of the worker. For example, loss of earnings benefits cease when the worker attains the age of 65[193] except where the worker is over the age of 63 at the time of the accident, in which case benefits continue for up to two years.[194] In the cases of workers under the age of 21, the Commission has a discretion to consider the probability that the workers' wages would increase in the future.[195] This discretion to consider probable earning capacity is

[193] subsection 38.11(14) of the WC Act
[194] subsection 38.11(15) of the WC Act
[195] subsection 37 of the WC Act

not available to workers over the age of 21. Indeed, there are approximately 50 references to "age" in the WC Act.

The Human Rights Act of New Brunswick prohibits discrimination on the basis of age with respect to any services available to the public.[196] While the case law makes it clear that not every distinction in a social program that is based upon age is discriminatory, there has been a great deal of litigation around this issue in recent years.

I note that in Ontario, the Workplace Safety and Insurance Act contains the following exemption from the Human Rights Code:

> "A provision of this Act or the regulations under it, or a decision or policy made under this Act or the regulations under it, that requires or authorizes a distinction because of age applies despite sections 1 and 5 of the Human Rights Code."[197]

There is a similar exemption in the Workers' Compensation Act of Newfoundland and Labrador.[198] We think it is prudent to include a statutory provision making it clear that the WC Act can make distinctions on the basis of age without infringing the Human Rights Act.

Recommendation #53	We recommend that the WC Act be amended to include a provision that any provision of the WC Act, the regulations or a policy of the Board of Directors, or any decision made pursuant thereto, that makes a distinction on the basis of age does not infringe the Human Rights Act of New Brunswick.

[196] Human Rights Act of New Brunswick s. 6(1)
[197] Workplace Safety and Insurance Act of Ontario, s. 2.1 (1)
[198] Workplace Health, Safety and Compensation Act of Newfoundland and Labrador, s. 2.01(1)