



LEGISLATIVE REVIEW
STAKEHOLDER CONSULTATION

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EXECUTIVE SUMMARY

WorkSafeNB and its board of directors are pleased to share these proposals as part of our statutory obligation to review workers' compensation legislation every five years.

During previous legislative reviews, the diverse suggestions for improvements from a wide array of stakeholders were essential to success. A collaborative process must continue, and this report provides the foundation for stakeholder consultation and dialogue. Once consultations are complete, WorkSafeNB and its board of directors will provide the Government of New Brunswick (GNB) with a "What We Heard" report to facilitate next steps.

This summary identifies three priority areas and 13 issues for stakeholder consultation and government deliberation, as follows:

PRIORITY AREA #1 – BENEFITS AND ENTITLEMENTS

Issue #1: Replace the current two-pronged system of ongoing survivor benefits with a single option, as is offered in all other Canadian jurisdictions.

Issue #2: Broaden the scope of young workers in legislation by increasing or eliminating the age limit to match trends in continued education and learning above the age of 21.

Issue #3: Address the difficulties injured workers face locating financial providers from which they are able to purchase annuities of smaller amounts.

Issue #4: Replace the existing rating schedule in *Regulation 82-165 Permanent Physical Impairment Rating Schedule* with the most recently published *Guides to the Evaluation of Permanent Impairment* from the American Medical Association (AMA Guides). This change would also require making several related amendments to the regulation.

Issue #5: Introduce a new section to the *WC Act* giving WorkSafeNB the explicit authority to collect benefit overpayments.

PRIORITY AREA #2 – ASSESSMENTS

Issue #6: Amend section 11(1) to clarify that WorkSafeNB has the authority to provide cost relief for negligence of another employer or their worker.

Issue #7: Amend Section 52, Section 54(1), and Section 54 (1.1) to include a prior year funding component and modern financial terminology to ensure rate stability for employers and the long-term sustainability of the workers' compensation system.

Issue #8: Amend section 28(2) to give WorkSafeNB the authority to determine what share of administration costs are attributable to self-insured employers.

PRIORITY AREA #3 – MODERNIZATION, CLARIFICATION AND RESEQUENCING OF THE WC ACT

Issue #9: Amend the *WC Act* to remove all gender-specific language and replace with gender neutral language.

Issue #10: Modernize the *WC Act* by removing outdated terminology and using plain language to ensure that those impacted by the legislation can fully understand its implications and what it means to them.

Issue #11: Modernize the *WC Act* by resequencing provisions in a more logical order; removing previously repealed and out of date provisions and reorganizing the Act so specific laws are easier to find and read.

Issue #12: To improve clarity, ease of understanding, and the administration of the *WC Act*, modernize and update essential definitions.

Issue #13: To help improve accessibility and readability for the average person, include a preamble to the *WC Act* that outlines the intent of the workers' compensation system and the main sections of the Act.

Section 38 of the *Workers' Compensation Act* covers wage-loss benefits, permanent physical impairment awards (additional guidelines in Regulation 82-165), and fatal accident benefits payable to injured workers and their families. In the 1970s and early 1980s, there was a shift from an impairment-based system to a wage-loss system. Benefits were changed again in 1993 to focus on fiscal restraint and, in 1998, to improve benefits and rebalance the system. As a result of these past amendments, the various provisions outlining benefits and entitlements are not consolidated, not arranged sequentially, and are difficult to read. This is problematic given that Section 38 contains the core benefits and entitlements available to injured workers and their families.

WorkSafeNB recommends several administrative and housekeeping amendments to Section 38 to modernize the Act and make it more user-friendly. These issues are canvassed in Priority Area #3.

loss of earnings / maximum annual earnings

WorkSafeNB launched an in-depth consultation focused on loss of earnings and maximum annual earnings in March 2022. Click here for more detailed information.

<https://www.worksafenb.ca/about-us/what-we-do/engagement-activities/stakeholder-consultation-benefit-improvements/>



Survivor's Benefits

Safety is our priority, and WorkSafeNB has several safety strategies in place to influence a decrease in injuries in the province. Through these strategies, the number of fatalities continues to decline in New Brunswick. Despite this fact, fatalities still occur. When they do, WorkSafeNB provides benefits, under section 38 of the *WC Act*, for dependants of the deceased worker. These benefits are provided where the worker dies of a compensable injury, whether the worker is killed at work, dies as a result of injuries sustained in a workplace accident, or dies from an occupational disease.

All Canadian workers' compensation jurisdictions offer surviving spouses or dependants a package of benefits. A typical package of benefits includes two broad categories:

- Burial and related expenses ("one-time" payments)
- Survivors' benefits ("ongoing" payments)

One-time payments

In 2012, New Brunswick significantly improved burial and related expenses. All survivors receive an immediate lump sum payment for costs that may arise, such as estate fees, travel for family to attend the funeral, family counselling, or other costs that may result from a worker's death. This could potentially be expanded to include educational opportunities and re-training for the surviving spouse.

Variations in the structure of survivors' benefits make cross-jurisdictional comparisons difficult, however it appears that New Brunswick offers a relatively generous package of one-time benefits upon the death of a worker:

- **Burial:** While most other jurisdictions compensate for the actual costs of a funeral/burial up to a set maximum, New Brunswick compensates survivors by issuing a flat sum equal to 40% of the NBIAE (2021: \$17,903.60), the highest such sum provided by any province.

- **Transportation:** New Brunswick is unique in stipulating in 38.5(b) that a body must be transported "a considerable distance" for transportation costs. Most other jurisdictions compensate for necessary or actual transportation costs regardless of the distance involved.
- **Lump sum:** Upon a worker's death, New Brunswick issues an immediate lump sum equal to 50% of the NBIAE (2021: \$22,379.50). This is roughly in line with similar lump sums in other Atlantic provinces. However, in New Brunswick, the provision for this lump sum is included under the section heading "Burial and related expenses" (38.5), creating ambiguity as to what expenses the sum is meant to compensate (generally, these sums are designed to compensate for non-economic losses). For administrative ease, the burial expenses and the immediate lump sum could potentially be combined into one lump sum equal to 90% of the NBIAE.

Ongoing payments

Other jurisdictions generally base the calculation of ongoing monthly survivor benefit payments on some measure of the amount the worker would have received in wage-loss benefits had the injury resulted in permanent total disability, rather than death.

In New Brunswick, for the first year after a worker's death, surviving spouses receive 80% of the deceased worker's average net earnings, payable for one year or to age 65, whichever occurs first. Within one year after the death, the surviving spouse must select one of two benefit options (see current survivor benefit options on next page).

The surviving spouse is entitled to receive independent financial advice before selecting between Option 1 and Option 2, but the selection is irrevocable.

Issue #1: Replace the current two-pronged system of ongoing survivor benefits with a single option, as is offered in all other Canadian jurisdictions.

Discussion

The current two-option system of ongoing survivor benefits is complex. By replacing it with a single option system:

- New Brunswick's system of compensating surviving spouses will align more closely with survivor benefits plans in other Atlantic provinces and throughout Canada.
- This will remove the burden imposed on surviving spouses by requiring them to make an onerous financial decision after the loss of a loved one. Although the current system provides for independent financial advice, it would nonetheless be difficult for a financial advisor to predict which option 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. This puts the surviving spouse in an unfair position following a tragic event.

Ongoing survivor benefits could be amended to more closely mirror the benefits available to a worker who suffered a total and permanent disability. For instance, a system wherein a surviving spouse is compensated for 85% of the deceased worker's loss of earnings until the surviving spouse attains age 65, with no family income test, and 10% set aside for the purchase of an annuity at age 65.

While this benefit package would be somewhat more generous than either current option, 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 comparable to life insurance. The goal of life insurance is to replace the wages lost by the deceased worker to enable the surviving spouse to maintain their 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.

Note: Survivor benefits align with current maximum annual earnings and 85% loss of earnings. If these benefits increase, so too will survivor benefits.

current survivor benefit options

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.

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.

Projecting Potential Earnings of Young Workers

WorkSafeNB understands that young and new workers are particularly vulnerable to workplace injuries. Supporting young workers is critical in fostering a long-term safety culture. If a young worker is injured, section 37 of the WC Act provides WorkSafeNB with the authority to determine average earnings to compensate for potential increases in future loss of earnings. The current framework allows WorkSafeNB to set policy that considers any career plans for an injured worker under the age of 21 and helps ensure appropriate loss of earnings awards to young workers with a long-term disability.

Issue #2: Broaden the scope of young workers in legislation by increasing or eliminating the age limit to match trends in continued education and learning above the age of 21.

Discussion

- The current age in legislation no longer reflects the realities of young workers continuing education past the age 21.
- WorkSafeNB has the lowest age in legislation for allowing consideration of potential increase in future earnings.
- In New Brunswick, learners are defined in the WC Act and are included in the definition of a worker; however, there is no further direction in determining learner’s average earnings.

- Each jurisdiction allows for some type of adjustment to an injured worker’s earnings, either based on age or existing learning path. In SK, ON, PEI, BC and NWT/NU, workers’ compensation boards can consider the worker’s earnings had the worker completed apprenticeship training or other education, without a defined age limit. MB and YT consider the level completed in an apprenticeship program. QC allows the injured worker to demonstrate what their gross earnings would have been had they not been injured.
- Updating this section of legislation would allow WorkSafeNB to provide appropriate wage loss benefits to young injured workers. As with any benefit improvement, employers could see an increase in claim costs. Potential impacts will be explored further during the consultation process.

	AGE	APPRENTICES OR OTHER LEARNERS
NB	21	-
AB	25	Yes
MB	28	Yes
SK	-	Yes
ON	-	Yes
NL	-	Yes
NS	30	Yes
PEI	-	Yes
QC	21	Yes
BC	-	Yes
YT	25	Yes
NWT/NU	-	Yes

Annuities

The annuity benefit offsets injured workers' loss of pension benefits that would have been accumulated while working.

The WC Act provides explicit direction in section 38.22 for setting aside amounts for the purchase of an annuity at age 65. Section 38.22(12) of the WC Act provides that when the amount for the purchase of an annuity results in a pension of less than \$500 per year, it may be paid as a lump sum: *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 (WorkSafeNB) may, in lieu of that pension, pay to the worker at age sixty-five the accumulated capital and interest.*

Issue #3: Address the difficulties injured workers face locating financial providers from which they are able to purchase annuities of smaller amounts.

Discussion

- It is recognized that the current lump sum is too low, with injured workers having difficulty finding financial institutions where they are able to purchase annuities with amounts equal to what is allowable to be paid in a lump sum.
- Jurisdictions that provide an amount to purchase an annuity allow for lump sum payouts of larger amounts:
 - MB - \$18,100
 - SK - \$28,500
 - ON - \$60,000 (approximately)
 - YT - \$50,000

- In the past, WorkSafeNB has proposed increasing the threshold for paying the annuity amount in a lump sum by changing legislation to base the amount on a percentage of the NBIAE. For example, if 60% of the NBIAE was used to determine the lump sum threshold, injured workers whose annuities amounts were less than \$26,855.40 would be given this amount in a lump sum, alleviating the difficulty of finding a provider to supply the annuity.

annuity set-aside comparison

Canadian jurisdictions offer anywhere from no coverage to 10% contribution. New Brunswick's current annuity set aside of 10% of benefits is the highest percentage, matching three other jurisdictions.

JURISDICTION	RETIREMENT BENEFIT
NWT	Clinical Rating Pension
PEI	5%
NS	5%
NU	Clinical Rating Pension
NB	10%
SK	10%
YK	10%
NL	5% or 10%
QC	None
AB	Pension
BC	5%*
ON	5%*
MB	0% to 7%*

*Allow worker to match contribution

percentage of loss of earning and the annuity amount

When the regular loss of earnings benefit was reduced from 90% to 85%, the set aside for the annuity paid at age 65 was 5% of earnings once an injured worker receives compensation for a 24-month consecutive period.

In 2009, the annuity contribution payable at age 65 increased to 10% of earnings.

For New Brunswick long-term clients on full LTD, the combined compensation – in addition to impacts of our higher marginal tax rates – makes benefits comparable to most other provinces.

If the loss of earnings benefit is increased to 90%, combined with the annuity set-aside of 10%, it would place New Brunswick at the highest benefit level in the country, tied with Saskatchewan.

(Morneau Shepell, Impact of Wage Replacement Rate Change, 2020)



Permanent Physical Impairment

Under the *WC Act*, injured workers are entitled to a lump sum payment when they suffer a permanent physical impairment (PPI) as a result of a compensable accident or occupational disease on or after January 1, 1982.

The PPI award is based on the injured worker's permanent physical impairment rating and is currently measured in accordance with an approved rating schedule as outlined in *Regulation 82-165 Permanent Physical Impairment Rating Schedule*. This regulation currently directs that WorkSafeNB can also use other approved rating guides when necessary for determining the impairment rating, such as the *American Medical Association Guides to Evaluation of Permanent Impairment* (AMA Guides; latest edition).

Issue #4: Replace the existing rating schedule in *Regulation 82-165 Permanent Physical Impairment Rating Schedule* with the most recently published *Guides to the Evaluation of Permanent Impairment from the American Medical Association* (AMA Guides). This change would also require making several related amendments to the regulation.

Discussion

The current evaluation and rating of impairment is based on medical consensus arrived at in the 1970s, based on the state of medical knowledge at that time. Since that time, considerable advances in rehabilitation medicine have reduced residual permanent physical impairment. Due to these advances, the current rating schedule may not be appropriate and reflective of today's best practices.

By replacing the schedule with the AMA Guides:

- The impairment ratings and approach to ratings would be consistent with current international consensus and practice by impairment evaluating physicians.
- The AMA Guides are updated regularly - it is now online, which means it is automatically updated and every time it is used, you are sure the Certified Independent Medical Examiner is using the latest revision/update of the edition.
- The certification of an examiner is rigorous, and examiners must be re-certified every five years.
- The methodology is diagnosis-based, and the criteria are objective, ensuring validity and improved inter-rater reliability.

AMA guides

AMA Guides to the Evaluation of Permanent Impairment (AMA Guides) is published by the American Medical Association.

It is used in workers' compensation systems, federal systems, automobile casualty and personal injury cases to rate impairment, not disability.

It is used internationally and in many Canadian provinces, including Ontario, Saskatchewan, Nova Scotia, Prince Edward Island, Yukon and the Northwest Territories.

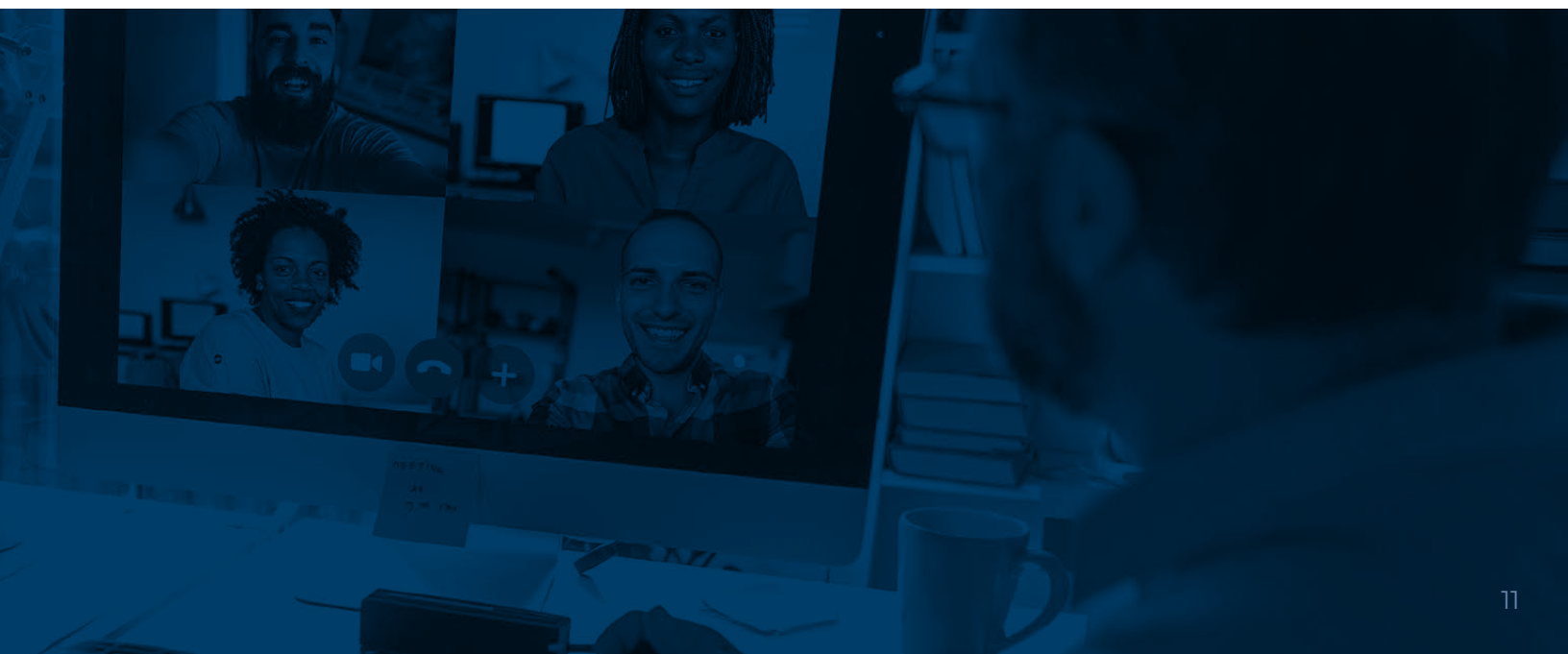
- The methodology adopts a framework based on the World Health Organization (WHO) classification of functioning, impairment and health.
- The AMA Guides are the recognized international authority for impairment rating and have been adopted by most countries throughout the world.
- Workers who qualify for a PPI assessment will be assessed by well-trained, certified personnel, using the same methodology and in a more predictable manner, providing the same impairment rating for similar injuries or conditions.
- Impairment ratings under the AMA Guides will be more valid, more consistent, reproducible, predictable, transparent, simple and more judicious for New Brunswick workers.

Adopting the AMA Guides may provide higher or lower ratings for some individuals, but overall it is expected to produce similar impairment ratings for similar injuries. Thus, no significant financial impact is expected from adopting the AMA Guides.

It is worth noting that the AMA Guides are a unilingual document. In New Brunswick – a proud bilingual province – this is an important factor to consider. WorkSafeNB consulted

with the Office of the Attorney General and received a legal opinion that it is acceptable to reference a unilingual document in legislation in this instance. In addition, adopting the AMA Guides will not impact WorkSafeNB's commitment to providing service in both official languages; clients will receive accurate, modern assessments and WorkSafeNB will ensure service is provided in the official language of their choice.

WorkSafeNB also consulted with internal and external medical professionals, who support adopting the AMA Guides as the best practice for determining PPI rating.



OVERPAYMENTS

Currently, New Brunswick's *WC Act* does not explicitly address the issue of overpayment of benefits.

Overpayment of benefits can occur for a variety of reasons, including deliberate misrepresentation by the benefit recipient, failure of an injured worker to report a material change in circumstances, duplication of earnings and benefits (such as when a worker is receiving benefits for their injury from multiple sources) and administrative error on WorkSafeNB's part.

New Brunswick and British Columbia are the only jurisdictions in Canada that do not have explicit legislation addressing overpayments of compensation.

Issue #5: Introduce a new section to the *WC Act* giving WorkSafeNB the explicit authority to collect benefit overpayments.

Discussion

- A new provision could be introduced that explicitly allows WorkSafeNB jurisdiction to collect overpayments, and the discretion to determine when doing so is appropriate.
- In other provinces, the legislative provisions pertaining to overpayments are generally framed broadly, granting jurisdiction to provincial boards to collect:
 - “An amount in excess of entitlement” (AB, MB, SK, NL, NS, PEI, QC, NWT)
 - “An overpayment as determined by board” (ON)
 - “Compensation to which a person is not entitled” (YK)
- A broad and express grant of authority to recover payments in excess of which an injured worker is entitled will enhance certainty for workers and encourage the prompt reporting of overpayments to WorkSafeNB.

implicit authority to collect overpayments

Currently, WorkSafeNB's authority to collect benefit overpayments is interpreted to derive from sections 15 and 33 of the *WC Act*:

Non-assignability and freedom from process

15 Unless with the approval of the Commission, no sum payable as compensation or by way of commutation of any periodical payment in respect of it shall be capable of being assigned, charged or attached, nor shall it pass by operation of law except to a personal representative.

Delegation of powers of inquiry

33 The Commission may act upon the report of any of its officers, and any inquiry that it is deemed necessary to make may be made by any one of the members or by an officer of the Commission or any other person appointed to make the inquiry, and the Commission may act upon his report as to the result of the inquiry, and any person so appointed to make the inquiry shall for the purposes of the inquiry have all the powers conferred upon the Commission by section 32.

WorkSafeNB is committed to system sustainability and ensuring there are always funds available to provide medical, rehabilitation and wage-loss benefits for those injured at work, while protecting employers from liability. To guarantee the future of these funds and services, WorkSafeNB uses the following principles when setting the premium rates:

- Collective liability – for a balanced system
- Full funding – for security of benefits
- Accountability – for performance

The calculation of assessment rates, the collection of the assessment premiums and the investment of the accident fund are key to maintaining the balance required to sustain the workers' compensation system. After several years of rising assessment rates, the average rate has declined, driven by a significant decrease in accident costs, administration costs and continued investment returns exceeding the long-term objective.

Legislation provides WorkSafeNB direction to collect assessments from employers, which includes the costs to cover current year and future year costs of claims and the administrative costs associated with managing those claims.

In the calculation of assessment rates, WorkSafeNB determines administrative costs and ensures that employers pay the true representative costs of managing the system. Included in the administrative costs are occupational health and safety costs, the associated costs of administering the Workers' Compensation Appeals Tribunal and advocates, and the general administration of WorkSafeNB.

Much of the legislation in the *WC Act* related to assessments has not been updated in decades. The issues to consider discussed on page 14 will help sustain the workers' compensation system and ensure that all employers pay their fair share of costs related to maintaining the system.

2022 average assessment rate

In August 2021, WorkSafeNB's board of directors was pleased to announce its 2022 provisional average assessment rate at \$1.69 per \$100 of assessable payroll, a *22% reduction* from the 2021 rate of \$2.17.

The improved financial position is due, in large part, to legislative changes passed by the government in 2018 and 2019. These changes returned exclusive jurisdiction over the workers' compensation system to the WorkSafeNB board of directors. They also clarified that workers' compensation benefits are to be provided only for injuries incurred in the course of employment. As a result, WorkSafeNB was able to take action to revise policies and manage operations so that financial liabilities at year-end 2020 have been reduced by \$195 million, compared to 2018.

The reduced provincial assessment rate is comparable to the Canadian average assessment rate.



COST RELIEF IN CASES OF EMPLOYER NEGLIGENCE

Within the *WC Act*, section 11(1) allows for WorkSafeNB to provide cost relief to an employer when the accident was due to negligence of an employer or worker in another class. This section of legislation has remained substantially the same since the inception of the *WC Act* in 1918.

However, the *General Regulations – Workers’ Compensation Act* section 3 indicates that all employers are in the same class, the New Brunswick Industry Class: “3 For the purpose mentioned in section 50 of the Act, all industries within the scope of Part I of the Act are included in the New Brunswick Industry Class.”

A recent legal opinion obtained by WorkSafeNB has indicated that section 11(1) relies on the employers being in a different class to charge the costs to the negligent employer. With all employers being in one class, WorkSafeNB can no longer direct the costs of claims to the negligent employer.

Issue #6: Amend section 11(1) to clarify that WorkSafeNB has the authority to provide cost relief for negligence of another employer or their worker.

Discussion

- Without this clarity there is a risk that, on appeal, the Workers’ Compensation Appeals Tribunal could find that an employer who was negligent or the employer of a worker who was negligent would not be responsible for the claim costs.

- With the exceptions of Saskatchewan and Nova Scotia, most jurisdictions mention providing cost relief in cases of negligence in legislation.
- While New Brunswick legislation includes such a clause, the regulations which stipulate that all workers are in the same class create ambiguity.

section 11(1)

11(1) In any case within section 10, no employer and no worker of an employer within the scope of this Part or dependent of that worker shall have a right of action against any employer within the scope of this Part or against any worker of that employer, where the workers of both employers were in the course of their employment at the time of the accident, but in any case where it appears to the satisfaction of the Commission that a worker of an employer in any class was injured or killed owing to the negligence of an employer or the worker of an employer in another class, the Commission may direct that the compensation awarded in that case shall be charged against the class to which the last mentioned employer belongs.

	COST RELIEF	ONLY IN DIFFERENT CLASSES
NB	Yes	Yes
AB	Yes	Yes
MB	Yes	Yes
SK	-	-
ON	Yes	Both
NL	Yes	Yes
NS	-	-
PEI	Yes	Yes
QC	Yes	No
BC	Yes	No
YT	Yes	Both
NWT/NU	Yes	No

provincial funding levels

NB	115%-125%
AB	114%-128%
MB	130%
SK	105%-120%
ON	-
NL	100%-120%
NS	-
PEI	100%-125%
QC	110%
BC	130%
YT	121%-129%
NWT/NU	105%-135%

Prior Year Funding

When determining the employer assessment, WorkSafeNB is directed (under section 52 and 54(1) of the WC Act) to collect sufficient funds to meet all claims for compensation incurred during the year; the estimated cost of those claims payable in subsequent years; and a sum WorkSafeNB considers appropriate for administrative expenses.

Recognizing that many in-year claims will include payments made well into the future, it is assumed that assessment premiums collected will be invested and earn investment returns to support injured workers with long-term needs. In fact, as much as half of the future long-term costs will be supported by investment returns.

When calculating the annual assessment rate, WorkSafeNB does not expect prior year costs and associated investments to materialize exactly as assumed. Costs will be higher or lower than estimated, and investment returns are not predictable in the short-term. WorkSafeNB closely monitors how costs and investments relating to prior year accidents evolve through the funding level. When the funding level falls below 100%, WorkSafeNB is required by legislation to collect additional funds under section 54(1.1).

As the two primary sources of revenue in the workers' compensation system are assessment premiums and investment income, if the investment income becomes insufficient to maintain the 100% funded position in legislation, the shortfall would need to be funded through higher assessment premiums collected from employers. Therefore, most workers' compensation boards in Canada have long-term fiscal strategies that target funding levels above 100% to avoid prolonged periods of being under funded. In New Brunswick, this is 115%-125%.

When outside of the 115%-125% range, WorkSafeNB makes assessment rate decisions to return prior year funding to the range in no more than 10 years. This is a short enough timeframe to ensure sustainability while not overly burdening employers in any single year.

In the existing legislation, there is a gap in how WorkSafeNB can manage long-term system sustainability when a change is made in respect to future payments relating to prior years' injuries and exposures. Currently, a line item can only be added if it creates a deficit position under section 54(1.1). Waiting to reach a deficit position under section 54(1.1) can cause more volatility to employer assessment rates.

Issue #7: Amend Section 52, Section 54(1) and Section 54 (1.1) to include a prior year funding component and modern financial terminology to ensure rate stability for employers and the long-term sustainability of the workers' compensation system.

Discussion

- A fourth subsection under section 52 and 54(1) could be added to allow WorkSafeNB to add a prior year funding component to the assessment rates even when it does not "incur a deficit". This would help clarify that WorkSafeNB can include a long-term funding provision for prior accident years when below target, and not just when in a deficit position relative to 100% funded as outlined in 54(1.1).
- The fourth subsection could read: *(d) such positive or negative sum to ensure long-term sustainability of the Accident Fund in respect of future payments relating to prior injuries and exposures.*
- In addition, to ensure clarity and alignment with modern International Financial Reporting Standards (IFRS), which require reporting on a short-term outlook, the term "on a going concern basis" could be added to paragraph b of Section 52 and 54(1). This is a financial term that points to WorkSafeNB's long-term financial stability and continued ability to meet obligations to injured workers. Adding this term would allow WorkSafeNB to continue determining the assessment rates using the same long-term best estimate approach, despite the IFRS requirement to report liabilities using a different assumption in the financial statements.
- The "going concern" basis wording would also need to be added to section 47(1) and 47(3) of the *Firefighters' Compensation Act*.

section 52 and section 54(1.1)

Annual estimate of assessment

52 The Commission shall on or before the first day of February of each year make an estimate of the assessments necessary to provide funds in each of the classes sufficient to meet:

- a) the cost of all claims for compensation incurred during that year;
- b) the estimated future cost of the claims in paragraph (a) payable during subsequent years; and
- c) such sum as the Commission considers appropriate for the administrative expenses of the Commission.

Assessment of Employer

54(1.1) Despite subsection (1), in the event the Commission incurs a deficit in any fiscal year, the Commission shall take the necessary steps following the occurrence of the deficit to assess, levy and collect sufficient funds to fund the deficit within the period of time determined to be reasonable and prudent by the Commission in the circumstances, to a maximum of 15 years.

Administrative Costs for Self-Insured Employers

The WC Act applies to all employers within the province that meet certain criteria including the number of employees and the type of industry. Within the existing legislation, section 28(2) applies to the Crown in the Province as an employer. In practice, the Province pays the actual costs of the claim plus an administrative fee for each transaction.

To determine this administrative fee for self-insured employers, WorkSafeNB determines what the fee per transaction would be if all employers participated as self-insured. For 2021, this resulted in a fee of \$106 per transaction. Assessed employers paid an administrative fee of 0.49 cents per \$100 of assessable payroll in 2021.

Currently, the legislation includes a sub-clause that requires the Lieutenant-Governor in Council to authorize any administrative fees charged to self-insured employers.

Issue #8: Amend section 28(2) to give WorkSafeNB the authority to determine what share of administration costs are attributable to self-insured employers.

Discussion

- The requirement to have the Lieutenant-Governor in Council approve administrative expenses could be viewed as inequitable and limits WorkSafeNB's ability to ensure all employers pay an appropriate and fair share of the overall administrative expenses required to maintain the workers' compensation system.
- This section should clarify that the arrangement between self-insured employers and WorkSafeNB is for administrative services only and does not constitute an insurance contract.
- This change would have no immediate impact on employers or workers; however, it would ensure all employers continue to pay their fair share of the administrative costs and system sustainability.

section 28(2)

28(2) If the Crown in right of the Province in its capacity as an employer submits to the operation of this Act, the Minister of Finance and Treasury board may

- a) pay such portion of the administration expenses as is authorized by the Lieutenant-Governor in Council, and
- b) make an advance to the Commission in respect of compensation that may be paid by the Commission.



Workers' compensation legislation was first introduced in New Brunswick in 1918. Since that time, the *WC Act* has been amended several times, but the 1918 legislation still forms the foundation. Before 2013 when GNB announced a comprehensive, multi-phase review of the *WC Act*, the legislation surrounding workers' compensation had not undergone a thorough review in more than 20 years. One of the objectives of the announced comprehensive review in 2013 was 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."*

Modernizing the *WC Act* is important for several reasons – namely, to improve readability, to update with modern language and to remove out-of-date provisions. Over the years, the *WC Act* has been amended many times. New provisions have been added and some existing provisions have been repealed and replaced. These changes have affected the organization, structure and clarity of the *WC Act*. As well, many of the existing provisions were first written over 100 years ago and do not meet modern standards for legislative drafting. All of this makes it difficult for readers impacted by the legislation to understand what it means.

Ultimately, it is the role of GNB's Legislative Counsel to update and draft legislation. WorkSafeNB is pleased to submit the following examples and issues to consider in modernizing the *WC Act*, and is available to provide more detailed information on specific provisions, including how they are interpreted and impact day-to-day operations.

Issue #9: Amend the *WC Act* to remove all gender-specific language and replace with gender neutral language.

Discussion

- In the past, the masculine pronoun was commonly used in legislation to signify the non-specific "he or she." In fact, the *WC Act* was originally called the *Workmen's Compensation Act*. It is now generally well-accepted that gender-specific language should not be used in legislation. Gender-specific words are exclusionary and can be easily replaced with gender-neutral words that are inclusionary and have the same meaning.
- The *WC Act* currently includes multiple references to "his" – within critical definitions, determination of benefits and assessments and more. There are also references to "fireman" and "seaman". These references can all be easily replaced with gender-neutral language without impacting the intent or meaning of the legislation.

Issue #10: Modernize the *WC Act* by removing outdated terminology and using plain language to ensure that those impacted by the legislation can fully understand its implications and what it means to them.

Discussion

- Many of the existing provisions in the *WC Act* were written over 100 years ago and do not meet modern standards for legislative drafting. In addition, outdated terminology does not reflect modern norms or language.
- A comprehensive modernization process should be undertaken. Rewriting the *WC Act* to remove outdated language and improve readability with plain language would not impact the laws concerning workers' compensation, occupational health and safety or employer assessment premiums. It would simply make the existing laws more accessible. As such, GNB Legislative Counsel would be best placed to lead this process.
- The table on page 20 provides a few examples where outdated language requires modernization. There are many more examples where the *WC Act* could be amended with plain language to improve clarity and readability.



SECTION OF THE WC ACT	CURRENT WORDING OF THE LEGISLATION	ISSUE
2(3)(a)	<p>Subject to sections 4 and 6, this Part does not apply to the following:</p> <p>a) persons whose employment is of a casual nature and otherwise than for the purposes of the industry;</p>	<p>Subsection (a), introduced with the Act in 1918, includes the term “casual”. This term has a different meaning in the modern workplace. Also, some may misinterpret the intent to exclude workers who are directed by their employers to do work that is not directly connected to the industry.</p>
2(3)(b)	<p>Subject to sections 4 and 6, this Part does not apply to the following:</p> <p>b) Outworkers</p> <p>1 In this part “outworker” means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for use or sale, in his own home or in other premises not under the control or management of the person who gave out the articles or materials.</p>	<p>Subsection (b), introduced with the Act in 1918, includes the outdated term “outworker”. This term could also lead to the incorrect interpretation that Part 1 does not apply to people who work from home.</p>
59(2)	<p>Notice of a general assessment may be in the form prescribed by Order in Council, and shall be published once in <i>The Royal Gazette</i>, and in such newspapers, and in such other manner, as the Commission may deem adequate or expedient.</p>	<p>Section 59(2) specifies that notice of general assessment should be published in newspapers. This is an outdated reference that no longer reflects the current practice of WorkSafeNB’s communication with stakeholders.</p>
38.51(11)	<p>Benefits shall be payable for a surviving dependent invalid child without regard to age, at a rate reasonable and proportionate to the pecuniary loss to the dependent invalid child on a scale to be determined by the Commission, having in view the scale of payments laid down in subsection (8), but the yearly amount paid by the Commission shall not be less than fifteen per cent of the New Brunswick Industrial Aggregate Earnings, and the payments shall continue during the lifetime of the child or until the child ceases to be an invalid or dependent.</p>	<p>Section 38.51(11), which relates to survivor’s benefits, uses the outdated term “invalid”. This is no longer an acceptable term in modern society and should be replaced with more appropriate language. The term “invalid” also appears elsewhere throughout the Act.</p>

Issue #11: Modernize the *WC Act* by resequencing provisions in a more logical order; removing previously repealed and out of date provisions; and reorganizing the Act so specific laws are easier to find and read.

Discussion

- The *WC Act* has been the subject of many incremental amendments over the years. New provisions have been added and some existing provisions have been repealed and replaced. These changes have affected the organization of the Act, such that what once had a logical organization when it became law in 1918 has lost its structure.
- For example, Section 38, as previously discussed, has seen significant changes over the past 40 years. All the out-of-date provisions remain in the Act and are not arranged sequentially. In his report for the Phase II Legislative Review in 2015, Gordon McKinnon suggests that Section 38 should be repealed in its entirety and rewritten from scratch. While WorkSafeNB does not necessarily recommend this approach, it highlights the structural problems with Section 38 and the *WC Act* in general.
- To improve clarity and readability, GNB Legislative Counsel should undertake a comprehensive process to: divide the *WC Act* into more logical parts; delete repealed provisions or those that are no longer needed; and, split complex provisions into individual components, creating more sections and subsections that are easier to read and understand. This could include sections like 38.11 (9) on supplements to compensation.
- WorkSafeNB believes that modernizing the *WC Act* to improve clarity and readability is essential to ensuring that workers, employers and others impacted by the Act are able to understand it. As such, WorkSafeNB has detailed tables outlining potential administrative and housekeeping amendments, available to GNB on request.

- In addition, WorkSafeNB recommends GNB repeal the *Silicosis Compensation Act* as there are no more beneficiaries of claimants under the pre-1948 legislation. Before 1948, WorkSafeNB adjudicated claims for silicosis under the *Silicosis Compensation Act*. Claims for silicosis after 1948 are adjudicated under workers' compensation legislation. As such, the *Silicosis Compensation Act* is no longer relevant or required.

Issue #12: To improve clarity, ease of understanding and the administration of the *WC Act*, modernize and update essential definitions.

Discussion

- Due to incremental amendments over the years, some definitions need to be reconciled because they are inconsistent and/or contradictory to certain provisions within the *WC Act*.
- In other cases, certain words are not defined that could lead to confusion over the interpretation of the *WC Act*.
- Below are examples where amendments to definitions would help improve clarity.



PROBLEM	SOLUTION
<p>Definition of “accident”/ “injury”/ “disablement”</p> <ul style="list-style-type: none"> • There is currently a circular relationship between the definition of accident and personal injury/ disablement. • “Accident” is defined in the <i>WC Act</i> in part by “disablement”, which makes determining <i>injury caused by an accident confusing as it could mean injury caused by an injury</i>. <p>Definition: <i>“accident” includes a wilful and intentional act, not being the act of a worker, and also includes a chance event occasioned by a physical or natural cause, as well as a disablement caused by an occupational disease and any other disablement arising out of and in the course of employment, but does not include the disablement of mental stress or a disablement caused by mental stress, other than as an acute reaction to a traumatic event</i></p>	<p>To address this issue:</p> <ul style="list-style-type: none"> • The definition of accident could be revised to be clear that it focuses on events/exposure and not the actual injury; and/or • A new definition of “Injury” could be added that is clear and distinct from “accident”. <p>It is important when addressing these definitions that entitlements do not change. That is, injuries currently accepted would still be accepted, such as recurrences, aggravation/exacerbation of a pre-existing condition, strains, secondary injuries and occupational diseases.</p> <p>Further, in making any amendments to the definition of “accident” or “injury”, the issue of mental stress should be addressed, either separately or within the definitions of accident and/or injury.</p>
<p>Definition of “compensation”</p> <ul style="list-style-type: none"> • There is currently no definition of “compensation” in the <i>WC Act</i> and it is used in multiple ways. • In some instances, “compensation” is used narrowly to mean wage loss benefits. In other cases, it is used broadly to mean all benefits, such as medical aid and return to work services. • The multiple uses for the term compensation can lead to confusion and different interpretations. 	<p>There are two potential approaches to address this issue:</p> <ul style="list-style-type: none"> • Include a definition of “compensation” in the <i>WC Act</i> that clearly states its broad meaning to include loss of earnings benefits, medical aid, PPI awards, or return to work services. • Replace “compensation” throughout the <i>WC Act</i> with the appropriate meanings, whether loss of earnings benefits, medical aid or return to work services, or some combination thereof.
<p>Definition of “medical practitioner”.</p> <ul style="list-style-type: none"> • While “medical practitioner” is currently defined in the <i>WC Act</i> broadly, there are also references throughout the Act to specific medical practitioners (chiropractor, nurse practitioner, physician, surgeon), but not others (physiotherapists, occupational therapists). • This inconsistency could create confusion about whether WorkSafeNB has the right to acquire services or testing not performed by professionals specifically listed in the <i>WC Act</i>. <p>Definition: <i>“medical practitioner” means a person duly registered under the laws of the Province as authorized to practice medicine in the Province, and includes a medical officer of Her Majesty’s armed forces serving in the Province</i></p>	<p>To address this issue, specific references to medical professionals (for example, chiropractors) could be eliminated and replaced with the broader “medical practitioner”.</p> <p>In addition, the definition of “medical practitioner” could be made more expansive to include other health care professionals licenced to practise in the province. This would eliminate any question about whether WorkSafeNB has the right to require an injured worker to undergo examinations or testing that is not performed by medical doctors (such as functional capacity assessments or audiograms).</p>

Issue #13: To help improve accessibility and readability for the average person, include a preamble to the *WC Act* that outlines the intent of the workers' compensation system and the main sections of the Act.

Discussion

- A preamble to legislation can help improve accessibility and readability for the average person, as preambles are often used to help articulate the goals and purpose of legislation.
- Preambles can provide a plain language overview of the values and goals that led to the creation of the legislation and can be a means for legislatures to reflect the diversity of conflicting values often at stake in legislation.
- For the *WC Act*, a preamble could highlight the foundational Meredith Principles and the value the workers' compensation system has for both workers and employers.
- Currently, seven other Canadian jurisdictions include preambles (AB, MB, ON, QC, YT, NWT, NU) while five do not (BC, PEI, NS, NL, SK).
- Preambles are not frequently used in New Brunswick legislation, with some notable exceptions, including the *Human Rights Act*, which has an extensive preamble.
- A legal opinion obtained by WorkSafeNB urges caution in the inclusion of a preamble, given that the *WC Act* is often interpreted by the WCAT with a limited right to appeal its decisions.



CONCLUSION

At the heart of workers' compensation in New Brunswick is the need for workers and employers to share a joint commitment to maintain a fair and equitable system. The system's sustainability depends on this balance, consistent with the Meredith Principles and the historic compromise, which is the foundation of all workers' compensation law in Canada.

Your feedback is crucial to ensure the ongoing success and effectiveness of the workers' compensation system in New Brunswick.

After the consultation concludes, WorkSafeNB will bring forward the issues found in this report and develop firm recommendations for government that reflect the voices of stakeholders and strike the balance required to

maintain fair compensation for injured workers and their families and the fiscal sustainability of the system.

WorkSafeNB will also canvass stakeholders for other issues that require attention in the legislative review not identified in this report. For instance, issues related to the *WC Act* ancillary legislation, such as the *Firefighters' Compensation Act* and the potential to expand the list of presumptive cancers, among other topics.

WorkSafeNB is looking forward to working with GNB and provincial stakeholders as we shape recommendations to workers' compensation legislation for the benefit of all New Brunswickers.



