REPORT OF THE

2012 LEGISLATIVE REVIEW ADVISORY COMMITTEE

ON THE

WORKERS COMPENSATION ACT OF PEI

SUBMITTED TO:
Hon. JANICE SHERRY
MINISTER ENVIRONMENT, LABOUR and JUSTICE

THIS 31st DAY OF JULY, 2012

BY THE REVIEW COMMITTEE:
DOUGLAS C. STANLEY, CHAIR
MARGARET STEWART, MEMBER
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INTRODUCTION

This Committee was established by the Workers Compensation Board of PEI (WCB) pursuant to a specific responsibility they have under s. 85(1) of the **Workers Compensation Act** of PEI. That provision, added to the legislation in 2001, requires the WCB to appoint an Advisory Committee to review the provisions of the Act every five years and to report to the Minister regarding its review. When s. 85 was introduced there already existed a provision in the Act, s. 30 (2), which required the Directors of the WCB to periodically review this Act and the Regulations and recommend to the Minister such changes as are considered advisable. We will comment on these two sections later in this Report. For the purposes of this introduction it suffices to observe that they are at odds with each other, could lead to problematic situations and may have resulted in the difficulty the government had responding to the last s. 85 Review.

That last review took place in 2007. It was a substantial undertaking and resulted in a Report delivered in December 2007 with many recommendations, none of which were ultimately acted on by the Government. This presented the current Workers Compensation Board with a problem five years later when they were required, in 2012, to establish yet another review.

We believe the Board of Directors of WCB, which is made up of representatives from the two stakeholder communities, have acted with a considerable degree of prudence in this instance. They established a small Committee of three, they appointed two Board members to sit on the Committee and they drafted terms of reference that acknowledged that the work of the 2007 Committee would have to be the foundation on which the 2012 Committee would have to try and build a consensus on contentious issues. Further, they assured this Committee that any recommendations the WCB had would be referred to this Review Committee.

Our terms of reference were as follows:

RESPONSIBILITIES

Review the 2007 Report of the Legislative Review Advisory Committee and the subsequent recommendations made by the Workers Compensation Board;

• establish the details of the consultation process;
• establish a time table for conducting the consultation process;
• develop a communication plan for its work;
• conduct the consultation items;
• identify possible amendments to the WC Act;
• consider financial and other implications of proposed legislative changes to the WC Act; and
prepare a Report outlining recommendations for amendments to the WC Act including any implications resulting from the recommendations by June 30, 2012.

It is this Committee’s opinion that the recent history of successive reviews has resulted in a considerable amount of “consultation fatigue” among stakeholders and a degree of cynicism among some about the commitment of the Government to the review process mandated in the legislation. Nonetheless, we feel we have engaged in a meaningful dialogue with stakeholders and that we have a very good understanding of where they stand on their priority issues. The difficulty, at this time, is that there is not a lot of common ground between the stakeholder organizations on several issues. What we have attempted to do is identify and deal with these priority issues in what we think is a fair and balanced set of recommendations.

Workers compensation systems in Canada arose out of consensus and it is important to the working of the system that both stakeholder groups, being objective, see the system as fair and balanced. Worker representatives will always want better benefits and employer representatives will always want cost containment. At the end of the day, both must be of a view that it is better to have a workers compensation system than to not have one. We are also concerned that promises of benefits far into the future that cannot be funded, and therefore might never be delivered, are hollow promises that undermine the consensus on which this system is built. This Committee believes that we have put forward a set of recommendations that both stakeholder groups can live with, if not embrace. These are changes that work to the benefit of the system and are in the long term interests of both stakeholder groups. We believe they should have the support of the Workers Compensation Board and they ought to be acted on by Government.
ORIGINS OF COMPENSATION IN CANADA: SIR WILLIAM MEREDITH

The idea of a system of workers compensation did not originate in Canada but it has had an enduring and successful history in each of our provinces. Conceived in Germany, it was adopted in Canada, first in Ontario, on the recommendation of Sir William Meredith. Meredith, a Chief Justice of Ontario, was appointed to head a Royal Commission in 1910, to study “Workman’s Compensation” systems throughout the world. In 1913 the Commission reported. The title of the Final Report bears consideration: “Laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily”.

Workers Compensation legislation in Canada is one of the most successful public policy responses to a real and serious problem. What to do about workers injured in the workplace who had no realistic hope of recovering damages for negligence against their employer through civil litigation? How to protect these workers and their families from destitution in the absence of any social safety net save private charity? No publicly funded health care and no government sponsored, universal, work-related disability benefit was available at that time. As Justice Meredith expressed his belief in his Report “the true aim of a compensation law is to provide for the injured workman and his dependants and to prevent their becoming a charge upon their relatives or friends, or upon the community at large”.

In his Report Meredith discusses the two principal problems in the development of the common law of negligence which he was trying to overcome with his statutory reform. It was his objective to “provide for substantial modification of the common law as to the liability of the employer to answer in damages to an employee who is injured owing to the negligence of the employer or his servants”.

Two developments in common law had to be reversed. First, the fact that a servant was taken to have accepted “risks incidental to his employment” and the risk of injury by a fellow servant when he entered into a contract for service. The second common law development making it impossible for workers to recover damages against their employer was the development of “contributory negligence”. In concluding his remarks on the reform of these common law principles, Meredith said:

That in making these recommendations I am not advancing any novel proposition is shown by the fact that what I propose should be done in this Province [has already been done in some US States], and that the rules which it is proposed to abrogate or modify no longer meet the requirements of modern industrial conditions and are unjust as applied to the complex relations of master and servant as now existing, and to the use of complicated machinery and the great dangerous forces of steam and electricity of today is the generally accepted view, and was the unanimous opinion of [an American study of the issue of workmen’s compensation].
In return for agreeing to a system of compensation the employer was to be immune from suit by his employee.

We comment at length on this aspect of Meredith’s Report because we believe it is essential in the twenty-first century to put this scheme in context. It was designed to remove the common law barriers to a workman’s ability to recover damages against his employer for an injury caused by the employer’s negligence or failure of that employer’s “duty of care” to the workman in a workplace that was radically different from that of the nineteenth century. In his Report, Meredith outlined five principles which have become known as the “Meredith Principles” and which have endured for almost 100 years as the underpinning of all Canada’s and a large number of American States’ systems of workers compensation. Perhaps the simplicity of these underlying principles is what has allowed the systems developed from them to adapt to dramatic changes in the environment in which they operate (for example, the introduction of publicly funded medical care) as well as fundamental changes in the definition of compensable loss.

The “historical bargain” struck by Meredith was that injured workers would be entitled to benefits, regardless of fault, giving up their right to sue their employer; the employer would bear the cost of the system in exchange for immunity from suit by an injured worker. Meredith’s five fundamental principles were the following:

1. NO FAULT COMPENSATION — Workplace injuries are compensated regardless of fault. There is no issue with respect to “responsibility or liability” for the injury. Fault becomes irrelevant and the issue is “compensation”.

2. COLLECTIVE LIABILITY — The total cost of the system is shared by all employers. All employers contribute to a common fund and “financial liability” becomes their “collective responsibility”.

3. SECURITY OF PAYMENT — A fund is established to guarantee that compensation monies will be available. Injured workers are assured of prompt compensation and future benefits.

4. EXCLUSIVE JURISDICTION — All compensation claims are directed solely to the Compensation Board. The board is the decision maker and final authority for all claims.

5. INDEPENDENT BOARD — The governing Board is autonomous, financially independent of government or any special interest. The administration of the system is focused on the needs of its employer and worker clients, providing efficient and impartial administration.

No one starts a review of workers compensation legislation without first referring to the Meredith Principles. We will return to the Meredith Principles in the discussion of the recommendations made to us by stakeholders and will attempt to filter our recommendations through a sieve of these Principles.
FUNDING

Funding is crucial to any review of workers compensation legislation. We have been specifically mandated to consider financial and other implications of proposed legislative changes to the Act. The funding position of the Board and the stability of the assessment rate are the “vital signs” of the robustness of a workers compensation system and its ability to take on additional risk.

The issue of funding was paramount to Meredith’s consideration and his approach to funding the system makes workers compensation unique and distinguishes it from most other government sponsored benefit programs.

From Meredith’s Report:

It is in my opinion essential that as far as practicable there should be certainty that the injured workman and his dependants shall receive the compensation to which they are entitled, and it is also important that the small employer should not be ruined by having to pay compensation, it might be, for the death or permanent disability of his workman caused by no fault of his. It is, I think, a serious objection to the British act that there is no security afforded to the workmen and his dependants that the deferred payments of the compensation will be met, and that objection would be still more serious in a comparatively new country such as this, where many of the industries are small and conditions are much less stable than they are in the British Isles.

Costs to employers that are associated with any one claim are the costs of benefits incurred in the year of the accident and the future benefits promised to the injured worker. From the beginning, debate centered around whether employers should be compelled to fund the system for the estimated costs of future benefits.

Having decided on the German model of collective liability, as opposed to the British model of individual employer responsibility, there was much debate in Meredith’s mind about the proper method of funding the system—should only current costs be funded or should the system assess employers for the costs of payments due to injured workers in future years. The argument made by employers, against funding future costs, was the prediction that rates would continue to rise over time and become unaffordable. On the other hand, Meredith cited the argument against the German model of funding—“that it is manifestly unfair to the employer of the future because it shifts upon his shoulders part of the burden of compensating for accidents which have happened before he became an employer, and that it results in low assessments in the early years of the operation of the law, and necessarily increases in the later years, until in a measurable period of time they become a burden too oppressive for the employer of the future to bear”.

In the end Meredith said:

I am not convinced that the German plan affords an adequate safeguard against the dangers [the dramatic increase in rates over time to fund future liabilities] which Mr. Sherman anticipates, nor am I satisfied that it does not do so. I have, therefore, concluded that the act should not lay down any hard and fast rule as to the amount which shall be raised to provide a reserve fund
and that it is better to leave that to be determined by the Board which is to have the collection and administration of the accident fund as experience and further investigations may dictate. I have therefore made provisions in the draft bill to that end, by making it “the duty of the Board at all times to maintain the accident fund so that with the reserves it shall be sufficient to meet all the payments to be made out of the fund in respect of compensation as they become payable and so as to not unduly or unfairly burden the employers in any class in future years with payments which are to be made in those years in respect of accidents which have previously happened,” (sec. 70), and by authorizing the Lieutenant Governor in Council if in his opinion the Board has not performed that duty to require the Board to make a supplementary assessment of such sum as in his opinion is necessary to be added to the fund, (sec. 90), and these provisions I deem essential to the safety and adequacy of the scheme of compensation for which the draft bill provides.

Although Meredith refers to the duty of the Board to raise “sufficient” funds, it is clear that he recognizes the importance of funding in relation to the security of payment to injured workers. He also recognizes the unfairness of shifting the costs of accidents to future employers. Although it was employers who were critics of the system of funding future liabilities, in the end, it is employers who bear an unfair burden when the future costs of accidents are not paid by the employers who are financially responsible for those costs. The idea that today’s employers pay the cost of today’s accidents is often referred to as “inter-generational fairness” in the system. If the employer group is relatively static, unfairness is less of an issue. Employer turnover in PEI is about 10%. Every year approximately 10% of employers drop off the assessment role and there are approximately 10% new employers, which suggests that, in theory, in fewer than ten years you have a completely different group of employers. This is a relatively short period of time compared to the long period over which liabilities have to be paid.

It is interesting that Meredith accepts that the Government would be the “watch dog” over Board prudence and responsibility in this area. Of course, he was operating at a time prior to politicians falling under the spell of deficit financing. The recent history of provincial governments acting responsibly to ensure assessments are “sufficient” to pay future compensation benefits is not good. In those jurisdictions where governments retained control over assessment rates, there are ample examples of governments acting to keep rates low for employers in the face of Compensation Board representation that assessment rates needed to increase. Again, we must emphasize, these artificially low rates are not in the long term interests of the employer community and they breach Meredith’s fundamental principle of benefit security. It is only recently, since some provincial Auditors General have taken the position that the Compensation system’s unfunded liability is a liability of the province, that provincial governments have registered concern for these underfunded systems.

One other observation: Meredith notes that the critics of a system that required the funding of future accident costs cited rising premium rates as the system gets started. He notes that the estimate was that it would take 25 years for the system to reach equilibrium and for rates to start to level off. In 2012 PEI is not starting from scratch; they have a long history of paying benefits and funding the system. The most recent history is that rates have been declining as a result of the changes made to the system in 2003. The actuarial opinion is that rates have probably stabilized and, absent changes to the system, are not likely to continue to decline or to increase.
dramatically. The system is fully funded so any ramp up in rates to fund future liabilities has already happened.

<table>
<thead>
<tr>
<th>Percentage Funding in PEI (smoothed)</th>
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<td>------</td>
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<tr>
<td>74%</td>
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Full funding, however, is not mandated by legislation in PEI. The legislation dictates that every year the Board “shall” estimate the assessments necessary to fund the cost of claims in the succeeding year and they “shall” collect that assessment from employers. The Act says that, in addition to this assessment, the Board “may” collect the assessments necessary to provide capitalized reserves from which all future year’s costs of those accidents can be paid. Thus in PEI “sufficient funding” is the legislative standard and has been since 1949.

Notwithstanding this discretion, the Board has established a policy (POL 136) with respect to funding future costs of claims. The important parts of that Policy are as follows:

1. The Workers Compensation Board is committed to achieving and maintaining the financial position of fully funded.

A fully funded compensation system is essential for securing financial obligations associated with the payment of current and future worker benefits and the administration of an effective workers compensation system.

2. The Workers Compensation Board will set employer assessments at a level sufficient to provide for all current and future worker benefits for accidents which may occur in that year. The current and future benefit costs associated with any accident year are estimated in advance of that accident year using actuarial methods and assumptions.

...  

6. The primary goals of the funding policy are to:

- Minimize the risk of becoming unfunded, thereby ensuring there is sufficient money available for payment of current and future worker benefits;
- Minimize cost volatility for employers so that the overall average assessment rate for the current year will not vary significantly over the previous year’s overall average assessment rate;
- Minimize the total cost charged to employers by ensuring the funded status is appropriate in relation to financial needs;
- Ensure today’s employers pay for the current and future cost of today’s accidents.

We agree with this prudent approach to funding the system described in the Policy. Having achieved relative stability at a fully funded level is a tremendous advantage from the point of
view of the flexibility it allows the Board. To be in a position that has transitioned from worrying about the ability to pay benefits promised to injured workers, to being able to consider whether the benefits to injured workers might be improved, is a paradigm shift.

The approach to funding in other Atlantic jurisdictions is worth noting. New Brunswick legislation mandates the Board to be fully funded, or in any year it is not fully funded to have in place a plan to be fully funded within five years. In Nova Scotia there is a statutory requirement for the Board to assess for current and future accident costs, subject to a specific direction to the Board where you find a clear reference to the concern that a funding deficit results in unfairly burdening employers in future years with the costs of accidents from previous years. Nova Scotia is presently 61% funded. The Newfoundland statute states that the Board “may” establish a fund for future accident costs. Newfoundland is presently 91% funded.

Being in a fully funded position means that the PEI Board is in a position, if it were to close its doors today and collect no more assessments from employers, to pay all the benefits injured workers are entitled to until the last of them and their dependants are deceased. That could easily be 80 years into the future. An unfunded liability breaks the trust with injured workers. When there is an unfunded liability there is no “security of payment”. In our view, governments should not allow the Compensation Board to breach this trust and should not allow the Directors to burden future employers with the costs of accidents they bear no responsibility for. If the provincial government is not prepared to underwrite deficits in the workers compensation reserves, they ought to mandate that the Directors not create a deficit.

We recommend that the legislation be amended to require that the Board maintain a fully funded status, or where they do not, that they have a plan to be fully funded within a definite period of years.
IMPLICATIONS FOR BENEFIT IMPROVEMENTS

The statutory authority of the Board is to raise money for the benefits outlined in the legislation. Our terms of reference were to look at “possible amendments to the Act and to consider the financial implications of proposed legislative changes”. We realize that this review is, amongst other things, an invitation for proposals to improve benefits under the Act. We started with an examination of “funding” because that is fundamental to our task of weighing the proposals made to us.

Being fully funded means you can pay the benefits you have promised; it does not mean you can promise more benefits, and it is a mistake to think that new benefits can be funded through surpluses—a view espoused by some stakeholders. Funding, however, is very relevant to our assigned task of considering the financial implications of proposed changes to the Act. We said above that the funding level, taken with the stability of assessment rates, is an indication of the “robustness of the system”. It is an indication that the system might be able to absorb some of the external shocks to the system—poor investment returns (for example in 2008 the investment returns were -17.98, a substantial loss), changes in industry mix, extraordinary increases in medical costs or dramatic changes in accident frequency. It is also an indication of the ability of employers to assume the costs of benefit improvements.

The recent history of assessment rates and funding levels in PEI, however, must be put in context. There are significant forces at work in PEI that would indicate the recent trend will come under increasing pressure and that the existing envelope of benefits will cost more in the future, necessitating higher assessment rates and/or eroding any surplus from previous years.

Health Care and rehabilitation costs are increasing.

| Health Care and Rehabilitation Costs (in thousands) |
|----------------------------------|--------|--------|--------|--------|--------|
| 2007    | 2008    | 2009    | 2010    | 2011    |
| $4,197  | $4,792  | $5,094  | $5,327  | $5,951  |
| % increase | 14% | 6% | 4.5% | 11.7% |

The trend is that claims are lasting longer.

<p>| Average Claim Duration in Days |
|--------------------------------|--------|--------|--------|--------|
| 2007    | 2008    | 2009    | 2010    | 2011    |
| 28.11   | 30.73   | 30.83   | 30.83   | 31.96   |</p>
<table>
<thead>
<tr>
<th>Average Claim Duration in Days</th>
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<tr>
<td>% increase</td>
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These trends have resulted in increasing wage loss benefits being paid.

<table>
<thead>
<tr>
<th>Total Wage Loss Benefits Paid (in thousands)</th>
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<tbody>
<tr>
<td>2007</td>
</tr>
<tr>
<td>$8,611</td>
</tr>
<tr>
<td>% increase</td>
</tr>
</tbody>
</table>

All of these increases are working against the trend of declining frequency and they may ultimately overtake that trend. Thus, the existing rates may not be sustainable in the short to medium future, and are not in the long range future.

Taken together, the relative movement of assessment rates and the funding level can give you an indication of the ability of the system to bear higher assessments. Those factors allow you to assess the reasonableness of asking employers to pay a higher assessment because any new benefits being proposed can only be funded through higher assessments.

Assessment rates have been decreasing in PEI. Actuarial advice is that with the present benefit levels they should stabilize near the present rate. Some but not all of this rate decrease has been due to the wait period introduced in 2003.

<table>
<thead>
<tr>
<th>Assessment Rates</th>
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<tbody>
<tr>
<td>$2.29</td>
</tr>
</tbody>
</table>

A significant part of the decline is also attributed to improved accident frequency. This has been a phenomenon across the country.
<table>
<thead>
<tr>
<th>Accident Frequency in PEI (injury frequency/100 workers)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
</tr>
<tr>
<td>------</td>
</tr>
<tr>
<td>Value</td>
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</table>

<table>
<thead>
<tr>
<th>Accident Frequency National Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
</tr>
<tr>
<td>------</td>
</tr>
<tr>
<td>Value</td>
</tr>
</tbody>
</table>

As we have seen above, at the same time accidents were becoming less frequent, they were becoming more expensive. Consequently, the savings from fewer accidents have been eroded by those accidents being more expensive.

Nonetheless, employers have reaped a benefit from reduced assessment rates and full funding as a result of the waiting period and a reduced accident frequency. The impact of the wait period on the system will be dealt with in the next section of this Report. The “savings” to the system from the wait period have been reflected in lower assessment rates. It is legitimate to ask whether injured workers might also see some benefit from the savings that resulted from reduced claim patterns and from the declining accident frequency. In 2003 PEI employers were paying $2.39 into a system that was 78% funded and in 2010 they were paying $2.15 into a system that was 108% funded. In our view this demonstrates a “capacity” for the system to accept higher rates. It is legitimate to look to where the benefit package for injured workers could be improved.
THE WAIT PERIOD

This is undoubtedly the most contentious issue. Unfortunately it has become a small “p” political issue and there is little informed, reasoned and objective debate on the question of a wait period in workers compensation. For organized labour the wait period represents something they “lost” and something that has to be “regained”. The wait period in PEI is 3/5ths of one week’s wages. This can be likened to a “deductible” in an insurance policy. In the original scheme proposed by Meredith, benefit entitlement started one week post-accident. Overtime, wait periods disappeared from the various systems in Canada. They were reintroduced in NB, NS and PEI all for the same reason—a perception that the system was in financial crisis. It was 2002 when the wait period was introduced in PEI and the real funding level in 2001 was 69%.

There is no question that the introduction of the wait period contributed to a decline in the number of claims in subsequent years. It was not, however, the sole contributor to that decline. Thus, whatever the predicted impact of the wait period, it was accelerated by the naturally declining accident frequency. So both these factors working together resulted in fewer claims, which led to a funding recovery and subsequently lower assessment rates. More importantly, what it appears to have done is introduce an element of stability to funding and rates.

We have heard that the wait period has simply discouraged injured workers from reporting accidents. That may be in some cases, but the most dramatic drop in the accident frequency in PEI occurred in the three year period 2000 to 2002, the three years prior to the introduction of the waiting period. In those three years the accident frequency dropped from 3.96 to 2.66, close to a remarkable one third reduction in accident frequency.

<table>
<thead>
<tr>
<th>yr</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
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<tr>
<td>#</td>
<td>5738</td>
<td>5341</td>
<td>4810</td>
<td>4562</td>
<td>4257</td>
<td>4153</td>
<td>4144</td>
<td>4067</td>
<td>4254</td>
<td>3931</td>
<td>3772</td>
</tr>
</tbody>
</table>

The difficulty with the wait period is that it is asymmetrical in its impact on the system. The dollar savings to the system far outweigh the dollar value of benefits lost to claimants. This is because it leads to fewer claims in the system. Again, this is a contentious point. The actuaries will not say that the fewer claims represent the absence of what would otherwise be bogus claims. The critics of a wait period say that the fewer claims represent injured workers who would, absent the wait period, report their injury.
The Federation of Labour is correct in their observation that the wait period has contributed to lower assessment rates. However, because of the asymmetrical nature of the wait period, the savings from the wait period can also be plowed back into benefits later in the claim as higher wage loss recovery benefits, or as personal care allowances for the more seriously impaired injured worker claimants.

The asymmetrical nature of the wait period is exaggerated by the fact that a great number of workers—particularly those covered by collective agreements and sick leave plans—do not actually suffer any financial penalty because of the wait period. Unlike the NB system, the PEI system allows employers to pay the wages lost during the wait period. The PEI Federation of Labour argues that the Act promotes this inequity and that it is those workers who can least afford it who actually suffer a financial loss as a result of the wait period. Unfortunately, if you eliminate the wait period, in order to pay that relatively small loss, you add a disproportionate cost to the system. Not because of the cost of the benefit, but because of the “claiming pattern” that actuaries predict without the wait period. The estimate in 2007 was that it would add 20 to 34 cents per hundred dollars of payroll to the assessment rate. The Federation of Labour do not accept the premise of the wait period and argue that all those claims that are not made represent injured workers who should have filed a claim. However you feel about the moral implications of this phenomenon, we have to accept the actuarial science.

On balance, our view is that the positive impacts of the wait period outweigh the negatives. The introduction of the wait period in PEI has the potential for a greater good for a greater number of injured workers if some of the savings from the wait period are put into improved benefits. The other important aspect of the wait period is that it has restored confidence in the system, and provided rate stability. It has allowed for the consideration of improved benefits to injured workers with more severe and long lasting disabilities. It is notable that PEI was able to bounce back after the market turmoil of 2006-2007 and to restore the security of worker benefits in 2008 and 2009.

Having said this, because the “savings” generated from the wait period do not come from the benefits not paid for those three days, but from the claims not filed as a result of the wait period, there is no particular reason for a wait period of three days. What the actuaries describe is a “tipping point” where the wait period, or deductible, is meaningful enough to have this impact on claim behaviour. The actuaries suggest that this tipping point is probably more than one day but could be less than three days.

The 2007 Review Committee recommended that the wait period be eliminated. That Committee was not mandated to consider the costs of their proposals. In our view, had they been given that mandate, and realized they would be adding an estimated 20 to 34 cents/$100.00 of assessment, they might have come to a different conclusion. The PEI Federation of Labour is a strong advocate of eliminating the wait period. They argue that it has served its purpose and that now that financial stability has been restored it can be eliminated. We have problems accepting this
analysis. Our concern is that removing the wait period could simply result in a return to the precarious financial position the Board was in on its introduction.

Having considered what we were advised by actuaries, and considering the overall impact of the wait period on the system, we would recommend that the period be reduced to two days from the date of the accident. When you consider what retaining the wait period allows you to do in terms of improving benefits for all injured workers, it is not reasonable to eliminate it.

**We recommend that the wait period be reduced to 2/5ths of the injured worker’s weekly earnings.**
SPECIFIC BENEFIT IMPROVEMENTS

Wage Loss Benefit

In some areas PEI’s basic benefit levels do not meet the standard of other jurisdictions. PEI’s wage loss benefit is 80% of net insurable earnings for the first 38 weeks on claim and 85% thereafter. All jurisdictions in Canada outside the Atlantic Region pay a wage loss benefit of 90% of net insurable earnings. In Atlantic Canada, NB pays 85% of loss of earnings, and NS pays 75% net for the first 26 weeks on claim and 85% thereafter. NFLD pays 80% of net loss of earnings. Of the four Atlantic provinces, only NFLD has no wait period and they have the highest assessment rate at $2.75.

What does this mean in real terms? In PEI the maximum insurable gross earnings is $49,300. This represents net earnings of $36,125 or $694.71 a week. The following chart demonstrates the present benefit in PEI, with the wait period of three days, starting one week post-accident and showing the cumulative benefit received over the subsequent periods. For the purposes of equalizing the weekly wage for a comparison with the other Atlantic provinces, we assume taxes are the same. We apply the wait periods and compensation rates in those provinces. This is what the worker would get in each of those jurisdictions:

<table>
<thead>
<tr>
<th></th>
<th>1 wk</th>
<th>3 wks</th>
<th>5 wks</th>
<th>6 wks</th>
<th>28 wks</th>
<th>40 wks</th>
<th>52 wks</th>
</tr>
</thead>
<tbody>
<tr>
<td>PE</td>
<td>222.30</td>
<td>1,333.82</td>
<td>2,777.80</td>
<td>3,334.56</td>
<td>15,561.28</td>
<td>22,298.88</td>
<td>29,384.88</td>
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<tr>
<td>NS</td>
<td>312.61</td>
<td>1,354.67</td>
<td>2,396.73</td>
<td>3,126.18</td>
<td>14,727.78</td>
<td>21,839.78</td>
<td>28,925.78</td>
</tr>
<tr>
<td>NB</td>
<td>236.20</td>
<td>1,771.50</td>
<td>2,952.50</td>
<td>3,543.00</td>
<td>16,534.00</td>
<td>23,620.00</td>
<td>30,706.00</td>
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<tr>
<td>NL</td>
<td>555.76</td>
<td>1,667.28</td>
<td>2,778.80</td>
<td>3,334.56</td>
<td>15,561.28</td>
<td>22,230.40</td>
<td>28,899.52</td>
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</tbody>
</table>

The injured worker does not pay tax on this benefit. If PEI were to keep everything else the same and pay 85% of net from the start of the claim, the benefit paid in PEI would be the same as the benefit paid in NB. It can be seen from this table that the effects of the wait period are largely overcome at the point the claim continues for 5 weeks and the cumulative benefit moves substantially ahead of other Atlantic provinces at 28 weeks. This is a conscious policy decision to weight benefits towards those injured workers with longer claims and, presumably, more serious injuries.

The PEI Federation of Labour recommended to us that the wage loss benefit be improved to 90%, the standard benefit scale outside Atlantic Canada. The 2007 Committee could not arrive at a unanimous recommendation on this issue. They did recommend moving to 80% for the duration of the claim, removing the step up to 85% after 39 weeks on claim. Their Report makes clear that some members wanted the rate to increase to 90%. The WCB reviewed the 2007
Report and, after costing all the proposals, it was their recommendation that the benefit be improved to 85%. In 2007 the actuarial estimate was that this benefit improvement would cost $.03 on the assessment rate.

This change results in a significant improvement in benefits for those injured workers with a one week to 38 week claim duration. The injured workers who made individual representations to our Committee were all on a long-term claim. It is our consensus view that, if there is room in the system to improve benefits for injured workers, the priority should be to move long-term claimants closer to the prevailing benefit standard that has been established in the Atlantic provinces.

**We recommend that the wage loss benefit be increased to 85% of net insurable earnings.**

**Indexation of Benefits**

Currently s. 50 (2) of the Act provides that pensions, extended wage loss benefits and survivor benefits paid by the Board will be adjusted on July 1st of each year in an amount equal to the lesser of 75% of the percentage change in the Consumer Price Index (CPI) for Charlottetown and Summerside and 4%. The 2007 Review Committee recommended a change to 100% of the CPI (with no cap).

There is no “standard” for benefit adjustment in the various Compensation Statutes in Canada. Some mandate indexing benefits using the CPI; some leave the issue to the Board to be determined by policy. Ontario uses 50% of CPI; NS and NB use a formula based on Industrial Agregate Earnings in the province. The WCB has costed the recommendation for indexation at 80% to be $.02 on the assessment rate and indexation at 100% to be $.07.

**We would recommend that pensions, extended wage loss benefits and survivor benefits paid by the Board will be adjusted on July 1st of each year in an amount equal to the lesser of 85% of the percentage change in the Consumer Price Index (CPI) for Charlottetown and Summerside and 4%.**
COVERAGE

The legislation in PEI already covers a much higher percentage of workers than are covered in other jurisdictions.

<table>
<thead>
<tr>
<th>Percentage of Workers Covered by System</th>
</tr>
</thead>
<tbody>
<tr>
<td>AB</td>
</tr>
<tr>
<td>85%</td>
</tr>
</tbody>
</table>

However, there are two important Island industries that are exempt from the legislation, farming and fishing. They are exempt by regulation under the Act, not by the Act itself, and therefore there is more flexibility in terms of Government’s ability to include them. Employers in these two industries can and do apply for voluntary coverage. The fact remains that significant numbers of workers are denied the protection of workers compensation in these two industries.

There is an aspect of coverage that is often overlooked. Since the time the provincial governments shifted responsibility for the enforcement of Occupational Health and Safety legislation—along with the cost of administering that program—to the Workers Compensation Board, it is assessment-paying employers who are funding this activity. However, the benefit of the WCB safety enforcement, promotion and education is not limited to assessed employers. Indeed, WCB has a Health and Safety Officer dedicated to the farming industry, and they do considerable education and promotion of health and safety in the fishing industry. It is not fair that assessed employers in PEI are paying the cost of providing this service to the farming and fishing sectors who pay no general assessment.

We believe the case is made for workers compensation and that it should extend to all workers. At the same time, we also accept that one of the strengths of the compensation system arises from its general acceptance by the employer community.

We recommend that the Board and Government undertake a vigorous consultation exercise with these two industries to discuss the terms on which they could be brought into the system so that employees in those two important sectors of the economy have the same protection as other workers in PEI.
REVIEW PROCESS AND WCAT

The three-stage process of decision making that presently exists looks like this:

<table>
<thead>
<tr>
<th></th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>claims adjudicated</strong></td>
<td>1903</td>
<td>1971</td>
<td>1778</td>
<td>1751</td>
<td>1736</td>
</tr>
<tr>
<td><strong>denied</strong></td>
<td>134</td>
<td>148</td>
<td>156</td>
<td>82</td>
<td>109</td>
</tr>
<tr>
<td><strong>to IRO</strong></td>
<td>95</td>
<td>108</td>
<td>132</td>
<td>74</td>
<td>78</td>
</tr>
<tr>
<td><strong>to WCAT</strong></td>
<td>22</td>
<td>22</td>
<td>48</td>
<td>23</td>
<td>16</td>
</tr>
</tbody>
</table>

This is only a rough representation of activity. The case that went to WCAT in any one year may not have been adjudicated in that same year. Approximately half of the claims that are adjudicated in any year are “wage loss claims”.

We received several submissions with regard to the timeliness of decisions from the Workers Compensation Appeals Tribunal. The 2007 Review Committee recommended that the legislative requirement found at s. 56 (24) of the Act be amended to refer to 60 days. The section presently reads as follows:

(24) On hearing an appeal, the Appeal Tribunal may confirm, vary or reverse the decision appealed from and shall, on the written request of a person with a direct interest in the matter, provide a written summary of its reasons within 90 days of the completion of the hearing.

The section does not simply direct that the WCAT shall render a decision within 90 days of the hearing, which is the standard time limit language found in other statutes. Requiring a party to make a written request for a “written summary of its reasons within 90 days” almost suggests that WCAT might have a practice of rendering oral decisions.

The PEI Federation of Labour recommended that the time limit for WCAT to issue a decision be reduced to 30 days. The WCB recommended that the section remain unchanged. WCAT in a brief to this committee stated that the 90 day limit was onerous given that Panel members serve part time. The latest annual report indicates that the WCAT was only able to meet the 90 day limit in 64% of cases. If WCAT is not able to achieve the present time limit, shortening it is not going to improve the result. We believe that there are administrative measures that could be taken by the Chair of WCAT to address the timeliness of decisions.

We recommend that the section be amended to relieve the parties from having to request the decision, so that it reads as follows:
(24) On hearing an appeal, the Appeal Tribunal may confirm, vary or reverse the decision appealed from and shall provide a written summary of its reasons within 90 days of the completion of the hearing.

We also recommend that the provision for time limits for commencing an appeal which are presently found in Regulations, along with WCAT’s authority to extend that time limit, be moved to the Act.

Standard of Review:

There is a decision of the Court of Appeal—*Workers Compensation Board (PEI) v. MacDonald 2007 PESCAD 04*—that interprets the existing statutory provisions as giving WCAT a broad power of review. Essentially what WCAT is doing at present is adjudicating a case from the start. We believe that the review/appeal process could be streamlined, by looking at WCAT’s standard of review, to achieve a greater degree of finality and more expeditious resolution of appeals. We heard from claimants who were frustrated by a lengthy WCAT process that was followed by an appeal to the Courts.

In their submission to us the WCAT referred to appeals becoming “complicated and detailed” and said that rendering decisions has become more time consuming. From the above chart it is clear that the Board adjudicative staff are processing claims daily. They are working with the legislation, Board policies and application of medical evidence on a daily basis. Similarly, the one Internal Review Officer would have developed skill and familiarity with these issues through daily interaction with the process.

WCAT in their submission to the Committee referred us to the Mullen case, a decision of the PEI Court of Appeal—*Workers Compensation Board PEI v. Mullen 2011 PECA 10*. Although it was referred to us in the context of the Court’s standard of review of WCAT, what it says about the principles underlying the issue of standard of review is clearly applicable to the standard of review that WCAT ought to be applying to their review of the IRO decision. In the Mullen case the Chief Justice says:

> Questions of fact, discretion and policy, as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness. Many legal issues attract a standard of correctness. However, some legal issues attract the more deferential standard of reasonableness. Stated more precisely, where the question is one of fact, discretion or policy, or where the legal and factual issues are intertwined and cannot be readily separated, deference will usually apply automatically. Regarding other questions of law, the reasonableness standard will usually apply where a tribunal is interpreting its own statute or statutes closely connected to its function with which it will have particular familiarity; and deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law rule in relation to a particular statutory context: Dunsmuir Para 51, 53, 54

A consideration of the following factors will lead to the conclusion that the decision-maker should be given deference and the reasonableness test applied:
A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference;

A discrete and special administrative regime in which the decision maker has special expertise;

The nature of the question of law: A question of law that is of central importance to the legal system and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

If these factors taken together point to a standard of reasonableness, the tribunal decision must be approached with deference. Applying the reasonableness standard to some questions of law in those circumstances simply means giving the adjudicator’s decision appropriate deference in deciding whether a decision should be upheld bearing in mind the factors indicated: Dunsmuir para 55, 56.

If you apply this to the situation we have here, clearly the IRO is the specialized body dealing with questions of “fact, discretion or policy, or where the legal and factual issues are intertwined”, and the legislation intends that they apply their expertise to the issue. It is a “discrete and special administrative regime in which the decision maker has special expertise”. None of this applies to WCAT. The legislation in PEI already has a provision applying to WCAT which says:

(17) The Appeal Tribunal shall be bound by and shall fully implement the policies of the Board and the Appeal Tribunal, its chairperson and members are prohibited from enacting or attempting to enact or implement policies with respect to anything within the scope of this Part.

WCAT may find their task to be onerous because they are taking on a substantive rehearing of matters they have no particular experience or expertise in deciding. They are part-time appointments and the various members hear only a very small number of cases in a year. The Board recommended that the WCAT standard of review of Board decisions be one of reasonableness. We agree.

We recommend that the legislation be amended to make it clear that the standard of review to be applied by WCAT in their review of IRO decisions is one of reasonableness and they ought to be deferring to IROs on questions of fact, discretion, policy, and questions where the legal issues cannot be easily separated from the factual issues. On questions of law and jurisdiction the standard of correctness would continue to apply.
The issue of disability resulting from mental stress is problematic for workers compensation systems. Again, the issues are fundamental to the remedial public policy objectives of workers compensation. The workplace of 2012 is different from the workplace of 1910. Medical science evolves, and diseases and conditions are added to the lexicon. However, the principles underlying workers compensation are the same: they are the nexus between “injury” to the worker (resulting in health care costs and loss of earnings capacity) and work relatedness and causation/responsibility of the employer.

The Workers Compensation Board is responsible for putting the meat on the bones of the benefit regime which is established by the legislation. Section 19 of the Act gives the Board responsibility for the administration of the Act. In addition to administering the system the Board is also given the power to legislate, to make the rules, governing the system within the framework of the Act.

30. (1) The directors shall establish policies and programs consistent with this Act in relation to the following:

(a) the administration of this Act;

(b) compensation benefits to injured workers and dependants;

(c) rehabilitation of injured workers; and

(d) assessments and investments.

AND

32. (1) Subject to sections 56 and 56.1, the Board has exclusive jurisdiction to examine into, hear, and determine, all matters and questions arising under this Act and as to any matter or thing in respect of which any power, authority, or discretion, is conferred upon the Board; and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any court, and no proceedings by or before the Board shall be restrained by injunction.

(2) Without limiting the generality of subsection (1) the decisions and findings of the Board upon all questions of law and fact are final and conclusive, and in particular, the following shall be deemed to be questions of fact:

(a) whether any injury or death in respect of which compensation is claimed was caused by an accident within the meaning of this Part;

(b) the question whether any injury has arisen out of or in the course of an employment within the scope of this Part;

(c) the existence and degree of disability by reason of any injury

(d) the permanence of disability by reason of any injury;
(e) the existence and degree of an impairment and whether it is the result of an accident;

(f) the amount of loss of earning capacity by reason of any injury;

(g) the amount of average earnings;

(h) the existence of the relationship of a member of the family;

(i) the existence of dependency;

The legislation says that a worker who is “injured” in an “accident”, and as a result “suffers an impairment”, is entitled to compensation for the “impairment”, medical aid, and, where the impairment leads to a “loss of earnings capacity”, “wage loss benefits”. It is the responsibility of the Board to flesh out this conceptual framework in relation to specific situations. They do that through the promulgation of policy. When an issue like stress arises the Board is challenged to determine how claims of disability due to “stress” fit into this conceptual framework.

The PEI Board adopted Policy 01 as follows:

1. The Workers Compensation Board will consider entitlement to compensation benefits for a psychological or psychiatric condition where the condition is diagnosed by the treating physician and confirmed by a psychologist or psychiatrist according to the latest edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association and the condition results from one of the following:

• organic brain damage resulting from a compensable head injury, exposure to toxic chemicals or gases, or anoxia;

• an emotional reaction resulting from the use of drugs used in the treatment of a compensable injury;

• an emotional reaction in response to a compensable physical disability;

• a delayed acute reaction resulting from an accumulation of a number of work related traumatic events which the worker was able to tolerate before.

Stress

1. Stress is a term that is commonly used to describe an individual’s non-specific physical and psychological response to the events or changes that occur in life. Stress is not an accepted medical diagnostic term. When a person’s ability to cope with stressors is overwhelmed, a negative form of stress (distress) can develop and result in a diagnosable psychological or psychiatric condition which may be compensable. To be compensable, stress must be an acute reaction to a traumatic event.

The policy continues to define specific instances when a worker will not be entitled to benefits arising from a claim of disability arising from stress. They include “stress caused by usual work pressures” resulting from decisions made by the employer, interpersonal relationships, union
issues, changes in the work place, layoffs, etc., and stress that develops over time and is not related to a specific traumatic event.

This Policy is similar to policies adopted by Boards across the country at about the same time.

The PEI Federation of Labour, CUPE, and other stakeholders made representations to us with respect to “chronic stress”. They advocate that “chronic stress” be a compensable condition. The 2007 Review Committee did not deal with “chronic stress” specifically but they did make two recommendations that would impact on the issue. They recommended that the definition of “accident” in the Act be amended to “reflect disablement due to injuries resulting from cumulative events”. Second, they recommended that the legislation be amended to “remove the exclusion of ordinary disease of life from the definition of occupational disease”. Both these would make the Policy adopted by the Board contentious.

The Greater Charlottetown Chamber of Commerce in a brief submitted to us urged a cautious approach to this issue. They recommended that PEI wait to see how this issue develops in other jurisdictions before extending compensation to what they refer to as mental illness.

WorkSafe BC is currently engaged in a consultation process on the issue of chronic stress. This follows up two earlier BC studies: the first a 1999 Royal Commission on Worker’s Compensation, and the second a 2002 provincial government “Core Services Review of the Workers’ Compensation Board”. Both of these reviews recognized the problem of “causation” in relation to the issue of chronic stress. The Royal Commission, for example, had this to say:

In the commission’s view, the most important feature distinguishing chronic stress claims from all other types of claims is the pervasive nature of stress in everyone’s life. Unlike other forms of workplace hazards and conditions which might lead to injury and disease, stress is omnipresent. It acts on all workers in various contexts both inside and outside the workplace, often in ways which cannot be disentangled. While multi-causal situations may present difficulties in adjudicating work-relatedness, chronic stress claims are uniquely challenging in that almost all claimants will have experienced stressors both related and unrelated to the workplace which may have played a causative role. (For the Common Good: Final Report of the Royal Commission on Workers’ Compensation in British Columbia, v. 11, c. 4, p. 38)

Although we talk about the system being “no fault”, it is important to realize that underlying the system is still a very fundamental concept of “responsibility” or of “duty of care”. The system is built on an acceptance that employers collectively owed a duty of care to workers to save them from harm resulting from their employment in the workplace. The system Meredith recommended was not completely divorced from accepted principles of tort law. From the beginning there were clear lines drawn around the extent of the employer’s duty of care and the scope of injuries that employers would be collectively responsible for. Most critical was the nexus between the injury and the employment or the “work relatedness” of the injury.
Meredith’s first and second principle taken together result in defined “risk” in the system being borne by employers. We said earlier that the title Meredith gave his Report bears notice, where he uses the words, “laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment…….”

In considering whether employers, through the vehicle of workers compensation, ought to be made liable for workers succumbing to the cumulative effects of stress in their lives, one has to reflect on the origins of this system and Meredith’s now seemingly quaint reference to “the great dangerous forces of steam and electricity”. Return to Meredith and consider that the remedial aspects of what he proposed were to free common law tort responsibility from the doctrines of “assumption of risk” and “contributory negligence”. It seems to us that what the Royal Commission is asking in the above passage is whether applying the accepted notions of tort law, you can say that an employer ought to be “responsible” for the “stress” being experienced by the worker, and whether the workplace stress can be separated from all the other stressors of modern life.

In 2003 a Statistics Canada Paper “Canadian Community Health Survey: Mental Health and Wellbeing” reported that 30.8% of respondents said work was “quite a bit or extremely stressful”. The 1999 Royal Commission on Workers Compensation in BC in the above quotation referred to “the pervasive nature of stress in everyone’s life” and the fact that stress was “omnipresent” and “multi-causal”.

In our view the multi-causal nature and the reported pervasiveness of stress in our society raises more than administrative difficulties for workers compensation. They raise a fundamental issue and questions that have to be asked and answered. Is chronic stress a public health issue? Is making employers responsible for the payment of medical expenses and wage loss benefits an appropriate public policy response?

We recommend that until these issues are thoroughly debated it is premature for the Government of PEI to consider making “chronic stress” a compensable condition under the Workers Compensation Act.
INDUSTRY SAFETY ASSOCIATIONS

One of the five strategic themes of the Board’s five year strategic plan is to “Focus on sharing prevention responsibilities—the WCB will collaborate with our workplace partners to create a culture of safety”. It has been a struggle for everyone engaged in occupational health and safety enforcement/promotion to have the workplace parties accept responsibility for health and safety in their workplaces. Coming forward and asking that they be allowed to introduce a levy on their industry to fund a safety association is a significant step. It says that the construction industry in PEI is willing to accept that responsibility.

Every other jurisdiction in Canada funds industry safety associations. These associations have been successful in changing the health and safety culture in the construction industry in New Brunswick, dramatically reducing the accident frequency, training thousands of workers and involving employers directly in the health and safety issues facing their industry.

All the stakeholders who made submissions to us mentioned the importance of prevention and the Board’s responsibility in promoting healthy and safe workplaces. Reducing accident frequency and promoting healthy and safe work places only works when you have industry support. Industry safety associations provide a means to achieve that goal at “no cost” to the compensation system. Using the assessment system as a vehicle to collect industry funds for this purpose is one of the more successful innovations developed by Compensation Boards and employers.

The Construction Association of PEI are strong advocates of the idea of a safety association. They recommended changes to the legislation in the last review. The 2007 Review made the following recommendation on this subject:

18. Amend the legislation to allow the Board to collect a levy on behalf of safety associations to fund programs related to injury prevention and safety.

The Construction Association of PEI made the same recommendations to us in 2012. It was their single most pressing issue.

We urge that the recommendations of the 2007 Review Committee be acted on. The legislation should be changed to give the WCB the authority to fund industry safety associations through a levy on those industries that are willing to take this important step towards making their industry safer for their employees.
THE PROCESS OF STATUTORY REVIEW

This Committee’s experience with public consultation has been informative on several levels. We had stakeholder organizations that came forward with briefs supporting positions that have been well established in their minds as “matters of principle”. On the other hand, we had several cancelled meetings with stakeholders—in one case we were advised that “issues that were of importance were no longer issues”. There is no doubt in our minds that the quality and level of participation has been influenced by the experience these stakeholders have had with this process and the last review that was extensive and resulted in many recommendations, but did not result in any legislative change.

This Committee met with the previous Review Committee and we have reviewed their Report and recommendations. Needless to say the 2007 Committee were disappointed that nothing resulted from the considerable work they did. On the other hand, they should be reassured that their work provided us with a foundation. The history of their Report and recommendations and our experience with consulting stakeholders has grounded us in reality and has caused us to examine the question of whether a legislative requirement to review this legislation every five years is a good idea.

Two questions spring to mind—is there any reason to believe there is a need to change the legislation every five years? is there any reason to believe governments will commit to making changes every five years? In the absence of affirmative answers to these two questions, requiring a review to take place every five years simply affords stakeholders a regular opportunity to manifest their philosophical differences on issues any government is likely to be reluctant to resolve. Further, it is counter to the kind of stability and certainty that is essential to the successful administration of this system of compensation.

Is the five year review itself consistent with Meredith’s principals? One of the points about Workers Compensation that becomes clear when you study the system is its long term outlook and perspective. The system provides benefits to be paid far into the future, requires that sufficient money be collected to pay those benefits and provides for claims to be made on the basis of incidents that took place in the past, sometimes in the distant past. It is a system that requires long term thinking in its administration and a degree of stability in proper planning and rate setting.

The Federation of Labour brief made the following comment:

We are disappointed that the WCB’s board of directors has not used its authority under subsection 30(2) of the Workers Compensation Act to undertake its own review and to recommend to the Minister changes beneficial to workers.

The Workers Compensation Board is made up of persons representing the interests of stakeholders. They grapple with the issues of properly funding and administering the benefit system. They are given considerable latitude in defining those benefits by policy they establish.
In our view the WC Board should be responsible for the review process. The Board is answerable to stakeholders and is in the best position to be able to conduct a knowledgable review of the legislation.

We recommend that s. 85 be repealed and that s. 30 (2) (c) be amended to give the Board the added discretion to appoint a “Review Committee” when they deem it advisable to do so.
OTHER ISSUES

The following are less contentious issues that will assist in the clear administration of the legislation to the benefit of all stakeholders.

Payment for Special Treatment, s. 52

Medical aid is paid for by the WCB for all injured workers under the authority of the following provisions of the Act:

MEDICAL AID AND REHABILITATION

18. (1) The Board may provide any worker entitled to compensation under this Part with medical aid, and every such worker is entitled to such prosthetic appliances and to such dental appliances and apparatus as may be necessary as a result of any accident, and to have the same kept in repair or replaced in the discretion of the Board, and to such corrective lenses as may be necessary as a result of the injury, which corrective lenses may, in the discretion of the Board, be renewed from time to time.

(2) The medical aid is at all times subject to the supervision and control of the Board and shall be paid for by the Board out of the Accident Fund, and such amount as the Board may consider necessary therefor shall be included in the assessment levied upon the employers.

(3) All questions as to the necessity, character, and sufficiency of any medical aid furnished or any vocational or occupational rehabilitation shall be determined by the Board.

Section 52 of the Act presently reads as follows:

52. Where in any case, in the opinion of the Board, it will conserve the Accident Fund to provide a special surgical operation or other special medical treatment for a worker, and the furnishing of the same by the Board is, in the opinion of the Board, the only means of avoiding heavy payment for a disability, the expense of such operation or treatment may be paid out of the Accident Fund. 1994,c.67,s.52.

The 2007 Advisory Committee recommended the repeal of s. 52 since, in their view, “the wording of this section may imply the Board’s only concern is monetary savings without consideration for the welfare of the worker”. The PEI Federation of Labour recommends that the Act be changed to provide that the Board “shall provide medical aid as is necessary as a result of the accident or occupational disease”.

We agree. In our view s. 52 of the Act is unnecessary given the broad powers given to the Board under s. 18. The language of s. 52 does appear anachronistic and out of step with the general theme of the legislation and the administration of the Act by WCB. That theme is that workers receive what they are entitled to as a result of their injury.

We recommend that s. 52 be repealed.
Benefits Payable on the Death of a Worker, s. 37

The 2007 Review Committee made a series of recommendations around s. 37 that were “an attempt to correct certain outdated provisions and to clarify or simplify benefit qualifications. Some of what they were trying to achieve was accomplished with the 2008 Domestic Relations Act. Two of the Review Committee’s recommendations were as follows:

#38 Amend the legislation so when there are “other dependants”, those individuals are also eligible to be paid a benefit which is limited to a pecuniary portion of the children’s benefit.

#39 Amend the legislation to allow for spousal benefits to be apportioned and paid to a person who was being paid by the worker because of a court order or separation agreement.

We recommend that s. 37 be amended to give the WCB a discretion to adopt a policy for the apportionment of benefits payable under s. 37 to other dependents of a worker.

Freedom of Information and Privacy Act

The Employer Advisor raised this issue in her submission to us. As a public body, the WCB is required to protect personal information and release it only in accordance with the recent Protection of Privacy Act. Rulings of the Privacy Commissioner have resulted in the Employer Advisor not being able to access information in an injured worker’s file with the result of not being able to represent that employer’s interests before the Board, the IRO, WCAT or in proceedings at the Court of Appeal.

We recommend that the Act be amended to make it clear that when the WCB releases information for the purposes of the proper administration of the WC Act it shall not constitute a violation of the Freedom of Information and Protection of Privacy Act.

Assignments of Benefits, s.16

We were advised by the WCB that in its present form s. 16 of the WC Act dealing with the assignment has been interpreted restrictively.

We recommend amending s. 16 to make it clear that compensation benefits may be “assigned, charged or attached where permitted by an agreement entered into by the Board”.

31
**Classification, s. 61(3)**

The section reads:

(3) The Board shall assign every employer within the scope of this Part to the proper class, and where any employer engages in more than one industry, the Board may assign the employer to more than one class. 1994,c.67,s.61.

The Board has a concern with the reference to “proper class”. Clearly it is the Board’s responsibility to classify the employers for the purpose of rate setting according to the Board’s classification system. Reference to “proper class” may be misleading and result in unnecessary disputes with respect to the Board’s administration of the system.

**We recommend that the word “proper” be deleted from the subsection.**

**Reporting of Information, s. 30**

Section 30 of the Act gives the Board the responsibility for enacting policies for the administration of the Act. Employers are required in the Act to report accidents and this reporting is the foundation for future claims by injured workers to medical and wage loss benefits. The Board also has responsibilities for Occupational Health and Safety. Data on accidents and therefore accident reporting is the foundation for Occupational Health and Safety programs. Clearly the proper administration of the Act requires timely information.

**We recommend that s. 30 clearly state that the WCB has the authority to require employers to provide information relating to accidents reported.**

**Filing Returns by Municipalities, s. 72 (2)**

This is a provision that is now redundant, having been completely overtaken by modern technology and more reliable sources of information.

**We recommend that s. 72 (2) be repealed.**

**Occupational Disease**

The Worker Advisor asked that we look at the time limit for filing a claim in relation to hearing loss. She advised that the six month limit disadvantages workers who have gradual hearing loss and may not file a claim after their first visit to an audiologist. The WCB asked us to consider an amendment to the Act to allow for a claim for occupational disease beyond the six month time...
limit that presently exists. Given the latency periods of some occupational diseases a six month
time limit for reporting is unreasonable.

We recommend that the legislation exempt occupational disease claims from the six month
time limit and allow the Board to set a time limit or to establish a policy for the filing of
claims for occupational disease.
ISSUES BEYOND OUR MANDATE

The Board received a number of recommendations that do not involve legislative change but relate to issues that are purely administrative matters or involve policy that is within the discretion of the Board to deal with. For example, the CFIB made a recommendation with respect to customer service and the experience rating system. These have merit; however, the Review Committee has not made any recommendation on these matters and have confined our recommendations to matters that require legislative change. We have forwarded the other recommendations to the WCB for them to consider in their regular oversight of the system.
CONCLUSION

This Review was intended to focus on the legislative framework for workers compensation in PEI. The legislation represents the trees in the forest of workers compensation. That forest includes things like early and safe return to work and responsibility for the administration of occupational health and safety. These are the issues that touch the stakeholders every day. They are important issues to them and we heard from them on these issues. We started by looking at Meredith’s Report. Meredith established a solid basis for compensating injured workers and assessing employers for the costs of those accidents. Public policy has built on that solid foundation. The associated activities of rehabilitation, return to work and accident prevention are now a recognized part of the system contributing to the well being of workers and employers. The success of these systems depends very much on the representatives of workers and employers who serve on the Boards of these organizations. They face the challenge of developing policy and programs, balancing the system, maintaining the stakeholder support and ensuring the system is adequately funded. It is our sincere hope that this Report and recommendations for change to the legislation assist them in their stewardship of the system.

Dated this 31st Day of July, 2012

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Douglas C. Stanley, Review Committee Chair

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Margaret Stewart, Review Committee Member

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Mike Annear, Review Committee Member