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Volume Two – Appendices

The Report of the 2013 Statutory

Review Committee on Workplace Health, Safety and Compensation

APPENDIX A

A Legal Review of the Workplace Health, Safety and Compensation Act (RSNL 1990 Chapter W-11)

Workplace Health, Safety and Compensation

2013 Statutory Review Committee

A Legal Review of the *Workplace Health, Safety and Compensation Act* RSNL 1990 Chapter W-11

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as Phase One of the 2012 Statutory Review

June 22, 2012

A REVIEW OF THE *WORKPLACE HEALTH. SAFETY AND COMPENSATION ACT*, RSNL 1990 CHAPTER W-11

Introduction

Background

The Government of Newfoundland and Labrador directed in early 2012 that as part of the statutory review required under section 126 of the *WHSCA* (NL) that the *WHSCA* (NL) itself be reviewed by independent external reviewers. The review was undertaken by Laurel Courtenay, legal counsel at WorksafeBC, and Doug Mah, legal counsel at the WCB - Alberta, commencing March 1, 2012 with delivery of a draft report to the Review committee as of June 22, 2012.

The purpose of the review was to produce a report detailing options for legislative improvement. This legislative review builds upon 2009 enhancements to the *WHSCA* (NL) and considered:

1. further enhancements based on a jurisdictional and best practices review of workers' compensation legislation elsewhere in Canada, including provisions for the statutory review process itself;
2. a gender-based analysis of the legislation;
3. the identification of any potential errors, anomalies or omissions; and
4. opportunities to further consolidate the legislation from a red tape reduction perspective and improve its overall readability.

The reviewers established that the work and any recommended amendments would be guided by the following principles:

1. modernization of the statute and alignment with current best practices in Canada with respect to workers' compensation statutes;
2. ensuring fairness to both workers and employers;
3. encouraging efficiency and efficacy within the system;
4. promoting long term sustainability of the system;
5. adhering to the basic principles of Meredith;
6. promoting advancement of the strategic plan, 2011 to 2013; and
7. leveraging existing work completed to date by WHSC Commission Counsel.

Process

The process involved a detailed section by section review of the entire *WHSCA* (NL) by the Reviewers, who compared NL wording and practice with that of other Canadian workers' compensation organizations in Canada, with a view to identifying and recommending best practices where needed. In each case where a best practice or wording change is recommended, the Reviewers comment on the rationale for the recommendations and indicate its source.

By and large, there was no concerted attempt to actually engage in any redrafting at this stage but to express concepts and ideas that could be later translated into statutory language by legislative drafters.

Commission counsel Ann Martin provided all necessary background documentation, including legislative history, and acted as an information source and quality assurance monitor throughout the review.

The body of the report provides detail of all of the identified best practices and recommended changes. At the end of each part reviewed by Laurel Courtenay, there is a section entitled "Issues that may warrant further study and consideration". With respect to the parts reviewed by Doug Mah, there is a document at the end entitled "Parking Lot" that contains ideas that were identified as substantive but for which further instructions are sought. There is also a "Housekeeping List" of less substantive amendments intended to update and clean up the *Act* that was compiled by both Reviewers.

Findings from the "Gender Based Analysis"

The reviewers interpreted the phrase "gender-based analysis" to refer to both (a) an examination of the statutory language to ensure that it is gender neutral; and (b) the identification for potential elimination of any possible instances of gender-based discrimination within the legislation.

Although earlier rules of statutory interpretation and some *Interpretation Acts* provided that the masculine form included the feminine, the modern convention is to use gender neutral language. The totality of the *WHSCA* (NL) is presently written in gender neutral language. If there is any need for adjustment in the way gender is expressed in the statutory language, it is in regard to the use of personal pronouns (specifically "he", "she", "him" and "her"), which at times may appear excessive or redundant or lead to awkward construction. Legislative drafters will restructure a section or use gender neutral nouns to replace pronouns.[1]

For example, s. 18(1) uses six personal pronouns:

> **18**.(1) An employee of the commission or a person authorized to make an inquiry under this Act shall not divulge, except in the performance of his or her duties or under the authority of the board of directors, information obtained by him or her which has come to his or her knowledge in making or in connection with an inspection or inquiry under this Act.

Using restructuring or gender neutral nouns, the section might be rewritten to read:

[1] See generally "Chapter 5: The Techniques of Gender Neutral Drafting" by Daniel Greenberg in *Drafting Legislation: A Modern Approach* by Constantin Stefanos, Constatine A. Stephanou and Helen Xanthaki (Ashgate Publishing, 2008).

> **18**.(1) An employee of the commission or a person authorized to make an inquiry under this Act shall not divulge information obtained by or coming to the knowledge of that employee or person in making or in connection with an inspection or inquiry under this Act, except in the performance of duties under this Act or under the authority of the board of directors.

Section 39 uses four personal pronouns:

> **39.** An employer in an industry may be admitted by the commission as being entitled for himself or herself and his or her dependents to the same compensation as if the employer were a worker.

Rewritten, the section might read:

> **39.** The commission may, upon application by an employer who is an individual, deem that employer to be a worker for the purposes of compensation under this Act.

In any event, the elimination of excess personal pronouns is a task for the eventual drafter given the task of doing a comprehensive rewriting of the *WHSCA* (NL) and is beyond the scope of this review.

The Reviewers were unable to find any instances of gender based discrimination within the legislation itself. In some workers' compensation statutes in Canada, gender discrimination issues can and do exist in provisions relating to fatality benefits, owing to the demographic fact that more men than women are killed in workplace accidents and the female spouse is more typically the surviving spouse. Some of these enactments have tended to cast women as not having roles outside of the home, being primarily responsible for child rearing or valuing their work outside of the home as less than that of male counterparts. These discriminatory provisions do not exist in the current NL statute.

The one well known instance of discrimination based on gender that was characteristic in several earlier workers' compensation statutes including NL's, the remarriage clause, has been repealed and post-*Charter* redress made available to affected spouses through NL's s. 65.1.

Themes

Through the course of their work, the Reviewers noted that some key themes were emerging as areas where legislative reform is indicated. These themes can be described as follows:

- **Governance** – Enabling the Commission's continued evolution into a modern business organization with a highly functioning governance board;

- **Independence** – Looking to strike the appropriate legislative balance between having a "polycentric" entity with exclusive jurisdiction and policy-making powers and ensuring that the entity is properly accountable to government and stakeholders;
- **Fulfillment of the Prevention Mandate** - Clarifying the duties and authority of the Commission with respect to its prevention mandate, codifying some existing practices of the Commission such as the promoting and funding of sectoral councils and the employer audit program and ensuring consistency with the *Occupational Health and Safety Act.*
- **A More Transparent Appeal Structure** - Making the existing appeal structure clearer and more obvious by expressly setting out the two existing levels of review in the system, more precisely spelling out the time lines for review, and clarifying the powers of the Review Division.
- **Financial Sustainability** – Providing a sound legislative foundation to enhance current and future sustainability of the workers' compensation system from a financial point of view.
- **Modernizing the Idea of Occupational Disease** – Aligning the "industrial disease" provisions with current practices by expressly including provision for long latency diseases, changing "industrial disease" to "occupational disease" to come in line with the rest of the country and conforming with the Commission's policies and the body of evidence concerning these diseases.
- **Employer Accountability** – Giving the Commission sufficient tools to more effectively manage the assessments of the Province's employers.

We are aware that the statute was enacted originally in 1952 and then consolidated in 1970. It underwent a review and consolidation in 1983, a further consolidation in 1990 and has been amended on a piece-meal basis throughout. As has been the experience of several jurisdictions, piece-meal amendment can lead to a disjointed, inconsistent statute that contains inaccuracies, errors and anachronisms. It is fair to say that this review is the first section by section review of the *Act* since 1983 and its first detailed, expert technical review since inception. The hope is that this review has identified any deficiencies in the statute. It is certainly the first attempt to comprehensively review the statute for the purpose of modernization and bringing it in line with best practices in Canada.

The Reviewers hope that this report will provide a basis upon which the Review Committee can develop an informed agenda for legislative reform.

Respectfully submitted,

Laurel Courtenay
Douglas R. Mah

A REVIEW OF THE
***WORKPLACE HEALTH. SAFETY AND COMPENSATION ACT*,**
RSNL 1990 CHAPTER W-11

PART I	THE WORKPLACE HEALTH, SAFETY AND COMPENSATION COMMISSION
Section	New (Should follow s. 3 in existing *Act*)
Topic	Corporate Organization – Natural Person Powers
Description	The Reviewers recommend the addition of a section that clarifies the Commission has all the legal attributes that are necessary to carry out its statutory mandate and objectives.
Rationale	Natural person powers (normally expressed in statutory language as "the capacity, rights, powers and privileges of a natural person") are the legal attributes that allow corporations and other modern business organizations to conduct business activities that are necessary to allow an entity to operate but are ancillary to the entity's core mandate. Examples are entering into IT contracts or offering employee benefit plans. Natural person powers are conferred through the NL *Corporations Act*. The Commission is not expressly referenced as a corporation under the *Corporations Act*. One might argue that it is restricted to the express statutory grant of power contained in the enabling legislation. Certainly when it comes to paying benefits, the Commission is restricted to its express grant of authority – it could not pay a benefit that is not contemplated in the statute. While there is a compelling converse argument that certain powers must be necessarily implied (for example, since s. 7 allows the Commission to have employees, the power to offer an employee benefit plan must be inferred), the debate centres on the question of whether the thing sought to be done is necessarily implied by some other section in the statute. The inclusion of the provision dispenses with any such debate, puts the question beyond doubt and as such would be considered a best practice.
Source	AB, s. 3; MB, s. 50(5); ON s. 159(2)

Governance

It was the clear intention in 1986 that the Commission change its governing structure from that of a board of commissioners to a more modern board of directors. This new body would reflect a modern governance model, engaging in oversight and policy formulation versus program delivery responsibilities. This much is evident from the briefing document that accompanied the Cabinet submission preceding the statutory reorganization of the Commission at its highest level. In particular, the briefing document clearly speaks to the delineation between the policy-making role of the board of directors and the operational role of the Commission and its staff in delivering services.

It stands to reason that a workers' compensation agency in Canada must be governed well. In a January 2007 Trusted Advisor Briefing, international business consulting firm PricewaterhouseCoopers LLP stated "corporate governance is as important in the public sector as it is to public companies. Stakeholders are demanding that public sector organizations be well-governed and operate in an ethical and compliant manner." In all provinces, the workers' compensation system is an important part of the economy. Workers and employers are depending on the system to be viable and sustainable. Moreover, a workers' compensation agency is generally a major business enterprise with significant assets, employing a large workforce and delivering an essential service.

Such an enterprise must be purposefully and efficiently governed. At the 2011 Governance Symposium of the Association of Workers' Compensation Boards of Canada, speaker Anne McLellan, QC noted that public sector boards should emulate many of the best practices of private corporations in the discharge of their public duties. She spoke from her experience as both a federal Minister of the Crown, to whom agencies reported, and as a current member of both private and public sector boards.

In a 2003 paper[2] discussing non-private board governance, the Institute on Governance identified the following roles for a board of directors:

- ensuring the organization's financial health,
- ensuring sound relationships with stakeholders,
- ensuring good organizational performance,
- developing and updating a longer term plan, and
- ensuring the existence of a sound governance framework on the process of decision-making.

At the core of successfully fulfilling these roles is having an appropriate and well-understood relationship with the CEO and the staff of the organization. To wit, the

[2] From Jeans to Jackets: Navigating the transition to more systematic governance in the voluntary sector (Institute on Governance: 2003)

board of directors should be in the business of governing and the CEO and staff should be in the business of program delivery.

The PricewaterhouseCoopers briefing observed that:

> Public sector organizations generally have no such specific governance requirements other than those prescribed by the Act under which they are incorporated or by memorandum of understanding with the government ministry to which they report. While some public sector organizations are following private sector developments and have adopted several best practices in governance, many still have room to improve governance and accountability.

The underlying legislation is the foundation upon which governance practices are built, and whether the boards emulate private sector practices or not, that legislation must be clear about the role of the board of directors.

Even given original intent, the current Newfoundland and Labrador statute still lacks a measure of clarity in role definition. Overall, the board of directors is said to be charged with "administering the Act". In several instances, responsibility for specific operational activities is placed in the hands of board members which may, on a discretionary basis, be delegated to staff members. It is noteworthy that Newfoundland and Labrador is the only jurisdiction in Canada, except Ontario and Saskatchewan, that makes its board of directors responsible for the administration of the Act, with a power to delegate functions to staff. Saskatchewan does not have a board of directors but still operates on the model of a three person board of commissioners.

Properly viewed, separating governance from operations should be seen as empowering rather than diminishing. As a governance board, the board of directors takes a high level and strategic view, monitoring performance, ensuring sustainability and planning for the future. It should not concern itself with the daily business of carrying out the operational activities described in the Act.

It is accordingly recommended that the following sections be examined for the purposes of introducing greater clarity into the role of the board of directors versus the role of the CEO and staff.

PART	I
Sections	4(1)
Topic	Governance – overall role of the board of directors
Description	The amendment will clearly establish that the overall role of the board of directors is to provide governance and oversight of the Commission, not to operationally administer the Act.
Rationale	The existing s. 4(1) states that the board of directors "shall be responsible for the administration of this Act". This could be taken to mean that the board of directors is responsible for the operational administration of the Act. Indeed, that interpretation seems consistent with other specified operational tasks that are assigned to the board of directors in Part I, including s. 7 (HR functions), ss. 15, 16 and 17 (inquiry, investigative and examination powers), and s. 18 (disclosure powers). Overall operational responsibility, or even specific operational responsibilities, is inconsistent with modern governance principles. Some greater clarity is required. Workers' compensation statutes in Canada are themselves inconsistent with regard to expressing an overall role for the board of directors. The Ontario statute, like that of Newfoundland and Labrador, seems to suggest that the board of directors is responsible for the administration of the Act. Other statutes only prescribe specific decision-making powers, such as a policy-making power, a budgetary power and a power to select the CEO. However, by far the majority of the policy documents that have been published by workers' compensation agencies indicate, notwithstanding what the statute might say, that the board of directors is responsible for the stewardship of the workers' compensation system in that province. Despite what a specific statute might say or might not say, it is clear that the boards and commissions see themselves not as operational actors administering the minutia of the system but rather as governors and stewards of the system. A more modern approach would be to state that "the board of directors shall be responsible for ensuring that the Commission fulfills its mandate, duties and responsibilities under this Act."
Note	Currently, the Board of Directors has implemented a delegation of the operational responsibilities to the CEO and staff by means of a by-law as a way of recognizing the separation of governance

and operations. The delegation, although lawful under the current statute, does not reflect best practice in modern governance.

Source

None of the current statutes spell out that the board of directors' overall role is to ensure the organization's achievement of its legislative mandate. However, such an amendment is a clear statement of role and consistent with modern governance. It is also consistent with almost all the governance policies or by-laws of workers' compensation agencies in Canada.

PART	I
Sections	7(1) and (2)
Topic	Governance – human resources function
Description	The Reviewers recommend that the specific human resources function be removed from the board of directors and the delegation power be deleted. It is also proposed that the Commission be given a power to hire and employ the employees necessary to carry out the administration of the Act and that the CEO be specifically assigned all functions related to human resources for the Commission.
Rationale	It is impractical, and inconsistent with modern governance, for a board of directors to hire the employees of an organization this size, prepare the job descriptions, classify the employees, determine their salaries, and finally, to specifically delegate to each of them the powers they require to do their jobs. Several jurisdictions, including Alberta, British Columbia, Manitoba and Nova Scotia, provide that either the organization itself or the CEO has the power to hire the necessary employees and that the CEO is responsible for all functions related to employee and labour relations. These amended provisions would make it abundantly clear that management is responsible for all staffing functions. In its governance role, the board of directors would still be responsible, if it chose to, for compensation policy or philosophy.
Sources	The organization (or CEO) may hire the staff deemed necessary for the purposes of administering the Act – AB s. 4, BC s. 86, MB s. 59(1) and NS s. 159. The CEO is responsible for all functions related to human resources – AB s. 8(3)(d), BC s. 84.1(4)(c), MB s. 59(1).

PART	I
Section	10(1)(a) & (3)
Topic	Investment power
Description	This is an amendment that removes constraints on the Commission's investment power, allowing it to structure its investments in a way that best achieves the objectives of a workers' compensation insurer.
Rationale	The current investment power is restricted by s. 10(3) which incorporates by reference only the permitted investments under the federal *Insurance Companies Act*. This federal statute regulates federally incorporated or registered insurance companies, i.e. insurance companies doing business nationally or in a number of provinces. Furthermore, the section numbers cited (86, 88, 91, 92 and 97) that supposedly specify the permitted investments do not, in fact, relate to permitted investments. Also, the rules pertaining to investment for federal insurance companies were substantially rewritten in 2000. The rules primarily relate to ownership of controlling shares in other companies and are not particularly relevant to workers' compensation agencies. Workers' compensation is unlike any other type of insurance in Canada owing to a number of unique features: monopoly market; mandatory nature; no risk can be refused; inability to choose customers; the fact of reopening, reconsideration and new evidence such that a claim is never closed; long term obligations; the fact that the enterprise is not-for-profit, to name a few. The liabilities of a workers' compensation insurer in Canada differ, in some ways markedly, from those of other Canadian insurers, particularly those in the life and property and casualty lines of insurance. One of the primary purposes of investment is to allow a match between assets and liabilities. There is also a need to avoid volatility in assessment rates so that businesses can operate with a degree of predictability. There is an inherent need as well to work towards full-funding and maintain long term sustainability. Thus the investment needs and objectives of a workers' compensation insurer differ that of private sector insurers. They would also differ from those of pension and retirement funds.

The Reviewers submit that incorporation by reference of the constraints imposed by the federal insurance statute is not necessarily appropriate given these differences. It is more appropriate for the board of directors, acting prudently, to establish the risk tolerance, the investment objectives, and the investment strategy without such constraints.

The board members are fiduciaries when dealing with investment governance. They will also have the benefit of professional managers and expert advice in carrying out this duty.

The model that is proposed is one in which the legal standard of a "reasonably prudent person" is imposed on the Board of Directors in its investment activities while giving it a freer hand in determining the management of investments. AB uses the term "exclusive authority" in describing the scope of investment discretion. Both NS and PEI employ the "reasonably prudent person" legal standard.

Source

AB, s. 92(1)
NS, s. 172(1)(a)
PEI, s. 30(3)(a)

PART	I
Sections	15(1), 16 and 17
Topic	Governance – inquiry and investigation powers
Description	This amendment clarifies that employees and agents of the Commission, as opposed to members of the board of directors, have the operational role of conducting inquiries and investigations under the Act.
Rationale	The role of conducting operational inquiries and investigations under the Act devolves to members of the board of directors under these sections. Section 15(1) currently gives board members the powers of inquiry under the *Public Inquiries Act*. Section 16(1) provides that an inquiry may be conducted by a board member. Section 17(1) further states that a director may conduct an examination or inquiry under the Act and in so doing (2) has a right of entry into premises, may compel the production of evidence and may take sworn evidence. There is opportunity under ss. 16(1) and 17(1) to delegate these functions to an employee or agent of the Commission. However, the sections suggest that primary operational responsibility for inquiries, investigations and examinations lie with board members. The majority of workers' compensation statutes in Canada do not imbue individual board members or directors with either the operational powers or functions relating to inquiry, investigation or examination. It is clear that such powers and functions would only be exercised in the context of specific claims or the handling of specific employer accounts. These are not activities that one typically would see in a modern governance setting for a board of directors. They are purely operational. Most workers' compensation statutes in Canada prescribe the powers and functions for the agency itself (board or commission) and then authorize the agency to empower an employee or agent to exercise the powers and carry out the functions. Generally, the inquiry or investigation section has this structure: • a general inquiry or investigation power with respect to the administration of the Act; • the prescription of powers and immunities, sometimes with reference to other statutes, such as the *Public Inquiries Act*, and including such powers as the right of entry into premises, the right to compel production of documents and the right to take sworn evidence; and

- a statement that the exercise of the powers and the discharge of the functions by the agency (board or commission) may be carried out by an employee of the agency or an agent appointed by the agency in that regard.

Source — AB ss. 18(2) and (3) and 20; BC ss. 87 and 88; MB ss. 66; NB ss. 32 and 33; and NT ss. 93 and 101(5).

PART	I
Section	18(2)
Topic	Governance – disclosure of confidential information
Description	This amendment changes the responsible body for approving requests for claimant file information from the board of directors to the Commission itself.
Rationale	Continuing with the theme of separating the role of the board of directors from operational activities, an amendment is indicated to remove responsibility for administering access and disclosure requests from the board of directors to the Commission itself. No other workers' compensation statute in Canada specifically makes the board of directors responsible for approving routine requests for disclosure of claimant file information to the legal counsel or representative of the claimant. Such a process is not only unwieldy, but requires the board of directors to apply the provisions of the *Access to Information and Protection of Privacy Act* and, at least potentially, subject board members to liability under that Act. The accepted practice in Canada is for the agency itself (board or commission) to have the power to approve and act upon requests for disclosure. As this comment only relates to governance, the question of sufficiency of the disclosure provision is dealt with elsewhere in this report. Typically, workers' compensation statutes in Canada stipulate that file contents may be disclosed to the authorized representatives of employers and workers in circumstances where an issue is being pursued with the board or commission or is being reviewed or appealed to either an internal or external body. This is expressed as a right on the part of the worker or employer, as opposed to an approval on the part of the workers' compensation agency or its board of directors.
Source	MB s. 101, BC s. 95(3), ON ss. 57 and 58

PART	I
Sections	NEW (should follow s. 5 in existing Act)
Topic	Governance – legislated standard of care
Description	This addition specifies the standard of care to be exercised by members of the board of directors in discharging their directorial duties.
Rationale	Workers' compensation statutes are trending towards including a specific statutory standard of care for the board of directors. This provides clarity to board members as to the standard they must meet in carrying out due diligence and fiduciary obligations. It is also a way to signal to stakeholders that the board of directors is accountable to them. A legislated standard of care also sets expectations for incoming board members. Typically, these legislated standards of care are consistent with similar standards contained in business corporation statutes or the common law. They require board members to act in good faith, exercise care and diligence and always act in the best interests of either the agency (board or commission) or the workers' compensation system itself. Some workers' compensation organizations which do not have statutory standards of care will prescribe such standards in a governance policy.
Source	BC s. 84, NB s. 8(4), NT s. 102, ON s. 163, YT s. 99(b)

PART	I
Sections	5
Topic	Governance – express governance powers
Description	This amendment spells out with greater clarity the governance powers of the board of directors as stewards of the workers' compensation system in the province, particularly in respect of future planning.
Rationale	Almost all workers' compensation statutes contain a specific list of duties for the board of directors. Generally, the items contained on the list relate to compensation policy, the approval of programs, the enacting of bylaws and consideration of annual operating and capital budgets. The NL Act contains a measure of this in the concluding words of s. 5(1): "… the policies shall ensure the intent of this Act and regulations is being applied to provide services to injured workers and dependants and shall promote adequate funding for the services through sound financial management." In order to flesh out the governance powers, consideration should be given to including other items in the list associated with the duties and responsibilities of the board of directors. Concepts that could be appropriately included are performance monitoring and oversight, a responsibility for continued sustainability and a direction to engage in planning for the future. Workers' compensation agencies that do not have these concepts stated in the legislation may encompass them in a governance policy. Several statutes noted below specifically reference future planning. It is suggested that language of this type be considered to enhance the understanding of the mandate of the board of directors, better manage expectations and accountability on the part of all concerned and align more closely with best practices in good governance.
Source	BC s. 82(2)(f) [future planning] MB s. 71.1 [requirement to prepare a five year plan] MB s. 51.1(1)(c) [requirement to plan for the future] ON s. 166(2) [requirement to submit five year strategic plan]

Independence

What is independence?

In both the practical sense and the administrative law sense, independence means being free from political influence. Such freedom or latitude relates to decision making that occurs at two levels. The first level is independence of decision making at the board of directors' level. This involves the board of directors being free to make decisions with regard to benefit and employer policies, the setting of rates, the selection of programs and services to be delivered, the direction of the organization and the selection of the CEO, without political influence or the appearance of political influence. The second level is the individual case level. Independence of decision making means that decisions regarding individual claims or employer accounts are similarly not subject to political influence or the appearance of it.

Independence of decision making at both levels goes hand in hand with the exclusive jurisdiction conferred on the Commission and similar bodies in other jurisdictions. Exclusive jurisdiction is conceptually incompatible with a high degree of government control.

Independence does not mean lack of accountability

Independence of decision making does not mean total lack of control on the part of government. Through legislation, government is still entitled to implement its policy. For example, government is entitled to (and does) expand or could even contract coverage according to its policy. The introduction of presumptive status for certain firefighter cancers is a recent example.

The key to a properly functioning independent agency discharging a statutory mandate is having appropriate mechanisms of accountability. Apart from amendment of the statute, the most obvious form of accountability is the appointment of members of the board of directors. It is assumed that government appoints qualified people of good will who, left to their own devices, will seriously and conscientiously go about the business of governing the workers' compensation system. If government, or the public through the government, is unhappy with a board of directors for reason of, let's say, unethical conduct, dysfunctionality or the failure to meet the mandate, the government is free to rescind one or more appointments and name replacements.

Other ways that the government is assured of accountability of its agencies is through the oversight provided by the provincial Ombudsman, the Human Rights Commission and the Office of the Information and Privacy Commissioner. Each of these bodies holds the organization accountable by requiring it to comply with regulatory standards, or in the case of the Ombudsman, administrative fairness.

Further, the organization and its board of directors are specifically accountable to the responsible Minister. This is achieved by way of an annual report that is tabled in the Legislature containing not only detailed financial information but also the outcomes of performance measures that are either prescribed by the responsible Minister or agreed to between the Minister and the agency. The organization is also accountable to the Minister and the Legislature by being responsive to questions and inquiries from constituents that are funneled through an elected official's office.

The annual report containing audited financial statements is also a form of accountability by the agency to all of its stakeholders. In two jurisdictions in Canada, a further form of accountability is a legislatively prescribed annual general meeting which gives stakeholders a chance to review the performance of the agency and pose questions to the board of directors, the audit committee and management. Furthermore, it is assumed that the organization is responsive to questions and issues arising from organized stakeholder groups, whether they be industry or labour, and individual stakeholders.

It is also expected that the financial statements will contain the required level of disclosure as may be prescribed by government directive. This ensures an adequate and consistent degree of transparency with regard to the finances within the province and represents a government policy of accountability from which the agency is not and should not be exempt.

GNL as Employer

The Government of Newfoundland and Labrador as employer is one of the Commission's largest clients, if not the largest. Even though the GNL is self-insured, the Commission is still required to make hundreds of adjudication decisions each year on the claims of GNL workers.

Having a high degree of control places both the GNL and the Commission in situations of potential conflict or the perception of conflict. The province's workers and labour unions may view the GNL as employer as receiving 'special treatment' from the Commission in deference to the GNL's many statutory control levers over the Commission.

Practical considerations

Independence of decision making with appropriate accountability measures has several practical outcomes:

- minimizing criticism that the system is not fair or impartial because of government influence;
- not positioning the government as the sole stakeholder in the workers' compensation system, and allowing employers who fund the system and clients who benefit from the system equal footing as stakeholders;

- understanding that the board of directors is better positioned than government to understand the needs of the system and the organization;
- maintaining the concept in the public mind that the Fund is separate and apart from the provincial accounts and notionally exists as a trust in favour of the employers and workers of the province;
- recognizing that the Commission and its staff are experts in the delivery of and financing of compensation; and
- significant red-tape reduction.

The above described factors will instill greater public trust and confidence in the system.

Recognizing that there are differing degrees of independence for workers' compensation agencies across Canada, the existing Newfoundland and Labrador legislation contains several sections that might be seen to impinge upon independence of decision making. These are discussed in the next pages.

Part	I
Section	4(1)(3)
Topic	Independence/Governance – Non-voting department employee on Board of Directors
Description	The Reviewers recommend deleting this position or modifying it statutorily to conform with good governance and institutional independence
Rationale	This section provides for an employee of the "department" (presumably the Department of Service NL under whose Minister's portfolio the WHSCC falls) to be a non-voting member of the board of directors. NL is unique among Canadian jurisdictions to have such a position on its board. Without further context, one guesses that the purpose of the position is to provide a liaison between the government and Minister and the WHSSC board of directors. This would enable the government or Minister to make their views known to the board. It would also allow the departmental representative to report to the government or Minister on discussions and decisions of the board. From a governance standpoint, the position is anomalous. Voting or not, without more such a member at common law at least would have the same duties and obligations of any corporate director, that is, to advance the best interests of the corporation, in this case the WHSCC and the workers' compensation system. Those duties and obligations are inconsistent with a liaison role, which requires the representative to advocate on behalf of its constituent, the government or the Minister. Also, the presence of the representative might prevent the board of directors from having frank discussions about government relations, the management of stakeholder relations (government primary among stakeholders) being an important role for the board directors. Finally, the reporting function is inconsistent with the duty of confidentiality that a board member must observe. Being unable to report about certain matters renders the liaison function difficult. The presence of a government liaison, voting or not, at board meetings gives the appearance of government control or influence at the board table. This tends to compromise independence and the appearance of independence. Moreover,

under governance principles for public sector organizations, the appropriate liaison relationship is between the Chair of the board of directors and the Minister, and the CEO and the ADM.

If the purpose of the representative's presence is to provide an operational government link to the WHSCC's prevention activities, then such a purpose is fulfilled by having this individual occupy the status of observer as the Quebec CSST does on its board. This status could be achieved through a governance policy and does not require statutory inclusion.

Source AWCBC website: Summary of board structure and composition.

Part	I
Section(s)	6 – CEO appointment requires LGIC approval 9 – property acquisition over $100,00 requires LGIC approval 10(c) – WHSCC's borrowing power subject to approval by Minister of Finance 11(1) & (2) – audit of Commission 53(2) – LGIC may extend limitation periods for claim acceptance 96(3) & (4) – where WHSCC seeks to vary an assessment or rate modification program for an industry and wishes to consult, it must obtain LGIC approval to consult and may implement the variation only with LGIC approval 116(1)(d) – LGIC approval required to create special reserve within Fund
Topic	Independence – Government approval to do certain things
Description	The reviewers recommend the removal of government approvals in the instances cited above.
Rationale	In general, higher approvals by an organ of government is unnecessary in view of: • either the Commission itself or the board of directors having greater expertise in technical matters; • the presumption that board of directors are qualified and competent to discharge their duties, will act in good faith, be better positioned to know and address the needs of the organization and the system, and have the best interests of the organization and the system at the fore at all times; • the need to demonstrate a good measure of independence in order to instill public confidence; • the fact that no government or taxpayer funds are at risk; • the existence of an audit process. <u>Section 6 – CEO</u> The preponderance of Canadian jurisdictions do not require LGIC approval to appoint the CEO. NB, NL, ON, PE and YT still require it, while AB, BC, MB NS, NT, QC and SK do not. The difference in practice depends on whether or not the position of CEO is seen as "political", i.e., whether the government sees a need to have a say in who is at the operational helm of the organization. If independence and the appearance of independence is a desirable goal, and if the government has confidence in the

board of directors as an institution, then the Reviewers submit that the trend in practice is toward no LGIC approval.

Section 9 – property acquisition of value of $100,000

It is difficult to see how the provincial government could be in a better position to know, or even second guess, what the Commission's requirements are in terms of real property. Planning for and acquisition of major infrastructure are strategic and therefore governance functions. No public funds are in play. It is unclear what government's interest is other than pure control. It is also difficult to see what manner of real estate could be acquired for under $100,000.

Canadian jurisdictions are equally divided on this point (6-6) but it seems that jurisdictions that have undergone legislative revamps in recent years (e.g. BC & MB) no longer have such a provision. AB abandoned this provision in 1995 as part of a move toward independence.

Section 10(c) – borrowing powers

While the Reviewers are not aware of the extent to which interim borrowings are required to alleviate temporary cash flow situations, it seems that the control on borrowing is unduly restrictive. Given that the Commission has both professional financial managers on staff and a well intentioned board of directors to provide oversight on finances, it is unclear what value is provided in seeking and obtaining provincial cabinet approval for the Commission to borrow money.

Only three other jurisdictions in Canada (MB, NT and SK) have this approval requirement but they are less stringent.

Section 11(1) & (2) – audit of Commission

In light of the fact that (a) the Commission is governed by its own board of directors, and (b) there are no public funds involved in the Commission's operation, it is not clear why the provincial government (the LGIC), basically a third party, should appoint the Commission's auditors. This arrangement might also tend to put the auditor in the position of being unsure whom to report to – the Commission's board of directors who has governance responsibility for the audited entity or the LGIC who appoints the auditor.

It is the better practice for the board of directors of the audited entity, not a third party with no financial interest in the audited entity, to appoint the entity's auditor. That is because the

auditor's true responsibility is to the board of directors. It is also because the board of directors is solely responsible for the financial health of the entity.

As for subsection (2), the Reviewers found only one other jurisdiction (MB – s. 69) where it is possible for a workers' compensation agency, once having an auditor of its own, to be subject to a second discretionary audit. The Review Committee should consider whether it is necessary to maintain this structure. In the view of the Reviewers, the second audit is redundant.

Section 53(2) – LGIC extension of limitation period for claim acceptance

The subject matter here is purely technical. The Commission and its staff would have greater expertise than the provincial cabinet in determining this technical matter. The present section also detracts from the principle of exclusive jurisdiction.

Commission counsel advises that the section has not been applied in recent memory. Its purpose is unclear, particularly in light of the fact that the Commission itself in the very next section (s. 54) has the power to waive non-compliance in reporting a claim, which includes the limitation period.

An equivalent provision was not identified elsewhere in Canada.

Section 96(3) & (4) – LGIC approval to consult re variation of an assessment or rate modification program for an industry and to implement such a variation

The Reviewers understand the intent behind these sections, namely, that in varying a rate modification program for a certain industry, the Commission needs to be mindful of the concerns of employers and in program design ought to have regard to at least meeting, if not exceeding, the stated legislated standards for occupational health and safety.

These are highly technical matters for which the Commission would have greater expertise than the provincial cabinet. Moreover, the Commission, as a publically accountable organization, can be trusted to conduct stakeholder consultation when necessary and have due regard for legislated standards.

The rationale is unclear as to why cabinet needs to be gatekeeper between the Commission and industry for

consultation, since the subject-matter of the consultation concerns a relationship between the Commission and industry.

Similarly, it is not clear why cabinet needs to exercising quality assurance over the Commission's design of a rate modification program. If the standards are legislated and a provision states that a variance of the program can only proceed if those standards are met or exceeded, then surely the Commission has a legal duty to comply. Further review and approval by cabinet, for such a highly technical matter, does not add value.

Equivalent provisions were not identified elsewhere in Canada.

Section 116 – creation of special reserve

In general, financial management of the system, financial sustainability and financial oversight are strategic and governance functions. These are functions best left to the board of directors, particularly when there are no public funds at risk.

The Reviewers did not locate another jurisdiction in Canada where the creation of reserve funds are subject to LGIC approval. Prior to 2000, NS did have a provision whereby the LGIC could give direction to the WCB as to how to raise and manage reserve funds.

Note: See additional comments in the "Housekeeping" List re the necessity to keep this section.

Source

Noted above
AWCBC website: *Comparison of Workers' Compensation Legislation and Policy: Accident Fund and Reserve Funds*

OTHER INDEPENDENCE CONSIDERATIONS

PART	I
Section	12(1)
Topic	Annual Report – Content
Description	The Reviewers recommend that subsection (1) be amended to more specifically set out the required content of the annual report.
Rationale	The annual report is one of the most important accountability mechanisms for an independent organization. It should promote confidence in the system by demonstrating transparency, financial accountability and organizational performance. The content requirements stated in the current subsection (1) are vague and provide limited guidance. The phrase "a report to the minister of its transactions ..." suggests a listing of all receipts and disbursements made in the year for whatever purpose. The reviewers recommend that in accordance with modern business practice the mandatory content consist firstly of the audited financial statements for the previous fiscal year. It is also suggested that secondly the report contain results for performance measures either prescribed by the Minister or agreed to between the Commission and the minister. These two components are the mandatory requirements – the Commission remains free to include any other information it feels is of interest to readers. There is significant variance across Canada as to the mandatory content of annual reports. However, a quick review of the annual reports show that most, if not all, workers; compensation agencies publish the audited financial statements and a selection of performance information. The suggested amendment would simply codify what the NL Commission currently does in its annual report. The Reviewers realize that the Commission is subject to the *Transparency and Accountability Act* in terms of the content and process for producing the annual report. If this recommendation is entertained, a discussion is required with government as to how transparency and accountability are best achieved for the Commission through its annual report.
Source	AB, s. 93(4); YT, s. 100(1)(c)

CONFIDENTIALITY

The Workplace Health Safety Compensation Commission (WHSCC) is subject to the *Workplace Health, Safety and Compensation Act,* the *Access to Information and Protection of Privacy Act,* and is designated as a custodian in the *Personal Health Information Act*.

These three pieces of legislation set the parameters for the management of the information resource in the custody and under the control of the WHSCC of Newfoundland-Labrador.

PART	I & III
Section	Replace section 18 & 58.1
Topic	Comprehensive Confidentiality of Information provision
Description	This section consolidates in one place a number of provisions relating to confidentiality. It specifically spells out the instances in which the Commission can disclose worker or employer information, particularly in the case of internal and external review or the health management of the worker. It also ensures that the information disclosed outside of the Commission is used only for purposes consistent with the *Workplace Health, Safety and Compensation Act*, such as in a review, or otherwise with consent.
Rationale	<u>Review Purposes</u> With regard to disclosure for internal and external review purposes, the amendment codifies the current practice which is necessary in order to ensure the procedure is fair and leaves no question that in disclosing information, the Commission is not running afoul of s. 36 of the *Personal Health Information Act*, SNL 2008 CP-7.01 (the "PHIA"). The Commission is designated as a "custodian" under s. 4 of the PHIA. Section 36 of the PHIA precludes a custodian from disclosing personal health information unless it has the person's consent. Section 43 of the PHIA permits disclosure of personal health information without consent where such disclosure is required by another statute. Explicitly setting out the obligation to disclose in the statute ensures that the Commission is complying with the PHIA when it discloses information for the purposes of an internal review. This also makes the duty to disclose explicit so that it clearly falls within s. 18(1) of the WHSCA as being disclosure "in the performance of his or her duties". The Reviewers understand that the Commission takes the position that disclosure of health information in an internal review is authorized under s. 43 of the PHIA because Policy GP-01 is "an arrangement made under another act". This is likely a viable interpretation; however, the Commission's position would be strengthened by setting out the explicit authority in the Act. Further, the Commission is subject to the *Access to Information and Protection of Privacy Act*, SNL 2002 CA-1.1 (the "AIPPA"). Section 39(1)(d) permits a public body to disclose personal information for the purposes of complying with an act or

regulation of the province or Canada. Section 39(1)(c) permits a public body to disclose personal information for the purpose for which it was obtained or compiled or for a use consistent with that purpose as described in s. 40. Section 40 sets out that use of personal information is consistent with the purposes for which the information was obtained or compiled where the use has a reasonable and direct connection to that purpose and is necessary for performing the statutory duties of or for operating a legally authorized program of the public body that uses or discloses the information. Thus, if the obligation to disclose is set out in the statute, the requirement in s. 39(1)(d) of the AIPPA that disclosure comply with an act or regulation and the requirements in s. 39(1)(c) and 40 of the AIPPA, that disclosure be necessary for performing the statutory duties, are met.

Many jurisdictions have explicitly set out in their statutes an obligation to disclose information relevant to a review or an appeal to employers or parties with a direct interest. Such an amendment would bring Newfoundland and Labrador in line with this common practice.

Sharing of health information with health care professionals

While the Commission is identified as a "custodian", it is unclear whether s. 39(1) of the *Personal Health Information Act* permits the exchange of a worker's medical information with health care providers involved in the worker's treatment and the management of the claim by the Commission. This stems from the fact that workers' compensation in NL is not funded in whole or part by the government and s. 39(1) of the *PHIA* only applies to medical information exchange under government funded health care programs. (Note: This may well be a drafting error in the *PHIA* as it seems it was intended for s. 39(1) to apply to the Commission but that is not its literal effect.)

For clarity and certainty, the Reviewers recommend adding a section that expressly permits the Commission to provide medical information received under a claim to other health care or rehabilitation providers, or to other medical or rehabilitative personnel involved in or assisting the Commission in the management of the worker's claim.

Restriction on collateral use

The records collected or created for the purpose of establishing and adjudicating claims or for assessing employers are intended only for uses relating to the administration of workers' compensation in NL. The personal information provided by an injured worker, created by WHSCC or collected from health care

providers is sensitive and should be afforded the utmost in protection. Business information of employers is generally confidential and may be proprietary in some cases or contain business advantage.

The Reviewers suggest an addition to section 18 that restricts use of the information to purposes contemplated under the *Workplace Health, Safety and Compensation Act* (i.e. internal review by a review specialist or external review by the Review Division) or that specifically identifies internal review and external review as the only authorized purposes. This would prevent, for example, a representative receiving worker information under the guise of a review and then sharing it with the media.

In many cases, the information generated or collected by the Commission has value for other purposes and cannot be obtained elsewhere. Examples might include civil litigation, labour arbitration and other administrative proceedings. As a means of providing some leeway, some workers' compensation statutes allow discretion to the board or commission to consent to the use of information for other purposes or permit documents to be admissible in other proceedings with consent.

<u>Model Structure of Confidentiality Provision</u>

1. The Commission, its directors, staff and agents are subject to a duty of confidentiality in respect of both worker and employer information collected or generated under the administration of the *Act* [similar to current s. 18(1)].
2. The Commission, its staff or duly authorized agent may disclose either (a) the claim information of a worker, or (b) the information of an employer only in the course of administering the *Act* [similar to current s. 18(2) but of more general application].
3. A list of the permitted circumstances for disclosure of a worker's claim information by the Commission:
    a. In the event of an internal review by a review specialist of a claim issue, the worker, employer or other interested party (as determined by policy) or the legal or other authorized representative of that person is entitled to disclosure. **[new]**
    b. In the event of a review by the external Review Division, the Commission is empowered to disclosure to the Review Division. **[new]**
    c. Where the worker's employer is seeking information to assist in determining modified work or fitness to return to work, the relevant claim information may be disclosed to the employer [existing s. 58.1].

d. Where the Commission finds it advisable to provide health information to health care professionals involved in the treatment of the worker (e.g. IME report to the worker's GP) or the management of the worker's claim (hospital records or GP report to an IME or medical panel).[3] **[new]**
4. Deemed consent by the worker to all of a. through d. above [a similar but expanded version of existing s. 58.1(2)].[4]
5. The Commission must advise the worker of disclosure made to an employer under a. [as in the existing s. 58.1(3)].
6. Where an issue of (a) the statutory bar under s. 46 or (b) the transfer of costs under s. 106 must be determined or becomes the subject of internal review, disclosure of the relevant information must be made to the applicant and any other interested party (as determined by policy),[5] and further, where external review to the Review Division occurs, disclosure is permitted by the Commission to the Review Division. **[new]**
7. A person receiving a worker's or employer's information under this section may only use[6] that information for the stated purpose or for another purpose under the *Act*.[7] An external review to the Review Division is another purpose under the *Act*. **[new]**
8. Documents originating from or contained the files of the Commission[8] are inadmissible in court or any other proceeding without the prior consent of the Commission. (Note: This includes documents such as letters from the

[3] In OIPC-AB F2011, the Office of the Information and Privacy Commissioner, in finding against the WCB-AB, stated that disclosure of a medical panel report to the worker's own treating physicians was a breach of the worker's privacy. In order for disclosure to be "authorized by the Board " or "in the course of administration of the *Act*", there has to be a specific statutory authority permitting the disclosure. Such phrases cannot be read as conferring a plenary disclosure authority. Therefore, the Reviewers recommend a specific statutory authority for sharing a worker's health information with other health care professionals involved in the worker's care or claim management.

[4] Deemed consent would not be required where the disclosure is made to the worker or worker's representative.

[5] **The Review Committee should address its mind to whether "deemed consent" and "advice re disclosure" provisions are necessary in the case of disclosure of employer information to an interested party.**

[6] **The Review Committee should consider whether <u>disclosure</u> for a purpose under the *Act*, in addition to use, should be permitted. If so, if disclosure is made by a party to someone else for a legitimate purpose under the *Act*, for example to an expert for an opinion, the same duty of confidentiality requirements and restrictions should be imposed on the person to whom the disclosure is made.**

[7] Note: Breach of this subsection by someone outside of the Commission would be an offence under s. 125.

[8] This would include all medical information, including medical reports or assessments ordered and paid for by the Commission.

Commission that are routinely sent to workers and their employers to update them on the claim.)[9] **[new]**

Additional note — The reference to the *Hospital Act* can be dropped as that legislation has been repealed and subsumed by the *PHIA*.

Source — AB, s. 147 (3) & 148; BC, s. 95(1.1) & 96.2(6); MB, s. 101(1), 101(1.2); NT/NU, s. 164 (1), (2); PE, s. 83 (1-4); SK, s. 171.1, 171.2; YT, s. 56 (1), (2), *PHIA*, ss. 4, 36, 39(1) & 43; *AIPPA*, ss. 39 & 40.

[9] The discretion to consent or not consent to admissibility in these circumstances (say, for example, where the evidence is not otherwise available in a grievance arbitration) must be exercised reasonably and is subject to judicial review: *Grondin v. Calgary (City)*, 2002 ABQB 17. **The Review committee may wish to consider "a prosecution under this *Act* or the *Criminal Code*" as an exception to this subsection.**

PART	I
Section	19(1)
Topic	Exclusive jurisdiction
Description	This amendment is recommended to clarify that the exclusive jurisdiction power encompasses all matters and things arising under the *Act*.
Rationale	There are two general approaches to exclusive jurisdiction clauses in Canada. The first one is to simply state that the board or commission has exclusive jurisdiction, without enumerating subject-matter (AB, NS, NT/NU), and the second is to state that there is exclusive jurisdiction that includes certain enumerated subject matter (BC, MB, ON). The current NL clause is a form of the latter but it can be read as being exclusive, i.e. subject matter that does not fall into the list is not the subject of exclusive jurisdiction. This means that someone could argue that some matters contained in the *Act* are not to be decided by the Commission and should instead be decided by the Courts. The Reviewers recommend that the first approach, stating exclusive jurisdiction without a list of enumerated subject-matter is preferable and would bring NL into line with the strongest exclusive jurisdiction clauses in Canada. Notwithstanding this recommendation, the Reviewers suggest that some form of s. 46 be retained to counteract the effect of the *Warford* decision such that the Commission still has jurisdiction to determine the applicability of the statutory bar notwithstanding that it is the Commission bringing the action.
Source	BC, ss. 96 (workers` compensation) & 113 (OH&S) MB, s. 60(1) & (2) ON, s. 118(1)&(2) NL non-interference & immunity provision, and privative clause, are as good as any in Canada.

PART I .1 (WORKPLACE HEALTH AND SAFETY)

Sections 20.2(e) and (f)

Topic Occupational Health and Safety Committees – Requirements and Certification

Description The Reviewers recommend that subsection 20.2(e) be amended to specify that the Commission shall set requirements for training of occupational health and safety committees established under s. 37 of the Occupational Health and Safety Act, RSNL 1990 c.0-3 (the "OHSA") or co-chairpersons of such safety committees, worker health and safety representatives designated under s. 41 of the OHSA, or workplace health and safety designates under s. 42.1 of the OHSA, as well as training programs established under the *Occupational Health and Safety Regulation 2009* (the OHSR") and persons who provide training of such programs.

The Reviewers recommend that subsection (f) be amended to read: "certify persons who meet the requirements referred to in paragraph (e) and training programs which meet such requirements".

Rationale Such an amendment tracks the language of the OHSA which speaks of the Commission's responsibility to set standards for training. The OHSA expressly provides that training provided to occupational health and safety committees or their co-chairpersons, worker health and safety representatives or workplace health and safety designates shall meet the requirements the Workplace Health, Safety and Compensation Commission may set. Sections 139, 374, 467, 483, and 511 of the OHSR speak of training programs "prescribed by the commission".

The OHSA is silent with respect to certification of any persons. Therefore, the reference in s. 20.2(e) to "persons required to be certified under the *Occupational Health and Safety Act*" is inaccurate and misleading. Further, the Reviewers understand that currently the Commission provides certification in three different ways: 1) certification of individuals; 2) certification of providers (and their training curriculum); and 3) certification of individual trainers. The Reviewers consider it is unnecessary to provide individual certification, except where the Commission actually develops the curriculum, as in committee training. In cases where the Commission certifies the training provider and approves their curriculum, it is the training provider who should

	determine if an individual meets the requirements of the training and provide certification. The Commission should certify the training program and the person providing the training and recognize the certification of any individual who has met the requirements of the training.
Source	Sections 38.1(3), 41(3), and 42.1(5) of the OHSA Sections 139, 374, 467, 483, and 511 of the OHSR
Consequential Amendments	Commission policy HS-03 would have to be amended to remove the reference to persons required to be certified under the OHSA and to remove the reference to certification of participants who take the training prescribed by the Commission under the OHSR.

PART	I.1
Sections	20.2(h), 20.3, 20.4, 2, and 4(3)
Topic	Define “Department” for consistency with the OHSA
Description	The Reviewers recommend that the word “Department” be added to section 2 of the Act and defined as “the governmental department appointed under the *Executive Council Act* to administer the Act”.
Rationale	“Department” is not a term defined in either the WHSCA or the OHSA. The OHSA refers to the “Department of Employment and Labour Relations” and not simply the “Department”. The reviewers understand that there was a recent order in council making Service NL the department responsible for the WHSCA and the OHSA, although the departmental notices have not yet been published. Both statutes could be amended to refer to “Service NL” in place of “the Department” or “the Department of Employment and Labour Relations”. However it might be preferable to simply define “Department” in both Acts in the way noted above to accommodate future department name changes and assignments.
Source	OHSA Section 19(1)

PART	I.1
Section	New subsection (should follow s. 20.2(h) in the existing Act)
Topic	Sectoral Councils
Description	The Reviewers recommend that an additional subsection be added specifying that the Commission shall promote and provide funding for industry specific safety councils, known as "sectoral councils".
Rationale	The Commission established its first sectoral council, the Newfoundland and Labrador Construction Safety Association (the "NLCSA") in 1998. In 2008 the Commission published a document entitled "Sectoral Council Funding Guidelines" on its website. The Reviewers are advised by the Commission that development funding under these guidelines has been approved for several other industry-specific groups to date. Such an amendment would provide express authority for promoting and funding such councils. Further, such an amendment would assist in furthering Recommendation #26 of the 2006 Statutory Review Committee that: "the Commission assist with the development and coordination of Sector Committees in key sectors such as manufacturing, health care, fishery, and mining. The Sector Committees should be established in accordance with the model used by the Newfoundland and Labrador Construction Safety Association". Although authority for provision of such funding may be implied by Sections 20.2(a), (b), and (g), this legislative amendment would provide express authority and greater certainty for the Commission and stakeholders in the system.
Source	*Sectoral Council Funding Guidelines,* WHSCC website Recommendation #26, 2006 Statutory Review

PART	I.1
Section	20.2 – Add as new subsection
Topic	Authority to conduct safety audits
Description	Amend section 20.2 to add a new subsection setting out the authority of the Commission to conduct audits and offer services to promote safety in the workplace.
Rationale	Section 20.2 of the Act was introduced in 1998 when the prevention branch of the Occupational Health and Safety Division was transferred from government to the Commission. During the past 14 years, the Commission's Prevention Department has developed an audit program which is not specifically referenced in s. 20.2. The audit is voluntary and can result in further services to the employer to assist in making their workplace safer. The authority of the Commission to perform these audits may be implied by ss. 20.2(b) and (g); however, since this has become an important part of the prevention program, the Reviewers recommend that the authority be explicitly set out in the Act.
Source	Prevention Services Procedure Number 62; Preventions Services website document "Health and Safety Audit"

PART	I.1
Section	New subsection (should follow s. 20.4 in the existing Act)
Topic	Funding of Sectoral Councils
Description	The Reviewers recommend that an additional subsection be added in a form similar to s. 20.5. The new subsection would correspond to the new sectoral council subsection in s. 20.2 (see recommendation at page 33) and set out the maximum percentage of its total income that the Commission may allocate to fund industry specific safety councils or sectoral councils. The new subsection would also expressly provide that the Commission may levy on the classes or subclasses of employers which in the opinion of the Commission correspond with the industries covered by a given sectoral council, a surcharge to cover the cost of funding the sectoral council where the Commission is satisfied that the work of the sectoral council provides a benefit to that class or subclass.
Rationale	This amendment would create an internally consistent Part I.1 in that where a subsection mentions funding, the source and budget for that funding is specified. It would also provide express authority for the Commission to continue a program which has become established practice and which the 2006 Statutory Review Committee recommended expanding. Currently the source of funding for this program is not set out in the Act, the Commission's policies or the Regulations. The Reviewers understand that in 1998 when the NLCSA was established, funding was paid by the provincial government under s. 64 of the OHSA. Somewhere along the way, responsibility for the grant was transferred to the Commission without accompanying legislative amendment. Authority for funding might be implied by a liberal and purposive interpretation of sections 5, 8, 20.2, 96(5), 97, 98 and 108 of the Act. However, an express grant of authority in the Act would provide clarity and certainty for the Commission and the stakeholders in the system.
Source	The Act, s. 20.5, s. 96(1) and (5) and s. 5 *Sectoral Council Funding Guidelines,* WHSCC website Recommendation #26, 2006 Statutory Review Commission Policies PR-01 through 13

Consequential Amendments	The Commission's policies PR-01 through 13 deal with a program respecting Prevention and Return-to-Work Insurance Management for Employers/Employees known by the acronym PRIME. The PRIME policies would have to be amended because those policies currently set out that an employer's assessments are determined by the employer's base assessment, the practice incentive component of PRIME and the impact of the experience incentive component of PRIME. The sectoral council funding is not a component of PRIME; therefore, the sectoral funding surcharge would be in addition to any practice incentive component of PRIME.

PART	I.1
Section	20.2(g)
Topic	Duties of Commission – standards of workplace health and safety
Description	The Reviewers recommend that the words “a high standard of” be added before the phrase “workplace health and safety”.
Rationale	This amendment would encourage an ongoing commitment to optimal health and safety standards. It echoes some of the language in the occupational health and safety provisions of the *Workers Compensation Act*, RSBC 1996 c. 492 and promotes an effort towards more than a mere minimal level of occupational health and safety standards. This amendment also complements Goal Three of the WHSCC 2011 – 2013 Strategic Plan (the “Strategic Plan”). Goal Three is aimed at developing and implementing an integrated prevention strategy which includes an evaluation component in the program design to ensure that programs are evaluated regularly for their effectiveness. This reflects a desire for ongoing evaluation and improvement in the health and safety program with a view to achieving and maintaining a high standard of workplace health and safety.
Source	Strategic Plan, Issue Three and Goal Three, pages 13 and 14. BC, s. 107(2)(a)

PART I.1

ISSUES THAT MAY WARRANT FURTHER STUDY AND CONSIDERATION

Under the Newfoundland and Labrador workers compensation system, the responsibility for workplace health and safety is shared between the Newfoundland and Labrador Government, Department of Employment and Labour Relations, Occupational Health and Safety Division, and the Workplace Health, Safety, and Compensation Commission. The government department is responsible for enforcement under the OHSA and development of health and safety regulations. The Commission is responsible for training and education as well as funding the Occupational Health and Safety Division and annual health and safety grants made by the minister to a maximum of 5% of its total assessment and investment income in a calendar year. A similar sharing of responsibility exists in the provinces of Ontario, Nova Scotia and Manitoba. In British Columbia, New Brunswick, the Northwest Territories and Nunavut, Prince Edward Island, Quebec, and the Yukon Territories, responsibility for workplace health and safety rests solely with the provincial or territorial board or commission. In Alberta and Saskatchewan, responsibility for occupational health and safety rests solely with the government, although in Saskatchewan, s.117(g) of the Saskatchewan Act permits the Board to expend monies for the cost of administration of the industrial safety program.

The Reviewers wish to highlight Recommendation #30 of the Report of the 2006 Statutory Review Committee on the Workplace Health Safety and Compensation Act (the "2006 Statutory Review"). The 2006 Statutory Review Committee recommended that the provincial government undertake the merging of the Occupational Health and Safety Branch of the Department of Government Services with the operations of the Commission. There are practical reasons for having the occupational health and safety provisions administered by the same body which administers the compensation provisions; the health and safety branch of the system has a direct impact on the claims branch and no one is in a better position to understand the impact of inadequate health and safety measures than those who deal directly with workers injured in the workplace. Such a recommendation goes beyond the scope of this review; however, the Reviewers wish to flag this as an issue which may warrant further study and consideration.

PART II	APPEALS
Section	New subsection (should follow s. 20.7 in the existing Act)
Topic	Two levels of Review system
Description	The Reviewers recommend that the Act be amended to explicitly set out the two existing levels of review in the system; namely, the division of internal review specialists of the Commission (the "internal Review Division") and the external Review Division.
Rationale	Public laws are intended to be transparent. One should be able to read a statute and glean basic things like time limits for appeal. The way the Act is currently written, it is unclear when time begins to run for the purpose of a review to the external Review Division. The Act sets out a time limit for seeking review to the external review body; however, it is impossible to discern from the Act that there is a second limitation period that must be met in order to have a right to seek review to the external Review Division. Nowhere in the Act does it say that exhausting the internal review right is a mandatory precondition to seeking review to the external review body. The Reviewers consider that the appeal process should be clear and obvious on the face of the statute. There are currently two levels of appeal within the system: an informal, policy-based system of review by an internal review specialist and a formal, statute-based review by a review commissioner. The statutory authority for the decisions made by the internal Review Division comes from s. 19(3) of the Act, but since the internal Review Division is not identified in the Act, it is not immediately obvious to the uninitiated party how the appeal system works. For example, it is unclear whether the time limits set out in s. 28 of the Act start to run upon the worker receiving the written decision of the original decision-maker or the worker receiving the written decision of the review specialist of the Commission or whether the time limit can run from either of these events. Policy provides that the review specialist makes the Commission's final decision; however, since time limits run from the date of the Commission's final decision it is recommended that the Act make it clear that the Commission's final decision is the decision of a review specialist. The Reviewers consider that the best way to achieve the goal of having a clear, obvious and well-communicated appeal system is

to amend the Act. The Reviewers recommend that the internal Review Division be set out in Part 2 of the Act and that a provision be included indicating that a decision of a review specialist is a decision of the Commission.[10]

Source — The Act, s. 19(3), s. 28

Note — Recommendation #43 of the 2006 Review Committee was to eliminate the internal review process so that the decisions of Intake Adjudicators and Case Managers would represent the final decision of the Commission. The Newfoundland and Labrador Government's Action Plan respecting the 2006 Review Committee Report does not appear to embrace elimination of the internal review process, but speaks of evaluating the process to identify options for enhancing the quality of client experience.

[10] Note that in *Newfoundland (Workers' Compensation Commission) v. Jesso*, 2001 NFCA 49, at paragraph 6, the Court of Appeal accepted that the decision of the review specialist is the final word of the Commission.

PART II

Sections	21, 22(1), 24(1) and (2), 24.1, 25, 27(1), 28(1.4), 30, 2(v.2), and 11(1) and (2)
Topic	Re-naming the external “Review Division”
Description	The Reviewers recommend that the name “Review Division” be changed to indicate that it is a body external to and independent of the Commission and a stand-alone agency and that sections 2(v-2), 11(1) and (2), 21, 22(1), 24(1) and (2), 24.1, 25, 27(1), 28(1.4), 30 be amended accordingly.
Rationale	The word “division” suggests a subset of something else. When used within the Workplace Health, Safety and Compensation Act without any further descriptors, the word “division” suggests a division of the Commission. It appears the Legislature intended the Review Division to be external to the Commission and to be independent of the Commission. The Review Division does not appear to be a division of any government department. The word “division” is, therefore, not being used in its ordinary grammatical sense. Furthermore, since policy refers to the internal review specialists as the “Review Division”, the two appeal bodies are easily confused for one another. In BC, the internal review body is known as the Review Division because it is a division of the Board. The Reviewers suggest that a name like Review Tribunal, Review Panel, or Review Board would better describe that body and would be less likely to be misunderstood to be a division of the Commission.
Source	BC, s. 96.2 and RSCM II, C13-100.00

PART	II
Section	23
Topic	Number of Review Commissioners hearing a review
Description	The Reviewers recommend that section 23 be amended to allow the Chair to refer a review to one review commissioner or to a three-member panel of review commissioners where the chief review commissioner determines the matter requires it.
Rationale	Such an amendment would allow the Review Division greater flexibility in allocating resources to the reviews that are particularly complex or that have particular importance to the system. This would also bring Newfoundland and Labrador in line with other jurisdictions in Canada. Currently, Newfoundland and Labrador is the only jurisdiction where the legislation limits the size of a panel hearing an appeal to a panel of one. The Reviewers note that section 22(h) of the *Interpretation Act*, RSNL 1990 c. I-19, provides that words in the singular include the plural. "Review commissioner" in sections 23 and 28 might be read to permit referral of a matter to more than one review commissioner. However, the Reviewers are of the opinion that it is preferable to explicitly amend the statute. The Reviewers also recommend that a multi-person panel be a three-member panel so that a quorum can be obtained on any issue.
Source	AB, s. 1301(2); BC, s. 238; MB, s. 60.3(1); ON, s. 174(1); NS, s. 244(b); PEI, s. 56(10); YT, s. 64(1); QC, s. 63(5); NT/NU, s. 123(3)

PART	II
Section	23(4)
Topic	Power of re-appointment
Description	The Reviewers recommend that section 23(4) be amended to give the Lieutenant Governor in Council the power to re-appoint the Chair and review commissioners for one or more successive terms.
Rationale	Such an amendment is desirable because it allows for retention of experience and expertise. It frees the government of restraints in hiring should there be a shortage of qualified candidates for review commissioner appointments. It also brings the Newfoundland and Labrador legislation in line with other jurisdictions. Currently, seven out of ten Canadian jurisdictions which have external appeal bodies have the explicit statutory authority to re-appoint the Chair and members of the appeal body. The Reviewers note that review commissioners may qualify as "public officers" within the meaning of section 2(1)(a) of the *Interpretation Act* and, therefore, section 21 of the *Interpretation Act* may apply to the appointment of review commissioners which would give the Lieutenant Governor in Council the power to re-appoint or reinstate. However, the Reviewers are of the opinion that it is preferable that the Act be amended for greater certainty.
Source	AB, s. 10(4); BC, s. 232(4); MB, s. 60.2(2.1); NT/NU, s. 121(2); NS, s. 238(6)

PART	II
Section	22
Topic	Authority to act after expiry of term or resignation
Description	The Reviewers recommend that section 22 of the Act be amended to provided that review commissioners may continue to exercise powers of a review commissioner after resigning or expiration of their appointment in any proceeding over which they had jurisdiction immediately before the end of their term of appointment.
Rationale	Section 4 of the *Workers Compensation Review Division Regulations* 1117/96 permits the chief review commissioner to authorize a review commissioner to carry out and complete any duties or responsibilities and exercise powers in relation to a specific proceeding in which he or she participated. This provision allows review commissioners to complete matters they have started to hear, preventing a waste of time and resources and increasing efficiency in the system. It also increases the perception of fairness because it ensures that review commissioners can allocate appropriate amounts of time and effort to cases that come before them near the end of their terms. Currently, five of the ten jurisdictions with external appeal bodies have statutory provisions giving the appeal body members the ability to act after resignation or expiry of their terms on matters that came before them prior to that time. The Alberta, Manitoba and Northwest Territories statutes give blanket authority to appeal body members to continue to act. In BC and Ontario the power to continue to act must be authorized by the appeal body's chair. The Reviewers consider that the former approach is preferable because it does away with a step in the process and also clearly permits the chair or chief review commissioner to continue to act.
Source	ON, s. 175; BC, s. 233(2); AB s. 10(7); NWT &N s. 121(3) MB s. 60.2(5)

PART	II
Section	26
Topic	Review Division statutory powers
Description	That section 26 be amended to codify the current practice of the Review Division.
Rationale	The scope of the Review Division's authority is not apparent from s. 26. The Review Division's empowering provisions are unique in workers compensation legislation in Canada. The provisions empower the Review Division to determine whether a decision of the Commission is in accordance with the Act, the regulations and policy established by the Commission. In *Jesso*[11], the Court of Appeal interpreted this as empowering the Review Division to: "re-examine the evidence, interpret the Act, regulations and policy, and, if he or she finds that the Commission has not correctly interpreted the Act, regulations or policy, substitute the decision which he or she considers to be proper or remit the matter to the Commission." Section 19(4) of the Act provides that the Commission decision must be upon the real merits and justice of the case and that the Commission is not bound to follow strict legal precedent. There is no equivalent provision respecting the Review Division; however, since the Review Division must determine whether a decision of the Commission is in accordance with the Act, it is arguable that the Review Division can decide whether the Commission exercised its discretion in any decision in a manner that is supportable under section 19(4). Although this specific issue did not arise in *Jesso*, the Court of Appeal appeared to interpret the Act as according the Review Division such authority. At paragraph 49, Cameron, J.A. for the court stated "on the other hand, if the decision of the Commission is consistent with the policies, the Review Division must still determine if, in the circumstances of the case, section 19(4) required that the discretion be exercised differently."[12] This implies that the Review Division can engage in weighing the facts.[13]

[11] *Newfoundland (Workers' Compensation Commission) v. Jesso*, 2001 NFCA 49

[12] See also *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Burridge*, 2001 NFCA 48 at para 29.

[13] In *Power v. Newfoundland and Labrador (Workplace Health, Safety & Compensation Commission)*, 2012 NLTD(G) 4 the Newfoundland and Labrador Supreme Court considered it within the Review Division's jurisdiction to reweigh conflicting medical opinions. See paragraphs 65 and 66.

It is also not clear from s.26 whether the Review Division has the authority to hear disputes about factual matters. The very broad powers of inquiry under s. 27 appear inconsistent with a narrow scope of authority for review. If the Review Division does not have authority to determine factual disputes, a party's only remedy would be judicial review. The Reviewers consider it would unduly fragment a challenge to a decision of the Commission if the challenging party were required to raise an issue of factual dispute not with the tribunal which might be the appropriate forum for other aspects of the challenge, but on an application for judicial review. To have factual disputes determined within the workers compensation system is preferable and furthers the goal of workers compensation legislation articulated in cases like *Pasiechnyk* that compensation be provided without resort to court proceedings.

It appears to be the current practice of the Review Division to hear disputes about factual matters. In British Columbia, the external Workers Compensation Appeal Tribunal ("WCAT") publishes statistics every year indicating the percentage of appeals allowed by reasons for issue outcome. These statistics have been quite consistent since WCAT's inception in 2003. In 2011, the WCAT allowed 7% based on reweighing of evidence and only 1% based on error in applying policy and 1% for error of law.[14] The Review Division does not break down its statistics into such categories but it seems likely that the Review Division would similarly be deciding a significant number of cases based on resolving factual disputes.

Finally, it is not clear whether the Review Division is empowered to determine if the Commission acted within the rules of procedural fairness. At common law, there is a presumption that the rules of procedural fairness apply to all public authority decision making. Only an explicit or clearly implicit statutory provision can override procedural fairness requirements.[15] However, the existence of a duty on the Commission to act fairly does not necessarily mean the Review Division has the corresponding authority to review Commission decisions for breach of the rules of procedural fairness.[16]

Source *Jesso, supra*; BC, s. 239 and s. 253; ON, s. 123 (1), (2), and (3); AB, s. 13.1(1); NS, s. 60.8(1) and (2)

[14] *WCAT 2011 Annual Report*, p.17
[15] *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at paragraphs 37 and 43
[16] In *Martinson v. Alberta (Workers' Compensation Appeals Commission)*, 2005 ABQB 545, the Alberta Court of Queen's Bench found that the Appeals Commission (AC) had the jurisdiction to review the Claims Services Review Committee (CSRC) decision for procedural fairness on the basis that the AC's empowering provision gave it "exclusive jurisdiction to examine, inquire into, hear and determine **all** matters and questions arising under this Act". This was broad wording which allowed the AC to consider whether the CSRC breached the rules of natural justice by deciding an issue not before it.

PART	II
Sections	26(1)(c)
Topic	Powers of Review Division - Type of decision reviewable
Description	Add the word “withdrawal” after “assignment” and remove the words “subclass or group” and substitute “industry”
Rationale	This amendment would expressly set out the authority of the Review Division to review Commission decisions to reclassify employers, adding greater certainty as to the types of decisions that may be reviewed. “Group” is not a term used in the assessment provisions. “Department or subclass” corresponds to the terminology in s. 94 and s. 95; however, permitting an employer to seek review of an assignment of the employer’s industry to a class or industry grouping has the potential to affect the assignment of other employers in that industry grouping in a significant way. Employers should only be permitted to seek review of the assignment of their undertaking to the lowest domain grouping, that is, the particular industry or NIC Code. While it is true that reassignment of an employer’s undertaking to a different industry or NIC Code could adversely affect the industry and, potentially, the class, from which that employer was withdrawn by reducing the size of the employer pool in the industry, it will not result in a rearrangement of the higher domain groupings such as the classes.
Source	The Act, ss. 94 and 95; BC, s. 96.2(2) (c) and (d)

PART	II
Section	26.1
Topic	Review Division bound by policy unless it is inconsistent with the Act.
Description	Codify the common law in this provision with the addition of words to the effect that a Review Commissioner shall not apply a policy established by the Commission under subsection 5(1) that is inconsistent with the Act or Regulations.
Rationale	The Newfoundland and Labrador Court of Appeal has determined in the cases of *Mount Pearl*[17] and *Jesso*[18] that the Review Division has the jurisdiction to determine whether a policy of the Commission is supported by the Act and Regulations and to refuse to apply a policy that is not supported by the Act and Regulations to the case before it. This amendment would codify the common law and would bring the provision in line with the external appeal bodies in other Canadian jurisdictions which have express statutory authority to refuse to apply policy which they find are not supported by the Act. Note that in Ontario and BC, the external appeal body is required by statute to refer any policies it considers are not supported by the Act to the Board and the Board makes the ultimate determination within the system on whether a policy is supported by the Act and Regulations and whether it must be applied.
Source	*Mount Pearl; Jesso;* BC, s. 250 and s. 251; ON, s. 126(4) and (8); MB, s. 183(5)(a) and s. 199

[17] *Newfoundland and Labrador (Workplace Health Safety and Compensation Commission) v. Mount Pearl (City),* 2008 NCCA 69

[18] *Newfoundland (Workers' Compensation Commission) v. Jesso*, 2001 NFCA 49

PART	II
Section	27(2)
Topic	Review Division – authority with respect to evidence and calling of witnesses.
Description	Amend the Act to provide authority to examine and cross-examine witnesses generally, not just those called to bring forward evidence in response and reply and amend the Act to provide that Section 8 of the *Public Inquiries Act* 2006 shall apply to those witnesses.
Rationale	The provision as worded expressly sets out that the full right to examine and cross-examine witnesses is only with respect to witnesses called to bring forward evidence in response and reply. This could be interpreted as excluding the calling of witnesses to bring forward evidence for the parties seeking review. Further, the provision, as worded, does not specify who has the right to examine and cross-examine witnesses. Since the subject of the sentence is the review commissioner, the provision could be interpreted to mean that only the review commissioner has those powers. Yet, Section 9 of the *Workers' Compensation Review Division Regulation* 1117/96 provides that a party may call witnesses. For greater clarity, and a better fit with the Regulation, the provision should be amended to specify who has the right to examine and cross-examine witnesses. The *Public Inquiries* Act has been repealed and replaced by the *Public Inquiries Act*, SNL 2006 CP-38.1. Section 3 of the *Public Inquiries Act* 2006 establishes the power of the Lieutenant Governor in Council to appoint a commission of inquiry. Section 8 of the *Public Inquiries Act* 2006 pertains to witnesses called to give testimony and is the provision that should be referenced in s. 127(2).
Source	*Public Inquiries Act* 2006, s. 8; Consolidated Newfoundland Regulation 1117/96, s. 9

PART	II
Section	28(1)
Topic	Application for review – time limits
Description	Clarify the date that time begins to run and ensure this corresponds with the triggering events set out in the Regulation.
Rationale	Section 28(1) provides that a party may apply to the Chief Review Commissioner for a review within 30 days of receiving a written decision of the Commission. "Apply" is ambiguous as it could mean the date a party mails an application for review or it could mean the date an application for review is received by or filed with the Review Division. "Receiving" the written decision of the Commission is problematic as it may be difficult to determine when a decision was received by an applicant. Some jurisdictions use the date that the decision being reviewed or appealed was made. This is an easier date to ascertain. Section 28(1.1) speaks of the date the Commission's decision was communicated to the party. This phrase poses the same problems. The date the decision was made is a preferable triggering date. Because the Commission and the Review Division take the position that only a decision of the internal Review Division may be reviewed, the Act should expressly state that time begins to run from the date the internal Review Division decision was made. Section 5 of the Workplace Health, Safety and Compensation Review Division Regulation provides that a written request for review must be served upon the Review Division. "Served" is not a defined term in the Act or Regulation. It is not clear whether s. 5 means service as used in the Rules of Court or service in a more generic sense. For greater certainty, the Reviewers recommend that the Act and Regulation be amended to specify that a written request for review must be filed with the Review Division within 30 days of the date the decision was made.
Source	BC, s. 243; ON, s. 125(2); AB, s. 13.2(8)

PART	II
Section	28(4)
Topic	Nature of hearing
Description	Provide the Review Division the discretion to conduct hearings orally, electronically or in writing.
Rationale	The current wording in Section 28(4) and 28(6) implies that the Review Division must hold an oral hearing in every case. Such a requirement is inefficient and unnecessary. Giving the Review Division the discretion to conduct hearings in writing or electronically where the issues are relatively simple and credibility of witnesses is not a serious issue accomplishes the goal of allowing the Review Division to allocate resources in a more effective manner and promotes the goal of speedy decision making, which is one of the foundational principles established in *Pasiechnyk*. This also brings the practice in Newfoundland and Labrador in line with most other Canadian jurisdictions where the external appeal bodies can conduct an appeal or review in writing.
Source	See: ON, s. 124(3); BC, s. 146(1); NS, s. 197.5 for jurisdictions where the discretion is set out in the statute.

PART	II
Section	28(6)
Topic	Interested parties
Description	Provide the Review Division the discretion to decide who is an interested party and require that the party have a direct interest in the matter being decided.
Rationale	The current wording of this provision would seem to place the power in the hands of the applicant; anyone with any interest in the matter before the Review Division can indicate in writing an interest to appear and the Review Division must notify them of the time and place of the hearing. It is recommended that the subsection provide that the Review Division decides the interest question and that a person must have a direct interest in a matter before the Review Division in order to participate in the review.
Source	AB, s. 13.2(6)(a); BC, s. 241(2), (3), (4), and (5); MB, s. 60.1(5); NS, s. 197(4)(c)

PART	II
Section	28(8)
Topic	Time for providing the decision of the Review Division
Description	Provide that the decision shall be made within 60 days after the hearing of the appeal ends.
Rationale	This amendment provides greater certainty. The current wording of Section 28(8) create uncertainty because it provides that a Review Commissioner has 60 days to communicate a decision to the applicant. It is unclear what "communicate" means in this context. It is simpler to substitute the date the decision was made as this leaves nothing open to debate. Sixty days from the "date of the application for review" is also unclear. This could mean 60 days from the date on the request for review form, 60 days from the date the Review Division received the application, or 60 days from the date the application was mailed. Furthermore, there may be a significant time lapse between the date an applicant submits an application for review and the date the hearing is held. It is more precise and likely more realistic to have the time limit triggered from the date the hearing of the appeal ends.
Source	BC, s. 253(4)(g); ON, s. 127(1); MB, Reg. 279/91, s. 12(1)

PART	II
Section	New: Should be added as a subsection to section 28
Topic	Disclosure for the purposes of an external review
Description	Add a provision giving the Review Division explicit authority to disclose information to participants necessary to participate in a hearing. The new provision should also provide that any person receiving a worker's or employer's information under the new section may only use that information for the purpose of that review. In addition, the new provision should specify that Item #8 of the Model Structure of Confidentiality Provision at pages 25 and 26 of this Report applies to information disclosed under the new section.
Rationale	This codifies the current practice of the Review Division of providing a "case description" to an employer or other party with a direct interest whom the Review Division has determined may participate in the proceeding. Such an amendment also ensures that the Review Division complies with the AIPPA, sections 39 and 40 (see Rationale re: Internal Review at pages 23 and 24 of this Report). In addition, as with disclosure in an internal review, the express authority to disclose information in an external review ensures that the Review Division is complying with s. 18(1) of the WHSCA as being "in the performance of his or her duties". This amendment would bring Newfoundland and Labrador in line with many other jurisdictions in Canada, which expressly set out in the statute the authority to disclose information for the purposes of a review or appeal and protect the information from further disclosure.
Source	Review Division Access to Information brochure AIPPA, ss. 39 and 40; BC, s. 245(3) and s. 260;AB, s. 147(3) NB, s. 101(1.1) and (1.2); NS, ss. 192 and 193; ON, ss. 58 and 59[19] YT, s. 56(2)

[19] Note that s. 59 provides that a worker can object to disclosure of health information and the Board will consider the objection and the Board's decision can be appealed to the Appeal Tribunal

PART	II
Section	New – to come after s. 28
Topic	Summary dismissal provision
Description	Give the Review Division the authority to dismiss a review without a hearing in certain prescribed circumstances.
Rationale	Many statutes establishing administrative tribunals have provisions allowing the Tribunal to dismiss a review or appeal without a hearing where the requested review has no reasonable prospect of success, is frivolous or vexatious, has been dealt with in another proceeding or where the external tribunal lacks jurisdiction to deal with the issues raised. This sort of provision could save valuable time and resources by identifying issues which the Review Division cannot or should not deal with before the matter gets to a hearing. The 2006 Review Committee identified the need for such a power at page 39 of its report. The 2006 Review Committee recommended there be a consultative intermediate level of review by an Appeal Resolution Officer without a hearing process. In order for such a system to function, summary dismissal powers would have to be spelled out in the Act. The only workers compensation jurisdiction in Canada with such express authority is British Columbia where, by virtue of the *Administrative Tribunals Act*, the Appeal Tribunal can dismiss an application at any time if it determines the application is not within its jurisdiction, was not filed within the applicable time limit, is frivolous or vexatious is made for an improper purpose, has no reasonable prospect of success, or has already been dealt with in another proceeding.
Source	BC, s. 245.1 and the *Administrative Tribunals Act*, SBC 2004 c. 45 s. 31; Finding the Balance: The Report of the 2006 Statutory Review Committee on the *Workplace Health Safety and Compensation Act*, page 39.

PART	II
Section	35
Topic	Stated case
Description	Change the words “Commission’s jurisdiction or a question of law” to “Commission’s authority to decide a matter or a question of law outside the Commission’s jurisdiction”.
Rationale	The word “jurisdiction” is ill-defined in the case law and is often used to describe unreasonable errors of fact and law causing a tribunal to “lose jurisdiction” as opposed to an error as to the scope of a tribunal’s authority. The privative clause in s.19 clearly gives the Commission the exclusive authority to decide questions of law arising under the Act. Decisions of the SCC such as *Dunsmuir v. New Brunswick*, 2008 SCC 9, and *Celegene*, confirms that an expert tribunal has the authority to determine questions of law arising under its enabling statute. The Reviewers are of the view that what was contemplated by this provision was jurisdiction in the narrow sense of a tribunal’s authority to determine a matter. Cases should only be referred to the trial division on questions of law which the Commission does not have the jurisdiction to answer.
Source	*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraphs 55 and 56; *Celegene Corp. v. Canada (Attorney General),* 2011 SCC 1, at paragraph 34

PART	II
Section	37
Topic	Heading amendment and “person interested”.
Description	Amend the title to “Notification of Stated Case” and amend s. 37 to provide that the trial division has the power to direct that a person who the trial division determines has a direct interest be notified of the hearing.
Rationale	This ensures that only those parties who will be directly affected by a decision may participate in the hearing and that the trial division has the authority to determine if a party has a direct interest. This amendment is consistent with the amendment recommended for Section 28(6); that only persons with a direct interest in the matter being decided may have standing and that the Review Division determines whether a party has a direct interest.
Source	The Act, s. 37; AB s. 13.2(b)(a); BC, s. 241(2), (3), (4) and (5); MB, s. 60.1(5); NS, s. 197(4)(c)

PART	II
Section	New [should come after s. 19 and s. 26(1)]
Topic	Jurisdiction over constitutional, Charter and human rights issues
Description	Consideration should be given to whether it is desirable to include a provision which sets out that the Commission and the Review Division do not have jurisdiction over constitutional questions, *Canadian Charter of Rights and Freedoms* issues and/or questions arising under the *Human Rights Act,* 2006.
Rationale	This is a substantive change which the legislators will want to carefully consider. The case of *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, established that absent legislative intent to the contrary, tribunals empowered to decide questions of law have jurisdiction to apply human rights legislation. In cases such as *Nova Scotia (Workers' Compensation Board) v. Martin,* 2003 SCC 54, *R. v Conway,* 2010 SCC 22, and *Doré v. Barreau du Quebec,* 2012 SCC 12, the Supreme Court of Canada has decided that tribunals with the express or implied authority to decide questions of law arising under a legislative provision are presumed to have jurisdiction to decide the constitutional validity of that provision and may be a Court of competent jurisdiction for the purposes of granting remedies under s. 24(1) of the *Charter*. Pursuant to *Doré,* administrative tribunals have the authority to determine whether a discretionary decision was made in accordance with *Charter* principles. Three Canadian jurisdictions have responded to these lines of authority by enacting provisions which expressly take away or circumscribe the jurisdiction of the workers compensation agency and/or appeal tribunal to determine constitutional questions and issues arising under the *Charter* and provincial Human Rights legislation. In Alberta, s. 11 of the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c. A-3, provides that notwithstanding any other enactment, decision-makers have no jurisdiction to determine a question of constitutional law unless a regulation made under s. 16 has conferred jurisdiction on that decision-maker to do so. The *Designation of Constitutional Decision-Makers Regulation* Schedule 1 provides that the Alberta Board and Appeals Commission have jurisdiction only over questions of constitutional law arising from the federal or provincial distribution of powers under the constitution of Canada. In BC,

s. 44 of the *Administrative Tribunals Act*, SBC 2004, c. 45 (the "ATA"), provides that the tribunal is without jurisdiction over constitutional questions and s. 46.3 provides that the tribunal is without jurisdiction to apply the *Human Rights Code*. Section 245.1 of the *Workers Compensation Act* makes ss. 44 and 46.3 of the ATA applicable to the Workers' Compensation Appeal Tribunal. Note that in British Columbia the internal Review Division of the Board is not subject to the *Administrative Tribunals Act* SBC 2004, c. 45 and, therefore, is considered to have jurisdiction to determine constitutional questions and issues arising under the *Charter* and provincial *Human Rights Code*. In Manitoba, s. 60(2.2) of the *Workers Compensation Act* provides that the Board and the Appeal Commission do not have jurisdiction over constitutional questions.

The desirability of this type of amendment will involve consideration of issues such as resources available, expertise available at the level of the internal Review Division and at the level of the external Review Division, statutory time frames, etc. For example, the Reviewers are advised that most decision makers in the system do not have legal training and would find the application of the complex body of constitutional, Charter and Human Rights law a difficult and time consuming exercise.

Source

MB s. 60(2.2); *Administrative Procedures and Jurisdiction Act*, RSA 2000 c. A-3, Designation of Constitutional Decision-Makers Regulation 69/2006, Schedule 1, s. 11; *Administrative Tribunals Act* SBC 2004, c. 45, s. 44 and 46.3, BC s. 245.1

PART III APPLICATION OF ACT

PART III APPLICATION OF ACT

Section 41

Topic Coverage for Independent Operators

Description The Reviewers recommend rewriting this section to provide for (1) a definition of "independent operator"; (2) the coverage of all independent operators as either deemed workers or workers with optional coverage; (3) setting the amount of coverage.

Rationale Independent operators who are exposed to the hazards of industry can present a conundrum in the NL compensation scheme. They are only optionally covered, which means that a site owner can never have complete security of coverage and may be subject to lawsuit. Site owners may insist that independent operators on the site have their own coverage but it is not a sure thing. Even an independent operator who purports to have coverage may have, advertently or not, allowed it to lapse or cancelled it without telling the site owner. In short the clearance system is not a 100% guarantee that there are no cracks in the statutory immunity that employers pay for and should otherwise enjoy.

(1) Providing a clearer definition of "independent operator" will assist in identifying individuals within this class of persons. A definition typically provides that the individual owns and operates a business of his/her own or works under a contract.
(2) Deemed coverage for those without their own coverage ensures certainty of coverage on a work site. Site owners can still insist that independent operators carry their own coverage, but in cases of optional coverage lapses, the coverage defaults to deemed coverage. AB and YT expressly have this model. Note: Under this model, there is still a need for the Commission to determine whether someone is an "independent operator" in order to qualify for an optional account.
(3) Earnings for independent operators are often difficult to determine due to their tax situations. This new provision permits the Commission to base compensation on the amount of coverage purchased for optional coverage or, in the case of deemed coverage, establish coverage amounts

for different industries using industry information (both mechanisms are part of the AB model).

Deemed coverage described in (2) above ensures that employers operating sites will experience no cracks in the statutory bar and acts as a backstop to the clearance system.

Source

AB, s. 1(1)(w) - definition of “proprietor”, s. 16(1)- statutorily “deemed worker”, AR 325/2002 s. 5 – amount of coverage.

MB, s. 75(3) – definition of “independent contractor”; s. 60(2.1) – “deemed worker” notwithstanding anything else in the *Act* and WCB may deem the earnings of that worker.

ON, ss. 1(2) & 12(3) – definition of “independent operator”.

NT/NU, s. 4(2) – Commission may deem certain persons as “workers” notwithstanding the appearance of a different relationship; s. 6(2) – Commission may determine earnings for optional coverage.

YT, s. 3(1) – definition of “worker” includes a partner or proprietor deemed by the WCB to be a “worker”; s. 3(2) “deemed worker” provision similar in effect to AB’s s. 16(1).

PART IV COMPENSATION AND RIGHT OF ACTION

Section 45(8) – (13)

Topic Subrogation where worker elects compensation

Description This amendment strengthens the Commission's rights by converting "subrogation" to "vesting" where the Commission seeks third party recovery.

Rationale Workers' compensation statutes typically preserve rights of action where the at-fault party is not a participant in the workers` compensation system[20]. In such instances, several Canadian statutes permit the injured worker to elect between taking compensation as the remedy or solely pursuing a personal injury lawsuit in the courts to the exclusion of the compensation remedy. However, the compensation remedy is chosen, the workers' compensation agency becomes "subrogated" to the rights of the worker in respect of the action or lawsuit. In effect, the agency is entitled to pursue the lawsuit in the worker's name to recover its costs outlay for the claim.

Sometimes tort actions are more valuable than workers' compensation claims for the same injury. Sometimes the reverse is true, because of the division of fault in the tort action. These are considerations which a worker mulls when deciding between pure tort and workers' compensation.

Where the compensation remedy is chosen and the agency is subrogated, the statute will usually speak to how the proceeds of the action are divided between the worker and the agency when there is more than enough to go around. The agency depends on the cooperation of the worker, who is the critical witness in the lawsuit, to achieve recovery.

The word "subrogation" can be a loaded one. At common law, a subrogated party is not entitled to collect until the injured person is "fully indemnified"[21]. This means the injured person must recover the full value of his or her tort loss before the subrogated party becomes entitled to reimbursement. This common law meaning of subrogation is not intended in cases where a

[20] Note that s. 44.1 also preserves a right against other participants in the system when the accident involves the use or operation of a motor vehicle carrying public liability insurance. In this event, the worker has an election to choose between tort and workers' compensation. Where the latter is selected, the Commission is subrogated under s. 45.
[21] *Ledingham v. Ontario Hospital Services Commission*, [1975] 1 SCR 332.

workers` compensation body is the subrogated party as the provisions of the statute take over. Subsection (11) contains the NL scheme of distribution in subrogated cases. It could be clearer. It leaves room for an argument that subrogation in the statute does not mean anything different than at common law.

Particularly in the case where the worker elects compensation versus a pure tort action, subrogation is intended to make the board or commission whole first, not the worker. The NL Commission's interests would be better served and the intent of the legislation better achieved with a conversion from "subrogation" to "vesting".

As opposed to merely being subrogated, vesting transfers the legal right in the action to the workers` compensation body. Holding the vested right, the workers' compensation body is not only assured its rightful amount of recovery but is also entitled to control the action. In at least one jurisdiction, the degree of control is spelled out in considerable detail. This statutory control extends to imposing a legal duty on the worker to cooperate in advancing the vested lawsuit.

Source

AB, s. 22
MB, s. 9(5)

PART	IV
Sections	48-51
Topic	Compensation and Residency
Description	An amendment that consolidates all of the residency sections
Rationale	The NL *Act* contains a rather stark prohibition against payment of compensation to non-residents at s. 48. Reading further, that prohibition is quickly and increasingly diluted through ss. 49, 50 and 51 to the point where, in practice, it can be said there is no residency requirement. Through formally eliminating the residency requirement, there is an opportunity for NL to make a political statement that it embraces the era of globalization, labour mobility and free trade agreements and that NL as an emerging economic player is "open for business". Thus, instead of positioning non-residency in the negative as a prohibition, we are suggesting it be expressed in the positive, i.e. having the section specifically allow compensation to non-residents in permitted situations. The section would then detail those permitted situations as they are currently described in the existing s. 49 (non-resident from a reciprocating jurisdiction injured in NL), s. 50 (claimant leaves NL to take up resident elsewhere, and s. 51 (non-resident worker employed by employer with substantial connection with NL is injured outside of the province). The rules of statutory interpretation would provide that since compensation to non-residents is available in certain named circumstances, it is not available in other circumstances. In this way, the ineffective and redundant residency requirement is formally abolished but the existing rules remain intact in a consolidated section. It is understood that residents of the province while employed by a NL employer have coverage wherever they injured. It is also understood that Temporary Foreign Workers, while in NL, are deemed to be residents and so they have coverage.
Source	No other workers' compensation jurisdiction in Canada as an equivalent to NL s. 48.

PART	IV
Section	53(1)
Topic	Compensation – Notice of Accident
Description	An amendment makes the worker's reporting obligations less rigorous
Rationale	The worker's reporting requirements in this section seem a bit onerous in that the worker must report the injury to the employer "immediately" after its occurrence and before voluntarily cessation of employment. There is any number of reasons why it is not practical to report the injury to the employer immediately: worker requires emergent medical care, worker is unconscious, worker is at remote site, worker doesn't know he or she is injured until many days later, latency periods, wrong diagnoses and so forth. It is recognized that the worker under s. 54 may get relief from strict compliance with s. 53 when certain conditions are met, but this requires the Commission to make an additional adjudication. Many jurisdictions require reporting the injury to the employer "as soon as practicable". This gives the worker some leeway to deal with circumstances such as described above. The added requirement that the report to the employer be made before the worker voluntarily leaves the employment on its face requires the Commission to make an adjudication on an employee or labour relations matter where termination is close in time to the injury, i.e. did the worker quit or was the worker fired or laid off? We were unable to find another jurisdiction that has this requirement and it seems irrelevant to question of acceptability of a claim. Commission counsel advises that the issue is rarely, if ever, actually adjudicated. We recommend changing "immediately" to "practicable" and deleting the reference to voluntary termination. We recommend retaining s. 54 as it presently stands for cases that fall outside of "practicable".
Additional note	Section 53(1) begins with the words "Compensation is not payable <u>to a worker</u> … " (emphasis added) and is followed by paragraphs (a) and (b) which set out conditions. Part of paragraph (b) deals with compensation in the event of death.

	There is a disconnect with the opening words of the section – compensation is never payable to a worker in the event of death. The section will have to be restructured so that the notion of compensation being payable to the dependents of a worker and is connected to notice of the death meeting certain requirements.
Source	"practicable" NT/NU, s. 17; AB, s. 32(2); BC, s. 53(1); MB, s. 17(1).

PART	IV
Section	56
Topic	Compensation – Employer's Report of Accident
Description:	An amendment that (1) clarifies that an employer has a duty to report an injury even if it is disputed by the employer, and (2) deletes subsection 3 as redundant.
Rationale	The existing section 56(1) requires an employer to report an injury three days after its occurrence. This is likely intended to include disputed claims, where the employer does not believe the injury happened at work or at all but the wording is unclear. It is natural that disputes of this nature will arise. The making of an employer report should not imply that the employer necessarily supports the claim. The employer can state right in the report that the claim is disputed or the employer can subsequently use the process set out in s. 63 (Objection to Claim). Several jurisdictions place a clearer legal onus on the employer to make the report even though the employer does not believe a work accident has occurred. This leaves no room for an employer to misapprehend the legal duty to report even where the injury is disputed. AB s. 33(1) requires an employer report when the employer "acquires knowledge of an accident or an allegation of an accident." BC s. 54(1) says an employer report is required where an accident "is claimed". MB s. 18(1) imposes the duty to report on an employer for anything "giving rise to a claim." YT s. 10(1) requires employer reporting if there is "a possibility of a claim". These are different words but they capture the same concept – an absolute duty to report every alleged occurrence of work-related injury. The Reviewers recommend an amendment to capture this clearer legal duty on the part of employers. In no way would it detract form the employer's ability to question the legitimacy of the claim.

Section 56(3) appears redundant. It provides that the costs of a claim unreported by an employer will be charged to that employer's experience record, presumably once the employer is known. That already occurs under section 96(1). Moreover, section 56(3) might inadvertently imply that where a claim is not unreported, the costs will not go to the employer's experience account. Deleting the subsection will avoid ambiguity, confusion and a possible misinterpretation.

Source AB, s. 33(1); BC, s. 54(1); MB, s. 18(1); YT, s. 10(1).

PART	IV & VI
Section	Replace sections 57, 58 & 89.
Topic	Duties of Health Care Providers – Consolidation
Description	This is a new section that (a) provides a comprehensive definition of "health care provider", and (b) consolidates into one section the provisions of three existing sections containing the duties of health care providers.
Rationale	It is beneficial to all users of the legislation to group similar concepts together. It would be of particular benefit to health care providers in this case if one section exhaustively described their duties. <u>Definition</u> The phrase "health care provider" is used repeatedly in the *Act*, particularly where statutory duties are imposed upon them, but the term is not defined. As a best practice in statutory construction, the Reviewers suggest that the term be clearly and comprehensively defined so those who are legally obligated to comply with these duties clearly know that. Jurisdictions vary as to the precise term used as well the scope of the definition. AB uses the word "physician" to describe any practitioner of the "healing arts". MB and NT/NU use the phrase "health care provider" to describe all practitioners contributing health related services to the workers' compensation system. ON and QC use "health professional" and SK has the term "heath care professional". PEI, YT and NL are the remaining jurisdictions that make no attempt to define their respective health care provider groups. It seems that "health care provider" is emerging as the most commonly understood and apt descriptor in Canada. There are two approaches taken in composing the definition. One approach is to generally describe the activity such as in AB's "practicing the healing arts". The other approach is to identify the specific regulatory regime, usually by reference to legislation, and thereby encompass a number of specific professions. For example, ON uses this approach in defining "health professional" as "a member of the College of a health profession as defined in the *Regulated Professions Act, 1991."*

The Reviewers suggest that the latter approach provides greater certainty and also allows for exclusion of unregulated practitioners.

Whichever term is used, it is important that it is comprehensive and includes all regulated professions contributing health services to the workers' compensation system that the Commission wishes to recognize, as well as hospitals or health regions and other licensed treating facility or agency. The Commission may wish to reserve flexibility by designating recognized regulated health professions through a Board of Directors policy.

Model Consolidated Duties Section

To capture the best elements of the existing NL legislation as well as desirable features from other jurisdictions, a model section on duties might look like this:

1. The definition of "health care provider".[22]
2. A health care provider who attends an injured worker or is consulted in a worker's claim shall provide reports to the Commission in respect of the worker's injury in the form prescribed by the Commission [current s. 57(1)].
3. A health care provider who attends an injured worker shall provide all necessary information, advice and help to the worker or dependents to apply for compensation, to provide the evidence [23] that is required by the Commission and to facilitate the worker's return to work[24] [current s. 57(2) with the addition of the "return to work" element].
4. The three parts of the provision of information section of current s. 89.3: (a) requirement to provide a functional abilities report to the worker, employer and the Commission when requested by either the worker or the employer in the prescribed form, (b) fixing the fee payable[25], and (c)

[22] The definition could be moved to the front of the *Act* in the definitions section as well, particularly if the phrase is going to appear elsewhere than in this section.

[23] We are suggesting the word "evidence" instead of "proof" [in the current s. 57(2)] as it is a less harsh word and does not imply that the onus is on the worker to prove the claim versus the onus being on the Commission to gather the evidence and adjudicate the claim.

[24] The addition of the "return to work" element obliges a treating physician to inform the worker about RTW status and thus enable the worker to provide that information to the employer at the very outset of the claim. Often this might mean the difference between a time-loss and a no-time-loss claim. This is a duty on the physician to inform the worker about RTW status (e.g. "off 2 days & then reassess" or "okay for light duties only"). It is distinct from the duty to inform the worker, employer and Commission about the worker's "functional abilities" following a request under current s. 89.3, which suggests a more detailed report on functional capacity while a claim is ongoing.

[25] This provision might be redundant in view of s. 85(3) with the addition of the words "under this *Act*" after "health care provider reports" in that section.

prohibition upon person outside the Commission receiving the report using that report for a collateral purpose.[26]

5. A general requirement to submit reports concerning the worker when required by the Commission[27].
6. A general requirement that health care providers provide other documents and information concerning the worker from their file when requested to do so. This includes chart notes, diagnostic results and the like.[28]
7. Deemed consent of the worker for the transmission of information from the health care provider to the Commission.[29]
8. Medical reports prepared for or at the request of the Commission are privileged and no action for defamation lies against the author of the report unless there is malice.[30]

Source

Definition

AB, s. 1(1)(v) "physician"; MB, s.1(1) "health care provider"; NT/NU, s. 1(1) "health care provider"; QC, s. 2 "health professional"; ON, s. 2(1) "health professional"; SK, s. 2(h.1) "health care professional"

Duties of Health Care Professionals

AB, s. 34: physician's duty to report, give assistance to worker; requirement of hospitals or treating agency to provide report on request; medical reports provided to WCB are privileged.

BC, s. 56: duties of physicians and qualified practitioners

MB, s. 20: duties of health care providers, health care facilities and hospitals; s. 20.1: medical reports inadmissible unless malicious.

ON, s. 37: duties of health care practitioners, hospitals and health care facilities; payment.

[26] The drafter may wish to consolidate this provision with the restriction on collateral use on receipt of information from the Commission.

[27] This duty already exists in s. 85(2) but the drafter may want to move the provision here so it is listed with all the other duties of health care providers.

[28] The Reviewers realize there is already a general power residing in the Commission to compel the production of documents but a specific legal duty dispenses with the need to issue a subpoena or to seek consent under s. 36 of the *PHIA.*

[29] Strictly speaking this may not be necessary in view of s. 43 of the *PHIA* but we leave that to the drafters to determine.

[30] A feature in AB and MB that prevents doctors and other health care providers from being sued by workers for defamation in respect of reports submitted to the WCB.

PART	IV
Section	75
Topic	Annuity at age 65
Description	The Reviewers recommend adding subsections that (1) provide a definition of "pension plan" that is consistent with the definition in provincial pension legislation, (2) provide certainty by specifying that the claimant must be a member of such a plan at age 65, and (3) specify the pension replacement benefit payable under subsection (1) is subject to the maximum LOE payable as prescribed under s. 80(8).
Rationale	In order to provide a degree of clarity with regard to which pension plans are referred to in this section and in sections 81(3.3) and (5), there should be a definition inserted that mirrors the definition of "pension plan" in the *Pension Benefits Act*. The current undefined phrase used in *WHSCA*, "employer sponsored pension plan", is ambiguous and gives rise to inconsistent interpretation. Furthermore, for greater certainty, there should be a clarification that the worker must be actually registered in a pension plan as at age 65.[31] The Commission interprets and applies s. 75(1) as subject to the maximum compensation payable as calculated using s. 80(8). This makes sense as a worker should not be in receipt of greater benefits in retirement than during the worker's working life. The issue is that the benefit is based on demonstrated pension loss not average weekly earnings. Nothing really imports the concept of the maximum into s. 75(1). The only other Canadian jurisdiction with this benefit is PEI. It similarly does not make its benefit expressly subject to the statutory ceiling. Accordingly, we recommend adding a subsection (1.1) that incorporates by reference the ceiling for compensation payable as established under s. 80(8).

[31] The Legislature has made a choice to compensate for loss of registered pension income and not for loss of other forms of retirement income. If it had wanted to compensate for loss of all forms of retirement income, then it would have legislated an actual annuity program not a pension loss benefit program.

AB and QC reduce the wage loss benefit at age 65. NT/NU pays lifetime pensions. The balance of the jurisdictions pay true annuities at age 65. A true annuity is where monthly sums from one or more sources are accrued and invested, and, upon the happening of an event (e.g., turning age 65), begins to produce a periodic income. NL should change the name of section 75 as it is not an annuity but rather a pension loss benefit.

Source AWCBC document entitled “Annuities at 65”.

PART	IV
Section	83.1
Topic	Overpayment of Compensation – Collection
Description	The Reviewers recommend amending this section to permit the Commission to collect the overpayment by way of filing a certificate as opposed to commencing an action
Rationale	The present recovery scheme for compensation overpayments in NL is first to recover the amount owing through set-off or deduction under Policies EL-04(A) & (B). Section 83.1 gives the Commission a cause of action in debt against a worker which is pursued by way of lawsuit. Presumably the s. 83.1 remedy is only pursued where set-off or deduction from benefits is not available and it is worthwhile to advance the lawsuit. In recognition of the Commission's exclusive jurisdiction, s. 83.1(2) stipulates that the court does not have jurisdiction in the lawsuit to determine whether the overpayment is owed or the quantum of it. Essentially, a worker has no defence to the lawsuit, although the opportunity to seek review of the overpayment decision is still in place. Nonetheless, the worker is entitled to file a defence and the Commission is required to overcome it, even if frivolous, through summary judgment. A worker is also entitled to whatever the litigation process offers to prevent the Commission from obtaining judgment in an expedient manner. Likely for this reason, the section is not invoked often. In cases where the worker is in a position to pay because of personal means even though there no further benefits in the foreseeable future against which to set-off, there is a recoverable debt. The Commission as the fiduciary of the Injury Fund should consider collecting the debt. A lawsuit, as noted, can be cumbersome for this purpose. It is recommended that the Commission be given the ability to file a certificate against a worker for an overpayment with the Court and enforce it like a judgment in the same way the Commission may do so in respect of assessment debt under s. 118(1). The worker is deprived of nothing. Due process is maintained because the opportunity for the worker to seek a review of the overpayment decision remains. What is achieved is

simplification of the process, considerable red-tape reduction and enhanced opportunity for the Commission to collect these debts in appropriate cases.

Since this is overpayment debt, not assessment debt, the lien and priority provisions would not apply.

Source: AB, s. 127(1) & (2); BC, s. 223; MB, s. 85(2); ON, s. 139; QC, s. 435; SK, s. 115 & 169.

PART V	MEDICAL AID
Section	Part V Title, s.2(1)(r), sections 84 - 87
Topic	Terminology
Description	Change “medical aid” to “health care” in the title of Part V and throughout the Act
Rationale	“Medical aid” is a dated term and implies care is limited to the physician/patient relationship. “Health care” implies a much broader spectrum of care and corresponds to the use of the term “Health care provider” used throughout the Act. It also corresponds better with the Policies of the Commission, which refer to “health care” rather than “medical aid”. Use of the term “health care” would modernize the language in the Act and follow the trend in other jurisdictions where the statutes use the broader term “health care”.
Source	WHSCC Policies: Health Care Services; The Act, s. 57, s. 85(2), (3), (4), s. 89.2(3)(b), s. 89.3(1) and (2); BC, s. 21; ON, Part IV
Consequential Amendment	s. 73(1)(a) would also have to be amended to provide “health care expenses as provided for in section 84” in place of “medical expenses as provided for in section 84”

PART	V
Section	86(1)
Topic	No contribution for medical aid
Description	The Reviewers recommend that this subsection be amalgamated into s. 87(1).
Rationale	Section 86(1) prohibits an employer from collecting or retaining contributions towards the expense of medical aid from a worker. This provision appears to be a vestige of the 1952 Act which permitted the Board to approve arrangements with employers for the provision of medical aid to workers. The only medical aid the subsection could be referring to in the current Act is that which the employer is obliged to provide under s. 87(1). Therefore, the logical place for this provision is at the end of s. 87(1).
Source	The Act, s. 87(1)

PART VI	RETURN TO WORK AND REHABILITATION
Section	89.1(13)(b)
Topic	Payments to the worker where an employer has not fulfilled its obligations
Description	Amend Section 89.1(13)(b) to prevent double recovery.
Rationale	Section 89.1 establishes the employer's obligations to re-employ a worker. Subsection 89.1(13) sets out the authority of the Board to levy a penalty not exceeding 12 months of the worker's net earnings where an employer has not fulfilled its obligations under this section. Subsection 89.1(9) sets out a rebuttable presumption that an employer has not fulfilled its obligations under this section if the employer re-employs a worker and then terminates the worker within six months. Sections 89.1(9) through (13) appear to leave it open to a worker to sue his or her employer for wrongful dismissal and make a claim under Section 89.1(11) that the employer has not fulfilled the employers' obligations to the worker. This might result in the worker receiving double recovery and the employer having to pay twice. It is a general common law rule that double recovery is not permitted, subject to the recognized exceptions of private insurance and charitable or benevolent gifts. A payment under subsection 89.1(13) would be neither a private insurance payment nor a charitable or benevolent gift. Such a payment is more akin to a collateral benefit. Case law has developed potential solutions to the problem of how collateral benefits should be treated in order to prevent double recovery. One solution is to deduct the collateral benefits from the tort award assuming that their receipt would result in double recovery. Another solution is to permit the victim to keep the collateral benefits, but to provide a right of subrogation to the payor of the benefits against the tort feasor. Yet another solution is to impose a trust on the benefits paid to the victim in favour of the payor. To provide greater certainty and provide a legislated solution, the Reviews suggest adding to subsection 89.1(13)(b) that the Commission shall have regard for an amount paid to a worker in a common law claim for wrongful dismissal in determining any payments under Section 89.1(13)(b) and that a court shall have regard for an amount paid to a worker under Section 89.1(13) in a common law claim for wrongful dismissal.
Source	*Cunningham v. Wheeler*, [1994] 1 SCR 359

PART	VI
Section	89.4(2)
Topic	Construction industry duty to cooperate
Description	Amend the section to provide that workers and employers engaged primarily in construction shall be required to comply with the duty to cooperate and re-employment requirements that may be prescribed in the published Policy and Practices of the Commission or Regulations made under Section 123.
Rationale	There are currently no regulations enacted under Section 123 with respect to the construction industry and the duty to cooperate and re-employ. This is currently done through Board policies RE01 through RE08 and Procedures 33.00 through 48.00.
Source	RE01 through RE08; Procedures 33.00 through 48.00

PART VII	INDUSTRIAL DISEASES
Section	Part VII Title, 90(1)(a), 90.1 – Heading, 2(m), 2(o)(iv), 53(b)(ii), 92(2), 124(b)
Topic	Terminology change
Description	Change “industrial disease” to “occupational disease”
Rationale	Newfoundland and Labrador is the only province or territory that continues to use the term “industrial disease”. All other provinces and territories in the country use “occupational disease”. This change in terminology would provide consistency with the rest of the country. In addition, organizations such as the Canadian Centre for Occupational Health and Safety use the term “occupational disease” in their literature. It is desirable that terminology in the Act correspond to terminology used in the community. Further, all of the Commission’s publications appear to use the term “occupational disease”, including the strategic plan and the publication entitled “A Strategy for the Prevention of Known Occupational Diseases 2011 – 2013”. In 2009, the Commission created the Occupational Disease Advisory Panel. Changing to “occupational disease” would, therefore, provide consistency within the system.
Source	AB, s. 1(1)(a); BC s. 1; MB s. 1(1)(c); NB s. 1; NT/NU s. 1; Policy 03.06; NS s. 2(v); ON s. 2(1); PE s. 1(1); QC s. 7; SK s. 2(r.2); YT, s. 3
Consequential Amendment	The Occupational Health and Safety Act (“OHSA”), s.65 (n) uses the term “industrial disease” and should be amended for consistency with the Act. Note that s. 60 of the OHSA uses “occupational disease” and the OHSA Regulation uses the term “occupational disease”.

PART	VII
Section	90(1)(b)
Topic	Nature of Employment – Long Latency Diseases
Description	The Reviewers recommend that the requirement in Section 90(1)(b) that the disease is due to the nature of the employment in which the worker *is* engaged be amended to provide that a worker meets the condition if the disease is due to the nature of *any* employment in which the worker *was* employed.
Rationale	As written, the requirement in Section 90(1)(b) appears to preclude claims for industrial diseases that have a lengthy latency period, such as many types of cancers, where a worker has changed the nature of the worker's employment or retired. The words "the disease is due to the nature of the employment in which the worker is engaged" suggest that the worker must be employed in the employment at the time the disease is recognized or becomes symptomatic or disabling. The original wording in the 1952 Act required that the disease be due to the nature of the employment in which the worker was and engaged in the 12 months prior to the disablement. It is likely that in 1952, the long latency period for many diseases was not recognized or contemplated. Interestingly, the suggested amendment would mean a return to the wording of the provision in the 1983 version of the Act. The wording was changed to its present form in 1990 when the statute was consolidated. The Reviewers are unaware of any reason for the change and since the Act indicates that s. 90(i)(b) was only amended in 1983 and 1992, this change in language appears to be a drafting mistake. Another rationale for changing the requirement in s. 90(1)(b) is that it is difficult to reconcile the wording in s. 90(1)(b) with s. 90.1, which directs that a worker is entitled to compensation under s. 90 or 91 notwithstanding that the worker is not employed at the date of disablement. If the worker is not employed when the worker becomes disabled, how can the disease be due to the employment in which the worker *is* engaged? This recommendation brings the legislation in line with the current practice of the Commission which recognizes long latency diseases and reflects a best practice.
Source	BC s. 6(1)(b); ON s. 15(1), PEI s. 84(1)

PART	VII
Section	90(3.1)
Topic	Rebuttable presumption – long latency diseases
Description	Amend s. 90(3.1) to remove the requirement that the worker be employed in a process involving asbestos "at or immediately before the date of disablement" to expressly incorporate a long latency period, which is known to exist between the exposure and onset of the disease.
Rationale	In order for the worker to benefit from the presumption in subsection 90(3.1), the worker must be employed in the process involving asbestos "at or immediately before the date of disablement". Asbestosis is an occupational disease known to have a long latency period; it can become manifest many years after exposure. In the modern work environment, it is not unusual for workers to change jobs or occupations several times over a working lifetime. Therefore, limiting the benefit of the presumption to workers currently working in an occupation involving asbestos puts workers with asbestosis who change jobs or occupations at a disadvantage. Further, the Commission appears to interpret s. 90(3.1) as if the words "at or immediately before the date of disablement" were not in the provision. Policy EN – 14 provides: "Pursuant to section 90(3.1) asbestosis is conclusively considered to have been contracted through employment where there is exposure to asbestos in that employment." Thus the current practice of the Commission appears to be to apply the presumption to asbestosis regardless of whether the worker is employed in the occupation at or immediately before the date of disablement. An amendment to the legislation would bring it in line with the practice of the Commission and provide greater certainty.
Source	Policy EN-14

PART	VII
Section	90(5) and 90(6)
Topic	Authority to order worker to undergo medical examination
Description	Consideration should be given to deleting these sections.
Rationale	The Reviewers are advised that the Commission does not currently employ sections 90(5) and (6). These provisions appear to be redundant. Under s. 62, the Commission can require a worker who is applying for or receiving compensation to submit to a medical examination. Pursuant to s. 43(5) of the Occupational Health and Safety Regulation 70/90, the minister can require a worker to undergo medical examination as part of a health surveillance program. The Reviewers note that s. 43 does not contain a provision similar to s. 90(6), requiring an employer to refuse to continue or maintain a worker in the employment until the worker has undergone the required medical examination. The legislators may want to consider whether such an authority would be more appropriately placed in s. 43 of the Occupational Health and Safety Regulation.
Source	s. 43(5) of the Occupational Health and Safety Regulation 70/90

PART	VII
Section	92(1) and 92(2)(a) and (b)
Topic	Terminology change
Description	Change “medical referee” in Sections 92(1) and 92(2)(a) and (b) to “medical practitioner” and define “medical practitioner”.
Rationale	“Medical referee” is not a defined term in the Act. “Medical practitioner” is used in Section 92(3) and use of consistent terminology throughout the provision will improve clarity. Further, since medical practitioner is not a defined term in the Act, it is recommended that it be defined (presumably as a person registered under the *Medical Act*, SNL 2011 c. M-4.02, see s. 2(g) of that Act). The Reviewers note that the term “doctor” is used in Sections 55 and 56. The Reviewers recommend that “doctor” be changed to “medical practitioner” for greater consistency throughout the Act.
Source	The Act, ss. 92(3), 55, and 56(1)(e); *Medical Act*, SNL 2011 c M-4.02, s. 2(g)

ISSUES THAT MAY WARRANT FURTHER STUDY AND CONSIDERATION

PART VII

Topic Medical Committee

Description Consideration should be given to whether it is desirable to continue to include the Medical Committee provisions in the Act and if the provisions are retained, whether it would be useful to include a provision making the decision of the Medical Committee final and binding.

Rationale The Reviewers understand that a Medical Committee under s. 92 is rarely convened and that this section has not been used in quite a few years. This may be due to the lack of resources and lack of qualified experts and the fact that the process is rather cumbersome and does not produce a binding result in any event. Nova Scotia has provisions for a medical review commission whose decisions are similarly not final and binding on the Board. Accordingly to the Association of Workers Compensation Boards of Canada-2011 website, to date, such a medical review commission has never been established.

The Reviewers question whether the Medical Committee process is really necessary since the Medical Committee determination is not final or binding on the Commission. The Commission has other ways of gathering medical evidence; for example, pursuant to s. 62, the Commission can require a worker to submit to a medical examination.

If the Medical Committee provisions are retained in the Act, consideration should be given to making the determination of the Committee on the medical issue final and binding on the Commission. It seems to the Reviewers that if the Commission is going to be put to the trouble of constituting a Medical Committee as contemplated in s. 92, then the end product of that process should be a resolution to the medical dispute.

British Columbia used to have a Medical Review Panel which issued final and binding decisions on medical issues. In 2003, the Medical Review Panel was abolished and in its place, the independent Workers' Compensation Appeal Tribunal was given the authority to retain an independent health professional to examine the worker and write a report. The Appeals Tribunal in Ontario has a similar authority. In Alberta, the Board or the

Appeals Commission can refer a medical issue to a medical panel and the decision of the medical panel is final and binding on the Board and the Appeals Commission. In Saskatchewan, the Board may appoint a medical review panel to determine a medical question and the decision of the panel is final and binding upon the Board and worker.

Source

BC, s. 249; ON, s. 134; AB, ss. 46.1, 46.2, 46.3, and 46.4; SK, ss. 60-66

PART VIII INJURY FUND AND ASSESSMENTS

Section 97

Topic Assessment – funding objective

Description The Reviewers recommend an amended section that more closely aligns with the Commission's objectives in collecting the annual assessment.

Rationale The concluding words of current s. 97, "sufficient funds to meet claims payable during the year" are open to meaning that the total annual assessment collected from employers should cover the anticipated cash transactions related to claims in the year.

The actual practice is spelled out in Policy IF-01, "Long Term Financial Strategy" (at page 2):

> Assessment rates for each year will be established at a level which, along with other revenue sources, will generate sufficient revenue to cover the anticipated cost of new injuries in the year …

The "cost of new injuries" is defined at page 4 of the policy as:

> (a) both the current and <u>future</u> benefit costs associated with new injuries occurring during the year,
> (b) the administrative costs of operating the Commission, the Workplace Health, Safety and Compensation Review Division, the Occupational Health and Safety Branch of the Department of Government Services, and Employer/Worker Advisors,
> (c) the annual amortization of capital expenditures of the Commission. (emphasis added)

The NL policy is consistent with the standard in Canada of collecting sufficient funds to cover the current and future costs of claims during the year. Accordingly, the Reviewers recommend alignment of the legislation with the board of directors' policy objective of funding both the current and future costs of claims incurred during the year through the annual assessment.

The Commission's external actuary has provided some model wording based on the New Brunswick legislation:

> **97 (1)** The Commission shall every year assess and levy upon and collect from the employers in each class by an assessment rated upon the payroll, or otherwise as the commission considers appropriate
> (a) sufficient funds to meet all claims for compensation incurred during that year;
> (b) the estimated cost of those claims in paragraph (a) payable during subsequent years; and
> (c) such sum as the Commission considers appropriate for the administrative expenses of the Commission.
>
> **97 (2)** Notwithstanding subsection (1), in the event that the Commission determines that the amount of the injury fund might become insufficient to provide for all future claims and expenses taking into account the risk of potential adverse events, levy and collect sufficient additional funds to restore the injury fund to a level that the Commission considers appropriate.
>
> **97 (3)** Notwithstanding subsection (1), in the event that the Commission determines that the amount of the injury fund might become greater than required to provide for all future claims and expenses taking into account the risk of potential adverse events, reduce the amount levied and collected to restore the injury fund to a level that the Commission considers appropriate.

- The text of 97(1) is borrowed from NB WHSCC 54(1).
- The text of 97(2) and 97(3) is modelled on NB WHSCC 54(1.1)

Source — AB, s. 91(3); NB, ss. 54(1) and (1.1); NS, s. 115(1)(a) and (b); ON, s. 96(2) and (3)

PART	VIII
Section	NEW (follows s. 101)
Topic	Compelling employer information by court order
Description	The Reviewers recommend insertion of a provision allowing the Commission to apply to the court for an order compelling an employer to produce the records required under section 101.
Rationale	Section 101 obliges employers to provide records and information of their businesses so that the workers' compensation system may be properly administered by the Commission. In some instances, particularly recalcitrant employers will fail or refuse to provide the required information. Such an employer may have ceased to carry on business and there may be amounts owing to the Commission for unpaid assessment. Some of these employers might be continuing in business but refusing to provide the information because they do not believe they are part of the workers' compensation scheme, do not want to be part of it or simply do not wish to pay assessment. Several jurisdictions are given a statutory ability to apply to the superior court of the province for a production order in respect of such an employer. The application is supported by an affidavit sworn by a workers' compensation employee attesting to the attempts to obtain the information voluntarily from the employer. Where the workers' compensation agency is able to satisfy the court that the information falls within the requirements of the statute and proves that the employer has failed to produce the documents, despite demand, the court may grant the production order, with or without conditions. Accordingly, the Reviewers recommend that such a power be given to the Commission statutorily to make such an application to the Supreme Court of Newfoundland and Labrador, Trial Division, where appropriate. The section should be written to include persons or entities that the Commission reasonably believes might be an "employer" under the Act. If the employer continues to refuse to submit the information or documents, the Commission then has a contempt remedy under the civil rules.
Source	AB, s. 18(4); MB, s. 100(3), NS, s. 180(5); ON, s. 135(3)

PART VIII

Section 111

Topic Assessment – employer giving security

Description An amendment is recommended that allows the Commission to require security not just from temporary employers but also from any employer where appropriate.

Rationale Maintenance of the Injury Fund to finance claims in the workers' compensation system is a pressing and substantial concern[32]. Presently, the Commission's ability to require security is restricted to temporary employers in the province, whose transient presence may place the honouring of its monetary obligations to the workers' compensation system in doubt.

There are other instances in which requiring security may be a good idea for maintaining the integrity of the Injury Fund:

- an existing employer who has a history of not cooperating and who is habitually and egregiously in arrears;
- where the individuals involved in a start-up business have a notoriously bad track record with the Commission;
- where the individuals involved in a new business have a history of corporate bankruptcies or receiverships;
- where an employer or the individuals involved in the business have been known to engage in deceptive practices to avoid payment of their workers' compensation obligations; and
- an employer or individuals involved in the business had to leave another jurisdiction because of similar problems.

Typical forms of security required under such a section would be letters of credit or other similar liquid assets which could be quickly converted to cash. It is noted that the Commission already has a statutory lien on tangible property through other sections in the Act. The power to require security, particularly of such a broad nature, is a discretion that must be exercised sparingly and in a commercially reasonable manner.

In Canada, five jurisdictions (AB, MB, NT/NU, ON and YT) have the more permissive provision that allows the requiring of security from any employer. Like NL, five other jurisdictions (BC,

[32] *Auger v. Alberta (Workers' Compensation Board)* (1990), 73 D.L.R. (4th) 357 [CA affirming (1989), 61 D.L.R. (4th) 660 (ABQB)]; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 475 at paras. 127 to 130.

NB, NS, PE and SK) have the more restrictive discretion relating only to temporary employers.

The Reviewers suggest that the Commission move to the more permissive discretion in order to better safeguard the Injury Fund.

Source — AB, s. 124; MB, ss. 83(1) and (2); NT/NU, s. 140; ON, s. 137; YT, s. 75

PART	VIII
Section	113
Topic	Sale of a business – *in personam* liability of successor
Description	This is an addition to the section that would extinguish the *in personam* liability of the successor when the employer selling the business in a *bona fide* transaction delivers a clearance certificate before the transaction closes.
Rationale	Many Canadian jurisdictions impose *in personam* or personal liability on a purchaser of an employer's assets or other successor, similar to NL s. 113, even in the case of a *bona fide* transaction. This form of liability is less known compared to principals' liability under s. 120. Seven jurisdictions in Canada (AB, MB, NB, NT/NU, PEI, SK and YK) contain a subsection that allows for the extinguishment of the *in personam* liability upon the employer selling the business (or part of it) delivering to the successor a clearance certificate. In NL, even where assets vest free and clear under s. 18.1(7), the personal liability under s. 113 continues indefinitely. By including such a subsection in s. 113, business people in NL will know that when purchasing business assets (or even the shares of a privately held company, which s. 113 seems broad enough to cover) they can be assured of not attracting personal liability for the seller's unpaid assessment by obtaining a clearance certificate. It is a commercial certainty provision. It is therefore suggested that a subsection (3) be added to s. 113 that in cases described in paragraphs (1)(a) and (b), the personal liability of subsection (1) does not attach where the successor demands and the employer delivers a clearance certificate before the closing date of the transaction. Paragraph (1)(c) is excluded as it describes cases of non *bona fide* transactions.
Source	AB, s. 132; MB, s. 81.1; NB, s. 72.3; NT/NU, s. 144; PEI, s. 70; SK, s. 155; YK, s. 90.

PART	VIII
Section	118, 118.2 & 122
Topic	Collection of Assessment – Statutory Lien and Priority
Description	The Reviewers recommend amendments to consolidate and strengthen the statutory lien and integrate the lien suspension "window" in s. 18.1 along with other amendments to move, condense and streamline s. 18.1.
Rationale	The Commission's current regime for establishing and enforcing its assessment lien is outlined in ss. 118, 118.2 and 122. Section 118 permits certification of the debt, which in turn allows the Commission to register and enforce the certificate as if it were a court judgment. Civil enforcement remedies then flow as a matter of law from registration of the certificate as a court judgment, such the filing of the judgment with the Sheriff's Office to enable seizure. The Commission may also register a document evidencing the lien in the Registry of Deeds to bind the debtor's real property. Where there are competing creditors in any of this enforcement activity, whether taken by the Commission or another creditor, the lien section then takes effect to give priority of payment to the Commission. There are actually 2 separate lien sections. The lien in s. 118.2 only arises upon certification under s. 118 and is characterized as a "first lien" upon the debtor's assets, subordinate only to wage claims under the *Labour Standards Act* and registered mechanics' liens. The second lien section occurs at s. 122. Subsection (1) provides first that upon distribution of the debtor's property in two named statutory scenarios[33], the Commission should be paid in priority. Subsection (2) provides that an assessment or a judgment based upon one is a first lien upon the debtor's property or property owned by a third party that is produced by or used in connection with the debtor's business. This lien is subordinate to municipal taxes and wage claims under the *Mechanics' Lien Act.* The lien regime is further complicated by s. 18.2 which allows lawyers, and others, to request a clearance certificate (called an "account status" in the section) but gives a special benefit of lien suspension to the clients of those lawyers in a defined

[33] Distribution under either the *Corporations Act* or the *Trustee Act*.

circumstance. Subsection (7) thereof provides that if the account status is not provided by the Commission within 21 days after acknowledging the lawyer's request, there is a "window" in which the effect of the lien is suspended (starting the 22nd day and continuing until the account status is actually issued). Subsection (7) is apparently intended to provide incentive to the Commission to expedite the issuance of clearances in the interest of timely closing of commercial or real estate transactions.

Following review of the lien and priority provisions of all of the other Canadian jurisdictions, the Reviewers note:

- having two separate lien sections may be confusing, likely overlapping and could be consolidated;
- there is wording in s. 118.2 that seems to suggest the lien is dependent on certification under s. 118(1) – elimination of this wording would clarify that the lien arises when the assessment is first due[34] ;
- the effect of the NL lien (that is, the nature of the charge and what it has priority over) is not clearly stated in comparison to the wording in other Canadian statutes (AB, BC, MB, NB, NT/NU, PEI, YT);
- the exceptions to the NL lien should be recognized in one place;
- the legal purpose of a priority section is to specify the order of payment when there are competing creditors for the finite assets of a debtor – identifying specific scenarios such as winding-up or distributions under the *Corporations Act* or the *Trustee Act* is unnecessary, as receivers and trustees are obliged to apply the law of priority;
- the "window" provision pertaining to lawyer requests for clearances should be moved to closer proximity to the lien/priority section.

The Reviewers recommend no changes to s. 118. With respect to the lien provisions (ss. 118.2 & 122), having regard to our survey of similar sections in Canada and in the interest of ease of administration and understanding by all, the following is proposed as a model section for NL incorporating the best features from other jurisdictions.

Model NL Lien Section

[34] Under section 100 the assessment is due on January 1st of each year and priority attaches at that point.

Priority of Lien for Unpaid Assessment

When arises

1. as soon an assessment or any other amount owed by an employer to the Commission under this *Act*[35] is due
2. whether or not a certificate has been filed under s. 118

Effect of lien

1. creates a fixed, specific and continuing charge
2. has priority over all other charges, liens, encumbrances, debts, assignments, mortgages of whatever kind, including a security interest as defined in the *Personal Property Security Act*, whenever created or to be created, except as hereinafter noted

Over what property[36]

1. all property, real and personal, of the employer indebted to the Commission, whether that property is used in or in connection with or produced by or in the employer's industry, or the proceeds of that property
2. all property used in or in connection with or produced in or by the employer's industry that is owned by another person, or the proceeds of that property

But is subordinate to[37]

1. wage claims, whether filed under the Labour *Standards Act* or the *Mechanics' Lien Act*
2. mechanics' liens under the *Mechanics' Lien Act*
3. municipal taxes.

Further comments and suggestions for improving s. 18.1

Further comments:

- Move the section to be in closer proximity to the lien and priority section.
- Subsection (1) can be repealed since the task contemplated thereunder (implementing an electronic clearance system) has been completed.
- All of subsection (2) is already allowed under section 18(2) and can be repealed. Section 18(2) specifically empowers the Board of Directors to create policy pertaining to the disclosure in s. 18.1 and therefore subsections (2)[who may ask for the information] and (4) [the reason for asking] could be repealed.
- The policy referred to above could include (1) what information can be disclosed (a clearance certificate, a statement that an account is not in good standing and a pay-out number), (2) to whom it may be disclosed (an employer seeking information on the employer's own account, a third party with a direct interest in the business of an

[35] Adding the words "or any other amount owed by an employer to the commission under this *Act*" makes s. 122(3) redundant and captures all other amounts that may be owed to the Commission, such as penalties.

[36] Unchanged from current wording – a very good description of the property covered -- except that "proceeds of property" added to account for when property is converted to cash.

[37] The exceptions are different for the current s. 118.2 and s. 122. We are assuming for public policy reasons that the government wishes to retain all of the exceptions in a consolidated section.

employer, and a lawyer acting for either an employer or a third party with a direct interest in the business of an employer, (3) a definition of what constitutes a "direct interest in the business of an employer"(e.g. where the employer is a contractor of the third party and the third party wants to release funds to the employer: s. 120; where the third party is buying assets owned by the employer: s. 113).

- Since the commission wishes to retain the ability to charge a fee for the information contemplated in this section, the power to prescribe and collect a fee should be retained.
- Even though the one-day response required under subsection (5) has been built into the system, the 21 day period in subsection (6) begins to run after the one day, so reference to the one-day response likely has to be retained.
- Since the "window" for suspension of the lien only applies in cases where a lawyer makes an information request, there would need to be some clarity about who is a lawyer or "legal counsel". In this day of lawyer mobility and cross-border transactions, it would seem that "legal counsel" should include all lawyers licensed to practice in Canada. Uniform professional standards are starting to come in place for Canadian lawyers. We do not know about the standards for foreign lawyers. Therefore, foreign lawyers will have to retain a Canadian lawyer as agent to make the request in order to get the benefit of the "window" for their clients.
- The definition of "security interest" in s. 18.1(9)(c) should have the same meaning as in the *Personal Property Security Act* for commercial certainty reasons.
- Some form of s. 18.2 would likely have to be retained to indicate that the legal counsel request is deemed fulfilled when the information is transmitted electronically, in order to define when the "window" is closed.

Reviewers' additional notes:

- Does it seem odd if the benefit of the "window" is still given when a certificate has been filed under s. 118(1)? Any lawyer engaged in a commercial transaction as part of due diligence would do a courthouse search on the vendor and would discover the certificate. The certificate is good evidence of the account status. It would be difficult for anyone to say that the assets should vest free and clear because of an unknown account status when there is filed evidence of that status at the courthouse.
- Further, if the Commission were permitted to file a financing statement at Personal Property Registry in respect of a certificate under s. 118(1) for assessment, there would be another public place for lawyers to look for the Commission's lien (or filed evidence of account status.) This currently done in AB [s. 127(1)(b)], NS [s. 147(7)] and NT/NU [s. 144(1)].
- The above two comments are made in the spirit of reducing the number of circumstances whereby a defaulting employer, through a lawyer, can use the "window" to effectively shed the lien.

Source AB, s. 129; BC, s. 52(1); MB, s. 104; NB, s. 72; NT/NU, s. 143 & 144(1); PEI, s. 78; YT, s. 87

ISSUES THAT MAY WARRANT FURTHER STUDY AND CONSIDERATION

PART IX REGULATIONS

Section 124(2)

Topic Power of Commission to enact regulations with respect to fishers.

Comment Pursuant to s. 123 of the Act, the Commission requires approval of the Lieutenant Governor in Council to make regulations with respect to the general administration of the Act, penalties and prescribing obligations of employers and workers with respect to the obligation to re-employ provisions. However, it appears that pursuant to s. 124, the Commission can make regulations respecting the fishing industry without approval of the Lieutenant Governor in Council. Further, while s. 40 empowers the Lieutenant Governor in Council to make regulations in relation to coverage for particular workers, including fishers, s. 40(2) empowers the Commission to make regulations as it considers fair and appropriate having regard to the intent that fishers shall, where possible, receive the benefit of and be subject to Act.

The Reviewers are not aware of a reason for the distinction between other types of regulations and regulations respecting the fishing industry. The regulation-making authority with respect to the fishing industry had its genesis in a 1980 amendment to the Act. The 1980 amendment established s. 5.1(1)(a) through (h), detailing the regulation-making power of the Lieutenant Governor in Council. Section 5.1(2) provided the Commission (then the Board), with the authority to make regulations for the fishery where the Act or regulations were inappropriate or unworkable with respect to the fishery. Section 5.1(2) has remained unchanged and is now s. 40(2) of the Act. The Commission's detailed authority set out in s. 124 of the Act seems to have come about during the 1983 consolidation. The 1983 consolidation gave the Lieutenant Governor in Council fishery regulation-making authority in s. 28(1). The detailed authority set out in s. 5.1(1)(a) through (h) was dropped from s. 28(1) and the Lieutenant Governor in Council was given a more general authority to make regulations in relation to fishermen and commercial buyers. However, the detailed powers in s. 5.1(1)(d), (e) and (f) were transferred, word for word, to the Commission in s. 112(a),(b) and (c) in the 1983 consolidation. Subsections 112(a), (b) and (c) of the 1983

consolidation are identical to subsections 124(a), (b) and (c) of the current Act.

Whether this substantive change was intended or not, the Act appears to give the Commission a fair amount of autonomy to enact regulations with respect to fishing. The Reviewers are advised that the last time the Commission exercised authority to enact a regulation respecting fishing was in 1992. Given that this is a seldom used authority, a more thorough review of the Commission's regulation-making authority under the Act may be warranted. In British Columbia, the Board can make general regulations without any government approval, but the Lieutenant Governor in Council is empowered to make regulations respecting the fishing industry.

Source

BC, s. 4; An Act to amend the *Workers Compensation Act* SNL 1980, c. 6, s. 1; An Act to Consolidate the Law Relating to Compensation to Workers for Injuries Suffered in the Course of Their Employment SNL 1983 c. 48 s. 112.

PART XI	REVIEW
Section	126(2)
Topic	Frequency of review
Description	The Reviewers recommend that Section 126(2) be amended to lengthen the maximum timeframe between statutory reviews.
Rationale	The statutory review contemplated by Section 126 is a large undertaking. The Committee has the power of a Commission of Inquiry under the *Public Inquiries Act*, 2006. The Reviewers are advised that the statutory review process from development of terms of reference through to consultation and writing of the report and recommendations can take more than a year. Eight out of 12 provinces and territories have some sort of statutory review process. In Manitoba, the review committee must be appointed at least once every 10 years, in Saskatchewan, the review committee must be appointed at least once every four years and in Prince Edward Island, the review committee must be appointed at least once every five years. In other provinces and territories, no specified time period is set out and it is in the discretion of the Minister or Lieutenant Governor in Council to appoint such committees, as necessary. The Reviewers consider that it is preferable to have a time frame set out in the legislation to ensure that the review takes place at least within a maximum number of prescribed years. However, to save costs, provide the Review Committee enough time to do meaningful work, give the Commission and government sufficient time to consider and implement recommendations of the Committee and allow time for assessment of any post-implementation effects, the Reviewers recommend that the timeframe between statutory reviews be lengthened.
Source	MB s. 115(1); SK s. 162(1); PE s. 85.1; NT/NU s. 171; BC s. 109; NS s. 161; ON s. 159(2)(g)

PART	XI
Section	New
Topic	Composition of the Review Committee
Description	The Reviewers recommend that the legislation specify that some of the committee members must be representative of workers and employers.
Rationale	This amendment would codify the current practice of appointing committee members representative of the stakeholders in the system. It also brings the legislation in line with other provinces that have mandatory statutory review committees. In Manitoba, the review committee must be composed of one or more persons, representative of the public interest, workers and employers. In Saskatchewan, the membership of the committee must include equal representation by employers and organized employees. In the Northwest Territories and Nunavut, the review panel must be composed of a worker representative, an employer representative, and a public interest representative to serve as the Chair.
Source	MB s. 115(2); SK s. 162(3); NT/NU s. 171

HOUSEKEEPING

Section Number	Description
PART I	**THE WORKPLACE HEALTH, SAFETY AND COMPENSATION COMMISSION**
2(j)(v)	**Definition of "employer"– Provincial Crown as "employer"** • Delete the word "permanent"; • Consider using language similar to the definition of "public body" in the *Financial Administration Act* ("a board, corporation, commission or similar body established by, or under an Act …"; • Style the provincial Crown as "the Crown in Right of Newfoundland and Labrador"; • Delete the reference to having to submit to the operation of the Act as unnecessary red-tape.
2(s)	**Definition of "member of the family"** Eliminating "illegitimacy" from the definition – this is a legal concept that has been abolished in NL.
2(v)	**Deduction of income tax from "net earnings"** • Some clarity required as "probable income tax deductions for those earnings" can be interpreted as either the amount that would have been deducted or withheld as income tax from those earnings (the correct interpretation) or the amount equal to the deductions from taxable income that the worker would have been entitled to make from those earnings; • Further guidance is also required to as how the probable income tax deducted or withheld is calculated under today's *Income Tax Act* rules, in view of the switch to tax credits versus income tax deductions. • See AB *Workers' Compensation Regulation*, AR 325/2002, as am AR 164/2010, s. 1(2) & (3) for possible model language. Note that BC, MB, SK and PEI, by legislation or policy, all use tax credits to calculate probable income tax. NS and ON rely on the TD1 claim code supplied by the employer.
2.01	**Applicability of *Human Rights Act, 2010*** The reference to the *Human Rights Code* should be updated to the

Section Number	Description
	Human Rights Act, 2010.
6	**Chief Executive Officer** Delete reference to "who shall devote the whole of his or her time to the performance of duties under this *Act*". This requirement seems unnecessarily restrictive and the Board of Directors, in any event, will make decisions about the CEO's performance.
PART I.1	**WORKPLACE HEALTH AND SAFETY**
20.3	**The words "and shall provide" be substituted for the words "including the provision of"** This is a stylistic amendment to the subsection sentence which would provide grammatical accuracy and improve clarity.
PART II	**APPEALS**
Title	**The title of this Part be amended to: "Reviews and Stated Questions"** The title "Appeals" appears to be a vestige of the pre-2003 appeal system when the external appeal body was called the Appeal Tribunal. Although the *Interpretation Act* specifies that headings do not form part of the Act, this heading is confusing and misleading. The title should be amended to reference the current Review Division as well as the power of the Commission and the Lieutenant Governor in Council to refer questions to the Trial Division as a stated case.
22(1) & (2) and 23	**Remove reference to "panel" in section 22(1)&(2) and section 23 of the Act** • The word "panel" is unnecessary and confusing. Sections 23 and 28 make it clear that reviews are always decided by a panel of one review commissioner; therefore, use of the word "panel" is at best superfluous. • Note that one of the recommendations in this Review is that the Review Division have the ability to appoint a panel of more than one Review Commissioner to hear a review. If the legislature chooses to adopt this recommendation, then the word "panel" should be used to refer to a panel appointed to hear a review. (The Act, ss. 23 and 28)

Section Number	Description
26(1)(a)	**The word "benefits" be removed from section 26(1)(a)** "Compensation" is defined in section 2 of the Act. The word "benefits" is, therefore, redundant. It is also potentially confusing as it raises the question whether there are other types of "compensation" decisions which are not "compensation benefits" decisions and, therefore, not reviewable. [NL, s. 2; BC, s. 96.2(1)(a)]
26(1)(a.1)	**Add "medical" or "health care" before the word rehabilitation** While the term rehabilitation may be read to include both physical and vocational rehabilitation, the word implies such services and benefits a worker receives after medical plateau. This interpretation is supported by the organization of the Act itself, which distinguishes between medical aid in Part V and return to work and rehabilitation in Part VI. Inserting the word "medical" or "health care" clarifies that the Review Division can consider decisions regarding medical aid. (The Act, Part V and VI)
26(1)(d)	**Delete "an employer's merit or demerit rating"** Reviews of merit and demerit ratings are covered by section 26(1)(b) "an employer's assessment"
28(1.2)	**Amend to provide that the application shall identify the decision being reviewed, how the decision is contrary to the Act, Regulations *or* policy and state the outcome requested** In order to make this section clear and remove any ambiguity, a disjunctive "or" is preferable to a conjunctive "and" because "or" makes it clear that the decision only needs to be contrary to any one of the Act, Regulations or Commission policy and not all three. It is also desirable to know what remedy the applicant is seeking because the Review Division has a choice of remedies pursuant to Section 28(4.2).[1] Such a requirement is common in workers compensation appeal provisions and the Reviewers note that the Review Division's brochure entitled "The Review Process" sets out that an applicant should indentify in the request for review form the type of benefits being sought. [1] Section 28(4.2) should also be amended such that the word "and" is replaced by "or". [BC, s. 242(2)(b) and (e); ON, s. 125(2); AB, s. 134(3)]

Section Number	Description
28.1(2)	**Amend the language for internal consistency and clarity** The Reviewers recommend that the time frame set out in this subsection begin to run from 30 days of the date of the decision of the Review Commissioner that is the subject of the reconsideration request. This language is consistent with the recommendations under s. 27 for the triggering of time limitations. It would clarify the time frame as the words "the reconsideration being given" suggests that the reconsideration will take place regardless of whether the 30 day time limitation is met. [The Act, ss. 27 and 28.1(2)]
36	**Heading Amendment** Amend the heading of this section to "Rules for Stated Cases".
2, 7(2), 8 and 13 (Workplace Health Safety and Compensation Review Division Regulation, 1117/96)	**Change "Commissioner" to "Review Commissioner" throughout the Regulation** The term "Commissioner" is used frequently in Regulation 1117/96. "Commissioner" is not defined in the Regulation. "Review Commissioner" is defined and "Commission" is defined. For greater clarity, and consistency with the defined terms, "Commissioner" should be amended to "Review Commissioner". [Regulation 1117/96, ss. 2, 7(2), 8, and 13]
PART IV	**COMPENSATION AND RIGHT OF ACTION**
45(2)	**Time limit for election by dependents** The timeframe allotted to dependents for electing between benefits and bringing an action in this section (3 months) should be changed to 6 months in order to be consistent with the timeframe for claiming compensation under s. 53(1)(b)(iii).
52	**No waiver of benefits** This section is currently worded as focusing on the worker's behaviour. It is, rather, a provision that protects the worker. Make the language more neutral and instead of saying "A worker shall not agree …" , say "No agreement between an employer and a worker that waives or purports to waive …" See AB, s. 140.
56 & 106	Section 56 uses the expression "**experience record**" while section 106 uses "**experience account**" to mean the same thing. The terminology

Section Number	Description
	should be consistent to avoid confusion.
68	**Death of child** This section allows the Commission to disallow a compensation claim where a child is unlawfully employed and killed at work. It appears to be aimed at the regulation of child labour. It seems unnecessarily punitive and is perhaps an historical artefact. Modern labour laws already deal with illegal underage employment.
70	**Continuation of household** Substitute a more modern term for "foster parent" – "guardian"?
82(3)	**Payment of compensation to confined person** Update the "mental hospital" terminology.
PART V	**MEDICAL AID**
84(1)	**Remove the words "or who would have been entitled had he or she been disabled longer than the day of the injury" from the provision** Section 43 provides that compensation is payable if an injury arises out of and in the course of the worker's employment and s. 47 makes it clear that only medical aid is paid for by the Commission where an injury disables a worker for only the day on which the injury occurred. Therefore, the words "or who would have been entitled had he or she been disabled longer than the day of the injury" are unnecessary in s. 84(1) and make the provision cumbersome and difficult to read. (The Act, ss. 43 and 47)
84(3)(g)	**Amend the subsection to clarify that it covers hearing and vision aids that may be necessary as a result of an incident causing injury or where the Commission is satisfied that replacement or repair of hearing or vision aids is necessary as a result of a work incident** The section, as written, is not clear. This amendment codifies the Commission's practice of repairing or replacing hearing and visual aids where the repair or replacement is necessary as a result of a workplace incident. [WHSCC Procedure Number 58.00 – Health Care Devices & Supplies (item numbers 58.7.4 and 58.7.5)]

Section Number	Description
86(2)	**Questions concerning payment for health care.** Remove this section because it is redundant as s. 85(1) provides that all questions as to the necessity, character and sufficiency of medical aid shall be determined by the Commission. [The Act, s. 85(1)]
87(1)	**Remove "within the meaning of this Act" from the subsection** • This provision is concerned with an employer's duty to obtain medical aid for a worker seriously injured or to transport the worker to a place where the worker can receive medical aid. The provision refers to a worker "so seriously injured within the meaning of this Act." • This is unnecessary language that makes the provision confusing and difficult to read. "Seriously injured" is not a defined term in the Act. "Injury" is a defined term in s. 2. Use of that word is presumed to be as it's defined within the Act. The *Interpretation Act*, RSNL 1990 CI-19, s. 22(i) provides that where a word is defined, other parts of speech tenses of the same word have corresponding meanings. [The Act, s. 2; *Interpretation Act,* s. 22(i)]
PART VI	**RETURN TO WORK AND REHABILITATION**
89.3(3)	**Amend the subsection to provide that any person other than the worker, who receives the information in subsection (1) shall not disclose that information, except as required for the purposes of returning the worker to work** The current wording of the subsection does not prevent a person who is assisting the employer from disclosing the information in subsection (1). [The Act, s. 89.3(3)]

Section Number	Description
89.1(7)	**Change the wording to make "the worker" the object of the verb "accommodate"** • The subsection as worded contains a grammatical error, which alters the meaning of the sentence. It is the worker that is the object of the accommodation. The provision should read something like: "modify the work or work place to accommodate the worker". • The return to work and duty to accommodate provisions in the Newfoundland Act are almost identical to those in the Ontario Act. It is noted that Section 41(6) of the Ontario Act contains an identical error. [ON, s. 41(6)]
PART VII	**INDUSTRIAL DISEASES**
92(6)	**Change the reference to "section 3 of the *Public Inquiries Act"* to "sections 9 through 11 of the *Public Inquiries Act* 2006"** Section 92(6) provides that a Committee has the powers conferred on a Commissioner by Section 3 of the *Public Inquiries Act*. The *Public Inquiries Act* was repealed and replaced by the *Public Inquiries Act* 2006. Section 3 of the *Public Inquiries Act* 2006 outlines the power of the Lieutenant Governor in Council to appoint a Commission of inquiry. The provisions of the *Public Inquiries Act* 2006 which confer powers on a Commission appointed under Section 3 are Sections 9 through 11. Reference to these sections will elucidate the powers of the Committee (*Public Inquiries Act* 2006, ss. 3 and 9 through 11)
PART VIII	**INJURY FUND AND ASSESSMENTS**
93(2)	**Payment from Injury Fund – clarification** Replace "… and other expenses under this *Act* …" with "... and all expenses incurred in the administration of this *Act …*" or otherwise be more explicit about what be paid out of the Injury Fund [MB, s. 81(1); NB, s. 52(c); NS, 115(1)(c); NT/Nu, s. 67(4)(b) & (c); ON, 96(1)&(2); PEI, s. 35; QC, s. 281].
109	**Agreements with other provinces** Add a reference to "territories" in addition to "provinces". NL is party to an agreement with the three territories of Canada (the Interjurisdictional Agreement).

Section Number	Description
116	**Reserves** • Repeal section; • … "any reserves that the commission deems necessary" can be added to s. 97 as one of the purposes for which assessment is collected.
PART XI	**REVIEW**
126(7)	**Change the reference in Section 126(7) from the *Public Inquiries Act* to the *Public Inquiries Act,* 2006 and refer to the appropriate sections of the current Act** The *Public Inquiries Act* was repealed and replaced with the *Public Inquiries Act*, 2006. The reference to subsection 3(1) in Section 126(7) should be changed to Sections 9 through 11, references to subsection 3(2) and (3) should be changed to section 8(1) and (2), and the reference to Section 2 should be changed to Section 3. (*Public Inquiries Act,* 2006)

PARKING LOT
Sections 1, 2 & 2.01 and Parts I, III, IV & VIII

Section Number	Description
2(m)	**Industrial diseases** that are not prescribed must be "peculiar to or characteristic of a particular industrial process, trade or occupation" This requirement seems to exclude **ordinary diseases of life** that are contracted in the workplace. You may wish to consider an amendment that includes these diseases in appropriate circumstances. Examples: viruses are present everywhere but can be picked up by health care workers in hospitals and nursing homes; HIV can be transmitted from a blood splash.
new	For enhanced transparency and accountability purposes, consider a **legislated annual general meeting** [AB, s. 7.1; SK, 21(4); YT, s. 104]
Financial Administration Act [ss. 6(c), 7(1)(f) & 7(2)(b)-(f])	**Comment regarding Independence and Labour Relations** As a function of the NL *Financial Administration*, the Treasury Board carries out a number of labour relations functions on behalf of or as agent for the Commission, including negotiation of collective bargaining agreements. The Reviewers accept that this arrangement is to promote equivalency and parity in public sector salary and benefits. However, the Reviewers note that "public money" as defined in the *FAA* is not at stake in the case of the Commission's labour relations and the Commission's finances are not part of the public accounts. Furthermore, while a "public body" because of its statutory origin, the Commission is neither a government department nor Crown Corporation. It is also our understanding that the Commission's employees are not part of the public service of Newfoundland and Labrador and belong to a separate bargaining unit. The Review Committee may wish to consider from the perspective of enhancing independence and the appearance of independence whether a discussion should be held with government about having the Treasury Board continue to the Commission's labour relations. While the matter of wage parity within the public sector may be a relevant consideration, there is no reason why it could not be adopted as a guideline by the Commission in its labour negotiations. . Further, by separating the Commission from the province for labour relations, the Commission may take a different approach in its effort to become an employer of choice and attract and retain suitable staff. The change could be effected by having the LGIC rescind the OC that includes the Commission as a public body for the sections noted in the margin.

New	Consider a section that authorizes the Commission to **prescribe mandatory forms** for submitting information to the Commission by workers, employers and health care providers.
New	Consider a section that permits the Commission to issue **evidentiary certificates** as a means of getting decisions of the Commission or other information of the Commission before the Court or other tribunal. This would be particularly useful for certifying the status of parties under the *Act* in cases under s. 46 where the 'bar to suit' is in question. [AB, s. 149 – WCB may certify any information; BC, s. 257 – tribunal may certify information relating to an action; ON, s. 182 – Board may certify anything; MB, s. 109.6(9) – Board may certify information for prosecution of other proceedings under the *Act.*]
74.1(1)	**Cost of Living Adjustment (COLA)** - the Reviewers ask that the Review Committee consider the following: • whether the power to set COLA should be exercised by the Board of Directors through policy as part of its exclusive jurisdiction to set compensation policy, rather than set by statute; • whether the Canada or the NL CPI is the appropriate index for NL COLA purposes (see website at http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ09a-eng.htm); • whether whichever CPI index is used needs to be adjusted for bias; • whether the COLA adjustment should be on annual earnings or on the compensation itself.
81.1	Should the outright **prohibition against "top-up"** of compensation by employers be maintained?
New	Does the Commission want an **explicit power to issue rebates** to employers once it exceeds the optimal funding level?)? [AB, s. 113; MB, s. 82(2)].
94, 95 *et seq.*	Does the Commission wish to update the **statutory terminology for classification** (classes, subclasses and departments) to reflect its current practice (industries and industry groups)?
New	The Reviewers suggest that the Review Committee consider discussing with government whether the **Workers' Advisor Program** should be re-envisioned in order to reflect what appears to be best practice in the rest of Canada. The predominant model in Canada (nine jurisdictions: BC, MB, NB, NT/NU, NS, ON, PEI, SK and YK) is for the workers' compensation agency to fund the program through a levy and for the provincial or territorial government to offer it as a government service (in some cases through the same Ministry under which the workers' compensation agency falls, in other cases a totally different Ministry, presumably for independence purposes). This ensures both that the cost is collected as a program cost of the system and that the program is independent of the workers' compensation agency. In all 9 jurisdictions, the advisors in addition to offering advice and assistance provide **actual representation** for injured workers

	before the external appeal tribunal. The current NL model is based on a funding agreement between the Commission and the Newfoundland and Labrador Federation of Labour, although the services are extended to workers regardless of whether there is union affiliation. By agreement, the services are restricted to advice and assistance and exclude actual representation before the Review Division. The program is accountable to the Commission through annual reporting and is directly financially dependent on the Commission for its continued existence. As it presently stands, the NL model raises perceived issues of independence, both from the Commission and organized labour. It is recognized that converting to the predominant model, particularly in offering representation services, would increase system costs considerably and create another government office. The rationale for doing so is that presents a more effective check and balance for system fairness. Workers are historically in a lesser position than employers and many lack the coping skills to represent themselves effectively or the financial means to hire legal counsel or other representation. The AB program is based on a more general legislative provision that permits the WCB to establish programs that benefit workers or employers. The Board of Directors has enacted a policy to imbue the program with functional independence while the advisors remain WCB employees. The Reviewers have refrained on commenting on the **Employer Advisor Program**. Only five jurisdictions reference an employer advisor program in the legislation. The remaining jurisdictions do not have such programs, except for NL which has established one by agreement. We do not see the same imbalance as with workers who are in an historically disadvantaged position. [See AB, 137 and Policy 01-07; BC, s. 94; MB, s. 108; NB, s. 83.1[38]; NS, ss. 262 & 269; ON, s. 176[39]; PEI, s. 85; SK, s. 161; YT, s. 109.]

[38] Includes a power for the Chief Workers' Advisor to hire legal counsel.
[39] Services provided primarily to non-unionized workers.

SUMMARY OF RECOMMENDATIONS

Section No.	Description	Page No.
PART I	**THE WORKPLACE HEALTH, SAFETY AND COMPENSATION COMMISSION**	
NEW (should follow s. 3 in existing Act)	The Reviewers recommend the addition of a section that clarifies the Commission has all the legal attributes that are necessary to carry out its statutory mandate and objectives.	1
4(1)	The amendment will clearly establish that the overall role of the board of directors is to provide governance and oversight of the Commission, not to operationally administer the Act.	4
4(1)(3)	The Reviewers recommend deleting this position or modifying it statutorily to conform with good governance and institutional independence	17
5	This amendment spells out with greater clarity the governance powers of the board of directors as stewards of the workers' compensation system in the province, particularly in respect of future planning.	13
NEW (should follow s. 5 in existing Act)	This addition specifies the standard of care to be exercised by members of the board of directors in discharging their directorial duties.	12
6, 9, 10(c), 11(1) & (2), 53(2), 96(3) & (4), 116(1)(d)	The reviewers recommend the removal of government approvals in the instances cited above.	19
7(1) & (2)	The Reviewers recommend that the specific human resources function be removed from the board of directors and the delegation power be deleted. It is also proposed that the Commission be given a power to hire and employ the employees necessary to carry out the administration of the Act and that the CEO be specifically assigned all functions related to human resources for the Commission.	6
10(1)(a) & (3)	This is an amendment that removes constraints on the Commission's investment power, allowing it to structure its investments in a way that best achieves the objectives of a workers' compensation insurer	7
12(1)	The Reviewers recommend that subsection (1) be amended to more specifically set out the required content of the annual report.	23
15(1), 16 &	This amendment clarifies that employees and	9

Section No.	Description	Page No.
17	agents of the Commission, as opposed to members of the board of directors, have the operational role of conducting inquiries and investigations under the Act.	
18 (replace)	This section consolidates in one place a number of provisions relating to confidentiality. It specifically spells out the instances in which the Commission can disclose worker or employer information, particularly in the case of internal and external review or the health management of the worker. It also ensures that the information disclosed outside of the Commission is used only for purposes consistent with the *Workplace Health, Safety and Compensation Act*, such as in a review, or otherwise with consent.	25
18(2)	This amendment changes the responsible body for approving requests for claimant file information from the board of directors to the Commission itself.	11
19(1)	This amendment is recommended to clarify that the exclusive jurisdiction power encompasses all matters and things arising under the *Act*.	30
19	Consideration should be given to whether it is desirable to include a provision which sets out that the Commission do not have jurisdiction over constitutional questions, *Canadian Charter of Rights and Freedoms* issues and/or questions arising under the *Human Rights Act,* 2006.	59
PART I.1	**WORKPLACE HEALTH AND SAFETY**	
20.2(e) & (f)	The Reviewers recommend that subsection 20.2(e) be amended to specify that the Commission shall set requirements for training of occupational health and safety committees established under s. 37 of the Occupational Health and Safety Act, RSNL 1990 c.0-3 (the "OHSA") or co-chairpersons of such safety committees, worker health and safety representatives designated under s. 41 of the OHSA, or workplace health and safety designates under s. 42.1 of the OHSA, as well as training programs established under the *Occupational Health and Safety Regulation 2009* (the OHSR") and persons who provide training of such programs.	31
20.2(h), 20.3, 20.4, 2 & 4(3)	The Reviewers recommend that the word "Department" be added to section 2 of the Act and defined as "the governmental department appointed under the *Executive Council Act* to administer the	33

Section No.	Description	Page No.
	Act".	
NEW (should follow s. 20.2(h) in the existing Act)	The Reviewers recommend that an additional subsection be added specifying that the Commission shall promote and provide funding for industry specific safety councils.	34
NEW (20.2 – add as new subsection)	Amend section 20.2 to add a new subsection setting out the authority of the Commission to conduct audits and offer services to promote safety in the workplace.	35
NEW subsection (should follow s. 20.4 in the existing Act)	The Reviewers recommend that an additional subsection be added in a form similar to s. 20.5. The new subsection would correspond to the new sectoral council subsection in s. 20.2 (see recommendation at page 33) and set out the maximum percentage of its total income that the Commission may allocate to fund industry specific safety councils or sectoral councils. The new subsection would also expressly provide that the Commission may charge the classes or subclasses of employers which in the opinion of the Commission correspond with the industry covered by a given sectoral council, a surcharge to cover the cost of funding the sectoral council where the Commission is satisfied that the work of the sectoral council provides a benefit to that class or subclass.	36
20.2(g)	The Reviewers recommend that the words "a high standard of" be added before the phrase "workplace health and safety".	38
PART II	**APPEALS**	
NEW subsection (should follow s. 20.7 in the existing Act)	The Reviewers recommend that the Act be amended to explicitly set out the two existing levels of review in the system; namely, the division of internal review specialists of the Commission (the "internal Review Division") and the external Review Division.	40

Section No.	Description	Page No.
21, 22(1), 24(1) & (2), 24.1, 25, 27(1), 28(1.4), 30, 2(v.2), & 11(1) & (2)	The Reviewers recommend that the name "Review Division" be changed to indicate that it is a body external to and independent of the Commission and a stand-alone agency and that sections 2(v-2), 11(1) and (2), 21, 22(1), 24(1) and (2), 24.1, 25, 27(1), 28(1.4), 30 be amended accordingly.	42
22	The Reviewers recommend that section 22 of the Act be amended to provided that review commissioners may continue to exercise powers of a review commissioner after resigning or expiration of their appointment in any proceeding over which they had jurisdiction immediately before the end of their term of appointment.	45
23	The Reviewers recommend that section 23 be amended to allow the Chair to refer a review to one review commissioner or to a three-member panel of review commissioners where the chief review commissioner determines the matter requires it.	43
23(4)	The Reviewers recommend that section 23(4) be amended to give the Lieutenant Governor in Council the power to re-appoint the Chair and review commissioners for one or more successive terms.	44
26	That section 26 be amended to codify the current practice of the Review Division.	46
26(1)	Consideration should be given to whether it is desirable to include a provision which sets out that the Commission and the Review Division do not have jurisdiction over constitutional questions, *Canadian Charter of Rights and Freedoms* issues and/or questions arising under the *Human Rights Act,* 2006.	59
26(1)(c)	Add the word "withdrawal" after "assignment" and remove the words "subclass or group" and substitute "industry"	48
26.1	Codify the common law in this provision with the addition of words to the effect that a Review Commissioner shall not apply a policy established by the Commission under subsection 5(1) that is inconsistent with the Act or Regulations.	49
27(2)	Amend the Act to provide authority to examine and cross-examine witnesses generally, not just those called to bring forward evidence in response and reply and amend the Act to provide that Section 8 of the Public Inquiries Act 2006 shall apply to those	50

Section No.	Description	Page No.
	witnesses.	
28(1)	Clarify the date that time begins to run and ensure this corresponds with the triggering events set out in the Regulation.	51
28(4)	Provide the Review Division the discretion to conduct hearings orally, electronically or in writing.	52
28(6)	Provide the Review Division the discretion to decide who is an interested party and require that the party have a direct interest in the matter being decided.	53
28(8)	Provide that the decision shall be made within 60 days after the hearing of the appeal ends.	54
NEW (should be added as a subsection to section 28)	Add a provision giving the Review Division explicit authority to disclose information to participants necessary to participate in a hearing. The new provision should also provide that any person receiving a worker's or employer's information under the new section may only use that information for the purpose of that review. In addition, the new provision should specify that Item #8 of the Model Structure of Confidentiality Provision at pages 25 and 26 of this Report applies to information disclosed under the new section.	55
NEW (to come after s. 28)	Give the Review Division the authority to dismiss a review without a hearing in certain prescribed circumstances.	56
35	Change the words "Commission's jurisdiction or a question of law" to "Commission's authority to decide a matter or a question of law outside the Commission's jurisdiction".	57
37	Amend the title to "Notification of Stated Case" and amend s. 37 to provide that the trial division has the power to direct that a person who the trial division determines has a direct interest be notified of the hearing.	58
PART III	**APPLICATION OF ACT**	
41	The Reviewers recommend rewriting this section to provide for (1) a definition of "independent operator"; (2) the coverage of all independent operators as either deemed workers or workers with optional coverage; (3) setting the amount of coverage.	61
PART IV	**COMPENSATION AND RIGHT OF ACTION**	
45(8) to (13)	This amendment strengthens the Commission's rights by converting "subrogation" to "vesting" where the Commission seeks third party recovery.	63
48 to 51	An amendment that consolidates of the residency	65

Section No.	Description	Page No.
	sections	
53(1)	An amendment makes the worker's reporting obligations less rigorous	66
56	An amendment that (1) clarifies that an employer has a duty to report an injury even if it is disputed by the employer, and (2) deletes subsection 3 as redundant.	68
57 & 58 (replace)	This is a new section that (a) provides a comprehensive definition of "health care provider", and (b) consolidates into one section the provisions of three existing sections containing the duties of health care providers.	70
58.1 (replace)	This section consolidates in one place a number of provisions relating to confidentiality. It specifically spells out the instances in which the Commission can disclose worker or employer information, particularly in the case of internal and external review or the health management of the worker. It also ensures that the information disclosed outside of the Commission is used only for purposes consistent with the *Workplace Health, Safety and Compensation Act*, such as in a review, or otherwise with consent.	25
75	The Reviewers recommend adding subsections that (1) provide a definition of "registered employer sponsored pension plan" (2) provide certainty by specifying that the claimant must be a member of such a plan at age 65, and (3) specify the pension replacement benefit payable under subsection (1) is subject to the maximum LOE payable as prescribed under s. 80(8).	73
83.1	The Reviewers recommend amending this section to permit the Commission to collect the overpayment by way of filing a certificate as opposed to commencing an action	75
PART V	**MEDICAL AID**	
Title, s.2(1)(r), 84 – 87	Change "medical aid" to "health care" in the title of Part V and throughout the Act	77
86(1)	The Reviewers recommend that this subsection be amalgamated into s. 87(1).	78
PART VI	**RETURN TO WORK AND REHABILITATION**	
89 (replace)	This is a new section that (a) provides a comprehensive definition of "health care provider", and (b) consolidates into one section the provisions of three existing sections containing the duties of health care providers.	70

Section No.	Description	Page No.
89.1(13)(b)	Amend s. 89.1(13)(b) to prevent double recovery.	79
89.4(2)	Amend the section to provide that workers and employers engaged primarily in construction shall be required to comply with the duty to cooperate and re-employment requirements that may be prescribed in the Policy of the Commission or Regulations made under Section 123.	80
PART VII	**INDUSTRIAL DISEASES**	
Title, 90(1)(a), 90.1 – Heading, 2(m), 2(o)(iv), 53(b)(ii), 92(2), 124(b)	Change “industrial disease” to “occupational disease”	81
90(1)(b)	The Reviewers recommend that the requirement in Section 90(1)(b) that the disease is due to the nature of the employment in which the worker *is* engaged be amended to provide that a worker meets the condition if the disease is due to the nature of *any* employment in which the worker *was* employed.	82
90(3) & 90(3.1)	Amend s. 90(3.1) to remove the requirement that the worker be employed in a process involving asbestos “at or immediately before the date of disablement” to expressly incorporate a long latency period, which is known to exist between the exposure and onset of the disease.	83
90(5) & 90(6)	Consideration should be given to deleting these sections.	84
92(1), 92(2)(a) & (b)	Change “medical referee” in Sections 92(1) and 92(2)(a) and (b) to “medical practitioner” and define “medical practitioner”.	85
PART VIII	**INJURY FUND AND ASSESSMENTS**	
97	The Reviewers recommend an amended section that more closely aligns with the Commission’s objectives in collecting the annual assessment.	88
NEW (follows s. 101)	The Reviewers recommend insertion of a provision allowing the Commission to apply to the court for an order compelling an employer to produce the records required under section 101.	90
111	An amendment is recommended that allows the Commission to require security not just from temporary employers but also from any employer where appropriate.	91

Section No.	Description	Page No.
113	This is an addition to the section that would extinguish the *in personam* liability of the successor when the employer selling the business in a *bona fide* transaction delivers a clearance certificate before the transaction closes.	93
118, 118.2 & 122	The Reviewers recommend amendments to consolidate and strengthen the statutory lien and integrate the lien suspension "window" in s. 18.1 along with other amendments to move, condense and streamline s. 18.1.	94
PART XI	**REVIEW**	
126(2)	The Reviewers recommend that Section 126(2) be amended to lengthen the maximum timeframe between statutory reviews.	100
NEW (under Part XI)	The Reviewers recommend that the legislation specify that some of the committee members must be representative of workers and employers.	101

The Reviewers

Laurel Courtenay is a graduate of the University of British Columbia Law School. She has been acting as in house counsel for the Workers' Compensation Board of British Columbia (WorksafeBC) since 1995. Laurel appears as counsel for the Board at all levels of court, including the British Columbia Supreme Court, British Columbia Court of Appeal and Supreme Court of Canada. Laurel has lectured at various Continuing Legal Education courses on workers' compensation matters. Since 1996, Laurel has been writing the chapters on workers' compensation law in two yearly Continuing Legal Education publications, the Annual Review of Law and Practice and the Motor Vehicle Accident Claims Practice Manual.

Doug Mah graduated from the University of Western Ontario Law School in 1981, following which he articled and then worked as a litigation associate in a large Alberta law firm for 7 years. After 10 years as an in-house lawyer at the WCB-Alberta, he was appointed its Secretary & General Counsel in 1998. He is the author of several publications, including *Workers' Compensation Practice in Alberta 2nd Edition* (Carswell 2005), is a frequent continuing education lecturer in administrative law and workers' compensation and was a sessional instructor in workers' compensation law at the University of Alberta Faculty of Law. He was appointed a Queen's Counsel in 2004 and was President of the Law Society of Alberta in 2011.

APPENDIX B

Statutory Review Process Methodology

Workplace Health, Safety and Compensation

2013 Statutory Review Committee

APPENDIX B: STATUTORY REVIEW PROCESS METHODOLOGY

JANUARY 2012 – LAUNCH

The Government of Newfoundland and Labrador announced in January 2012 the start of the Workplace Health, Safety and Compensation Commission (WHSCC) statutory review. The review process is an opportunity to ensure the continued improvement of the workers' compensation system. The Statutory Review Committee's (SRC) focus is to examine compensation and health care service, overall client service, the prevention of injuries and fatalities, and the financial sustainability of the worker injury fund.

The statutory review is required every five years under the *Workplace Health, Safety and Compensation Act* (henceforth referred to as the Act). The SRC prepares a report comprised of conclusions and recommendations for government's consideration. One of the primary goals of the statutory review is to listen to the views of the province's workers, employers and other interested parties to identify potential improvements in the system. The SRC invites submissions and presentations for its consideration.

The Honourable Paul Davis, then Minister of Service NL, appointed a committee representing key stakeholders to oversee the statutory review process in January 2012. Mr. Ralph Tucker was appointed chair of the Statutory Review Committee and is the WHSCC board representative. Mr. Claude Horlick, a retired human resources practitioner, was appointed employer representative, and Mr. David Burry, a fire captain with the St. John's Regional Fire Department, was appointed worker representative.

The SRC was assisted in its work with the services of an executive assistant and two consultants.

MARCH TO DECEMBER 2012 – TECHNICAL REVIEW

The SRC engaged legal experts, Laurel Courtenay, WorkSafe BC and Douglas R. Mah, WCB-Alberta, as technical advisors to conduct a comprehensive review of the *Workplace Health, Safety and Compensation Act* (RSNL 1990, Chapter W-11) to ensure it reflected the current practice by the WHSCC and best practices embodied in similar legislation in place in other provinces. Their report provided the first comprehensive review of the legislation in Newfoundland and Labrador since 1983.

The technical advisors' report addressed issues relating to governance and independence, prevention mandate, appeal process, financial sustainability, occupational disease, and employer accountability, among other matters. At the SRC's request, the technical advisors also conducted an analysis of the current *WHSC Act's* provisions with respect to the external review division's role and practice. Along with the jurisdictional and best practices review, the technical advisers were also tasked with implementing a gender based analysis of the *WHSC Act*, identifying any potential errors, anomalies, or omissions, and presenting any opportunities for reducing red tape and improving readability.

APPENDIX B: STATUTORY REVIEW PROCESS METHODOLOGY

AUGUST TO NOVEMBER 2012 – CONSULTATION PAPER

On November 21, 2012, the SRC released its consultation paper *Working Together: Safe, Accountable, Sustainable.* The purpose of the document was to focus the public consultation process and to outline the current status of the system. The Committee wanted to seek input from employers, workers and others who were affected by the system.

The key themes identified in the document for consideration included:

- Maximum Compensable Assessable Earnings (MCAE) (Claim Benefit Ceiling)
- Financial Sustainability
- Labour Market Re-entry (LMR)
- Medical Management
- Occupational Disease
- Prevention – Role of Stakeholders

The SRC used electronic and postal mail to distribute approximately 100 copies of the paper to stakeholders. The paper was also posted online at http://www.servicenl.gov.nl.ca/Consultation/index.html along with information on the SRC's consultation schedule. As well, the Newfoundland and Labrador Information Service (NLIS) distributed a copy of the news release announcing the availability of the consultation paper and the SRC's proposed schedule. A copy of the consultation paper is included as Appendix C.

FEBRUARY TO APRIL 2013 – PUBLIC CONSULTATIONS

The SRC offered stakeholders the option of presenting at public hearings and/or submitting briefs for review. To avoid conflict with other consultation processes, government did not approve the SRC process until February 2013.

The SRC held public hearings from February 26 to April 3, 2013. The SRC were available in the following communities: Labrador City, St. Anthony, Corner Brook, Port Aux Basques, Gander, Clarenville, Carbonear, St. John's, Marystown, Springdale, Grand Falls-Windsor, Stephenville, and Happy Valley-Goose Bay. The list of participants in each community is presented in Appendix B.

These meetings were promoted through the media via weekly advertisements in local papers, through public service announcements, and through Twitter. The SRC met with employers, injured workers, family members of injured workers, health professionals, consultants, researchers, community advocates, MHAs, safety sector councils, labour groups, and community agencies.

The SRC heard 52 presentations from 58 presenters, and reviewed 14 written submissions. There were 26 injured workers, 15 employers and employer groups, 11 labour groups, nine advocates/advocacy organizations, three safety sector councils and one health professional

organization. One individual, an injured worker, presented twice and provided a written submission.

MAY TO DECEMBER 2013 – REPORT WRITING AND RESEARCH

The SRC conducted an extensive consultation and review process including researching concerns relating to workers' compensation. The SRC received six orientation sessions, at the beginning of the review process, providing them with a comprehensive overview of the workers' compensation system in this province. The SRC also collected the necessary information to undertake its analysis and develop recommendations.

The SRC also collected extensive information and data from experts and organizational representatives who provided detailed briefings and material on specific issues of concern to the SRC or identified as a result of the public consultations and submissions. These individuals included the following:

a) Staff of the WHSCC
b) Russell Investments
c) Morneau Shepell
d) WHSCRD Commissioners
e) Assistant Deputy Minister – Occupational Health and Safety Branch, Service NL

The SRC considered holding roundtable discussions but representatives of the key stakeholders declined, noting they had had sufficient opportunity throughout the public consultations to present their perspectives.

APPENDIX C

List of Presenters

Workplace Health, Safety and Compensation

2013 Statutory Review Committee

APPENDIX C: LIST OF PRESENTERS

February 27, 2013 – Springdale

- No Presenters

February 28, 2013 - Grand Falls

- No Presenters

March 1, 2013 - Gander

- Barry Warren, Dooley's Trucking

March 4, 2013 - Labrador City

- Colleen Rixon, Iron Ore Company of Canada
- Ron Thomas, Steelworkers Union Representative

March 5, 2013 – Goose Bay

- No Presenters

March 6, 2013 – St. Anthony

- Maurice Simmonds, Maurice's Service Centre
- Sam Elliott, St. Anthony Basin Resources
- Tyson Simms, Injured Worker

March 13, 2013 – Clarenville

- Darlene Thomas, Hospitality Newfoundland and Labrador
- Douglas Brown, Injured Worker
- Glen Brown, Injured Worker
- Donald M. Pelley, Concerned citizen

March 14, 2013 – Marystown

- No Presenters

March 15, 2013 – Carbonear

- Claire Murphy, Family Representative – Injured Worker
- Peter Griffin, Injured Worker

March 19, 2013 – Port aux Basques

- Paul McNeil, Injured Worker
- Steve McCarthy, Injured Worker
- Cathy Lomond, Employer
- Jackie Crocker, Injured Worker

March 20, 2013 – Stephenville

- No Presenters

APPENDIX C: LIST OF PRESENTERS

March 21, 2013 – Corner Brook

- Donna Ryan and Carole Ferguson, Canadian Union of Public Employees
- Gary Sheppard, Injured Worker
- Glenn Sharpe and Julia Sharpe, Injured Worker
- Lawrence Wells, Injured Worker
- Lucy Anderson, Injured Worker accompanied by Nathaniel Noseworthy
- Marvin Way, Way's Transport
- Roy Foster, Forestry Safety Association
- Tim Buckle, Royal Newfoundland Constabulary Association
- Dr. Robert Sexton, Employer
- Norris Milley, Recent College Graduate

April 1, 2013 – St. John's

- Don Dunphy, Injured Worker
- Derek Butler, Association of Seafood Producers
- Dr. Darrell Wade and Dr. Carl Eustace, Newfoundland and Labrador Chiropractic Association
- Rick DeHann and Doug Cadigan, Firefighters Presumptive Cancer Committee
- Kim Dunphy, Injured Worker
- Ray Connolly, Injured Worker
- Richard Alexander, Newfoundland and Labrador Employers' Council
- Denis Mahoney, St. John's Board of Trade
- Keith Coombs, Injured Worker

April 2, 2013 – St. John's

- Andrew Parsons, MHA, Burgeo-LaPoile
- Debbie Forward, Newfoundland and Labrador Nurses' Union
- Jackie Manuel, Construction Safety Association
- John Dicks, Municipal Safety Council of Newfoundland and Labrador
- Lorraine Michael, MHA, Signal Hill-Quidi Vidi
- Mark Walsh, Injured Worker
- Nancy Maclean, Public Service Alliance of Canada
- Doug Cadigan and Rick DeHann, St. John's Firefighters' Association, Local 1075
- Earl McCurdy, Fish, Food and Allied Workers' Association

April 3, 2013 – St. John's

- Dr. Chava Finkler, University Researcher
- Dallas Mercer, DM Consulting
- Dr. Barbara Neis and Dr. Stephen Bornstein, SafetyNet Centre for Occupational Health & Safety Research
- Gerry Dowden, East Can Transport Services accompanied by Larry Caines, Proactive Solutions

- Jerome Lawlor, Injured Worker
- Lana Payne, Newfoundland and Labrador Federation of Labour
- Peter Griffin, Injured Worker (Second presentation)
- Trish Dodd, Injured Workers' Association

In addition to these presentations the Committee received fourteen written submissions from the following individuals and organizations:

- Gary Layman, Injured worker
- Ben Warford, Injured worker
- Leonard Clarke, Injured worker
- Peter Griffin, Injured worker * later decided to make verbal presentation
- David Wellon, Family representative – Injured Worker (deceased)
- Robert Feltham, Injured worker
- Sherri Bradshaw, Injured worker
- Newfoundland and Labrador Health Boards Association
- Canadian Federation of Independent Business
- Women Interested in Successful Employment
- Provincial Advisory Council on the Status of Women
- Town of St. Lawrence
- Vina Gould, Newfoundland and Labrador Association of Public and Private Employees
- Augustus Doyle, United Brotherhood of Carpenters and Joiners of America, Local 579

APPENDIX D

SRC Discussion Paper

Workplace Health, Safety and Compensation

2013 Statutory Review Committee

WORKING TOGETHER

Safe · Accountable · Sustainable

Workplace Health, Safety and Compensation
2012 Statutory Review Committee

I. INTRODUCTION

The Government of Newfoundland and Labrador announced in January 2012 the start of the Workplace Health, Safety and Compensation Commission (WHSCC) statutory review. The review process is an opportunity to ensure the continued improvement of the workers' compensation system by considering the compensation and health care services, overall client service, the prevention of injuries and fatalities, and the financial sustainability of the worker injury fund.

The statutory review is required every five years under the *Workplace Health, Safety and Compensation Act* (henceforth referred to as the Act). The statutory review committee prepares a report comprised of conclusions and recommendations for government's consideration.

The primary goal of the statutory review is to listen to the views of the province's workers, employers and other interested parties to identify potential improvements in the system. The Committee invites submissions and presentations for its consideration.

II. BACKGROUND

Previous review committees identified different themes to guide their work and analysis. In 2000, the workers' compensation system was experiencing a financial crisis. In its final report, *Changing the Mindset (2001),* the Task Force mapped out the design of a comprehensive framework for the future of the workers' compensation system. To control escalating costs and increasing claim duration, the Task Force recognized the need to place substantially increased responsibility upon the workplace parties (workers and employers). The authors of the 2005 statutory review committee report noted that government, workers, employers, and the Commission's Board of Directors endorsed the framework put forward in 2001's *Changing the Mindset*, resulting in significant changes to the system, especially in its financial sustainability management.

The 2005 review committee examined the efforts made by the commission in implementing the 2001 report and considered the need to manage competing interests. In their report, titled *Finding the Balance* (2006), the 2005 Committee concluded that *"claims duration is the key to lower assessment rates and increased benefits***."** The Committee also highlighted the need for more effective performance indicators so that the Commission and the key stakeholders could be better prepared to identify factors affecting claim duration, assess their influence, and implement changes to produce the desired results.

One of the key issues identified by the 2005 committee was the need for, and the continued support of, collaboration between all stakeholders – the Commission, employers, and

workers – to ensure success in achieving a vision of a responsible, responsive, and viable workers' compensation system in Newfoundland and Labrador. Indeed, in the discussions undertaken by the 2012 Committee to prepare for its work and in developing its approaches for this discussion paper, the theme of working together has arisen consistently.

As a result, the 2012 Statutory Review Committee is particularly interested in contributions that look at how the stakeholders can work together to continue to improve the system. All stakeholders are collectively responsible for supporting, contributing, and ensuring the system is working effectively in promoting workplace safety, providing appropriate benefits to workers, and ensuring the financial sustainability of the system. The WHSCC is constantly adapting to better meet the needs of the changing work environment but it is essential that all stakeholders work together to ensure a safe and healthy working environment for the workers of our Province.

III. HISTORY OF THE WORKERS' COMPENSATION SYSTEM IN CANADA

The workers' compensation system in Canada is founded on the principles developed by Judge Sir William Meredith, and these continue to serve as the foundation for workers' compensation systems across the country. In 1910, Meredith was asked to design a system of compensation which would be payable to individuals who were injured during the course of their employment. His report, submitted on October 31, 1913, identified five core concepts that are today the hallmarks of a reliable, equitable, and manageable compensation system. The five Meredith Principles[40] are described below:

1. ***No-fault compensation****: Workplace injuries are compensated regardless of fault. The worker and employer waive the right to sue. There is no argument over responsibility or liability for an injury. Fault becomes irrelevant, and providing compensation becomes the focus.*
2. ***Collective liability****: All employers share the total cost of the compensation system. All employers contribute to a common fund. 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. Nor is the Board bound by legal precedent; it has the power and authority to judge each case on its individual merits.*

[40] Saskatchewan's Workers' Compensation Board. http://www.wcbsask.com/About_Us/Meredith_Principles.html.

5. ***Independent board****: The governing board is both autonomous and non-political. The Board is financially independent of government or any special interest group. The administration of the system is focused on the needs of its employer and labour clients, providing service with efficiency and impartiality.*

There are twelve workers' compensation Boards in Canada. In Newfoundland and Labrador, the Workplace Health, Safety and Compensation Commission (WHSCC) is responsible for administering the WHSCC Act, which includes injury prevention and claims management.

All stakeholders have undertaken initiatives to build a safer work place culture and to improve client services that are more responsive to stakeholder needs. This has contributed to a reduction in the injury rate with the following results:

- Overall the average incidence rate has declined from 3.2 in 2001 to 1.8 in 2011, even though the number of workers, especially in the resource sector, increased over the same time period.
- Between years 2001-2011, there were about 20,269 fewer injuries in our province with a costs savings of almost $610 million.

These improved results are encouraging; however there is still much work to do. In 2011, there were still about 4,070 reported injuries, the cost of which has a projected actuarial value of $154 million.

IV. STATUTORY REVIEW PROCESS

The 2012 statutory review has two phases:

1. The first phase is a technical review of the Act to identify areas for improvement and modernization. This process began in March 2012 and will form a component of the Committee's final report to government.
2. The second phase is the public consultation process and it will focus on the broader administration of the Act and its regulations. The Statutory Review Committee will conduct public consultations and roundtable discussions as needed. The Committee will also accept written submissions. *For additional instructions on how to participate, please review the directions in the section at the end of this document, titled "Participation Guidelines."*

We encourage everyone with an interest in workplace health, safety and compensation to contribute to the review process.

V. THEMES

The Newfoundland and Labrador Employers' Council, the Newfoundland and Labrador Federation of Labour, and the Commission conducted a pre-planning phase to identify key themes for the public consultation process. Each sector had identified three priority themes. Together, these are:

1. Maximum Compensable Assessable Earnings (MCAE) (Claim Benefit Ceiling)
2. Financial Sustainability
3. Labour Market Re-entry (LMR)
4. Medical Management
5. Occupational Disease
6. Prevention – Role of Stakeholders

5. 1 Maximum Compensable Assessable Earnings (MCAE)

Injured workers qualify for wage loss benefits. Sections 73, 74 and 80 of the Act address wage loss compensation. Wage loss benefit is subject to a maximum prescribed amount set out under Regulation 21 of the provincial legislation.

In 2012, injured workers in Newfoundland and Labrador receive 80% of their net earnings based on maximum gross annual earnings of $52,885 (defined as Maximum Compensable and Assessable Earnings).

Some questions to consider:

- *Is the current MCAE a reasonable level of wage loss compensation?*
- *What are the advantages or disadvantages of changing the MCAE payable to injured workers?*
- *What other alternatives are possible to ensuring a reasonable income replacement level for injured workers?*

5.2 Financial Sustainability

Financial sustainability is an outcome of balancing the costs of the system and benefits to injured workers. Financial sustainability is achieved through several approaches. These include a strong injury prevention strategy, a prudent investment policy, adequate experience-based assessment rates, and the provision of adequate compensation benefits. While recommendations should not be determined based solely on cost, the statutory review process will take into account the costs and effects of recommendations, both individually and collectively.

Some questions to consider:

- *What role can stakeholders play in reducing the costs of the system?*
- *What other factors affect the long-term financial sustainability of the system?*

5.3 Labour Market Re-entry (LMR)

When injured workers cannot be accommodated in suitable, available employment and earnings, the Commission provides the workers with a labour market re-entry process which includes a re-entry assessment, and if necessary a labour market re-entry plan (Section 89.2 of the *Act).* In the last statutory review (2006), the LMR process was targeted for improvement. The Commission developed and implemented a plan to address improved staff training, education, and performance measurement.

Some questions to consider:

- *How effective is the current LMR process in meeting the needs of workers and employers?*
- *What additional measures or changes would enhance the current LMR process?*

5.4 Medical Management

Early intervention on a claim from a medical management perspective has a positive impact on the injured worker's recovery, early and safe return to work, and claim costs and benefits. The Act and the Commission's policies provide direction for the medical management of claims. Through its policies, the Commission has developed strategic initiatives with respect to medical management. This statutory review provides an opportunity to discuss medical management.

Some questions to consider:

- *How can appropriate medical treatment be provided in a timely manner to support recovery and manage claim duration effectively?*
- *Are there other approaches that could enhance or improve medical management to better facilitate rehabilitation and early and safe return to work?*
- *How do stakeholders inspire and support change in the teaching and management of occupational health and occupational medicine?*

5.5 Occupational Disease

Currently the Commission defines and adjudicates occupational disease claims under Section 90 of the Act and Section 23 of its Regulations. This review will consider all matters associated with adjudication, benefit liability, and prevention of future occupational diseases. Managing occupational disease is challenging. For example, latency periods mean delays in the appearance of disease, sometimes when the person is no longer employed with the company.

Some questions to consider:

- *How could the system be best funded to address the coverage requirements?*
- *What revisions, if any, are needed in the current process of adjudicating occupational disease claims?*
- *What prevention measures are necessary to reduce the occurrence of occupational disease?*

- *How could the roles of WHSCC, the Occupational Health and Safety branch and other stakeholders be enhanced to increase workplace safety relating to awareness and the prevention of future occupational diseases?*

5.6 Prevention

The Commission offers prevention services to employers and workers to promote the reduction of workplace injury. The Prevention Services Division is responsible for the design, development, delivery, monitoring, and evaluation of workplace health and safety education and accident prevention initiatives. As well, the Commission is responsible for certification of safety training standards.

Prevention Services works with industry sectors, employers, and workers to promote awareness and prevention. This is done through consultation, collaboration, education, promotional material, and audits. As well, Prevention Services offers support for Occupational Health and Safety Committees, and the application of certification and training standards.

The Statutory Review Committee is interested in hearing about prevention models and methods and learning how best to identify opportunities for stakeholders to undertake initiatives that would continue to move the province toward a sustainable safety culture.

Some questions to consider:

- *How could workplace incident reporting be improved to provide the necessary information for stakeholders to use in the prevention of workplace injuries?*
- *What additional reporting criteria would enhance the potential for prevention?*
- *What approaches or initiatives should stakeholders undertake to develop an effective safety culture in our province's workplaces?*
- *What kind of training is needed to develop an effective safety culture in our province's workplaces?*

VI. PARTICIPATION GUIDELINES

Individuals and organizations wishing to make oral or written submissions are advised that all submissions will form part of the public record of the Statutory Review Committee's proceedings and will be publicly accessible through the *Access to Information Act*.

There are several ways to contribute to the statutory review process.

Presentations – The Committee will hold consultations in various parts of the province and invites individuals, stakeholder organizations, and others to share their perspectives on how to improve our system. Due to anticipated demand, those people wishing to present should pre-register to indicate their interest and to facilitate our planning of the consultation

schedule, planned for January-February 2013. To register, call or email the Statutory Review Committee office at 709-778-4804 at ***WHSCCinfo@gov.nl.ca***.

Written submissions – The Committee will accept written submissions (paper or electronic PDF copies) on the themes outlined in this document or on any topic relating to the workers' compensation system in Newfoundland and Labrador. Submissions may be stand-alone documents or may expand upon the themes presented at the public sessions. Written submissions may be sent by postal mail, e-mail, or fax ***by March 1, 2013***:

- By mail to:
  Statutory Review Committee
  PO Box 8158
  St. John's, NL A1B 3M9

- By e-mail (PDF formats only please) to:
  WHSCCinfo@gov.nl.ca

- By fax to:
  709-778-4808

Round table discussions – The Committee may host several stakeholder roundtable discussions to engage key individuals and organizations on specific topics as needed. Participation in these sessions will be by invitation only.