Consultation on Stage 1 of the Legislative Review of Workers' Compensation in New Brunswick

Brief submitted by
The New Brunswick Nurses Union
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Introduction

The New Brunswick Nurses Union is a labour organization representing 6700 registered nurses in the Province of New Brunswick. The nurses we represent practice in acute care facilities, long term care facilities, correctional facilities and the community.

A report prepared by Informetrica Limited for the Canadian Federation of Nurses Unions, using Statistics Canada Labour Force Survey data, notes that in 2012, 10.1% of public sector healthcare nurses working in New Brunswick were absent from work due to disability or illness. Although not all of these disabilities and illnesses are work-related, many of them are. According to findings from the 2005 National Survey of the Work and Health of Nurses, the nursing profession has statistically significantly higher rates of exposure to risk of infection, experience of physical or emotional abuse, suffering from back pain, arthritis and stress than workers in other professions.

Given these facts, ensuring that New Brunswick has a fair and effective Workers' Compensation system is essential to upholding the interests of our members. As an organization, we acknowledge the direction the government is taking on this very important matter and we thank the department of Post-Secondary Education, Training and Labour and WorkSafeNB for the opportunity to contribute to this comprehensive review of the Workers' Compensation system in New Brunswick.

NBNU Recommendations

1. Calculation of Benefits under *section 38.11(9)*

a. How would you balance compensating an injured worker for their loss while providing proper support to help their safe return to work?

NBNU believes compensating an injured worker for their loss is an obligation that needs to be addressed separately from the provision of proper supports to help safe return to work. Measures to ensure both need to be in place simultaneously and the provision of one need not be balanced against provision of the other. If a worker is injured at work s/he is entitled to be compensated for their loss, regardless of whether they are ever able to return to work. Likewise, proper supports must be in place to allow for safe return to work for those who are able, regardless of the fact that compensation is provided for those who are not able to work.

As stated in the Meredith Report "the true aim of a compensation law is to provide for the injured workman and his dependants and to prevent their becoming a charge upon

their relatives or friends, or upon the community at large." (Meredith, p.4). This is the foundation on which workers' compensation legislation in Canada has rested and must be respected in New Brunswick's consideration of revision to our compensation system.

In the 2013 Discussion paper on Stage 1 of 2013-2016 Legislative Review of the Workers' Compensation System it is stated that the objective of the review is:
"– to ensure that the workers' compensation system addresses the needs and realities of current and future workplaces; and
– to strike the right balance between adequate compensation for injured workers and employers' fiscal interests" (p.4). If there is concern that the cost of injured workers being off work and collecting compensation is damaging the fiscal interests of employers, the solution is not to be found by examining rates of compensation and provision of supports for safe return to work. Reduction of costs to employers must be sought through measures that reduce workplace injuries from occurring in the first place. Once injuries have occurred it is "the duty of the Board at all times to maintain the accident fund so that with the reserves it shall be sufficient to meet all the payments to be made out of the fund in respect of compensation as they become payable" (sec. 70) (Meredith, p. 6).

Maintaining a fund from which to compensate workers who have been injured does come at a cost to employers. However, this cost is offset by the fact that coverage by workers' compensation legislation replaces workers' right to sue their employers in the event of workplace injuries. Such legal action would come at greater cost to employers and would come with higher individual liability for each employer, rather than being a shared risk shouldered equitably by all employers as WorkSafe rates are. Currently, in New Brunswick, funding workers' compensation benefits is not a strain on employers. WorkSafeNB's 2012 annual report recorded a surplus of $101 million. That same year, Labour Minister Danny Soucy announced that WorkSafeNB would be cutting its average assessment rate from $1.70 per $100 of payroll to $1.44.

Both fair compensation rates for workers and the provision of proper support to help safe return to work are measures that are concurrently affordable for employers. There is no need to balance one against the other and by strongly providing both of these measures to workers; employers are gaining benefits for themselves as well.

Recommendation 1: NBNU believes that low compensation rates need not and should not be used to encourage injured workers back to work. Workers should be required to return to work if (and only if) they are able to do so safely and with proper supports. As per the Meredith Report, a worker who has been injured should receive fair compensation for their loss, regardless of whether they will ever be able to return to work.

b. How would you distinguish in legislation, between different types of employment related income and how they are to be treated in the determination of loss earnings benefits?

NBNU is in favor of re-drafting Section 38.11 (9) of the WC Act into "plain language" in order to distinguish that CPP retirement benefits, vested pension amounts, funds in RRSPs and other retirement savings are *not* employment related income to be deducted from benefit amounts in the determination of Loss of Earnings benefits. Section 38.11(9) states:

> *38.11(9) Notwithstanding subsection (2), where a worker has not received remuneration from the employer or any income replacement or supplement benefit from the employer or from an employment-related source in respect of the injury or recurrence of the injury for a period of time after the injury or recurrence of the injury that is equivalent to three working days and where the worker commences to receive compensation under subsection (2), there shall be payable to the worker only that portion of compensation which, when combined with the amount of any remuneration received by the worker from the employer or any income replacement or supplement benefit received by the worker from the employer or from an employment-related source, does not exceed eighty-five per cent of the worker's pre-accident net earnings calculated for the same period of time as that during which compensation is paid.*

It had been the practice of the WHSCC to treat CPP retirement benefits as "supplement benefits" to be deducted from Loss of Earnings benefits. When the New Brunswick Court of Appeal was asked to interpret the WC Act in the case of *J.D. Irving v. Douthwright and the WHSCC,* the Court determined that CPP retirement benefits as well as other pension benefits do not meet this definition of employment related income and therefore, should not reduce Loss of Earnings benefits.

The re-drafting of Section 38.11(9) must include wording that adheres to the decision of the Court of Appeal of New Brunswick in the case of *J.D. Irving v. Douthwright and the WHSCC*, 2012 NBCA 35. The *Douthwright* decision is clear that CPP retirement benefit payments do not constitute employment related income or income supplement to be deducted from the 85% of the worker's pre-accident net earnings used to calculate Loss of Earnings benefits. The Court made this determination on the basis of the Supreme Court of Canada's decision in *Clarke:*

> *[57] The Supreme Court determined that "[p]ension benefits are not 'income' in the traditional sense, i.e. payments for present work, nor are they income to be earned in the future. They are benefits earned throughout the period of the pension […] '[…] in reality schemes for saving which divert present income to future use in times of peril or when the ability to earn income has passed'[…]. A*

pension is created by earlier savings which give rise to future benefits. In this sense it is like an insurance plan or any other savings scheme, structured or otherwise […]" (para. 60).

In the *Douthwright* decision, the Court of Appeals goes on to state:

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

This statement indicates that the Court's decision regarding CPP retirement benefits also applies to other retirement benefits, including RRSPs and vested pensions.

Jurisdictionally across Canada, New Brunswick is the only province, aside from Quebec, that deducts CPP retirement benefits from Loss of Earnings benefits. Although Quebec also deducts CCP benefits, employer pension amounts are not deducted and that province pays a maximum benefit of 90% of net earnings, compared to an 85% maximum in New Brunswick. As well as not including CPP retirement benefits in the calculation of supplemental income amounts to be deducted from Loss of Earnings benefits, most other Canadian provinces do not include employer pensions in this calculation either.

In light of the *Douthwright* decision and considering the comparison with other provinces in Canada, it must be made clear in the re-drafting of Section 38.11(9) of the WC Act that CPP benefits and other retirement benefits are not to be deducted from the amount allowable for Loss of Earnings benefits.

Recommendation 2: NBNU supports a re-drafting of Section 38.11(9) of the WC Act into "plain language" to make it easier to understand. We believe this re-drafting must clearly stipulate, in accordance with the Court of Appeal's decision in *Douthwright* as well as the precedence set by other Canadian provinces, that CPP retirement benefits and other retirement benefits must not be deducted in the calculation of Loss of Earnings compensation benefits to be paid.

2. Merits of Introducing a dispute resolution mechanism relating to processes and procedures

a. **Is there merit to introducing a fair practice office within the workers' compensation structure in New Brunswick?**

NBNB does not believe it is necessary to introduce a fair practices office within the workers' compensation structure in New Brunswick for workers to be able to appeal a decision to an independent body. We believe that the Appeals Tribunal has been arriving at fair decisions. The fact that the Tribunal has not hesitated to overturn decisions of WorkSafeNB, despite its connection to the agency is evidence that it is honouring its mandate to operate at arm's length from WorkSafeNB. We recognize that there have been issues with the Appeals Tribunal under the current structure as it has been operating; however it is not certain that introducing a fair practices office would resolve these issues.

Determining the merit to introducing a fair practice office requires consideration of the possible drawbacks of such as mechanism as well as its potential advantages. The principles of impartiality, confidentiality and independence should be adhered to in order to maintain a structure that operates fairly. There is certainly merit in a dispute resolution mechanism that would uphold these principles. A fair practices office may operate according to such principles, but its ability to affect outcomes that are influenced by those principles may be limited. This would likely be the case if the New Brunswick mechanism is modeled after the Manitoba office, since that office only has a mandate to make a recommendation and does not have authority to actually change a decision.

An additional drawback of a fair practices office with such a limited authority is that even if it arrives at a just recommendation, a decision may not be changed in accordance with that recommendation and the process would need to proceed to the Appeals Tribunal. In cases such as these, the function of the fair practices office is not only useless, but has added time and resources to a process that could have been resolved more efficiently had it proceeded directly to the Appeals Tribunal.

Spending time and resources on a process that potentially ought to be bypassed is wasteful in any context. At a time when the provincial government is currently looking to reduce spending across all departments, it is especially imprudent to consider introducing a new bureaucratic structure unless absolutely necessary. A fair practices office or similar dispute resolution mechanism to assist in administrative and communication matters would, by its very nature, incur new costs for government, even if it managed to divert some claims from proceeding to the Appeals Tribunal. The introduction of such a structure would not be advisable unless these administrative costs would offset spending elsewhere within the workers' compensation system, resulting in an overall reduction in spending and time limits. Further, if the objective of a potential fair practices office can be achieved through the current system, the impending costs associated with creating a new office could be avoided altogether.

Improvements to the current system should be focused on arriving at fair decisions as early as possible in the process, to minimize the need of any form of appeal. NBNU has confidence in the decisions of the Appeals Tribunal should an appeal be necessary,

however the most desirable situation would be one where less claims proceed to that stage. In order to achieve a reduction in appeals, we suggest the following measures:

Increase the number of workers' advocates, to create more manageable case loads.

Increase training and resources to workers' advocates, to improve their capacity to advocate as effectively as possible.

Expand mediation sessions between workers' advocates and WorkSafeNB case managers to resolve conflicts without requiring an appeal.

NBNU believes that if improvements to the current structure are put in place to allow it to function more efficiently, no new dispute resolution mechanism would be required.

Recommendation 3: NBNU does not believe the introduction of a fair practices office within the workers' compensation structure in New Brunswick is necessary in order for workers to have a process by which they can appeal a decision to an independent body. Instead, improvements should be made to strengthen the current structure, including increasing the number of workers' advocates, expanding the mediations sessions between workers advocates and WorkSafeNB case managers.

b. If so, what option(s) do you suggest to change the legislation regarding a "fair practices" mechanism and why?

Recommendation 4: Since NBNU does not believe the introduction of a fair practices office within the workers' compensation structure is necessary, we do not suggest any changes to the legislation, only the changes in practice outlined in recommendation 3.

3. Governance structure and mandate related to the Appeals Tribunal

a. What workers' compensation appeal structure best meets all stakeholder interests? Please provide reasons.

As discussed in the previous section, NBNU believe that the current structure and mandate of the Appeals Tribunal has the potential to meet all stakeholder interests. However, we recognize that there have been issues and conflicts arise under the current operational practices. The improvements suggested in recommendation 4 pertain to the resolution of disputes between workers, employers, worker's and employers' advocates, and WorkSafeNB case managers. As mentioned above, NBNU has confidence in the Appeals Tribunal, to resolve these conflicts fairly once other measures of resolution have been exhausted. However, differing views between

WorkSafeNB's Board of Directors and the Appeals Tribunal have been negatively impacting the Appeals Tribunal's ability to see its resolutions upheld.

In order to allow the Appeals Tribunal to function at its best capacity under its current structure and mandate, NBNU recommends the following adjustments to the current practices:

> In the interest of increasing impartiality, confidentiality and independence, the Chair of the Appeals Tribunal should not sit on the WorkSafeNB Board.
> Appointments of Chairs and Vice-chairs of the Appeals Tribunal should be based on experience and knowledge in workers' compensation and new appointees should receive prompt and comprehensive training and orientation.

If improvements were made to the appointment process and training on workers' compensation was delivered to Chairs and Vice-chairs on appointment, the ability of the Appeals Tribunal to achieve its mandate under the current structure would be improved.

Recommendation 5: NBNU believes the current structure can meet all stakeholder interests, if practices are adjusted to increase the effectiveness of the Appeals tribunal. Adjustments should include appointments of Chairs based on experience in workers' compensation, increase in training and orientation for new appointees and removal of the Chair of the Appeals Tribunal from the WorkSafeNB corporate board.

b. What other changes to the appeal system would you like to see included in the legislative review?

The current challenges of the Appeals Tribunal do not require a change in structure and mandate in order to be resolved. The issues that arise from differing views between the Appeals Tribunal and WorkSafeNB's Commission also need to be addressed in terms of current practices, rather than an amendment to the structure. Section 21(11) of the WHSCC Act states:

> *Any decision, determination, direction, declaration, order, interim order or ruling of, or any act or thing done by a panel of the Appeals Tribunal shall be a decision, determination, direction, declaration, order or ruling of, or an act or thing done by the Commission.*
>
> According to the Court of Appeal's statements in *Douthwright:*
> *[43]the law is clear that neither this Court nor the Appeals Tribunal is bound by Commission policies[…]There is no room for confusion in that statement: the Appeals Tribunal is not bound by Commission policies. The rationale for this should be self-evident: a policy directive cannot amend the Workers' Compensation Act and the Appeals Tribunal is bound to apply the Act.*

The court goes on to say:

> *[47]…the Workplace Health, Safety and Compensation Act leaves no ambiguity in this regard. It provides that a final right of appeal to the Appeals Tribunal, notwithstanding any provision of the Workers' Compensation Act…[49]In summary, the law of this province is clear. The Appeals Tribunal is the final*

administrative decision-maker on the question of the proper remuneration to be paid.

This means that WorkSafeNB is bound by the decisions of the Appeals Tribunal.

When the Court of Appeal noted in its decision in *Sanford v. Workplace Health and Safety Compensation Commission* that “perhaps the time has come for the Legislature to consider the implications of s. 21(11)” it continued by stating:

> *[24]In the alternative or in the meantime, I am of the opinion the Commission should come before this Court adopting a clear, consistent position: the decision of the Appeals Tribunal was correct, and should be upheld. For greater clarity, it is reasonable to expect the Commission to adhere to the following general framework when participating in appeals before this Court:*
> *1. If the Commission is the sole respondent, or if another named respondent does not appear, or is unrepresented by legal counsel, the Commission is expected to defend the decision of the Appeals Tribunal.*

This illustrates that a change in the legislation is not necessarily required to resolve conflict between WorkSafeNB’s commission and the Appeals Tribunal. It is NBNU’s belief that there should be no change to the legislation, but a change in the policies and practices of WorkSafeNB’s commission to respect the current legislation and uphold the decisions of the Appeals Tribunal.

Recommendation 6: : NBNU believes the current structure can meet all stakeholder interests, provided the policies of the WorkSafeNB board are adjusted to respect the decisions of the Appeals Tribunal as stipulated in the WHSCC Act.

Additional Considerations

With regard to the calculation of benefits, NBNU believes consideration should be given during stage 1 of this legislative review to section 38.1(3) of the Workers Compensation Act:

> *38.1(3) The maximum annual earnings shall be set by the Commission as of the first day of January of each year and shall be an amount equal to one and one-half times the New Brunswick Industrial Aggregate Earnings.*

The following table (Table 1) illustrates a comparison between the average annual salary of New Brunswick nurses (RN Class A step G) and the maximum annual earnings set by the Commission, based on the *New Brunswick Industrial Aggregate Earnings* (NBIAE):

Table 1

	Average Annual Nurses Salary (Class A Step G)	NBIAE Maximum Insured Salary (2012)
Gross Income	**$73 866.00**	**$58 100.00**
CPP contributions	**$ 3 483.22**	**$ 2 702.70**
EI premiums	**$ 3 483.22**	**$ 1 063.14**
Income tax	**$17 669.86**	**$12 293.84**
Net loss of earnings	**$51 361.18**	**$42 040.32**
85% of net loss of earnings	**$43 657.00**	**$35 734.27**

The difference between 85% of a nurse's actual average net earnings and 85% of the maximum insurable earnings based on the NBIAE amount is $7922.73 annually. This comparison indicates that nurses receiving Loss of Earnings benefits are only receiving 70% of their average net earnings.

NBNU believes that a significant negative difference between a workers' pre-injury salary and the Loss of Earnings benefit they receive while on workers' compensation is a violation of the principle of security of payment, as a founding principle of workers' compensation laws in Canada. Where compensation benefits are intended as income replacement for a worker who is unable to work due to workplace injury, payment to that worker cannot be considered to be secure when the benefit is unfairly below their working wages. In order to uphold the principle of security of payment, NBNU believes the maximum annual earnings used to calculate Loss of Earnings benefits should be raised to a more fair level.

Recommendation 7: NBNU believes that the maximum annual earnings should be raised to result in a more fair level of wage replacement for higher earning professionals, such as nurses.

Conclusion

As stated by the New Brunswick Court of Appeal in the cases of *J.D. Irving v. Douthwright and the WHSCC* and *Sanford v. Workplace Health and Safety Compensation Commission*, both the *Workers Compensation Act* and the *Workplace Health, Safety Compensation Commission Act* have been misinterpreted in the applications of policies and practices of the WorkSafeNB Board of directors. These misinterpretations, along with a cap on maximum insurable earnings have led to unfairly

low Loss of Earnings benefits compensation paid to workers who have been injured in their workplaces.

As an organization representing 6700 nurses, working in high risk workplaces across New Brunswick, the New Brunswick Nurses Union has a great interest in seeing workers receive fair compensation for workplace injury. We are pleased that government is taking action on this important issue and hope that as a result of the opportunity to receive input from stakeholders, much needed improvements will be made. Amoung those improvements we support a re-drafting of Section 38.11 (9) of the WC Act to clarify in “plain language” that CPP and other pension benefits should no longer be deducted from Loss of Earnings benefits. We ask that the calculation of those benefits be further improved by a raise in the maximum annual earnings.

In addition, NBNU recommends measures to improve practices related to appointments of Chairs to the Appeals Tribunal, maximize effectiveness of dispute resolution measures currently available and bring WorkSafeNB board policies in line with decisions of the Appeals Tribunal. We would like to thank the Department of Post-Secondary Education, Training and Labour and WorkSafeNB for their attention on this matter and trust that our recommendations will be given full consideration.