Workers Compensation: The Historical Compromise Revisited

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I. Introduction

This committee, after our study, declares that our present system of workers' compensation legislation is still fundamentally sound in concept.

- Report to the House of Assembly of the Select Committee on Workers' Compensation, May, 1981

In the last decade health and safety issues in the workplace have gained a special prominence. Across North America new initiatives have been taken in response to an old problem. One aspect subjected to re-evaluation in many jurisdictions is the statutory scheme of workers' compensation. In Nova Scotia a Select Committee of the Legislature was given the mandate to reassess this scheme, and its overall verdict after two years of study was that only tinkering is required. Is that a fair conclusion? The question is much more than a purely academic one, since it is expected that the Select Committee's report will form the basis of new legislation in Nova Scotia. The adequacy of that legislative response will have immediate and significant relevance to injured workers in this province.

To assess the present scheme it is obviously necessary to understand it, and a historical perspective provides the best insight into why the scheme looks the way it does. Current workers' compensation legislation is fundamentally the same as it was in 1915, when a statutory scheme was born of compromise between employers and employees. But while an understanding of that historical compromise is crucial, it need not be accepted as an essential ingredient in 1981. The most basic question to be asked about workers' compensation is whether that historical compromise has any continuing validity, and it is to that question that this paper is directed. In particular, this paper will focus on one of the most important features of the scheme from the perspective of injured workers - the scope of compensation.

* L.L.B. Dalhousie, 1982. This paper was submitted in partial fulfilment of the requirements for the Employment Law course at Dalhousie Law School. The law surveyed is current to December, 1981.
This paper will proceed, firstly, by tracing the emergence of workers' compensation, and then situating that development in the context of the present. The main body of this paper will consist of an analysis of a variety of issues related to the basis upon which compensation is, and/or should be, awarded. Once this task is completed, a few concluding remarks will be offered.

II. The Emergence of Workers' Compensation

At the turn of the century a worker injured on the job in Nova Scotia had to look to the common law for redress. Quite apart from the fact that financial considerations made access to the courts difficult for employees, the tort remedy was not a very satisfactory one for workers. In the first place, the worker had to prove that the employer had been at fault. This was no easy task given the standard of negligence in the nineteenth century. Indeed, the emergence of fault as a standard of liability had coincided with the coming of the industrial revolution, and was quite clearly designed to insulate the new industrialists from responsibility for industrial accidents.¹ In addition, the common law afforded the employer very powerful defences even where fault on the part of the employer had been demonstrated. At this stage the doctrine of contributory negligence imposed an absolute bar to recovery, even if the plaintiff's degree of fault were very small.² Furthermore, the common law denied recovery where there had been a voluntary assumption of risk. In the employment context this concept was given a very broad interpretation; the employee was deemed to have voluntarily accepted a wide range of risks as an implied term of his employment contract.³ Finally, the common law developed the doctrine of common employment (or fellow servant rule) which precluded recovery where the cause of the injury had been the fault of another employee.⁴ An underlying theme of this trilogy of defences was the fiction that the worker had some control over his working conditions. The consequence was that it was usually the worker himself who shouldered the blame for, and the cost of, an industrial accident. It was very rare for a worker to succeed in a tort claim against his employer, although the

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2. Id. at 489 (The statutory change of this rule, providing for apportionment, was first introduced in Nova Scotia in 1925; the Contributory Negligence Act, 1925, S.N.S. 1925, c. 5; rep. & sub. by the Contributory Negligence Act, 1926, S.N.S. 1926, c. 3)
3. Fleming, supra, note 1 at 486-489.
4. Id. at 489.
incidence of industrial accidents was very high.\(^5\) The carnage among workers was a cost of production which employers, for the most part, did not have to bear.

It was a situation that cried out for legislative intervention. The legislative response was initially quite modest. "The Employers' Liability for Injuries Act" was adopted in Nova Scotia in 1900\(^6\), based on the 1880 English act\(^7\). This act attempted to remove the special hurdles faced by employees, compared to other plaintiffs,\(^8\) but it was still fundamentally a fault based system.\(^9\) Monetary limits on recovery were set for any action under the act.\(^10\) The act allowed an option of suing at common law, requiring the worker to elect between the act and a common law action.\(^11\) The courts remained the forum in which the worker sought redress.\(^12\) "The Employers' Liability for Injury Act" was only a slight improvement upon the common law, and within a decade it was pronounced inadequate and superseded by Nova Scotia's first workers' compensation act.

The "Nova Scotia Workmen's Compensation Act", passed in 1910,\(^13\) was significantly different from the scheme of workers' compensation which would ultimately take hold. The 1910 act continued to make employers liable on an individual basis.\(^14\) It did, however, make a significant advance by imposing liability without proof of fault by the employer.\(^15\) The statute fixed a scale of compensation based on workers' previous earnings, with a statutory limit of $1500 in compensation.\(^16\) For fatal accidents the act contemplated a lump sum payment;\(^17\) for other accidents the employer was required to pay compensation on a weekly basis.\(^18\) Any dispute about the employer's

\(^{6}\) S.N.S. 1900, c. 1.
\(^{7}\) McKinnon, *supra*, note 5, at 5.
\(^{8}\) S.N.S. 1900, c. 1, s. 3.
\(^{9}\) S.N.S. 1900, c. 1, ss. 3, 5.
\(^{10}\) S.N.S. 1900, c. 1, s. 6. The limit was $1500, or the worker's average salary over the last three years, whichever was greater.
\(^{11}\) S.N.S. 1900, c. 1, s. 16.
\(^{12}\) S.N.S. 1900, c. 1, s. 3.
\(^{13}\) S.N.S. 1910, c. 3.
\(^{14}\) S.N.S. 1910, c. 3, s. 5.
\(^{15}\) S.N.S. 1910, c. 3, s. 5. However, the right to compensation was disallowed where the injury was attributable to the serious and wilful misconduct or drunkenness of the worker, s. 5(2) (c).
\(^{16}\) S.N.S. 1910, c. 3, First Schedule, s. (1).
\(^{17}\) S.N.S. 1910, c. 3, First Schedule, s. (1) (a). The amount of the lump sum paid to dependents was $1,000, or the deceased's salary over the last three years from that employer, whichever was larger, up to the $1500 maximum.
\(^{18}\) S.N.S. 1910, c. 3, First Schedule, s. (1) (b). The weekly payment was 50 percent of the
liability under the act was resolved not in the ordinary courts but by arbitration.\(^{19}\) Again, the act did not take away the right to sue at common law; it only stipulated that an employer could not be held liable under both the act and at common law.\(^{20}\) The 1910 act was not given time to be tested; it was shortly overtaken by other developments.

In 1910 the Chief Justice of Ontario, Sir William B. Meredith, had been appointed by that province’s government to head a Commission of Enquiry into workers’ compensation. The Commission’s report was completed in 1914, and formed the basis for Ontario’s *Workmen’s Compensation Act*, which became effective on January 1, 1915.\(^{21}\) Ontario’s act served as a model for other Canadian provinces, and Nova Scotia was quick to respond. In 1914 the Nova Scotia government appointed its own commission to prepare a draft bill.\(^{22}\) The result was the Workmen’s Compensation Act, 1915,\(^{23}\) based on its Ontario counterpart, which became effective in 1917.\(^{24}\)

The 1915 act reaffirmed the principle of the 1910 act that compensation for work-related injuries and disease did not depend on proof of fault.\(^{25}\) The only situation in which fault was relevant was in a case where the injury was attributable solely to the serious and wilful misconduct of the employee; such conduct normally disentitled the worker to compensation.\(^{26}\) However, there was an exception to the exception. Where death or serious and permanent disability resulted, even wilful misconduct by the employee would not bar a claim for compensation.\(^{27}\) In essence, the act imposed absolute liability for work-related accidents.

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worker’s previous earnings, with payments not to exceed $7 per week, with an aggregate total limit of $1500.

19. S.N.S. 1910, c. 3, s. 5(3).

20. S.N.S. 1910, c. 3, s. 5(2). If the employee sued at common law and lost, he still retained his right to compensation under the act, subject to costs being assessed against him for the common law action, s. 3(4).


22. An Act Respecting the Laws Relating to the Liability of Employers to Make Compensation to their Employees for Injuries Received in the Course of their Employment, S.N.S. 1914, c. 9.

23. S.N.S. 1915, c. 1 (currently, *Workers’ Compensation Act*, S.N.S. 1968, c. 65, as am.)


25. S.N.S. 1915, c. 1, s. 7 (currently S.N.S. 1968, c. 65, s. 7).

26. S.N.S. 1915, c. 1, s. 7(2) (currently S.N.S. 1968, c. 65, s. 7(1) (b)).

27. S.N.S. 1915, c. 1, s. 7(2) (currently S.N.S. 1968, c. 65, s. 7(1) (b)), i.e. the exception was narrower than in the 1910 act, *supra*, note 15).
Employers were made to shoulder this liability, but not, as before, on an individual basis. The responsibility for paying the costs of workers' compensation was imposed on employers on a collective basis. Compensation was paid from an accident fund, financed by assessments levied against all employers covered by the act. Employers were divided into classes, and the rate of assessment for each class of industries was a function of the accident record of these industries. The responsibility for levying these assessments and paying compensation was entrusted to a new administrative agency, the Workmen's Compensation Board.28

The fundamental and underlying assumption of the scheme was that it is employers who are responsible for injuries that occur on the job. In much the same way that wages are a cost of production, so is the cost of compensating injured workers. But this principle was accepted only up to a point. There was to be compensation only for loss of earnings, and to a limited extent, medical costs; there was to be no compensation for pain and suffering or other non-pecuniary losses. Furthermore, the compensation for loss of earning was well below full compensation.29 The compromise was clear. Workers were offered a speedy remedy on a no fault basis in exchange for being forced to accept only partial compensation.

A further concession was demanded of workers covered by the act. Workers were denied the right to sue in tort both their own employer, and any other employer covered by the act.30 Workers who could have succeeded in a claim of negligence against their employer were placed on an equal footing with injured workers who could not prove fault. Both had to be satisfied with compensation under the act. Employers were called upon to finance the statutory scheme, but were relieved of tort liability.31

In the context of 1915 workers probably got more from the compromise than they lost. The tort remedy they were forced to give up was then a poor one in any event. The alternative of workers' compensation, although far from perfect, was interpreted as an

28. S.N.S. 1915, c. 1, ss. 49-80 (currently S.N.S. 1968, c. 65, ss. 84-125).
29. S.N.S. 1915, c. 1, ss. 35-48 (currently S.N.S. 1968, c. 65, ss. 30-71).
30. S.N.S. 1915, c. 1, ss. 10, 11 (currently S.N.S. 1968, c. 65, ss. 15, 16) Where there was a cause of action against a non-employer for work-related injury, there was an option of suing at common law or claiming compensation under the act, s. 9 (currently s. 14).
31. Employers not covered by the act were obviously an exception to this rule. Employees injured in a worksite not covered by the act had to resort to court; the standard of liability was one of negligence. S.N.S. 1915, c. 1 Part II, ss. 84-89 (currently S.N.S. 1968, c. 65, Part II, ss. 160-164). Employees not covered by either Part I or Part II had to resort to the common law alone.
important achievement by workers. Nevertheless, it was an achievement to be built upon, and not one with which workers were entirely satisfied.32

III. Sixty-four Years Later

It has been 64 years since Nova Scotian workers lost their right to sue their employers in tort in exchange for the right to workers' compensation. In the interim the common law concept of negligence has undergone a marked transformation. Negligence has become a very broadly based head of liability, and the standard of fault has become increasingly demanding of defendants, particularly manufacturers.33 In jurisdictions where tort actions still lie against employers the special common law defences have been whittled away.34 Looked at in the context of the present, to deprive workers of their right to sue in tort is to deprive them of a very significant remedy. Have developments in workers' compensation kept pace with developments in tort? There can be no dispute that the answer to that question is an emphatic NO.

Throughout most of Canada the basic structure of workers' compensation remains essentially the same as it was at the time of World War I. In Nova Scotia there have been numerous amendments to the statute; indeed there have been amendments passed almost every year since 1915. But those amendments have represented only small refinements. The underlying scheme remains intact.

Workers' compensation has begun to show the strains of being called upon to adapt to new realities. In the 1910s the worker was relieved of the requirement to show fault, but the requirement to establish work-relatedness remained. In the 1980s it is recognized that the requirement to prove work-relatedness can impose its own straightjacket. Showing that an accident occurred on the job is usually not difficult, but an effort to demonstrate that a disease is work-related is still confronted by a wall of resistance.35 Workers' compensation has not yet really come to terms with the implications

33. Fleming, supra, note 1 at 103 ff.
34. Id., at 486. Also, employees covered by Part II of the Workers' Compensation Act are not subject to those special employer defences, S.N.S. 1968, c. 65, Part II, ss. 161, 162.
35. P. Weiler, Reshaping Workers' Compensation for Ontario (Ontario, November, 1980) at 137-141 (hereafter referred to as the Weiler Report). The whole area of industrial diseases is only briefly canvassed by Weiler; it will constitute a central focus of his second report, forthcoming.
of multiple causes, (only one of which is work-related),\textsuperscript{36} nor has it been ready to acknowledge the real incidence of occupational disease.\textsuperscript{37} Another problem area concerns the nature of the administrative structure. In the 1910s an administrative board was the obvious means of providing a fair and efficient way of operating the scheme. In the 1980s the bureaucratization of the administrative machinery has raised questions as to its efficacy.\textsuperscript{38} The system does not always respond with dispatch. A third general area of concern centres on the scale and type of compensation. In the 1910s the acceptance of only partial compensation was part of the bargain. The question whether that is a fair deal for workers in the 1980s is a question that cannot be ignored. All of the above concerns merit examination and response. In this paper, attention will be directed to only one, the last mentioned, the issues surrounding the basis on which compensation is awarded.

The difficulties noted above have called for a re-evaluation of workers' compensation. Governments have been prepared to acknowledge that problems exist. To date, however, the response in Nova Scotia has been limited. In May, 1979 the government proceeded to constitute a Select Committee of the Legislature to undertake a comprehensive review of workers' compensation in this province. The Committee undertook its own investigations, held public hearings, and submitted its report in May, 1981.\textsuperscript{39} The Select Committee's Report bears the mark of a decidedly \textit{ad hoc} approach. The Report examines a number of issues, and articulates a series of recommendations, but it is difficult to detect a common thread. The approach is not one of examining fundamental assumptions, and there is little sign of an overall conceptual framework. There is no real effort to start from first principles, and build upon that. The Report does deal with several issues concerning the basis of compensation, issues

\begin{itemize}
\item[36.] The act stipulates that compensation should be proportional to the contribution of the work-related cause, S.N.S. 1968, c. 65, s. 7(2). Such a provision was first introduced by S.N.S. 1952, c. 56, s. 2. In contrast, tort liability has taken a more expansive approach. The defendant is fully liable if the defendant is responsible for a material contribution to the injury. \textit{McGhee v. National Coal Board}, [1972] 3 ALL ER 1008 (H. L.).
\item[37.] In one case, that of coal miners, the Legislature has solved the problem of proving causation by legislating automatic assumption. Any person who has been a coal miner for twenty years and who suffers from a loss of lung function has a right to compensation. S.N.S. 1981, c. 46, s. 1. This provision in effect deems a causal link without specific proof. This legislative response is the exception that proves the rule, and represents only the tip of the iceberg of occupational diseases.
\item[38.] \textit{E.g.} submission of Mrs. Irene Hallett to the Nova Scotia Select Committee on Workers' Compensation.
\item[39.] Select Committee Report, \textit{supra}, note 21.
\end{itemize}
which will be addressed below, but it does not do so in a particularly comprehensive fashion.

Other jurisdictions have taken a more systematic approach to reform. Quebec subjected its legislation to a major overhaul in 1978,40 Saskatchewan did so in the following year.41 Ontario is currently in the midst of a comprehensive review. The Ontario exercise is an interesting one to compare with Nova Scotia's. The Ontario approach was to issue a White Paper in late 1979, and to commission an academic study in 1980. Paul Weiler, former Chairman of the British Columbia Labour Relations Board, was given a board mandate to review workers' compensation in Ontario. His first Report was released in November, 1980.42 The Weiler Report is in marked contrast to the Select Committee's Report. The Weiler Report does attempt to examine first principles, and to develop a philosophy of workers' compensation. For that reason the Weiler Report is a very good reference point against which to assess issues in workers' compensation. Weiler very clearly articulates his assumptions and outlines his preferred directions for change. Accordingly, Weiler's approach will be examined in considerable detail in the ensuing discussion.

IV. The Basis of Compensation

The present analysis of issues concerning the basis of compensation will proceed by an examination of the present system measured against the critiques contained in the Select Committee Report and in the Weiler Report. In addition, the analogy to personal injury damages in tort will be explored in an effort to place the scheme of workers' compensation in the context of the alternative foregone.

What should be the starting premise for any discussion of the scope of compensation? The Select Committee Report gives the following response:

There was agreement that the legislation should provide the most comprehensive protection possible to the work force, consistent with economic realities, i.e. that costs would be a direct charge upon industry.43

The Select Committee Report does not really follow through on this point. It neither discusses what full compensation would entail, nor

41. S.S., 1979, C. W-17.1
42. See supra, note 35.
43. Select Committee Report, supra, note 21 at 2.
whether there are any barriers to its achievement. The present discussion will attempt to do that, starting from the presumption that there should be full compensation.

The presumption of full compensation is based on an assumption that both the Select Committee\textsuperscript{44} and the Weiler Report\textsuperscript{45} profess to accept that workers' compensation is not a social assistance program dependent upon society's good graces, but rather a right enjoyed by all workers. A century ago the law deemed that there was an implied term in an employment contract that the worker accept risks on the job.\textsuperscript{46} The essence of an employment contract is that the worker gives his labour to generate profits for his employer. If the employer reaps the benefits, he should also bear the risk of loss. It would therefore seem more appropriate that the implied term of the employment contract should be that the worker will be fully compensated for any work-related injury. The innovation of workers' compensation is that employers are expected to respond on a collective rather than an individual basis in the performance of this obligation.

The fact of financing by employers is a fundamental feature of workers' compensation. It is a cost of production, a direct charge upon industry.\textsuperscript{47}

It is illegitimate in principle to argue that the Workers' Compensation Board must tighten up on claims and cut back on benefits because its total budget is growing too large, too fast, for the economy to afford ... the only proper means of containing the bill for accident losses is to reduce the number of accidents themselves.\textsuperscript{48}

The Workers' Compensation Act prohibits employers from passing on the costs of assessments to their employees.\textsuperscript{49} But this is probably more a control of form than of substance.

Management, canvassing other options, will naturally analyse higher workers' compensation premiums as an increase in its overall labour costs ... In the final analysis I believe that compensation benefits are paid not by capital but by labour, both as consumers of higher-priced goods and as wage earners in an industry faced with increasing labour costs in a competitive world ... workers' compensation is a vehicle

\begin{itemize}
\item \textsuperscript{44} Id. at 11-12.
\item \textsuperscript{45} Weiler Report, supra, note 35 at 13.
\item \textsuperscript{46} Fleming, supra, note 1, at 478.
\item \textsuperscript{47} supra, note 43.
\item \textsuperscript{48} Weiler Report, supra, note 35 at 15-16.
\item \textsuperscript{49} S.N.S., 1968, c. 65, s. 18.
\end{itemize}
through which able bodied workers share their income with their disabled fellows.\textsuperscript{50}

In reality, the question is not whether the full costs of compensation will be paid, but how much of the cost must be born by the injured worker himself.

A fundamental question is: "Compensation for what?" Workers' compensation has always been primarily concerned with compensation for loss of earnings. This is the main battleground about the nature of compensation awards. Nevertheless, issues of compensation for non-pecuniary losses and for cost of care are also basic to any scheme of compensation. Furthermore, inasmuch as the aim is to restore the worker as much as possible to his pre-injury situation, issues of job security are closely intertwined with those of compensation. These various aspects of the compensation system will each be examined in turn.

\textit{(A) Loss of Earnings}

The basic thrust of workers' compensation is that it is aimed at replacing lost wages, or at least some portion of lost wages. The compensation for lost earnings is currently organized on the basis of distinct categories of benefits, i.e. entitlement in case of death, permanent total disability, permanent partial disability, and temporary disability (whether total or partial). The particular types of benefits raise unique questions, but there are also matters common to all types of benefits. These common questions will be addressed first.

\textit{(i) Periodic versus Lump Sum Payments}

A preliminary issue, which is something of an aside, concerns the mode of payment. One of the virtues of the fact that workers' compensation is operated by an administrative board is that it is easy, and indeed the norm, to make periodic payments to claimants. This is a marked advantage over the system of tort liability, where personal injury damages are awarded on a once only, lump sum basis. The lump sum award requires guesses, founded on actuarial evidence, as to how long the plaintiff will live, or how long his disability will last. But since actuarial predictions make no claim to accuracy in individual cases, tort damages are awarded with an almost certain knowledge that they are erroneously calculated.\textsuperscript{51} Periodic payments

\textsuperscript{50} Weiler Report, \textit{supra}, note 35 at 17-18, See also Select Committee Report, \textit{supra} note 21 at 12.

solve this problem by being capable of responding to actual occurrences. The courts have declared themselves incapable of awarding periodic payments as tort awards without direction from the Legislature, because the courts do not have the administrative machinery to handle them.\textsuperscript{32}

Lump sum awards also require the courts to make projections far into the future about inflation and return on investments that the lump sum could earn.\textsuperscript{53} Periodic payments again avoid such guesswork, and a response can be made to the inflation problem by indexing benefits to the cost of living, as was done in Nova Scotia in 1973.\textsuperscript{54}

Ordinarily a periodic payment is more appropriate, but there are circumstances in which a lump sum is preferable. The Workers' Compensation Board does currently have the power to commute a periodic payment into a lump sum.\textsuperscript{55} Overall, as regards the method of payment, the workers' compensation system is much more adaptable and more appropriate than the comparable response by a court to a tort claim.\textsuperscript{56}

\textit{(ii) Earnings Ceilings}

Entitlement to workers' compensation is calculated on the basis of the worker's pre-injury earnings. From the inception of the statutory scheme a ceiling on average earnings has been imposed. In effect, anyone actually earning more than the ceiling is deemed to be earning only the level set by the ceiling. Initially, in 1915, the ceiling was set at $1200 a year.\textsuperscript{57} At the time this was at the high end of the scale of industrial wages.\textsuperscript{58} As general wage levels increased, changes in the ceiling came more slowly. The first increase, to $1500, was not adopted until 1937.\textsuperscript{59} After that changes became more frequent, and in recent inflationary times, very frequent. The ceiling is no longer set by the statute itself, but by regulation.\textsuperscript{60} The current ceiling is $15,000,

\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.} at 471-474.
\textsuperscript{54} S.N.S. 1968, c. 65, s. 38A, added by S.N.S. 1973 (2nd Sess.), c. 6; as am. by S.N.S. 1975, c. 63, s. 3.
\textsuperscript{55} S.N.S. 1968, c. 65, s. 42(1).
\textsuperscript{56} Where the administrative machinery works properly, the payment of claims is also much faster from an administrative board than from a court.
\textsuperscript{57} S.N.S. 1915, c. 1, s. 41. This was compared to a ceiling of $2000 in Ontario, Weiler Report, \textit{supra}, note 35 at 33.
\textsuperscript{58} Weiler Report, \textit{Id.}
\textsuperscript{59} S.N.S. 1937, c. 37, s. 8.
\textsuperscript{60} S.N.S. 1968, c. 65, s. 51B, added by S.N.S. 1975, c. 43, s. 6; S.N.S. 1975, c. 63, s. 4.
which is approximately the average industrial wage in Nova Scotia.\textsuperscript{61} This means there are a significant portion of injured workers whose earnings are underestimated because of the ceiling. The Select Committee Report recommends that the ceiling be raised to $19,000,\textsuperscript{62} without explaining how that figure was arrived at, and without examining the question of whether, in principle, any ceiling is justified.

Weiler does address this issue, and expresses considerable doubt as to the conceptual rationale for a ceiling.\textsuperscript{63} As Weiler notes, workers’ compensation is not designed as a social assistance program to keep its recipients above the poverty line; its analogue is tort damages which have never questioned that actual earnings form the basis of the calculation. If the objective is to replace lost earnings, a ceiling is an anomaly. Weiler further notes that the impact of the ceiling is far more acute on individuals than on the compensation plan as a whole.

The justification for such restraint cannot be fiscal concern, since there is something of an inverse relationship between high levels of earnings and high levels of risk.\textsuperscript{64} Nevertheless, Weiler displays some caution about venturing into an as yet untried system of compensation with no ceiling. Instead, he proposes that a ceiling be retained, but that it be drastically increased such that almost no one earns more than the ceiling. Weiler’s suggestion is a moving ceiling based on 250 percent of the average industrial wage (currently $40,000) which would exceed the earnings of about 99 percent of Ontario’s workers.\textsuperscript{65}

The Ontario government has accepted this recommendation in principle.\textsuperscript{66} The provinces of Saskatchewan, Manitoba, British Columbia and Quebec have also recently set relatively high ceilings which are automatically adjusted.\textsuperscript{67} Although there does not seem to be a justification for any ceiling, if we must have one we should at

\textsuperscript{61} Employment earnings and hours, Statistics Canada, Catalogue, 72-002 Monthly (May 1981): For the first three months of 1981 the figures for the industrial composite average weekly earnings for Nova Scotia were about $288, which is approximately $15,000 per year.

\textsuperscript{62} Select Committee Report, supra, note 21 at 27-28.

\textsuperscript{63} Weiler Report, supra, note 35 at 34-36.

\textsuperscript{64} Id. at 35.

\textsuperscript{65} Id.


\textsuperscript{67} Weiler Report, supra, note 35 at 34. The ceilings are 150 percent of the average industrial wage in British Columbia and Quebec, which cover about 90 percent of
least ensure that its impact is minimized. The Select Committee’s recommendation of a ceiling of $19,000 a year falls far short of this objective.

(iii) Gross or Net

The question of whether compensation benefits should be calculated on the basis of gross or net pre-injury earnings was not addressed when the workers’ compensation scheme was introduced in 1915. The reason was that there was then no difference; this was prior to the introduction, on a “temporary” basis, of income tax in 1917. The adoption of a system of income tax did not, however, result in a change in the basis of calculating workers’ compensation; the basis continues to be gross earnings.

If workers’ compensation benefits were taxed on the same basis as employment income, there would be no complication involved in paying compensation on the basis of gross earnings. It would not be necessary to be concerned about the impact of tax if it fell equally on the pre-injury earnings and the post-injury compensation which substitutes for those earnings. And, from a practical standpoint, this would be the easiest way to proceed.

Unfortunately, reality is more complicated. In fact, workers’ compensation benefits are not taxable income. Nor would it be a simple procedure to make workers’ compensation payments taxable, and increase the amount payable to offset the impact of tax. The reason is that the Income Tax Act is a federal act (provincial income tax also being imposed on the basis of the federal act in all provinces except Quebec), whereas workers’ compensation is a provincial responsibility. It is not simply a matter of getting federal and provincial governments to agree in principle to the taxation of workers’ compensation benefits. If workers’ compensation benefits were taxed, the federal government would reap a windfall. Any effort to increase benefits to offset the impact of the tax would mean a net loss for the provinces (either the government or the employer contributors).

workers; in Saskatchewan and Manitoba the ceiling is set so that only ten percent of claimants have earnings above the ceiling. Weiler treats these two approaches as roughly similar, without noting the distinction that the former is based on 90 percent of all wage earners whereas the latter is based on 90 percent of injured workers. If Weiler’s assumption about the relationship between salary level and incidence of injury is valid, the ceiling under the Saskatchewan and Manitoba formulation would be lower.

Short of a complete rearrangement of fiscal relations between Ottawa and the provinces, it is clear that workers' compensation benefits will remain non-taxable income.\textsuperscript{70} As long as workers' compensation benefits are non-taxable, certain inequities result from the fact that benefits are based on pre-injury gross earnings. The actual loss suffered by the worker is a loss of his net, not his gross, earnings. The problem is not that anyone gets in excess of his net pre-injury earnings in compensation; the less than full compensation avoids this.\textsuperscript{71} The inequality is that the relative amount of under compensation is unevenly distributed. A claimant with no dependents, who is relieved of the greatest amount of tax, gets a higher proportion of his net pre-injury income than does a claimant with dependents. Compensation on the basis of gross earnings arbitrarily imposes harsher treatment on claimants with families.\textsuperscript{72}

If this anomaly cannot be cured by taxing workers' compensation benefits, the obvious alternative is to pay compensation benefits on the basis of pre-injury net earnings. This is administratively more complex than basing payments on gross earnings, but Quebec has succeeded in implementing a net based scheme without too much difficulty.\textsuperscript{73} Weiler recommends that this approach be adopted in Ontario,\textsuperscript{74} a suggestion accepted in principle by the Ontario

\textsuperscript{70} Weiler Report, \textit{supra}, note 35 at 38-29.
\textsuperscript{71} As will be discussed in detail in the following section, benefits have always been considerably less than 100 percent of gross earnings; the current level is 75 percent. In order for a taxpayer to have an effective tax rate of 25 percent (i.e. to have a net income of less than 75 percent of gross earnings) a taxpayer with no dependents would require an annual income of more than $23,000, and a taxpayer with a fully dependent spouse and two fully dependent children would require an annual income in excess of $34,000 (judged from current tax deduction tables for Nova Scotia employees, S.O.R. 80/941, Table 402; account was taken of C.P.P. and U.I. deductions). Since these incomes far exceed the workers' compensation earnings ceiling, everyone is \textit{undercompensated} under the present scheme.

\textsuperscript{72} It should be noted that the Canadian approach in tort liability is to ignore the effect of tax in non-fatal cases, \textit{Andrews v. Grand & Toy}, \textit{supra}, note 51 at 474-5. The rationale for not deducting the tax from pre-injury earnings is that it is the earning capacity, a capital asset, and not lost earnings that is being compensated. (This rationale is said not to apply in fatal cases, \textit{Keizer v. Hanna}, (1978), 82 D.L.R. (3d) 449 (S.C.C.)) The complication faced in tort cases that is not faced in workers' compensation cases arises from the fact of a lump sum payment in tort. In long term disability cases a lump sum is calculated on the basis that the lump sum will earn income. Although the lump sum itself is not taxable, the income it produces is. In addition to ignoring the tax on pre-injury earnings the courts also ignore the tax on income from the award, (\textit{Andrews} at 474-5). The net effect of ignoring tax in both pre- and post-injury situations is very unclear.

\textsuperscript{73} Weiler Report, \textit{supra}, note 35 at 39.
\textsuperscript{74} \textit{Id.} at 40.
government. The Select Committee Report ignores this issue entirely, but the net earnings approach is conceptually appealing. It is also very closely intertwined with the question of what percentage of pre-injury earnings should be paid in compensation benefits, to which the discussion now turns.

(iv) Percentage Basis

As was noted earlier, at its inception, workers' compensation never promised to replace all lost earnings. In the beginning compensation amounted to 55 percent of average earnings (up to the ceiling). This was increased to 60 percent in 1929, to 66 2/3 percent in 1937, to 70 percent in 1956, and to 75 percent in 1959. There has been no change since 1959.

Are we not due for a further increase? The Select Committee Report does not address this issue. It is hard to believe that its members did not turn their minds to the question. One is left with the suspicion that the Committee members made a conscious decision to support no change, but found silence to be the easiest way to defend that position.

Is there any reason why the basis of compensation should not be 100 percent? An argument that account must be taken of the incidence of tax can be met by paying compensation on the basis of net earnings, as discussed in the previous section. An argument that the bargain struck in 1915 contemplated only partial replacement of lost earnings should not be controlling in 1981. In the first place, since the tort remedy has greatly expanded since 1915, a very comprehensive system of workers' compensation is required to re-establish a balance similar to that struck in 1915. In the second place, and more importantly, there is no particular reason why, in 1981, we must continually refer back to a historical compromise fashioned two-thirds of a century ago. Surely we have now reached the stage where workers'
compensation should be designed in accordance with what we think public policy demands.

It is from this perspective that Weiler assesses the question of the appropriate percentage. As discussed above, Weiler begins with an initial assumption that the total cost is no reason for denying injured workers 100 percent of compensation. But for other reasons, he concludes that something less than total compensation should be awarded; specifically he recommends that compensation should be 90 percent of net earnings.

Weiler's argument is that there must be a "modest" shortfall from full compensation. His 90 percent figure would apply across the board, i.e. to both total and partial disability, and to temporary and permanent disability. However, he actually develops his argument in the context of temporary total disability, and that seems to colour his approach.

The essence of Weiler's argument is that something less than 100 percent is required in order to provide an incentive to return to work. He concedes that a large gap to achieve this end would be an unfair penalty on those unquestionably unable to work, but does conclude that a modest gap is necessary. On reflection, this analysis seems to break down, especially when looked at with reference to the specific types of compensation benefits.

Looking firstly at permanent total disability, it does seem rather inconsistent to award compensation on the basis that a claimant is incapable of ever returning to work, and in the next breath indicate that he needs an incentive to return to work. As regards partial disability (whether temporary or permanent), the compensation received must, by definition, be less than a claimant's pre-injury earnings. It is only partial compensation. That, in itself, provides an incentive to work. An additional incentive is not necessary.

The only circumstance in which an incentive to return to work does, at first glance, seem appropriate is in the case of temporary total disability, which is the context in which Weiler raises the issue.

82. Weiler Report, supra, note 35 at 10-11.
83. Id. at 40.
84. Id. at 37-38 Weiler does not suggest that a worker would actually sustain an injury to get off work, but does suggest that after the event, a prod might be needed to get him to return to work.
85. Id.
86. Furthermore, Weiler himself offers a means of dealing with a partially disabled claimant who is not working up to his potential. Weiler suggests that the Workers' Compensation Board should have the power to deem that a claimant was receiving income if he refused work he was capable of performing. (Id. at 62).
However, there already is a powerful incentive to return to work—the Board has the power to cut the claimant off if the Board concludes that the person is fully recovered and able to return to work. In light of this, it seems unfair to penalize the claimant who is in fact not yet capable of returning to work. In principle, it seems preferable to let the system tolerate a few malingerers, rather than penalize the innocent.

Weiler raises a subsidiary issue to the effect that able bodied workers incur certain expenses that workers' compensation claimants do not have. The argument is that 100 percent compensation would actually improve the financial position of injured workers. Weiler cites specifically job related expenses such as transportation, cafeteria meals, special clothing and day care. There are a number of responses to this point. A person on partial disability who is in fact working will incur such expenses in the same way as his able bodied co-workers. A workers' compensation claimant who is not working would not incur these specific work related expenses but nor will he get any tax deductions for them. In addition, a point which Weiler himself notes, an injured worker may well face extra expenses resulting from his disability. There is no particular reason to assume that the net effect of these costs gives a net benefit to injured workers. Weiler makes a further comment that an injured worker does not have to sacrifice leisure time in order to work. Again, this would or could only apply to total disability, but even where it could apply Weiler himself offers the rejoinder that the disability itself is likely to detract from that leisure time. It seems to be a very suspect argument for reducing compensation payments.

In sum, there does not seem to be any real justification for paying compensation amounting to anything less than 100 percent of pre-injury net earnings.

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87. S.N.S. 1968, c. 65, s. 58(1); the Committee on the Weiler Study "The Weiler Report: A step forward for injured workers?" fact sheet at 2.
88. It is not clear that a 10 percent reduction would be enough of a penalty to deter a malingerer in any event.
89. Weiler Report, supra, note 35 at 37.
90. Id.
91. Id.
92. Id.
93. Id.
94. Weiler also raises in this context the point that workers on total disability compensation are not subject to the threat of interruption of earnings due to illness, unemployment, etc. This issue will be discussed in detail below, in a separate section: (vi) wage adjustments and contingencies.
(v) **Collateral Benefits**

The present act does make one reference to fringe benefits:

46(1) In fixing the amount of a weekly or monthly payment regard shall be had to any payment, allowance or benefit which the worker may receive from his employer during the period of his disability, including any pension, gratuity or other allowance provided wholly at the expense of the employer.

(2) When the compensation is payable any sum deducted from the compensation under subsection (1) may be paid to the employer out of the Accident Fund.\(^{95}\)

The corollary should be that any fringe benefits that the worker was receiving before the injury which are not being maintained by his employer during his disability should be replaced by the workers' compensation scheme. The present act does not allude to this, nor does the Select Committee Report refer to it. Weiler does, however, comment upon the problem. He suggests that an employer be required to maintain fringe benefits for any employee on *temporary* disability, and that where a person becomes *permanently* disabled, the Board should provide acceptable substitutes for these fringe benefits, either in kind or through supplements to the basic pension.\(^{96}\)

Weiler's approach is eminently sensible.

The issue of pre-injury fringe benefits is conceptually fairly easy to grapple with. The question of collateral benefits, other than workers' compensation benefits, which accrue as a consequence of the disability is somewhat more problematic. Such collateral benefits, e.g. insurance or pension benefits, can be either private or public. From a practical and policy perspective, the latter, in the form of Canada Pension Plan disability and survivor pensions, are the most significant.

The present approach in Nova Scotia is simply to ignore collateral benefits, although it is not clear whether this is a conscious choice or a function of the fact that the Canada Pension Plan was instituted long after the workers' compensation scheme had become well entrenched. The approach taken in tort cases is similarly to decline to make any adjustments for collateral benefits, whether in respect of the Canada Pension,\(^{97}\) or private pension/insurance schemes.\(^{98}\) The rationale is that the plaintiff has paid for or otherwise earned the right to the pension. If the contingency had not happened, he would not have

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95. S.N.S. 1968, c. 65, s. 46, as am. by S.N.S. 1978-79, c. 38, s. 1(2).
96. Weiler Report, supra, note 35 at 44-45.
reaped any benefit; where the contingency has now happened, his rights under the plan should not be denied.

Weiler, however, takes a different approach. He is concerned about the "stacking" of benefits, and recommends that any Canada Pension Plan payments received should be fully deducted. He deals with the question on the footing that workers' compensation represents a full compensation of lost earnings, which is not in fact what he is recommending. Where compensation is less than complete, it seems illogical to object to a claimant receiving Canada Pension to top off his workers' compensation benefits. But even if workers' compensation were full compensation, Weiler's approach is questionable. He assumes that since the Canada Pension Plan is the more generalized plan, (i.e. benefits are paid irrespective of the cause of disability), workers' compensation schemes should be the last insurer. The reverse agreement seems more appealing to the writer. It is the scheme that provides the minimum floor for everyone that should be the last insurer. If any deductions were to be made, it would seem that the Canada Pension Plan should take account of workers' compensation benefits, instead of the reverse. This is not, however, being recommended. A person who has paid for his Canada Pension benefits should not be deprived of them. The argument accepted in tort cases is viewed as compelling. Any overcompensation that results can be rationalized on the basis that the worker has purchased this right to overcompensation, even if by means of a compulsory contributory pension scheme.

(vi) Wage Adjustments and Contingencies

Workers' compensation payments are paid on the basis of pre-injury earnings. In compensating for lost earnings, the built-in assumption is that the injured worker would have continued to earn the same wage if he had not been injured. Especially in permanent disability cases, this is clearly a significant distortion.

A very major element of wage adjustment is now accounted for in Nova Scotia, because benefits have been indexed to the Consumer

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99. Weiler Report, supra, note 35 at 41-42. Weiler also suggests that supplementation of workers' compensation benefits by private disability plans should be prohibited (at 42). It is not at all clear why there need be any concern about private sector responses to disability.

100. Id. at 41.

Price Index since 1973.\textsuperscript{102} Still, this does not take account of real increases in wages that the injured worker would have enjoyed. Such real increases could arise from either a general rise in real wage levels in that industry, or from the advancement of the particular worker, or both. Tort awards in long term personal injury cases do take such factors into account, and do make an effort to project what the average income of the plaintiff would have been, while admitting that a large amount of guesswork is involved.\textsuperscript{103}

The Select Committee Report does not comment on this aspect; Weiler does make a few references in passing. Weiler does not think that, as a general rule, the Board should be asked to speculate about such matters, although he does see some role:

But where there is an established job progression scheme or salary grid encompassing the position actually occupied by the injured worker, the Board should take this into account in calculating the benefit which is intended to replace income lost as a result of the injury.\textsuperscript{104}

Weiler offers no specific details as to how this would work. Weiler also addresses this general issue, somewhat more indirectly, when discussing escalation to deal with inflation. He suggests that it might be more appropriate to index according to the increase in the average wage, (recognizing that this would in some instances be lower than the inflation rate).\textsuperscript{105} This suggestion responds to the realities of wage escalation of individual injured workers only in a tangential way; the position of the individual worker may be far removed from the average.

It is admitted that it would be administratively cumbersome to build wage escalation factors into benefits on an individual basis, but Weiler's suggestion that this be done only where a clear pattern exists seems to represent unfair discrimination against others. Perhaps a more appropriate solution would be for the Board to develop separate guidelines appropriate to particular job classifications, guidelines that would be regularly adjusted and reflected in individual pension awards (both past and present).

\textsuperscript{102} S.N.S. 1973, c. 6. There are still a few anomalies. As the Select Committee Report (supra, note 21 at 27) points out, temporary total disability claims lasting more than a year do not currently benefit from indexing. The Select Committee recommends that this be rectified. The Select Committee also recommends that pensions which began before 1973, and were thus eroded by inflation prior to the adoption of indexing, should be adjusted upward to compensate (at 28).

\textsuperscript{103} Andrews v. Grand & Toy, supra, note 51 at 469.

\textsuperscript{104} Weiler Report, supra, note 35 at 45.

\textsuperscript{105} Id. at 74.
Another factor taken into account in tort awards which is not considered in workers’ compensation benefits is the notion of “contingencies of life”. The approach taken in tort cases is somewhat arbitrary. A 20 percent reduction for contingencies is common, but the figure seems to be pulled out of the air. The basis for this adjustment is

It is a general practice to take account of contingencies which might have affected future earnings, such as unemployment, illness, accidents, and business depression.

As Mr. Justice Dickson notes in Andrews, there seems to be a bias in favour of the negative contingencies of life. There would not appear to be a very good justification for taking account of such contingencies in relation to workers’ compensation benefits, since it is such a speculative exercise. If account is to be taken at all, it should simply be built into the adjustments made in respect of real wage increases, discussed above.

In sum, it is being suggested that workers’ compensation benefits should be adjusted to take account of wage adjustments that injured workers would have experienced. Some rough attempt should be made to respond to individual circumstances. It is admitted that this will be a very imprecise exercise, but the resulting distortion should be less than that created by completely ignoring changes in real wages.

(vii) Issues Relevant to Particular Types of Benefits

The preceding discussion has concerned issues applicable across the different types of workers’ compensation awards. Although there are no other particular issues which will be discussed in relation to temporary total disability benefits, there are some specific issues that should be raised in relation to permanent disability, partial disability, and survivors’ benefits.

(a) Permanent Disability

At present a person in receipt of a permanent total or permanent partial disability pension receives the same basic pension for the rest of his life. Weiler suggests that after a person reaches retirement age, this is not exactly appropriate. If the point of the scheme is to

107. Id.
108. Id.
109. S.N.S. 1968, c. 65, ss. 36(1), 38(1).
replace lost income, at the stage of retirement, it should be replacing lost retirement income.110 The practical implication that must be addressed is that lost retirement income would ordinarily be less than lost wage income.

In principle, it is hard to argue with Weiler that at retirement age the compensation should be for lost retirement income. However, Weiler's argument does not seem to really hold unless the compensation for lost wage income was in fact complete, including compensation for lost wage increases. For if there was any under-compensation in the pre-retirement years, a tolerance of some over-compensation in the post retirement years should be the quid pro quo. It would be almost impossible to make individual adjustments in this respect, so if the statutory scheme admits of any undercompensation during normal working years, the workers' compensation pension should not be changed at retirement age.

But if there were full compensation for lost wage income, Weiler's notion of lost retirement income would probably have to be adopted. What Weiler envisages is that the Board would contribute to the employees former pension plans, both private and public, or if that were not feasible, the Board would purchase R.R.S.P.'s to generate a comparable annuity at age 65.111 This might create some administrative difficulties, but it does seem sound in principle,112 and it is more analogous to the approach accepted as valid in tort cases.113

Weiler actually only discusses this matter in respect of permanent total disability. Conceptually, it should apply to permanent partial disability as well.

(b) Partial Disability

The basis on which partial disability pensions are awarded is one of the most contentious issues in workers' compensation. On the face of it, the act appears to direct the Board to make a standard assessment of lost earnings.

38(1) Where permanent partial disability results from the injury the compensation shall be a weekly payment of seventy-five per cent of the difference between the average weekly earnings of the

110. Weiler Report, supra, note 35 at 45.
111. Id.
112. It has been suggested that Weiler's approach ignores the fact that the disability continues after age 65, Response of Injured workers, supra, note 101 at 6. In respect of lost earnings, that is not really the point. It is, however, relevant in respect on non-pecuniary losses, discussed below.
113. Guy v. Trizec, supra, note 98.
worker before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident, and such compensation should be payable during the lifetime of the worker.\textsuperscript{114}

In fact the system has very little to do with the measurement of lost earnings. The workers' own pre-injury earnings form the basis of the calculation, but the percentage award (i.e. the percentage of the 75 percent basis) does not often come very close to the actual impairment of earning capacity.

The Compensation Board in this Province like most of the Boards in Canada pays a pension to such individuals based upon an objective disability evaluation schedule. Every person with the same injury receives the same percentage pension. The use of the 'Physical Disability Evaluation Schedule' scornfully referred to by many as the 'meat chart' method \textsuperscript{115}

If the meat chart indicates that an injured worker has a disability of 50 percent, it matters not whether the worker is completely unable to work, or is capable of returning to his old job. It is a loss of function test rather than a loss of earnings test, and is unresponsive to the job skills of individual claimants.

The issue arises in both temporary and permanent partial disability, but it is obviously more crucial in relation to the latter. The result of the meat chart method is that many claimants are grossly undercompensated for their injuries, whereas other claimants are effectively overcompensated. Average justice results in considerable injustice for those who are undercompensated.

Both the Select Committee Report\textsuperscript{116} and the Weiler Report\textsuperscript{117} strongly recommend that the meat chart approach be abandoned in favour of compensation for actual wage loss. Since that is what workers' compensation is designed to do in the first place, it is hard to quarrel with that conclusion.

The Select Committee Report does not really explore the implications of such a change; Weiler does discuss this. Weiler notes that administratively, a wage loss system requires a lot more work on the part of the Board. It requires that the Board obtain information on the claimant's post-injury actual earnings, and it leads logically to the conclusion that the Board would deem that a person had post-injury

\textsuperscript{114} S.N.S. 1960, c. 65, s. 38(1), am by S.N.S. 1978-79, c. 38, s. 2(2).
\textsuperscript{115} Select Committee Report, supra, note 21 at 24.
\textsuperscript{116} Id. at 24-25.
\textsuperscript{117} Weiler Report, supra, note 35 at 52-62.
earnings in the event that an injured worker refused a suitable job that he was capable of performing. This would increase the amount of administrative discretion exercised by the Board.

From the point of view of the injured worker, he loses his automatic entitlement to a fixed pension which is independent of the bureaucratic favour of a Board already distrusted by many of these permanently disabled workers.

On balance, however, the advantages of abandoning the meat chart system seem to outweigh the disadvantages.

It is clear that the implications of a wage loss measure is that if someone is capable of returning to his old job in spite of his work caused disability, he would not get any compensation for loss of earnings. If this seems harsh, it should be remembered that we are here speaking only of compensation for loss of earnings. This conclusion does not preclude compensation assessed on a different basis, as will be discussed below in respect of non-pecuniary losses.

(c) Survivors’ Benefits

Workers’ compensation benefits are payable upon the death of the worker both where the work related accident/disease is the immediate cause of death, and where the work related accident/disease results in a compensatory disability and that disability is in turn the cause of death.

Where death results, compensation is payable to a spouse and to other dependents of the deceased worker. Death benefits at least cover funeral expenses (including transportation costs). Where there is a surviving spouse, a lump sum payment is made. But the principal part of the compensation is periodic payments in respect of the spouse, children and other dependents. The benefits payable on the death of a worker are currently as follows.

118. Id. at 62.
119. Id. at 59.
120. S.N.S. 1968, c. 65, s. 30(a), as am.
121. S.N.S. 1968, c. 65, s. 30(b) (c), as am.
122. S.N.S. 1968, c. 65, s. 30(b)(e) (d) (e), as am.
123. Where a widow remarries, she loses the spouses’ pension as such, but does get a special payment upon remarriage. S.N.S. 1968, c. 65, s. 51, as am. by S.N.S. 1973, c. 6, s. 3.
124. Although there is currently no limit no matter how many dependents, there used to be such a limit. The limit was abolished by S.N.S. 1965, c. 58, s. 3.
Summary of Present Benefit Scales
(Effective January 1, 1981)

<table>
<thead>
<tr>
<th>Benefit Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spouse's pension</td>
<td>$395.00/mo</td>
</tr>
<tr>
<td>Spouse's remarriage allowance</td>
<td>$2,181.00</td>
</tr>
<tr>
<td>Widow's/widower's special allowance following loss of spouse in addition to pension</td>
<td>$1,000.00</td>
</tr>
<tr>
<td>Funeral expenses paid to</td>
<td>$750.00</td>
</tr>
<tr>
<td>Transportation of body</td>
<td>$300.00</td>
</tr>
<tr>
<td>Children's pension</td>
<td>$84.00/mo</td>
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<tr>
<td>Orphan's Pension</td>
<td>$109.00/mo</td>
</tr>
<tr>
<td>Other dependents' pension</td>
<td>$134.00</td>
</tr>
<tr>
<td></td>
<td>$176.00</td>
</tr>
</tbody>
</table>

*NOTE: These increases effective January 1, 1981 resulted from the provisions of Section 38A (1973 Amendment), whereby certain awards are increased in accordance with changes in the Consumer Price Index.

Death benefits constitute an anomaly in that the amount of the benefits is *not* a function of the deceased workers' previous earnings; benefits are paid in fixed sums according to different categories of dependents. If the rationale for workers' compensation is replacement of lost earnings, fixed rate awards do not fit. If the counter argument is that one man's life should not be valued more highly than another's, why is it that it is permissible to value one man's total disability more highly than another's? The point of periodic payments under a workers' compensation scheme is to replace lost earnings. Even if it is agreed that inequality of family incomes is a problem in our society, survivors' benefits under workers' compensation seem a very odd place to start a crusade. Besides, the level of survivors' benefits is sufficiently low (unless there are a very large number of dependents) that the fixed rate scheme imposes equality at a very minimal level.

The response of the Select Committee to survivors' benefits is rather unclear:

125. There is a nominal exception in that where the deceased worker was an officer or shareholder of the company, the survivors benefits cannot exceed 75 percent of the workers' prior average earnings. S.N.S. 1968, c. 68, s. 31. However, survivors' benefits are simply too low for this provision to have any effect (unless the number of children is very high).
With respect to permanent pensions we therefore suggest that: awards should be based on the workers' loss of earnings arising out of the accident and not just on the loss of body function.

This committee also recommends:
that this concept be extended to cover other pensions to workers and dependents.\textsuperscript{126}

Is the latter point an oblique reference to survivors' benefits? Later in the report, the Committee does assume that it has already addressed survivors' benefits:

This committee has as previously indicated adopted the principle that \textit{future} claims should be dealt with on the basis of loss of earnings for the claimant or \textit{in the case of fatalities on the loss of expectation of earnings}. Adjustments however are necessary at this time for surviving spouses as well as dependents and permanent pensioners.

This committee recommends that:
the pension to surviving spouses be increased to $425 per month and for each dependent to $110 per month.\textsuperscript{127} (emphasis added)

It is not at all clear whether that last recommendation refers to current cases only, or to both current and future cases.

Weiler does make clear that he favours an approach based on the lost income from the deceased worker, rather than fixed sum awards.\textsuperscript{128} Saskatchewan, British Columbia, Alberta, and Quebec have all recently moved to adopt this principle.\textsuperscript{129} The approach is a sound one.

The adoption of the approach that survivors' benefits should be based on the loss of earnings does not, however, settle all the issues. As is the case when damages are awarded under the Fatal Injuries Act,\textsuperscript{130} account should in principle be taken of the fact that the deceased worker no longer has to pay for his own living expenses.\textsuperscript{131} Alberta now awards a workers' compensation benefit equivalent to what would have been awarded if he had suffered permanent total disability.\textsuperscript{132} Where compensation is less than full in the first place, this would probably not result in overcompensation to the surviving family.\textsuperscript{133} But if the total permanent disability pension were indeed

\textsuperscript{126} Select Committee Report, \textit{supra}, note 21 at 25.
\textsuperscript{127} \textit{Id.} at 28.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} R.S.N.S. 1967, c. 100.
\textsuperscript{131} See, e.g. \textit{Keizer v. Hann}, \textit{supra}, note 72.
\textsuperscript{132} Weiler Report, \textit{supra}, note 35 at 47.
\textsuperscript{133} If there were less than complete compensation in order to provide an incentive to return to work, that clearly has no application in respect of a deceased worker.
full compensation, this would result in some overcompensation. The approach should either be to award some portion of the total permanent disability pension (perhaps 90 percent), or to award 100 percent, acknowledging that there is an element of non-pecuniary loss built into the pension.

Weiler raises a further issue in relation to young spouses with no dependents. He argues that the notion of the dependence of such persons should be reassessed. He proposes a rather complex scheme of taking age and presence of dependent children into account in assessing whether a spouse should receive a periodic pension, and if so, how much. It probably is realistic to take such factors into account, but it is difficult in principle to decide how. Such an effort will not be undertaken here.

In sum, it is suggested that there should be a fundamental change in survivors’ benefits from fixed sum periodic payments to periodic payments related to the pre-injury earnings of the deceased worker. Several questions still remain, however, as to details of how such a change should be implemented.

(B) Non-Pecuniary Loss

When it was instituted in 1915 the workers’ compensation system was specifically designed not to include compensation for non-pecuniary loss. It was not that non-pecuniary loss was judged inappropriate in principle as a basis for compensation, but rather it reflected the determination that the scheme was only designed to provide partial compensation. That was supposed to be part of the bargain, something that workers would have to give up to be granted a comprehensive scheme of workers’ compensation. But even in 1915 there was some implicit recognition of compensation for non-pecuniary losses, specifically in respect of permanent partial disability.

39(2) Notwithstanding the provisions of sub-section 1, where in the circumstances the amount which the workman is able to earn after the accident has not been substantially diminished, the Board may nevertheless recognize an impairment in earning capacity, and may allow a lump sum in compensation.

135. Weiler also proposes a vastly increased lump sum payment in respect of death benefits Id. This will be discussed in the next session.
136. S.N.S. 1915, c. 1, s. 39(2).
The present section 38(2) is in very similar terms, although the references to “substantially” and to a lump sum have been dropped.\(^1\) This seems to say that even though there is no loss of earnings, there will be compensation. Although the compensation is really for pain and suffering, it is not politic to make such an admission explicitly.

The Select Committee Report does not provide any elaboration on the matter of pain and suffering, or other non-pecuniary losses (loss of amenities, loss of expectation of life). On the other hand, Weiler makes extensive comments. He confronts the question in the context of permanent partial disability. The issue is impossible to ignore when considering the case of a worker who has suffered a permanent disability, e.g. the loss of a limb, but who has not suffered any loss of earnings. It seems extremely harsh to tell such a person that his loss is not deserving of any compensation at all. It appears to be widely accepted that this is not the appropriate response.\(^2\) Weiler suggests that we should not hesitate to compensate for such a loss, and not hesitate to label it as compensation for non-pecuniary loss.\(^3\) Of course it would be illogical to make such a payment only to those who suffer no loss of earnings, if compensation for pain and suffering, etc. is to be awarded, it must be awarded to all.

Weiler makes the initial point that it makes no sense to base an award for pain and suffering on the person’s previous earnings.\(^4\) Although awards not related to loss of earnings do have some relationship to the problems of returning to work,\(^5\) they are primarily given to compensate for loss of enjoyment of life outside the job context. In respect of non-pecuniary loss, the “meat chart” approach, assessing loss of function, does make some modicum of sense.\(^6\)

Weiler’s proposed solution is a lump sum payment to be given to workers in addition to any compensation payable in respect of loss of earnings.\(^7\) This is also the approach adopted under Saskatchewan’s new statutory scheme.\(^8\) The Select Committee Report does not say so

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1. S.N.S. 1968, c. 35, s. 38(2).
2. Weiler Report, supra, note 35 at 55.
3. Id.
4. Id. at 56.
5. E.g. even if an injured worker were able to return to his old job, it might be more difficult, or create greater risks, or affect his job mobility. Response of Injured Workers, supra, note 101 at 3.
6. Weiler Report, supra, note 35 at 55. However, it should be remembered that persons with different interests and activities will be differently affected by the same loss of function.
explicitly, and indeed makes no reference to lump sum payments, but it did apparently have the Saskatchewan model in mind.\textsuperscript{145} It is not entirely clear why a lump sum is deemed appropriate. It is true that lump sums are awarded in tort for non-pecuniary loss, but that is only because there is no alternative. Since, for example, a permanent disability is going to last for the rest of the worker's life, why should not the compensation be co-extensive, i.e. by means of a non-income related periodic pension?\textsuperscript{146} If a claimant preferred a lump sum, he could choose that option, and have a pension commuted,\textsuperscript{147} but in principle, a periodic payment seems conceptually more attractive. The result is that a person's periodic pension could have two components: one based on his previous income, and one totally unrelated to his previous income.

Assuming a periodic pension in respect of non-pecuniary loss would be something more than a token amount, it would mean that the scheme of compensation could provide a significant remedy even to those who could show little or no loss of earnings. This would not only afford a response to cases in which the injured worker is capable of performing his former job or one comparable to his former job. If the system, in respect of loss of earnings, were to embrace the concept of loss of retirement earnings, a periodic pension for non-pecuniary loss would ensure that a worker injured shortly before retirement age would not be shortchanged by the scheme. Even if he received little compensation for loss of earnings, he would still be entitled to more than nominal compensation.

In terms of the \textit{amount} of compensation that should be paid in respect of non-pecuniary loss, there is no particular principle which points to an appropriate response. An award is, by definition almost, arbitrary.\textsuperscript{148} Although neither the Weiler Report nor the Saskatchewan response considers periodic payments, the stipulations as to lump sum amounts give some indication of what degree of recognition is to be extended to non-pecuniary loss. Weiler suggests that the maximum lump sum award, i.e. for the most serious disability, be

\begin{itemize}
\item \textsuperscript{145} Comment by Gordon Gillis, counsel to the Select Committee, made at employment law seminar, Dalhousie Law School, November 22, 1981.
\item \textsuperscript{146} Weiler suggests that adjustments be made to the lump sum according to the age of the claimant; (Weiler Report, \textit{supra}, note 35 at 56-57). However, this seems to be a very inexact way to respond to the fact that some claimants will suffer their disability for a longer period than others. A life-long periodic pension gives a direct response to this factor.
\item \textsuperscript{147} S.N.S. 1968, c. 65, s. 42(1).
\item \textsuperscript{148} \textit{Andrews v. Grand & Toy}, \textit{supra}, note 51 at 475-478.
\end{itemize}
pegged at the wage ceiling, currently $40,000.\textsuperscript{149} It is not clear why the wage ceiling is appropriate, or even relevant - in truth the figure seems to be taken out of the air. The Saskatchewan maximum, which is apparently the model looked upon favourably by the Select Committee,\textsuperscript{150} is much smaller, a sum of $10,000.\textsuperscript{151} Indeed, that Saskatchewan figure seems to be downright niggardly, particularly when compared to tort awards. In \textit{Andrews v. Grand \& Toy} the Supreme Court of Canada adopted a conventional figure of $100,000 as the normal maximum for non-pecuniary loss. That figure was chosen as representing a \textit{modest} response, with the explanation that it was legitimate to take aggregate costs into account in assessing non-pecuniary loss.\textsuperscript{152} Such a reserve could apply equally to workers' compensation. But while it is fair to avoid extravagance in compensation for non-pecuniary loss, the compensation should be significant enough that recognition is given to the fact that severely injured claimants have suffered a real and substantial loss apart from loss of earnings.\textsuperscript{153} The response by the workers' compensation scheme should be comparable to that given in tort awards.

Weiler presents a strong argument that the time has come for the workers' compensation scheme to expressly make allowances for non-pecuniary losses. In reality, the scheme has been doing so since the beginning, but on a very uneven basis. Whatever the excuse once was for overlooking non-pecuniary loss, it no longer is valid. If the overall principle of full compensation is accepted, compensation for non-pecuniary loss logically follows. Furthermore, that compensation should constitute more than a token response.

\textbf{(C) Costs of Care}

Initially, the response of workers' compensation to the costs of care, principally medical costs, was extremely limited. The focus of the scheme was on replacement of lost earnings. Anything else was decidedly of secondary importance. There was only one provision in the 1915 act relevant to costs of care, and the underlying "guardian of the fund" mentality was made quite explicit.

\begin{itemize}
  \item \textsuperscript{149} Weiler Report, \textit{supra}, note 35 at 55.
  \item \textsuperscript{150} Comment by Gordon Gillis, \textit{supra}, note 145.
  \item \textsuperscript{151} S.S. 1979, c. -17.1, s. 67.
  \item \textsuperscript{152} \textit{Andrews v. Grand \& Toy}, \textit{supra}, note 51 at 476-477.
  \item \textsuperscript{153} Weiler suggests that in fatal cases the surviving spouse should be given a substantial lump sum in addition to any periodic pension granted; (Weiler Report, \textit{supra} note 35 at 49-50). To a large extent, he appears to be suggesting compensation for non-pecuniary loss. Again, this raises the question whether it should be in the form of a lump sum or a periodic payment.
\end{itemize}
45(3) Where in any case, in the opinion of the Board it will conserve the accident fund to provide a special surgical operation or other special medical treatment for a workman, and the furnishing of the same by the Board is, in the opinion of the Board, the only means of avoiding heavy payment for permanent disability, the expense of such operation or treatment may be paid out of the accident fund.\textsuperscript{154}

The well-being of the injured worker seemed totally irrelevant. Gradually, however, the scope of coverage of costs of care was expanded. In 1919 provisions were introduced to cover medical care services during the 30 days after the disability was sustained.\textsuperscript{155} In 1927 a provision was added whereby the Board could pay, for one year, the costs and repair of an artificial limb, if this would lessen the disability.\textsuperscript{156} In 1929 apparatus and spectacles were added to this provision,\textsuperscript{157} and in 1937 dental appliances were included.\textsuperscript{158} In 1934 the medical services provisions were altered such that the 30 days of care could be any time within 60 days from the date of disability.\textsuperscript{159} Three years later this was altered to stipulate that medical services could be provided for a period of more than 30 days if this were beneficial to the claimant and would preserve the accident fund.\textsuperscript{160} Finally, in 1944 both the 30 day limit on provision of medical services, and the one year time limit on the supply and repair of devices were removed.\textsuperscript{161} At last there was a general right to medical services and devices financed by the Workers' Compensation Board. The advent of hospital insurance and medicare have not affected this basic concept. Medical costs are still paid by the Workers' Compensation Board.\textsuperscript{162}

More recently other innovations in respect of costs of care have been introduced. In 1961 provisions for a helpless allowance first appeared.\textsuperscript{163} The current provisions for the helpless allowance are as follows:

60(4) Where a worker is rendered helpless through permanent total disability and the Board is satisfied that the worker requires treatment, service, or attendance as a result of the disability, the

\textsuperscript{154} S.N.S. 1915, c. 1, s. 45(3).
\textsuperscript{155} S.N.S. 1919, c. 61, s. 8.
\textsuperscript{156} S.N.S. 1927, c. 38, s. 2.
\textsuperscript{157} S.N.S. 1929, c. 44, s. 5.
\textsuperscript{158} S.N.S. 1937, c. 37, c. 1.
\textsuperscript{159} S.N.S. 1934, c. 33, s. 2.
\textsuperscript{160} S.N.S. 1936, c. 37, s. 2.
\textsuperscript{161} S.N.S. 1944, c. 36, s. 2.
\textsuperscript{162} S.N.S. 1968, c. 65, s. 60(1), as am. by S.N.S. 1972, c. 59, s. 2.
\textsuperscript{163} S.N.S. 1961, c. 51, s. 5.
Board shall make an allowance of three hundred dollars per month for such treatment, services or attendance or, if the allowance is inadequate, may provide such treatment, services or attendance.\(^{164}\)

Although there is authority to exceed $300 per month, the wording of the statute makes it quite obvious that there is a presumption against this. There is no clearly established principle that the Board is to ensure that every effort is made to provide the claimant with whatever care he reasonably requires. A recent tort award for a quadriplegic, accepting that home care was the appropriate type of care, made an allowance for the cost of future care (including basic living costs) in excess of $4,000 a month.\(^ {165}\) In that context, a helpless allowance of $300 a month looks quite limited indeed.

The Workers' Compensation Act also provides for a clothing allowance, first introduced in 1970.\(^ {166}\) The current provision reads as follows:

\[60(4)\] The Board may allow to an injured worker, who because of the nature of an injury in respect of which he has received compensation wears a prosthetic device or full-length brace or is a paraplegic or quadriplegic, or is confined to a wheelchair, an additional clothing allowance to compensate for the additional deterioration of clothes not exceeding three hundred and fifty dollars per year.\(^{167}\)

Beyond the provision of basic medical services and necessary devices, the response of the workers' compensation scheme to the costs of care of an injured worker remains quite limited. It is clear from the structure of the statutory scheme that costs of care are still very much secondary to the objective of replacing lost income. The contrast with the approach recently adopted by the Supreme Court of Canada in personal injury tort claims is marked. The Supreme Court has made it plain that ensuring that the injured person receives adequate personal care is the most important objective that the court must meet.\(^ {168}\) Under workers' compensation, concern for the costs of

\(^{164}\) S.N.S. 1968, c. 65, s. 60(4), rep & sub by S.N.S. 1978-79, c. 38, s. 7, as am. by S.N.S. 1981, c. 46, s. 2(1). The select committee recommended this increase to $300 per month, Select Committee Report, \textit{supra}, note 21 at 25.

\(^{165}\) \textit{Andrews v. Grand & Toy}, \textit{supra}, note 51.

\(^{166}\) S.N.S. 1970, c. 70, s. 6.

\(^{167}\) S.N.S. 1968, c. 65, s. 60(4), added by S.N.S. 1978-79, c. 38, s. 7, as am. by S.N.S. 1981, c. 46, s. 2(2). The Select Committee recommended this increase to $350 per year. Select Committee Report, \textit{supra}, note 21 at 26.

a claimant's care is an afterthought, and there is no direction to the Board to systematically assess a claimant's needs. Such an oversight warrants correcting.

(D) Job Security

At first glance, the issue of job security might seem to be a matter quite independent of any notion of compensation. But if compensation is viewed in its broadest context, i.e. as restoring, as best as can be done, the claimant to his pre-disability position, the issue of job security is clearly very relevant.

At present the workers' compensation legislation is silent about the right of an injured worker to return to the job. For someone who is permanently and totally disabled, the issue is not a real one. But for persons temporarily or partially disabled, the question is one of enormous practical importance. Since they have no rights deriving from their status as workers' compensation claimants, they must look to the rights of injured or sick workers generally.

At common law permanent illness is taken as amounting to frustration of the employment contract. A person suffering from a permanent partial disability, unable to perform his old job but capable of performing other tasks, has no actual right to an alternate job with his employer. However, in instances of temporary illness or disability, where the employee is later capable of returning to his old job, the situation is quite different at common law. The employment contract is not frustrated by temporary absence due to illness; the contract subsists during the period of the illness. Since the employee has never lost his job, he does not have to get it back. Temporary absence due to illness or injury is not just cause for summary dismissal. Nevertheless, this body of law assists the injured worker only up to a point. Absence of just cause does not preclude dismissal; as long as notice (or payment in lieu) is given, the employee can be dismissed. If the required notice is of any significant length, this might provide disincentive to the employer to dismiss, but this amounts to a very uncertain assurance of job security.

170. Id. at 427.
171. Id. at 420.
172. Id. at 423.
173. The period of notice would run, not from the date the employee took sick, but from the date the employer informed the employee that he was not wanted back on the job.
Employees covered by collective agreements, assuming there is the standard clause prohibiting dismissal without just cause, are in a much better position. Arbitration cases hold that a single period of absence due to illness, even if quite lengthy, does not constitute just cause for dismissal. Furthermore, depending on the wording of the particular collective agreement, an injured worker unable to perform his old job might be entitled to be assigned to alternate work by his employer.

Turning to statute law, the Canada Labour Code does offer some protection to workers under federal jurisdiction.

61.4(1) No employer shall dismiss or lay off an employee solely because of absence due to illness or injury if
(a) the employee has completed three consecutive months of continuous employment by the employer prior to his absence;
(b) the period of absence does not exceed twelve weeks or the period during which an employee is undergoing treatment and rehabilitation at the expense of a workers' compensation authority; and
(c) the employee, if requested in writing by the employer within fifteen days after his return to work, provides the employer with a certificate of a qualified medical practitioner certifying that the employee was incapable of working due to illness or injury for a specified period of time, and that period of time coincides with the employee's absence from work. (emphasis added)

The exact implications of s. 61.4(1), particularly subsection (b), are unclear. A workers' compensation claimant could presumably rely on the longer period under subsection (b), but if he has to rely on the second branch of the subsection, certain difficulties may arise. The “and” between treatment and rehabilitation may be a limitation, and the subsection does not appear to cover a period of convalescence. This latter point may well exclude a large number of workers' compensation claimants. It is also very doubtful that section 61.4(1) would cover a situation where an employee was no longer capable of performing his old job but was capable of undertaking alternate

174. Re United Automobile Workers and Massey-Ferguson Ltd. (1969), 20 L.A.C. 370 (Weiler). The situation is more ambiguous in respect of a series of absences due to illness, where just cause might be found. Thus an injured worker who had returned to work but was forced to miss work from time to time because of the continuing effects of his disability might be subject to dismissal, characterized as “non-disciplinary.”
175. Re United Automobile Workers, Local 399, and Anaconda American Brass Ltd. (1966), 17 L.A.C. 289 (Arthurs).
work for the same employer. The “solely” in the beginning of the subsection would probably give the employer an excuse to circumvent the section. Nevertheless, the section does offer some protection, including some special protection to workers’ compensation claimants. As for the remedy, if the employer were convicted of a violation of section 61.4, the convicting court would have the power to order reinstatement under section 71(2). Dependence on the conviction of the employer is, however, a very impractical remedy. If resort could be had to section 61.5, the section allowing adjudicators to reinstate employees dismissed without just cause, the employee would be more likely to get a remedy. The difficulty is that, by virtue of section 61.5(1)(3), section 61.5 cannot be used if there is an alternate procedure for redress, such that section 71(2) may preclude resort to section 61.5. There are no cases to date on this point under section 61.5.

While all of the above does offer some job security to injured workers, it is very spotty (especially given the limited number of workers governed by the Canada Labour Code). Also, little or no job security is available to an injured worker unable to perform his former job but capable of undertaking alternate work for his employer. This is in fact the thorniest aspect of the job security issue as it effects workers’ compensation claimants. In order that job security concerns of workers’ compensation claimants be adequately addressed, specific legislation is required.

The Select Committee Report, in addition to offering some general recommendations about rehabilitation and vocational training, makes the following recommendations concerning job security:

Emphasis must be placed on programs to encourage employers to hire workers who may have been injured and sustained disability.

This means that:

Legislation to be introduced to protect the workers’ job while the worker is on compensation benefits so that he can return to his previous employment when he may recover and is physically capable of performing his former duties.

179. Given the narrow scope given by the courts to section 67A of the Nova Scotia Labour Standards Code, S.N.S. 1972, s. 67A, added by S.N.S. 1975, c. 50, s. 4, as am. by S.N.S. 1976, c. 41, s. 15, the parallel to section 61.5, and given the absence of any equivalent to section 61.4 in the Nova Scotia act, it is questionable that s. 67A would be used to reinstate a person dismissed because of absence due to illness.
Also:

Programs must be devised to encourage employers to give injured workers priority in filling new positions. To do this it may be that commonly accepted seniority principles will have to be compromised where there are new jobs which the former claimant is able to fill.\textsuperscript{180}

This does create a full right to the job where the worker is capable of returning to his former job,\textsuperscript{181} but it falls far short of a positive right to alternate work if the employee is not capable of performing his former job. Weiler also shies away from a full right to an alternate job,\textsuperscript{182} but he goes further than the Select Committee. Weiler suggests that where an employer refuses to offer an available alternate job, (\textit{not} confined to a \textit{vacant} alternate job), he would face a penalty of increased assessment.\textsuperscript{183} This seems to be a fair response, but a stronger response would be possible. It is not disputed that an employee should not have a right to a job if there is no actual job that he can perform. But it would be possible to impose a \textit{prima facie} obligation on the employer to hire back the injured worker, leaving an onus on the employer to satisfy the Workers' Compensation Board that no suitable job exists. Such a provision should be complemented by a general obligation on employers to hire workers' compensation claimants (present or former), even if not formerly employed by them.\textsuperscript{184}

The Select Committee refers to the problem of employer reluctance to hire persons who have previously filed workers' compensation claims. Their only suggestion, however, concerns adjustments to assessments levied against employers.\textsuperscript{185} Weiler suggests a more concrete step, which is quite appropriate. He recommends a statutory prohibition against employer discrimination against employees who have ever filed a claim for or received workers' compensation benefits.\textsuperscript{186}

Statutory reform of workers' compensation legislation is necessary to give injured workers meaningful job security protection. This is a very important right for injured workers. Sustaining an injury on the job imposes enough suffering on the employee. Whenever possible,
the worker should be spared the added difficulty of loss of a job. The statutory response on this question should be firm and clear.

V. Conclusion

The foregoing discussion has canvassed a wide range of issues related to the basis on which workers' compensation benefits are paid. Although it is not disputed that, in principle, a scheme of workers' compensation is a good thing, and it is suggested that the coverage of workers' compensation should be broadened to cover essentially all workers,\textsuperscript{187} there are some serious deficiencies with the present scheme.

Some of those deficiencies have recently been investigated by a Select Committee of the Legislature. The Select Committee has suggested a number of important reforms, but has also ignored some fundamental questions. The report in total falls far short of a recommendation of full compensation for injured workers. The recent report of Professor Paul Weiler, concerning the scheme of workers' compensation in Ontario, is a much more in depth analysis. While certain disagreements with some of Weiler's recommendations were expressed in this paper, some of them being very fundamental disagreements, there can be no doubt that the Weiler Report represents a very useful and important perspective on workers' compensation.

It has been two-thirds of a century since the scheme of workers' compensation was born of historical compromise. That surely represents enough of a time span to allow for a reassessment of that compromise. The essence of the compromise was that workers gave up their right to sue their employers in tort in exchange for the right, on a no fault basis, to workers' compensation which promised partial compensation for work-related injury. Since that bargain was struck tort liability has greatly expanded in scope. The alternative that workers were required to forego in 1915 is now a much more formidable remedy than it was at that time. In contrast, workers' compensation has changed very little in the interim. That in itself would provide sufficient justification to substantially upgrade workers' compensation. But that is not the only basis for suggesting a major overhaul. The time has come to detach ourselves from the historical compromise, and to ask what, from a public policy per-

\textsuperscript{187} At present there are a significant number of occupations excluded from coverage of the act, the most notable being farm workers, domestic, and outworkers, S.N.S. 1968, c. 65, s. 2(2).
spective, a scheme of workers' compensation should provide. The response given in this paper is that workers' compensation should provide full compensation of work-related injuries.

At the end of his report Weiler poses the question whether workers should be given back the right to sue employers in tort, as an alternative to workers' compensation. He responds in the negative.\footnote{Weiler Report, supra, note 35 at 134-137.} With respect, I would suggest that Weiler asked the wrong question. If the workers' compensation system did what it ought to do, i.e. provide full compensation, the question of the right to sue in tort would become irrelevant because tort liability would not yield any advantage. Workers' compensation would, as it should, provide a remedy equal to that offered by tort liability. The alternative foregone would not be worth resurrecting.

The Nova Scotia government may soon introduce a revamped scheme of workers' compensation. The extent to which it will embrace the concept of full compensation for injured workers will, in large part, provide a measure of the adequacy of the legislative response.
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