

Thank you for this opportunity and for the work you are doing on this file. I appreciate that in order to protect the privacy of injured workers and to encourage full disclosure, portions of your hearings are being held in-camera, including today's session. That said, I want to inform you that a version of my comments will be posted to my office's website and I will be prepared to comment publicly in the media about my prepared statement. If you wish your questions to me and any discussion we have after this presentation to remain off the record, I will of course respect your wishes.

My comments today are not the product of a single focused investigation, but are the result of an ongoing series of contacts, inquiries, and investigations over many years, including those made by the Office of the Ombudsman before my mandate began two years ago. As such, my remarks may not be full of surprises. In many cases, I am simply restating reports our office has already published. You will recall that I became aware of a previous exercise and on that occasion, drove on rather short notice to make my views known. I did not have time then to prepare a full presentation, but I considered the matter so important that I felt the opportunity could not be missed.

It has not been my style to conduct the business of my office publicly, so I hope you will appreciate that my doing so is a direct reflection of both the importance and concern with which we regard these files, and the unique and critical opportunity which we feel your commission provides.

I am taking the decision of speaking publicly because I am of the belief that the issues surrounding Worksafe go right to the heart of its alignment. They are not a matter of technicalities, but of something more fundamental. I believe a very large discussion needs to be held, and not just at the level of experts like yourselves, or those who work in regular contact with the corporation and its clientele like our office.

I am speaking of a broader public discussion, which I might phrase as follows: If Worksafe did not exist and we were to build it from scratch today, how would we proceed? I know that your mandate by necessity has its boundaries, but I encourage you to ask yourself that question, to have it inform your recommendations.

It is too easy in government to begin with what we have now and then ask how it might be changed. That is a very practical approach, but it is also limiting. We are a small province, it is true, but that is no reason to limit our ambition. Indeed, my observation in working with governments at the international, national, and provincial levels is that larger the entity, the more difficult it is to turn. We should take advantage of the flexibility our smaller jurisdiction provides to be innovative and forward-thinking.

I also want to make clear that my comments, although they may seem critical of Worksafe New Brunswick in part, are not aimed at individuals within that organization. We receive a number of complaints concerning Worksafe each year, and thus have had the opportunity to build relationships with a number of the people employed there. Those Worksafe employees generally present as intelligent, professional, and compassionate people discharging their duties as they understand them. To be frank, no department or agency is ever truly delighted when we contact them, as the nature of our work typically stems from a complaint of unfairness, but Worksafe's dealings with us are typically open and productive. It is not my intention to single out any individual or to accuse them of bad faith.

Our concerns are with the Worksafe organization as an entity, which means they are in some ways much deeper than they might be if it were a matter of individual staff. If it were just a matter of a few “bad apples” as one might call them, then this would be a personnel matter, not a policy one, and the sort of reforms and review which are being contemplated would be unnecessary. Instead, I think the problem at Worksafe is with the barrel not the apples, if you follow my metaphor. This is why your work is so vital.

From the very beginning the Meredith principles and the system of Workers’ Compensation to which they gave birth have had at their heart a balance between the interest of the employers and the employed. The worker forgoes the right to sue his or her employer through the courts, a process which may be long, uncertain, and expensive. The employer gains immunity from suit and in exchange contributes an assessment (Meredith himself explicitly disliked the word “premium”) to ensuring that workers receive timely, no-fault coverage for their injuries. Balanced right, all society is the beneficiary. The worker is not forced into social assistance as a result of an injury. The company is not forced to close its doors as a result of a lawsuit.

When someone speaks of a balancing, we typically picture a scale. If one side of the scale is up, the other is down. So it’s tempting to think that if injured workers win, employers lose, or vice versa. But if the Workers Compensation system functions optimally, neither party really loses anything.

Under Workers Compensation, the injured employee receives the same levels of benefit and protection a court would order, but without the delay, financial and emotional cost, and uncertainty of a trial. The company’s assessment should align with its risk, so it is able to plan financially. The same money which the company would have been paid out irregularly in court orders is instead paid in regular, manageable assessments to the Compensation Fund. The company benefits from certainty, saving legal expenses, and avoiding loss of reputation.

We should step back a moment and recognize that, fundamentally, both parties are on the same side. The company needs healthy workers to deliver its product, and the workers need profitable companies to provide employment.

We should also recognize that, in determining a system of compensation, there is no perfect answer and there is no permanent one, either. Changes in the labour force, the economy, industry practices, medical practices, even banking and tax policies all impact how the workers compensation scheme functions. As a result, most jurisdictions have found it both desirable and necessary to adjust the program from time to time, finding a new point of balance.

When a program is seen as an historic compromise, however, there arises an understandable resistance to adjusting it, even when it has clearly fallen away from what would be optimal today. As humans, when dealing with long-standing systems, our tendency is to wait until the system collapses or nears collapse to make needed reforms. Until that point, the argument “It ain’t broke, don’t fix it” will hold sway.

Our inertia in changing long-standing institutions provides a certain stability, but it also means that when reforms come, they have to be quite substantial. The bigger the change, the harder it is to get agreement for, design, and implement. So it is that, over time, we tend to think of the status quo as having some natural gravity, when it is simply a historic, and now outdated, compromise point.

In contrast with some other jurisdictions, New Brunswick hasn't revisited this question very often or very recently. We should ask ourselves honestly why that is. Is it because the sorts of changes which occur in other jurisdictions haven't happened here? Or is it more likely that our reluctance to change is more about subjective factors, more a product of our perspective rather than reality?

Let us recognize then that the present balance point in New Brunswick today, some 100 years after the Meredith report, is not some natural point, but instead the product of many years of practice. Among other things, it reflects the refocusing of Worksafe in the late 80s and early 90s to ensure security of the fund at manageable contributions.

The exercise in which you are now engaged exists because, on some level and for a number of years, government has sensed that Worksafe has been moving out of balance. This is not to condemn the past or to belittle the substantial and worthy work of Worksafe in accomplishing the goals it has been given. For example, Worksafe has recognized the dividends paid by proactive measures to prevent accidents, and takes understandable pride in its initiatives related to that. It has also become more sophisticated in its ability to group employers and levy assessments based on the true risk of the industry, a fairer system for business which decreases the likelihood of safer employers subsidizing the less safe.

However, and in a rather fundamental way, it is our strong impression that Worksafe's present calibration, if I may use that word, is proving less equitable to injured workers than it should.

Having made that rather large statement, let me add some caveats. When I say that it is "proving less equitable than it should," I am not concluding that Worksafe is currently inequitable to workers. That is a conclusion which would require a much deeper investigation than my office currently has been able to undertake. I am speaking of it needing significant improvement.

I am not, I hope, speaking naively. I am not, for example, discounting the need of any Workers' Compensation system to ensure claims are true, comprehensive, and properly documented. At the same time, I am not suggesting merely that the present calibration is less equitable to workers than it "could be." I am speaking instead of the "should," which certainly contains a moral element. I am stating that the need for change goes beyond theoretical and beyond tinkering. What is needed is a significant altering of philosophy and culture of the Corporation. In this way, alterations to legislation or formal structures can be an aid, but must not be seen as a substitute for that larger, more significant shift in the Corporation's centre of gravity. That is a direction which needs to emanate from the Corporation's leadership and resonate throughout its employees and its policies.

At the Office of the Ombudsman, we live, work and breathe the concept of equity. Society's understanding of equity has been maturing for many years. We used to speak largely of "equality," of treating everyone the same. As we have implemented that idea, we have increasingly come to recognize its limitations.

It was a great step forward in equality when, for example, segregation was dismantled and both black and whites could use the same public restrooms. It took more time to get around what was required to ensure the people in wheelchairs could also use public restrooms. It was not enough to simply say, "Well, you are allowed to use the same restrooms as anyone else." In order to make that access a reality, in order to ensure we were treating everyone fairly, something more had to be done. There were additional costs to everyone associated with that which had to be faced and accepted in order to

be equitable. We had to recognize that treating everyone the same was not equitable. Instead, we had to factor in to our calculations a recognition of the resources or, put another way, the power which the differing parties brought to the matter at hand. As a society we began to recognize our obligation to assist the less powerful to ensure they too are able to receive the full protection and treatment which they deserve.

In terms of the interests we seek to balance in a Workers' Compensation system, let us take a moment to do that analysis. On the one hand, we have the worker and on the other the company which employs them. Who generally holds the advantage in society? What tax rates do they each face, and to what degree are they able to manage their affairs to minimize them? What is their relative access to decision makers in government? Their access to government subsidy? What are their comparative fiscal, informational, and legal resources?

When you do this comparison, one thing becomes very clear. For the worker, the injury represents a deep, life-changing, and fundamental challenge to their ability to live the sort of life any of us would wish, both for them and their families. It touches them very deeply. The injury is a blow to financial and emotional security for them and their loved ones. It also may, at the very time of this challenge, diminish their mobility, their ability to perform their daily tasks and hence their available time. The injury itself, the medication needed to treat it, and the stress and trauma of the accident and the uncertain future may also compromise their mental health.

In contrast to this, the Company faces no such existential crisis. Its challenge in finding a replacement worker or in reallocating duties may be more accurately described in terms of degrees of inconvenience.

Let us look at the imbalance another way. Any government agency which interacts regularly with powerful, articulate and monied interests in the private sector risks over time being persuaded to shift its perspective towards that interest.

If regular self-examination is not conducted, agencies may find themselves what is termed "captured." They become so used to seeing the world in a certain manner that they lose the ability to see the invisible ways in which they are favouring one side of the balance they are tasked with ensuring. These are all matters of degree. They need not be malicious or even conscious. Worksafe is not blind or unwilling to do better. It tries where possible to gain input. For example, it conducts surveys of the injured workers to give it some sense of how it is succeeding in serving them. But again, in our view, Worksafe seems to miss certain key aspects of those survey results. It does not regard non-completion of the surveys of some of the injured workers as possibly significant. It fails to recognize that many workers may feel so vulnerable by their circumstances and their course of dealing with Worksafe that they fear answering critically.

When the number of critical responses rises as it has over the past few years, Worksafe regards this as largely inconsequential. This, I submit, is an example of filtering at work. It is a symptom of capture.

Given both the comparable resources of these parties and the challenge posed by the injury, what society concerned with fairness would see its role as a pure bloodless arbiter, right down the middle? Would it not instead have compassion and empathy and recognize that some proactive measures need be taken to protect the injured worker against being disadvantaged by their lack of comparable resources, their lack of power? Equity requires a conscious commitment to counter those imbalances in the private world with policies to protect the most vulnerable.

I say this and it makes sense to all of us in theory, but I can tell you that in our conversations with Worksafe, this sort of thinking is seen as risking unfairness to the employer. Yes, of course, if an individual person's injuries are such that they have a special need there can be empathy and effort made to accommodate. But far more often in the global sense this is seen as something outside their mandate, perhaps even illegitimate. The policies and direction are provided by the Board; the Board has representatives of both labour and industry on it. That is seen as the assurance of balance.

With that filter in place, a broader vision which would require more awareness of this power imbalance would be seen as outside Worksafe's mandate. It would cost it its objectivity and independence, and hence its legitimacy.

We need to understand that bureaucracies have many strengths, but fostering outside-the-box thinking is not typically one. Far more often, the temptation in bureaucracies is to reduce personalized problems to applicable rules which limit or eliminate the judgment of the line employee. That is the more easily understood system. It provides the employee with clear guidance, certainty, and thus greater job security than a system which would call on them to exercise as less fettered judgment. It gives more certainty of outcomes, particularly with regard to total expenditures. It has the advantage of treating people equally, or at least appearing to do so. It may not, however, be equitable.

Of course, one cannot give line employees carte blanche to do whatever they think is right. Guidance is provided in the form of training, policies, and directives. One safeguard of equity is to ensure that when a decision maker pronounces, certain procedures are followed. These include communication in a clear and timely matter of the decision made, the reasons for which it was made, and the opportunity to have the decision appealed.

In this Worksafe has had some confidence that its Appeals system acts as a curative and further assurance that the balance is set correctly. Except that for many years now, the Worksafe relationship with the Appeals Tribunal has been unlike any we in our office witness elsewhere.

Simply put, the Corporation takes its direction from the Board, the employees take their direction from management, and for a number of years neither recognized the Appeals Tribunal as an overarching and guiding authority of the Corporation's broader practices.

Instead, Appeals Tribunal rulings have been seen as idiosyncratic judgments on individual aspects of individual cases with no greater impact. If the Appeal Tribunals rules that compensation should not be denied to an injured worker on certain grounds, it will not alter its policy to insure that other injured workers will not be denied on those same grounds. Instead, it forces the other workers to go through the lengthy appeal process even though it is a certainty that the Tribunal will rule in the injured worker's favour.

I am going to quote from a number of paragraphs of the unanimous judgment of the New Brunswick Court of Appeal in the Doughtwright case. Bear in mind this is just three years ago:

[39] I have extensively set out the arguments made on appeal because credit should be given where credit is due. In this case, I give full credit to Mr. Doughtwright for raising compelling arguments supporting the Appeals Tribunal's decision. I agree with most of his arguments. I especially agree with his position that the interpretation both JDI and the Commission propose would produce absurd

consequences, would be extremely unreasonable and inequitable, and is simply not consistent with the legislative intent. I also give credit to the Appeal Tribunal for consistently overturning the Commission when CPP retirement benefits have been deducted from workers' compensation payments. With respect, I consider wholly untenable the position put forth by JDI and supported by the Commission, which is reflected in the impugned portion of Policy 21-215.

[42] Regarding the third ground of appeal, both JDI and the Commission submit the Appeals Tribunal was bound by and required to apply Policy 21-215 and both argue that, in any event, the Appeals Tribunal erred in not giving deference to the Commission's interpretation of s. 38.11(9). Both these propositions blatantly ignore this Court's unequivocal decisions to the contrary.

[43] ....There is no room for confusion in that statement: the Appeals Tribunal is not bound by Commission policies.

[48] This provision [subsection 21(11)] highlights the absurdity of the Commission's position in this appeal. As the final administrative determination of the issue, the decision of the Appeals Tribunal is the 'decision [of] the Commission', yet the Commission supports the Appellant's position. The Commission is arguing against its own decision.

[65]....Add to this that the Commission wants to reduce his compensation benefits by the amount of his CPP retirement benefits, but refuses to consider those benefits as part of his pre-accident earnings, and the proposition certainly transcends the border into the realm of the ridiculous.

Remember, this entire system is designed to avoid court proceedings, to expedite provision for injured workers without a long judicial process. In this particular case, our own office had conducted an investigation and made recommendations which, if followed, would have saved the parties the considerable expense and effort involved in court hearings. To have persisted on that course all the way to the Court of Appeal, which characterizes your position as ridiculous? Some soul searching should surely be in order.

Government has seen the issue and has sought to revamp the Appeals process with strengthened powers and resources, changes which we are hopeful will help. However, the problems in our view did not stem from gross inadequacies on the part of the Appeals Tribunal, but on the very questionable notion that Worksafe has held for many years as to its ability to ignore, on a larger scale, the decisions of that Appeals Tribunal.

This situation has reached such a level that Worksafe last year reported that three-quarters of all Appeals were successful at the Appeals Tribunal. For many of us, this might seem an alarming number. If I were to tell you that the body responsible for overseeing your decisions disagreed with you three times out of every four of the hundreds of decisions you were rendering, you might be concerned you were doing something fundamentally wrong. Even at 50% or 51 % success rate you might at least have some reassurance that we're right more often than wrong – no-one is perfect. At 25% one might expect some doubt to creep in.

Yet Worksafe did not regard this statistic as unsettling, other than that it to them demonstrated the Appeals Tribunal's failure to understand the direction and mandate of Worksafe. While Worksafe diligently and professionally sets and achieves goals to manage files with certain efficiencies or to

maintain or lower premiums, it sets no goal for itself to improve its record to the Appeals Tribunal. The problem, to the extent that there is one is, in the view of Worksafe, on the Tribunal side.

The result of this "failure to be directed," if I may call it that, is a requirement for multiple and repeated appeals within the Worksafe system. With each barrier, of course, some workers become discouraged and surrender, even when they feel they have been treated unfairly. The Appeals process backlogs and delays. Yet the Corporation, holding the Appeals Tribunal at arm's length, does not take ownership of the role its practices have played in exacerbating that backlog.

Now, changes in legislation and in procedures have been made and continue to be made to begin to address this issue. It will take time to assess their effectiveness. As long as this attitude on the part of Worksafe persists, however, the ability to redress this balance through changes to the Appeals Tribunal structures will be limited.

What led to this dysfunction, this skewing of the centre of gravity of Worksafe? The problem is as simple and as deep as the very self-identity of Worksafe. Over time, it has come to think of itself, to speak of itself and its work, and thus to act as an insurance firm. This basic conception has caused it to think of the contribution of employers as not necessarily naturally coming to cover the level of claims, but as a premium to be minimized.

Of course, in conducting its work, any agency must seek to control its internal expenses with strong fiscal discipline. What has happened with Worksafe is that premium levels and the amount in long-term funds have come to be viewed as key indicators of the success of the Worksafe Corporation. Lower premiums and good balances have become goals in themselves.

This idea has permeated the organization, and when employees grasp that this is the true identity and goal of the corporation, no explicit direction is needed to tilt the scale away from the injured worker.

Let me give you an example, one of many. We know of cases in which Worksafe has initially decided to provide benefits, but then sought out and found an expert to disprove the illness involved, in order to cut off benefits. Would the Corporation be so far-reaching to find an expert to prove an illness that they had initially denied benefits for? Equity would suggest that they must, yet the prospect seems highly unlikely given Worksafe's present alignment.

(two other examples)

Why, whenever there is a decision which might be argued either way, does the resolution so frequently find itself on the side of denying coverage for the injured worker? The corporation's 75% overturn rate on appeal is not simply an accident; it is a reflection of the way in which Worksafe views itself and its mandate. If I may use a baseball metaphor at this time of the year, it is a well-known idea that in baseball, "the tie goes to the runner." Yet, in New Brunswick's Worker's Compensation system, the tie never seems to go to the runner. If there is any conflict of evidence, the runner is out unless or until they can somehow prove themselves "not out."

Before I move off this point, let us take a moment to consider what, in human costs, this means to that individual. To the bottom line of the Corporation, it is only accumulation of a series of these files which matters, but to the injured worker, their entire life is at stake. These decisions for them are matters of dignity, of quality of life, and even in some cases of life itself.

The Corporation can comfort itself that it is treating all persons in this situation “equally.” It is of no comfort to the injured worker whatsoever to be informed that their fellow injured workers have also had their claims rejected, and they too face a similar dire future without assistance. It does not put bread on the family dinner table to be informed that others too are starving.

I submit to you that it is this overall approach, of seeing Worksafe as a type of insurance in which the companies pay premiums and the workers make claims, which is responsible for its focus on the measurable outcome in dollars and cents rather than the immeasurables of equity. Again, this is not unique to Worksafe. It is a danger throughout government, particularly in a time of fiscal restraint. But the problem at Worksafe is more acute than we see elsewhere.

We understand the resistance to change and the drift involved here has happened without malice and, in some cases, unconsciously. That is one of the reasons the challenge is so great. It is also one of the reasons why my strong counsel to you, as you conduct your deliberations, is not to tinker or treat symptoms, but to try to ensure that your proposals seek to coherently address the deeper fundamental issue at Worksafe.

For this reason, I recommend that any legislative review include a substantial reworking of the mandate of the corporation as a whole. A new set of guidelines are needed from the very foundational document of the statute in order to build modern notions of equity into the DNA of the corporation.

As a society we placed it on a path, but our understanding has matured, and it is past time for us to adjust that path. The adjusted path will not be without its challenges. If I had to predict, it will come with additional costs and may require small increases in employer contributions. Were I an employer, that would not be good news.

But let us step back a moment and not position ourselves on the side of the workers per se or the employers per se. A worker is injured. If our Workers Compensation system fails to rehabilitate and return that employee to work, or to provide compensation to allow them to continue to live with dignity and purpose, are we under some illusion that those costs are avoided? Yes, they do not appear on the Worksafe balance sheet, but are they not then of necessity borne by society's other support structures?

Worksafe, of course, must look to its own mandate and ensure it is doing what it can within it. But as a society and as a government, we must take the broader view. We need to count the broader economic and human costs and provide steady direction to Worksafe as a tool for equity. In this way it is not merely a balance of premiums and payouts, but a reflection of broader and more important values. And yes, perhaps this means that to some degree employers become subsidizers of a social support. Is that not the same obligation we place upon them with taxation generally?

Before we shudder at the thought of moving away from an illusory bloodless balance to one which better protects injured workers, let us recognize the bigger picture. In my view, we could take a substantial step in refocusing Worksafe with an eye to better worker protection without risking inequity to employers. In my view, the steps ahead would include both a willingness to rethink and rephrase Worksafe's mandate, and to review it independently every 10 years to ensure it stays in line with our understanding of equity and our goals as a society. The longer we delay making those changes, the more jarring they will be. If we build them into our vision going forward, they may take the form of a "tune up" rather than a heart transplant. The latter lies closer to what is needed now.

Although I have no direct mandate in the area of fiscal accountability, because the changes I am calling for are substantial, I would also counsel the committee to recommend that this change in direction include a detailed audit of Worksafe. I say this in reflection of the significant work involved and the need to ensure that such a significant change is done with a solid understanding of the entity's finances in detail. It is important that the changes made be substantial, but also that they be feasible and can be given measurable timelines and accountability. We are dealing with a large entity. Our lofty ambitions for it can only be achieved with attention to those details. Without that, we risk our changes being delayed, sidetracked, or only cosmetic, with both the reforms and Worksafe itself losing credibility. I note that a previous study of this in 2008 I believe made similar recommendations, which were not accepted. Our experience seven years later should cause us to re-evaluate the value of such an audit.

Now if I have painted a rather dark picture, let us take a moment to recognize the opportunity which presents itself, with government committed to making substantial and thoughtful changes to Worksafe's direction. Changes in legislation have been made, your study is underway, there is also a process of generational change which is occurring naturally throughout government agencies as the baby boom passes into retirement. All that should give us reason to be optimistic, but not complacent. It is my observation that opportunities for real change present themselves infrequently. In today's modern society with the footprint of government so large, it is very easy for priorities to shift, or for the important to be set aside in favour of the urgent. I believe this is a tremendous opportunity to modernize and improve Worksafe, and I urge you to seize it, and in full measure. Do not take the present corporation in for a tune-up, and drive out with a hundred year old car with a new paint job and an air freshener. Go out on to the lot and find the vehicle that meets the needs of today, and then see what value our previous structure has for a trade-in.

I will make one final point with regards to independence. The independence of arm's length agencies, in terms of hiring, staff policies, internal management is something everyone wishes to respect. But that independence must operate within limits. Government is the architect, the agency becomes the engineer. If government commissions the building of an opera house, it is not acceptable to find itself several years later with a hockey rink, no matter how well designed and how well-run the hockey rink is. And this is my point. The architecture of the Corporation needs to be altered. The Corporation cannot, will not, and arguably should not make that change. It is the moral responsibility of the society to do so and of government as an expression of that society to do so.

So, in conclusion, my recommendations to the committee are:

1. Recognizing the need for fundamental changes in the mandate and philosophy of the Corporation, drill down to the very legislative mandate given the Corporation under the Act. Rather than attempting to tweak or reform what presently exists, ask yourselves what, given the needs and modern understanding of equity, is the Workers Compensation system that 21<sup>st</sup> century New Brunswick needs? Build from that foundation, rather than that of the existing Corporation.
2. Explicitly recognize that a new Worksafe based upon a modern understanding of equity may result in higher assessments for some employers. As part of the reinvention of Worksafe, conduct detailed independent audits to determine value for money, health of the fund, and whatever else is needed to truly assess how deep the changes are needed.
3. Set a timeline (I recommend ten years) to re-examine the Corporation's direction to determine if it is drifting from the goals government has set for it. This will help rein in any tendency to mistake arm's length for absolute autonomy, and also avoid a scenario such as the one we face

now, where change has been avoided for so long that the adjustments needed to get back on course may have to be jarring.