YUKON CHAMBER OF COMMERCE

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June 15, 2006

Mr. Patrick Rouble, Chair
Workers' Compensation Act Review Panel
P.O. Box 2703
Whitehorse, Yukon
Y1A 2C6

Re: Joint Submission to the Workers' Compensation Act Review Panel

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Dear Mr. Rouble,

On behalf of the Yukon Chamber of Commerce, Yukon Federation of Labour, Whitehorse Chamber of Commerce and Yukon Workers' Compensation Health and Safety Board, we are pleased to submit our joint submission on the 88 issues identified in the Workers' Compensation Act Review Panel's 2006 Options Paper.

The above named stakeholders have worked extremely hard to present an informed and unified position on the many difficult issues under review. As highly vested stakeholders, we respectfully request that you provide to each of the signatories to this position paper, a copy of your Recommendation Paper immediately following the day after the Minister responsible for Workers' Compensation has received it.

On behalf of the above-mentioned organizations, we thank you for your hard work and efforts to ensure there was sufficient opportunity for input by stakeholders to this process. We look forward to reading your report once the Minister has received it.

Yours truly,
YUKON CHAMBER OF COMMERCE

Sandy Babcock

Sandy Babcock, President & CEO

Encl.

Moving Forward Together

Submission to the Workers' Compensation Act Review Panel

June 15, 2006

Submission by Stakeholders

And the Yukon Workers' Compensation Health and Safety Board

INTRODUCTION

When Chief Justice Meredith envisioned the first workers' compensation system in Canada, it was partly in response to the adversarial and legalistic model that had arisen in Ontario with respect to work-related injuries. In Meredith's no fault, collective liability system the rules were clear-cut: employer pays assessments, worker gets injured at work, worker receives benefits from a fund administered by an independent administrative body whose decisions are final.

In today's environment, Meredith's system is no longer as clear cut and, in the Yukon, has once again become adversarial and legalistic with varying levels of appeals, court challenges, denied claims, and so on. This is not working for Yukoners. The Yukon has a problem with the incidence of injuries and an even greater problem with the length of time it takes workers to return to work and recover following a work-related injury.

By working together, stakeholders can and will make a difference. Working together, stakeholders recently developed better policies, a prevention strategy and a Northern Safety Network Yukon. Therefore, working together on the review of the *Workers' Compensation Act* makes good sense.

Employers, workers and the Yukon Workers' Compensation Health and Safety Board (YWCHSB) need to collaborate in order to address the safety and return to work issues in this jurisdiction. It is in that spirit that the following organizations have collaborated on this joint submission to the WC Act Review Panel (WCARP):

- Yukon Federation of Labour (representing ~ 4,000 workers);
- Yukon Chamber of Commerce (representing ~900 employers, including the Whitehorse Chamber of Commerce), and
- Yukon Workers' Compensation Health and Safety Board.

All of the issues in this submission have the full agreement of these organizations – the stakeholders who directly fund the system; the stakeholders who are insured by the system (without a right to sue), and the independent body which administers the system.

In order to ensure that any legislative changes reflect stakeholders' intent and needs, stakeholders, stakeholders and the Board feel our involvement in the legislative drafting process is imperative. Therefore, it is requested that the WCARP recommend such involvement to the Minister in the final report of the Panel to the Minister.

We, the undersigned, confirm that this is the sole position of our organizations on the 88 issues identified in the Workers' Compensation Act Review Panel's 2006 Options Paper. Signed this 15th day of June in Whitehorse, Yukon Canada.

Sandy Babcock
Yukon Chamber of Commerce

Ed Sager
Whitehorse Chamber of Commerce

Douglas Rody
Yukon Federation of Labour

FOR
Jim Brohman
Yukon Federation of Labour

Laurie Butterworth
Yukon Federation of Labour

Rick Karp
Whitehorse Chamber of Commerce

Craig Tuton, Chair
Yukon Workers' Compensation
Health and Safety Board

GOVERNANCE ISSUES

GOVERNANCE ISSUES

The governance of the workers' compensation system (including the Workers' Compensation Act and the Occupational Health and Safety Act) occurs through a Board of Directors made up of workers and employers, as well as a neutral chair and a neutral alternate chair, the President/CEO of the YWCHSB and the Chair of the Workers' Compensation Appeal Tribunal.

Since the WC Act review process began, the relationships within the Board itself, between the Board and stakeholders and between the Board and the Minister's office have evolved. Stakeholders and the Board are working well together through inclusive processes. However, it is recognized that changes in the composition of the Board or stakeholder organizations could change this dynamic.

Therefore, the recommendations regarding the 16 Governance Issues are presented so that today's relationships are protected through the legislation and that the Board's governance role is maximized.

An overarching theme for this section would be "principled versus prescriptive" legislation. Putting detailed instructions in the Act (e.g. how many days to put an ad in the paper) fetters the Board and its stakeholders ability to respond to the changing environment in a timely manner. For example[1], if the Board has received little response from newspaper notifications, but a tremendous response from website notifications, the Board should be able to stop using the newspaper in favour of the more effective and cheaper alternative; however, with legislation that prescribes using the newspaper, such an action would not be possible. This is but one of many examples where the Board and stakeholders need solid

[1] Note – this example is given to make the point about the changing environment – no analysis has been completed regarding this issue.

legislative direction (i.e. principles) but the flexibility to meet changing needs (i.e. not prescriptive).

Issue #1G – Entire Governance Structure

For stakeholders, a well-functioning Board of Directors is critical to a well-functioning workers' compensation system. The entire governance structure must facilitate such a well-functioning Board that is able to fulfill the objects or purpose of the Act.

The legislation interpreted by the Board must be clear as to its intent so as to enable the Board to develop policies that reflect the intent of the legislation. In the current Act, the word "board" is used frequently. Unfortunately, it is sometimes unclear whether the intent is for the "Board of Directors" to directly do something or have responsibility for a function or whether the intent was for the Workers' Compensation Health and Safety Board to have a particular responsibility. This is confusing to stakeholders, the YWCHSB and its Board of Directors. Clarity is needed so that the Board of Directors has clear responsibility for system governance and the YWCHSB has clear direction for administrative issues.

In considering the composition of the Board of Directors, stakeholders and the Board are clear: the historic compromise was between workers and employers who are already represented in equal numbers on the Board. The public does not have the same vested interest in this system and the very real concern is that adding public representatives could result in "lobbying" on issues; this would not help the Board to reach the best decisions for the system. If technical expertise is required, the Board can, and does, use consultants.

The inclusion of the WCAT chair on the Board of Directors is not appropriate. The chair is in conflict on most issues and cannot retain his objectivity. This has

been recognized by the Board of Directors as well as the current chair of the WCAT who has, by choice, not attended Board of Directors' meetings.

The President is hired by and reports to the Board of Directors. It would be inappropriate for the President to be a voting member of the Board to whom that position reports.

The final sub-issue raised in Issue 1G "Entire governance structure" is the meeting schedule of the Board. The current legislation ensures at least monthly meetings which the Board and stakeholders feel is necessary to ensure that the Board fulfills its governance role in a timely manner. To legislate anything more or less prescriptive would not be helpful to the effective and efficient working of the Board of Directors.

Recommendations:

1. Entire legislation needs to be reviewed so that there is a clear differential between the Board of Directors and the YWCHSB itself. Currently, the word "board" is used and causes confusion internally and externally.
2. No public representatives should be added to the Board.
3. Section 106(2)(c) be repealed to remove the chair of the appeal tribunal as a member of the Board of Directors.
4. The President of the YWCHSB must remain a non-voting member of the Board of Directors in order to effectively fulfill the requirements of the position.
5. No change to section 106(12) with respect to the meeting schedule of the Board.

Issue #2G– Voting and Role of the Chair

Whether or not the Chair votes, how ties are broken or, preferably consensus is reached, is an issue for each individual Board of Directors to determine through their Governance Guide. The current wording in the Act gives the Board and the Chair the ability to address this issue.

The legislation is not a collection of job duties or responsibilities. If the duties and responsibilities of the Chair were included in legislation it would be bound to be an incomplete list and could discourage potential chairs from taking the position. Detailed roles and responsibilities are better suited to the Board of Directors' Governance Guide (available on the YWCHSB public website at www.wcb.yk.ca).

Recommendation:

6. No change to the Act on the voting role of the chair or the chair's duties.

Issue #3G – Relationships Between the Appeals Tribunal and the Board

Recommendation:

7. See recommendation #3 to remove the chair of the WCAT as a member of the Board of Directors.

Issue #4G – Links between the powers/duties of the board and the objects of the Act

The Objects in the Act set the guiding principles for the Board of Directors and the system as a whole. The specific duties of the Board of Directors related to those objects is a governance concern, not a legislative one that is better suited to the Board's Governance Guide.

Recommendation:

8. No change to the Act to include additional Board duties and responsibilities.

Issue #5G – Reporting Structure of the President

Currently, the President has a dual reporting relationship to the Board of Directors and to the Minister. A change would add clarity over which takes precedence – the Board of Directors. The Board and its stakeholders are not recommending that the President not be a Deputy Head – this status enables the YWCHSB to employ public servants under the Public Service Act and use the

services of Yukon Government with respect to collective bargaining, payroll, etc. This helps keep administrative costs down. However, the legislation must be clear that the President ultimately reports to the Board of Directors.

Recommendation:

9. Change the legislation to make it clear that the President is ultimately accountable to the Board of Directors through the Chair.

Issue #6G – Processes for appointment to the Board and the Appeal Tribunal

Stakeholder input into the appointment of Board and Appeal Tribunal members is absolutely paramount to the well-being and balance of the workers' compensation system in the Yukon. However, it is not enough for the stakeholders to be consulted – the Minister must choose the Board members from among the qualified persons recommended by the stakeholders.

The Board of the YWCHSB has a varied, complex and critically important mandate. Therefore, individuals appointed to the Board must have certain qualifications. The Board and stakeholders agree to work together to develop the minimum qualifications for Board Members and members of the WCAT.

Recommendations:

10. Amend Section 106(5)(a) to require that the Minister shall appoint employer representatives to the Board of Directors from a list of name(s) of qualified individuals provided by employers and employer organizations.
11. Amend Section 106(b) to require that the Minister shall appoint worker representatives to the Board of Directors from a list of name(s) of qualified individuals provided by workers and worker organizations.
12. No change to legislation regarding process for appointing the chair and the alternate chair.

Issue #7G – Board Policy developments (emerging issues, are policies current?)

Board policy is critical to YWCHSB staff and all stakeholders as it provides interpretive direction with respect to the Workers' Compensation Act. There are numerous reasons why policies should change or why new policies must be developed. However, policy development schedules, and whether policies are current are not legislative issues; to make them so would be too restrictive on stakeholders and the Board to be responsive to changing policy needs.

Recommendations:

13. No change to legislation regarding how policies are developed, changed, rescinded or chosen for any of the above.

Issue #8G – Consultation Process on policy development

A main, overriding theme for this issue is that policies affecting the Yukon can and must be made in the Yukon, by the Yukon, for the Yukon. Any recommendations of the panel to absolve the Yukon of this right and responsibility, through aligning the legislation to that of another jurisdiction to avoid local consultation, are vehemently opposed by stakeholders and the YWCHSB.

Consultation on Board policies affecting stakeholders is critical since policies are written for stakeholders as well as for staff. Consultation helps make policies more reflective of the needs of stakeholders and more usable by stakeholders. However, the current prescriptive, yet limited, consultation provision of section 108(j) of the Act (two weeks of public consultation via newspaper for policies affecting claims for compensation) does not serve this purpose. In the past, this requirement has not served to gain feedback but rather to slow down the policy process.

A more appropriate solution is to have a section of the Act which enshrines stakeholder consultation for all non-administrative policies of the Board. This section would be a "principled" section and should not state detailed, specific requirements. Administrative policies are those that deal with internal structure, authorities, human resources, etc. of the YWCHSB. An example would be a policy to outline internal levels of signing authority for expenses. The new section would apply to all claims, appeal, assessment, and other issues that directly impact stakeholders.

Recommendations:

14. Repeal Section 108(j), which specifies the public policy process required for claims-related policies.

15. Add a new section that requires the Board to consult with stakeholders on all non-administrative policies and that requires the Board to give advance notice of policies under development.

Issue #9G – Disclosure of financial/management information

The issue of financial/management information is a critical one to stakeholders and to the YWCHSB. In order to demonstrate accountability, the board must provide accurate, relevant and timely information to stakeholders. However, the information required will change with the rapidly changing environment of workers' compensation; therefore, it is not recommended that specific performance reporting requirements be included in the Act. This issue, as described by the Panel, is a policy/Governance issue and is not a legislative one.

Recommendation:

16. No change to the legislation with respect to requiring annual service plans or specific annual report requirements regarding same.

Issue #10G – Annual reporting of the Board and the President to the Legislative Assembly

The Chair of the Board of Directors and the President/CEO of the YWCHSB are legislatively required to appear in the Legislative Assembly to answer whatever questions they may have about the YWCHSB. In the spirit of transparency and accountability, the Chair and President/CEO welcome these opportunities to discuss the issues with the representatives of the Yukon people. While other Canadian jurisdictions may not have this requirement, it is considered beneficial in this jurisdiction.

Recommendation:

17. No change to section 109 of the Act – Chair and President appearing before the Legislative Assembly.

Issue #11G – Releases of the annual report and the financial statements

As noted in Issue #9, accountability and transparency are critical to a well-functioning YWCHSB. The current timeframes for the annual report and report of activities are not conducive to timely review of the issues and progress towards goals. The Office of the Auditor General indicated that the timeframe for their annual audit is dictated by legislative requirements – currently June 30th for the YWCHSB. A different time frame would mean a different, yet achievable, audit schedule.

Recommendations:

18. Repeal sections 108 (c) (annual report to Minister by June 30th) and (d) (activity report to Minister 90 days after end of calendar year) regarding current reporting requirements.
19. Create new section 108 (c) with a single annual report requirement that would include audited financial statements to the Minister by April 30th each year.

Issue #12G – Consistency of scheduling the annual information meeting

The annual information meeting is one of many stakeholder meetings throughout the year; however, it is the only one legislated. It is important to keep this legislated requirement to ensure that stakeholders are guaranteed at least one opportunity to receive information and ask questions of the Board and Administration. It would make sense for this meeting to be held after the tabling of the Annual Report in the legislature so that stakeholders have the most accurate information possible. This meeting should be held as soon as possible after the tabling of the Annual Report and at the convenience of stakeholders.

Recommendation:

20. Change section 111(1) to reflect the Board holding a meeting after the tabling of the Annual Report in the Legislative Assembly and at the convenience of stakeholder organizations.

Issue #13G – Promotions of WCB and occupational health and safety programs and accident prevention strategies

Prevention of Injuries is one of the two raisons d'etre of the YWCHSB. The Board, in consultation with stakeholders, has developed a Prevention Strategy, created a Prevention Fund and is developing a prevention/RTW incentive program. Legislating specific requirements in this area simply does not make sense. Providing enabling legislation when initiatives are developed does make sense. This will be covered in more detail under Issue 34A.

Issue #14G – The effectiveness and appropriateness of the Board administering both the Workers' Compensation Act and Occupational Health and Safety (OH&S)

Occupational Health and Safety and Workers' Compensation go hand-in-hand: prevention of injury/disease, compensation for injury/disease, RTW and recovery from injury/disease and prevention of secondary injury/disease. In order to be the most effective, the YWCHSB must continue to have responsibility and control

over both these functions. In jurisdictions where OH&S is not directly controlled by the workers' compensation board, it is still funded by the Compensation Fund and therefore paid for by employers. In such jurisdictions, boards are frustrated by this lack of control and lack of co-ordination between the activities of the board and the government department or agency with responsibility for OH&S.

Recommendation:

21. No change to the Workers' Compensation Act with respect to the Board's jurisdiction over the Occupational Health and Safety Act.

Issue #15G – Administration costs

Since the workers' compensation system is funded by employer assessments, the Board must be extremely diligent in its expenditures, recognizing that this smallest Canadian jurisdiction (population) requires all the services of the other jurisdictions. However, the issue of administration costs is not a legislative one. To put an artificial legislative boundary on administration costs will stifle the Board's ability to respond to changes needs and priorities. This issue was raised by the OAG and continues to be raised by the employer community; however, the OAG did not recommend a legislative solution.

Recommendation:

22. No legislative changes to create administration cost limits in the Act.

Issue #16G - Attraction and retention of key personnel

As with Issue #15, this is an important one to the YWCHSB and another issue raised by the OAG. However, once again, there is no legislative solution to this issue.

Recommendation:

23. No legislative changes with respect to the attraction and retention of key personnel.

ASSESSMENT ISSUES

ASSESSMENT ISSUES

Employer assessments fund the workers' compensation system. In the Yukon, the Board has very successfully invested those funds and, through those investments, have created a fully funded Board with the lowest rates in Canada up to the end of 2004. With the removal of subsidies on employer assessments, the average assessment rate increased in 2005 and 2006 and will increase again in 2007. Yet, even with these increasing rates, assessment premiums only account for ½ of the annual revenue requirement of the YWCHSB – the remainder comes from investment revenue.

On the issue of assessments, the Board and its stakeholders believe in fair assessment rates with variation in rates by industry. However, it must always be remembered that the system is based on collective liability - a principle that applies in the Yukon more than any other jurisdiction in Canada. With a very small employer base (~2400) and a large proportion of very small employers within that base, the Meredith principle of collective liability is fundamental in the Yukon. Without collective liability, one catastrophic claim (e.g. young quadriplegic) could result in assessment rates so high as to put an individual business or even an entire small industry, out of business.

Another principle that must be remembered in considering assessment rates is the historic compromise: workers gave up their right to sue their employer in exchange for guaranteed, no-fault insurance. Employers cannot buy any other insurance that protects them from suit in the same manner as workers' compensation legislation.

It is in this context that the assessment issues of the WCARP options paper are discussed.

Issue #1AS – Access to information on which individual assessment rate is based and calculated and rationale for any change to assessment rates

As noted in the preamble to this section, the Yukon assessment rates are more dependant on the principle of collective liability than anywhere else in Canada. In fact, the Yukon is so small, we could easily have one single assessment rate for all employers. However, stakeholders and the Board desire a system that recognizes industry experience and so we have the current rate structure.

In this structure, it is not possible to provide a breakdown of industry rates and surpluses as noted in the British Columbia example in the WCARP options paper. In fact, the entire Yukon is not large enough to make one 100% credible rate code in British Columbia.

However, employers need to understand how their rates are calculated and how injury rates, claims costs and return to work impact their rates. The Board's actuary has been able to provide graphs by rate code to show trends over time. Further, employers can request individual information and can appeal rate classification decisions through existing mechanisms.

To legislate a specific one-size-fits-all reporting requirement will not meet the needs of stakeholders.

Recommendation:

24. No changes to legislation to require specific rate code assessment/cost reporting structure.

Issue 2AS – Distribution of administration costs to industry classifications

This issue is very similar to issue #1AS. Administration costs are currently distributed amongst the industry codes based on claims costs. To do otherwise with such a small rate base could result in increased administration costs.

For example, to distribute OH&S costs only among the employers inspected by the Board or who attend OH&S training sessions would increase administration costs and would likely discourage employers from using OH&S services.

The WCARP offered no options to address this issue.

Recommendation:

25. No changes to legislation with respect to distribution of administration costs to industry codes.

Issue #3AS – Equal treatment for all employers

There seemed to be two issues contained in the discussion of Issue #3AS in the WCARP options paper: (1) transition of rate subsidies and (2) inability of the Board to audit its largest assessable employer: Government of Yukon.

The transition of subsidies has begun and almost all subsidies will be removed in 2007 rates (i.e. by the end of 2006, nearly all employers will be paying actual required assessment rates). Stakeholders are satisfied with the progress on this issue.

With respect to Government of Yukon, it is the only employer that the Board cannot audit and the stakeholders and Board feel that this is wrong and unfair to all other assessed employers. While the Board would not be planning an annual comprehensive audit, it must be able to audit specific issues as they arise (e.g. a specific department's contract list).

Recommendations:

26. No changes to the legislation regarding transition of rates or rate structure.
27. Change section 105(3) of the Workers' Compensation Act so that the reference to section 81 is removed making Government of Yukon subject to audit as are all other assessed employers.

BENEFIT ISSUES

BENEFIT ISSUES

It was extremely difficult to review benefits individually since worker benefits need to be considered as a whole in order to fully understand the results of the historic trade-off. When workers gave up the right to sue their employers in the event of work-related injury/disease, they gave up a fundamental right available to all other Canadians. In accepting this trade-off, employers received protection from law suit, agreed to fund the system and agreed to it being no-fault (on either party).

In the Yukon, the benefit package available to workers is very comprehensive with return to work and recovery being the most important services available. For some workers the severity of their injury prohibits return to work and in those cases the services are recovery to the greatest extent possible, maximizing quality of life and ensuring payment of benefits to meet their ongoing financial needs post-injury/illness, including compensation for permanent impairment.

Some workers will never directly receive the benefits of the workers' compensation system: the benefits of the system go to their surviving spouses and dependent children because these workers were killed on the job or succumbed to a work-related injury or disease.

Statistics show that since 1992 the equivalent of far more than the entire Yukon workforce have received benefits from the workers' compensation system: a usage to covered workers ratio not seen in other jurisdictions.

The benefit package must reflect the historic trade-off, allow for all of the services outlined above and not result in assessment rates that compromise the viability of Yukon employers.

Issue #1B – Age limitation of claimants

Currently, workers' compensation benefits are paid to age 65 for most workers; however, when workers are injured at age 63 or older, wage loss benefits are limited to a two year period effectively making most older workers ineligible for an annuity.

At issue is the use of the age 65 as representing the most common retirement age and the age at which Old Age Security (OAS) and full Canada Pension Plan (CPP) retirement benefits start for eligible Canadians.

While the use of the age 65 has not yet changed with respect to federal program benefits, workers are working beyond age 65 and some jurisdictions (such as Ontario) have recognized this fact.

To make the Yukon Workers' Compensation Act as current as possible, it is recommended that the specific age "63 or over" be removed and the end of benefits be tied instead to the federal retirement age (for full eligibility to the federal public pension programs of OAS and CPP). While this does not solve all the problems associated with this issue, it solves one. This issue must be considered again in the next review of the legislation.

Recommendations:

28. Amend section 3(3) of the Act to reflect the federal retirement age less two years instead of the current reference to "at least 63 years of age or over".
29. Ensure that the issue of age limitation on claimants is included in the next review of the Workers' Compensation Act.

Issue #2B – How government consents to/accepts responsibility for volunteers

How the Government of Yukon accepts responsibility for volunteers is not a legislative issue. Further, employers who wish to cover their volunteers can make application to the YWCHSB for such coverage using the existing section 4 of the Act.

Recommendation:

30. No change to the legislation regarding non-profit and charitable organizations covering their volunteers.

Issue #3B –Termination of Benefits

In section 8(1) of the current legislation, the YWCHSB has the ability to reduce or suspend a worker's compensation benefits (wage loss benefits only – does not include entitlement to medical aid) where the Board can show the worker:

a) unreasonably refuses to submit to treatment or rehabilitation the board considers essential to the worker's recovery or rehabilitation;
b) unreasonably takes part in any activity that imperils or delays recovery from the disability; or
c) unreasonably changes medical practitioners.

There are two main issues in this section: (1) the YWCHSB can never terminate a worker's benefits and (2) there is no onus on the worker to mitigate his/her injury: the onus is on the YWCHSB to show that the worker has acted unreasonably.

Termination of benefits is an extreme penalty on an injured worker that would be used rarely, but a tool that may be necessary in some cases. Stakeholders agree that rare circumstances exist that could warrant termination; however, termination must only be used as a last resort in a manner similar to progressive

discipline programs in the workplace. The purpose is to give the worker the opportunity to change his/her behaviour regarding recovery and return to work following an injury. Clear policies, developed in consultation with stakeholders are needed to ensure that this penalty is used appropriately following due process.

Mitigation of loss is a basic premise in the insurance industry as well as in the court system. A man[2] is sitting at home one windy Sunday evening when a small tree uproots and falls in through a window into his living room. Looking through the hole in the side of the house, he sees dark clouds and knows it's about to rain and there's no way the window will be fixed tonight. The man gets a friend, pulls the tree onto the lawn and covers up the window with a temporary tarp. This man has attempted to mitigate his loss – even if the tarp leaked and the living room carpet was damaged over night. However, had the man sat back in his chair, let the rain rush into his house in the expectation that the insurance company would have fixed not only his window, but also that ugly green carpet he's been meaning to replace, he would get a big surprise when he files his insurance claim because he made no attempt to mitigate his loss.

In the workers' compensation system, this principle applies to injured workers with respect to mitigating their losses (physically, financially, etc) resulting from their injury. A simple example would be a nurse who has low back strain from lifting a particularly large patient[3]. On the day of injury, the doctor recommends active physiotherapy and the nurse goes in for an assessment where 10 treatments are recommended starting immediately. The nurse has filed a workers' compensation claim that has not yet been adjudicated. The nurse has medical insurance through her employer which covers all 20 physiotherapy treatments. The nurse does not go to physiotherapy because she does not want to use her own insurance (that would be reimbursed by the YWCHSB upon

[2] This example is hypothetical and does not reflect a particular individual or insurance company.
[3] This example is hypothetical and does not reflect a particular injured worker, doctor or physiotherapist.

acceptance of the claim) and stays off work for two weeks until the claim is accepted. However, when she goes to the doctor, the two weeks of inactivity have made her injury worse. She has not reasonably mitigated her injury. In this situation, a remedy may be to reduce or suspend compensation until such time as the status of her condition returns to the level it was at the time of injury or to suspend compensation for the two weeks of inactivity.

Stakeholders and the Board feel it is reasonable for an injured worker to mitigate their injury and the legislation should be changed to reflect that responsibility.

Recommendations:

31. Amend section 8(1) to include "terminate" compensation along with reduce or suspend; ensuring that the wording reflects the progression associated with termination as the last resort.
32. Amend section 8(1) to reflect the worker's obligation to mitigate the effects of their injury: put the onus on the worker to mitigate rather than the onus on the board to show the worker acted unreasonably.

Issue #4B – Benefits During Appeal Process

This issue was raised by workers in response to slow processes and appeal times. However, while benefits benig paid during an appeal period may speed up the process it would not guarantee quality and would increase the number of appeals.

The solution to this problem is not paying benefits during appeals but rather to ensure quality and efficient appeal processes at the YWCHSB, the WCAT as well as at with Workers' Advocate Office.

Stakeholders and the Board want to work together to develop such processes through a policy. Enshrining a process in legislation eliminates flexibility to meet changing needs. To ensure that everyone understands the appeal process and time limits, it is recommended that the Board be given the authority to make

Board Orders regarding maximum time frame for various steps in the appeal process.

Recommendation:

33. Amend the legislation to give the Board the authority to make, by order, time limits for various stages in the appeal process.

Issue #5B – Limitation Periods

This issue considers how long a person has to file a claim for compensation from the date of disability. Currently, the Act is specific with section 10(1) requiring a claim within 12 months of the date of disability. Subsection 12(2) allows the Board to accept claims outside this time limit, which enables the board to deal with late applications. A Board policy is needed to provide consistency in when to accept a late claim for compensation.

Stakeholders and the Board agree that these provisions are specific enough for the purpose of fairly administering the Act with respect to time limits for filing a claim for compensation.

Recommendation:

34. No change to the Act regarding time limits to file a claim for compensation.

Issue #6B – Commuting benefit payments

When Sir William Meredith developed the compensation system, he was looking for a solution to litigation following work-related injury. His solution was a system of guaranteed benefits to compensate for a worker's wage loss over whatever period of time the worker was unable to work.

Commuting benefits into a lump sum payment goes against the wage loss system envisioned by Meredith; in fact, Sir Meredith advised against such lump sum payouts. Further, commutations damage the viability of the Compensation Fund as large amounts of money are removed from the investment portfolio at

often inopportune times. Therefore, it is recommended by stakeholders and the Board that no further commutation of benefits be permitted.

Recommendation:

35. No change to the legislation to allow commuting of benefits.

Issue #7B – Awards for pain and suffering

The Workers' Compensation Act provides for two types of direct, financial benefits to workers: wage loss and non-economic loss. The non-economic loss award is based on percentage of impairment, the calculation of which is based on the American Medical Association's Guidelines for Impairment. The 5th edition AMA guidelines consider pain in the assessment of impairment.

Further, the concept of "pain and suffering" stems from tort law and was an award granted in exceptional circumstances. To move back in this direction is a move back to a litigious system that is not desired by stakeholders or the Board.

Recommendation:

36. No change to the legislation regarding an award for pain and suffering.

Issue #8B – Maximum non-economic loss awards

The non-economic loss award is based on $80,000 and is currently indexed to over $86,000 at present. This amount is considered reasonable by stakeholders and the Board; therefore no changes are recommended.

Recommendation:

37. No change to the legislation with respect to calculating the maximum non-economic loss award.

Issue #9B – Compensation for loss of personal property - amount

The amount of the loss of personal property award is currently set by Board policy. Stakeholders and the Board agree that the amount is too low and therefore the policy will be reviewed to update the amount and to provide for some type of future increase provisions so that the amount does not get stale again. Everyone agrees that in order to maximize flexibility, this should remain a policy issue and not be prescribed in legislation.

Recommendation:

38. No change to the legislation regarding the maximum amount of loss of personal property.

Issue #10B - Compensation for loss of personal property - triggers

In order to be eligible for compensation for loss of personal property, an injured worker must be disabled and have suffered a wage loss as a result of the injury (as per section 35 of the Act). The requirement to have a wage loss in order to be eligible is considered unfair by the Board and its stakeholders. There are hundreds of medical aid-only claims each year and it is unfair that when a legitimate loss of personal property arises as a result of a work-related injury, those claiming only medical aid are ineligible for compensation for their loss.

However, this section cannot be so broadly applied to include “incidents” as suggested in one of the options presented by the WCARP. Using the word “accident” would be better suited to the intent of this section; however, a definition of “accident” will be needed.

Recommendation:

39. Amend section 35 of the Act to remove the requirement for disability in order to qualify for compensation for loss of personal property and add “where a worker suffers a loss of personal property as a result of a workplace accident …”. Include a definition of accident.

Issue #11B – Pay on day of injury

Pay on the day of injury is generally accepted to be the responsibility of the employer; however, the current legislation does not specify this. Stakeholders and the Board agree that this requirement should be clear in the legislation to ensure that all workplaces are consistent in this regard.

Recommendation:

40. Add a new section to the Act requiring the Board to begin compensation on the day following the injury and requiring the employer to pay on the day of injury.

Issue #12B – Claims Costs

Claims costs are a huge issue for the workers' compensation system in the Yukon:

- they are a reflection on the number and severity of injuries
- a small number of employers bear the cost of claims
- claims costs are driven by claim duration. Claims with a long duration have a very low rate of return to work which negatively impacts the worker, his/her family, employer, co-workers and the economy.

However, the resolution to high claims costs (an issue raised by the OAG in the 2002 Special Examination) is prevention and claims management – not legislation. The issue of the level of compensation benefits is discussed in issue #13.

Issue #13B – Calculation of Wage Loss Benefits

The wage loss package one of the Yukon is the highest in the country. While it is very good that this jurisdiction is able to provide such benefits to injured workers, some would argue that it is the benefit rate that is causing the long claim

durations that are so problematic. The benefit rate may be one of many factors affecting duration: this is why mitigation of injury legislation (See Issue 3B) and return to work legislation (See Issue 25A) are so critical. However, the legislation is not enough: it must be effectively and consistently implemented by the YWCHSB. Stakeholders and the Board recommend no change to the current benefit rate of 75% of gross pre-injury earnings.

However, the Yukon is one of only three Canadian jurisdictions where Canada Pension Plan (CPP) Disability benefits are not offset, to some extent, from workers' compensation wage loss benefits. In cases where the worker is earning below the maximum compensation earnings level, receipt of workers' compensation and CPP disability benefits results in post-injury income that is significantly higher than pre-injury. In the past, CPP Disability benefits took a long time to get and were usually awarded only when permanent disability existed. However, Human Resource Development Canada has made significant improvements to their internal processes with CPP Disability being adjudicated on a more timely basis following a disability. It is unknown how many Yukon injured workers are also in receipt of CPP Disability benefits since the YWCHSB has not historically tracked such information; however, stakeholders and the Board agree with the principle that injured workers should not receive more income related to their disability than they had related to their employment.

CPP disability benefits are offset in varying percentages across the country: from 50% to 100% offset. Since workers and employers contribute equally to CPP, a 50% offset would appear reasonable. The offset would only apply to the worker's CPP Disability benefits – any dependant benefits would not be considered.

Using a gross-from-gross offset calculation high wage earners who are already experiencing a significant loss of income through the receipt of workers' compensation benefits, would not see a detrimental reduction through CPP Disability offset.

Consider the following hypothetical and rough examples to illustrate this point (using 2004 as this was the most readily available data regarding the maximum CPP amount):

Joe earns a gross salary $90,000 working as a project manager for a mineral prospecting company. He is injured on the job. The maximum compensable earnings level was $65,800 in 2004 and the maximum CPP disability amount in a recipient's hands was approximately $12,000 (note that CPP calculations are complex – these total gross amounts are used for simplicity of example). With a 50% CPP offset, Joe's workers' compensation benefits would not be affected:

Pre-injury gross	$90,000	
Less 50% CPP offset	(6,000)	(Joe would qualify for the max CPP)
Subtotal	$84,000	

Since $84,000 is greater than the maximum of $65,800 there would be no impact on Joe's workers' compensation benefits. Annually, Joe would get $49,350 (65,800 X 75%) in tax free benefits from workers' compensation as well as his CPP disability income (which is taxable). With both sources of income, Joe does not receive more than he did pre-injury.

Now consider Sue, earning less than the maximum. Taking a pre-injury wage of $44,000 gross:

Pre-injury gross	$44,000	
Less 50% CPP offset	(6,000)	(Sue would qualify for the max CPP)
Subtotal:	$42,000	
X 75%	$31,500	

Sue would receive $31,500 in tax free benefits from the Board as well as her taxable CPP entitlement. Without, the CPP offset, Sue would receive $33,000 per year in tax free workers' compensation benefits in addition to her CPP, bringing her total after tax income higher than before her injury.

Recommendations:

41. No change to legislation with respect to 75% gross earnings benefit rate.
42. Amend a section to allow a 50% CPP Disability benefit offset from pre-injury earnings on a gross from gross basis for workers who become entitled to CPP Disability benefits (including retroactive entitlement) on or after the effective date of the legislative change.

Issue #14B – Average weekly earnings

At what point post-injury, where the YWCHSB calculates a long term rate for an injured worker who continues to experience a wage loss resulted from his/her work-related injury/illness, is a policy matter for the Board, and should not be prescribed in legislation. The Board recently developed a policy on this matter in consultation with stakeholders.

Recommendation:

43. No changes to the legislation regarding calculation of a long term rate.

Issue #15B - Earnings

The types of income that workers earn or the types of income replacement benefits to which they are entitled, are as varied as the workers themselves. To attempt to create an inclusive list to cover all types of employment income would be almost impossible. Stakeholders and the Board feel that this issue is best left in the realm of Board policy for maximum flexibility to meet changing needs, tax laws and developing employment relationships.

Recommendation:

44. No changes to the legislation regarding type of employment income considered compensable.

Issue #16B – Vocational rehabilitation benefits

This issue was raised by the WCARP itself. Stakeholders and the Board do not feel that this is an issue since the revised policy CL-35 "Loss of Earnings Benefits" clarifies it.

Recommendation:

45. No change to the legislation regarding the worker's benefit rate during vocational rehabilitation.

Issue #17B – Different Minimum Compensation Levels

This issue has been dealt with by the Board and its stakeholders through the 2006 policy priority list. To ensure that the minimum compensation amount is current, it has been tied to the indexed maximum amount (25% of the maximum).

Minimums for optional coverage have also been reviewed and minimum coverage amounts have been replaced with minimum assessment amounts.

The Board and its stakeholders are satisfied that the amount of minimum compensation is no longer an issue; however, the wording in section 40 is somewhat problematic. The minimum amount must be set "based on full-time employment". The difficulty with this is that full-time employment varies from employer to employer. Some consider 28 hours a week as full-time, others 35, others 37.5, others 40 etc. Removing this phrase will remove the problems with this section.

Recommendation:

46. Amend section 40 of the Act to remove the phrase "based on full-time employment" with respect to establishing the minimum compensation amount.

Issue #18B – Minimum compensation levels

This issue has been satisfactorily dealt with – see Issue #17B.

Issue #19B - Annuities

To whom does a worker's annuity transfer in the event of the injured worker's death prior to age 65? The Board and its stakeholders feel that any annuity monies should be distributed in the same manner as benefits in the event of a work-related fatality – i.e. to the worker's spouse and dependant children. Where none exist, the annuity would revert back to the Compensation Fund. Monies from the Compensation Fund are not intended for just anyone – the system was designed to financially protect the worker and his/her dependents; therefore, stakeholders and the Board want to ensure that Compensation Fund monies not be directly paid to non-dependants, charities, estates, etc.

Recommendation:

47. Change the Act to have the Board pay annuity funds to spouses and/or dependant child(ren) as specified by the worker, in the event that the worker dies before an annuity has been paid.

Issue #20B – Rehabilitation Assistance for Incidental Costs

When a worker attends a vocational rehabilitation program, there are miscellaneous costs incurred such as school supplies, clothing for the course (e.g. lab coats), equipment, etc. Board policy already provides for the payment of such incidental costs and stakeholders are satisfied that the policy effectively addresses this issue.

Recommendation:

48. No change to legislation regarding incidental costs for injured workers in rehabilitation.

Issue #21B – Maximum wage and assessable earnings rates

The methodology specified in the Act with respect to the calculation of the maximum compensable and assessable earnings rates is confusing, time consuming, retrospective, costly and limited in its use.

A new method of calculating the maximum that meets all of the following criteria is most desirable:

- Publicly available
- Ready in advance
- Free or as inexpensive as possible
- Tied to wages in the Yukon, and
- Reflective of the wages of the majority of Yukoners.

However, recently the Government of Yukon increased the minimum wage rate for the Territory and tied future annual increases to the Consumer Price Index. Stakeholders are recommending that the Whitehorse CPI be used for indexing of benefits. Therefore, it is recommended that the Whitehorse CPI be used as the basis of indexing the maximum compensable and assessable earnings level.

Recommendation:

49. Change section 117 to reflect a revised methodology of calculating the maximum assessable and maximum compensable earnings level based on the Whitehorse CPI.

APPEALS PROCESS, LEGAL AND POLICY ISSUES

APPEALS PROCESS, LEGAL AND POLICY ISSUES

This section of the WCARP options paper contains many important issues affecting benefits, assessments and the system as a whole. Issues such as return to work are central to the benefit system for injured workers and employers and, in fact, to the long term viability of the system in the Yukon.

Stakeholders and the Board are committed to good, timely processes which work for all users and payers of the system whether in an OH&S, insurance or a workers' compensation context. Further, it is the desire of stakeholders and the Board to make the system as user friendly and non-litigious as possible.

Issue #1A – Process to lodge administrative complaints

The Act currently contains two levels of appeals for workers and employers who are not satisfied with decisions of the YWCHSB: internally through the hearing officer process or the Board (depending on whether the appeal is on a claims or assessment or OH&S issue) and externally at the WCAT for claims appeals. However, the Act does not specify a process for administrative complaints such as a concern regarding fair process or appropriate treatment.

In the Yukon, the Office of the Ombudsman has been established to address these areas for Government offices and agencies, including the YWCHSB. Through the report of the Ombudsman, it is noted that injured workers do access this office for administrative complaints. The YWCHSB has committed for further communication regarding other means of addressing complaints such as through the supervisory chain of command within the organization or via the Workers' Advocate Office, which has regular meetings with the Claims Department Director.

Recommendation:

50. No change to the legislation regarding a process to lodge administrative complaints.

Issue #2A – Recourse to review WAO decisions under section 13

When the WAO refuses to assist an injured worker who seeks help, it must provide a written decision to the worker explaining same. On such occasions, the injured worker can go to the Office of the Ombudsman for assistance if they feel wrongly done by. Additional legislation is not needed given this avenue of recourse available to injured workers. However, it is important that workers know what they can do.

Therefore, rather than a legislative solution, the stakeholders and Board choose a communication solution with a flow chart available in hard copy and on the YWCHSB and Workers' Advocate Office website regarding the recourse available to workers.

Recommendation:

51. No change to section 13 regarding a legislative process to appeal the WAO refusal to assist a worker.

Issue #3A – Decisions must be in keeping with the Act and Policy

If YWCHSB decisions are not in keeping with the Act and policy, changing the Act and policy to require same would not address this problem. Internal quality control processes are being put into place along with more procedures to facilitate consistent decision-making, while not fettering the discretion of the organization to consider the merits and justice of each case.

Issue #4A – Processes for dealing with new evidence

Whether upon adjudication of a new claim or determining a worker's functional ability to work, new evidence can change a previous decision. When new evidence is presented it should go to the YWCHSB decision-maker for a review of the previous decision. Currently, this is not always the case and the WCAT may overturn a YWCHSB decision upon review of new evidence – an original decision that was made without the opportunity to consider the new evidence.

Recommendation:

52. Change the legislation to require new evidence (regardless of the type of decision) to be reviewed by the YWCHSB before being considered by the WCAT.

Issue #5A – Mediation as an effective method for primary dispute resolution

Mediation and other alternative dispute resolution methodologies are not prohibited in the current legislation. Stakeholders and the Board agree that resolving disputes prior to the appeal process is beneficial for all parties.

Recommendation:

53. No change to legislation regarding a requirement to specifically offer mediation as the method for dispute resolution.

Issue #6A – Administration's standing at hearings

The WCAT process is designed to help ensure that injured workers receive the benefits to which they are entitled under the Act. To make this process effective means ensuring that all parties pursuant to the issue are given the opportunity to be present at the hearing: worker, employer, representatives and the YWCHSB.

The Board desires the opportunity to attend hearings but not for the purpose of defending its decision: the decision of the Board must stand on its own merit in the context of the claim record. The purpose of the Board's standing at hearings would be to clarify jurisdiction, correct the record and provide procedural fairness with respect to all parties pursuant to the issue having the ability to be present. Such procedural fairness is a key principle of natural justice. This would help reduce later reconsideration of WCAT decisions by the Board on these grounds.

Recommendation:

54. Change the legislation to allow the YWCHSB limited standing at WCAT hearings for the purpose of clarifying jurisdiction, correcting the record and ensuring all parties pursuant to the issue can be present.

Issue #7A – Jurisdiction of Appeal Tribunal
Issue #8A – Employers' Appeal Process

The WCAT was designed to address claim issues, whether appealed by the worker or the employer. Therefore, employers have access to the WCAT when they wish to appeal YWCHSB decisions regarding their employees.

OH&S and assessment issues are specialized and very infrequent. Currently, employers appeal to a panel of the Board of Directors on these issues. With only one or two assessment and OH&S appeals per year, the WCAT members would struggle to be knowledgeable about these complex areas.

Recommendation:

55. No change to the legislation regarding the jurisdiction of the WCAT or the employer appeal process.

Issue #9A – Application to the Supreme Court

Extraneous legislation that adds layers of court decisions to the Act is desired by neither stakeholders nor the Board. However, when considering who can take what to court, one gap exists in the current legislation: the ability to proceed to court to determine whether WCAT decisions are consistent with the Act. This gap was highlighted in a recent court decision.

Recommendation:

56. Change the legislation to give both the Board and the WCAT the ability to appeal to the Supreme Court whether WCAT decisions are consistent with the Act.

Issue #10A – Standing at assessment hearings

Assessment issues under appeal relate to the employer's entire workplace; they are not applicable to an individual injured worker. Therefore, it is not appropriate for individual workers to attend assessment appeal hearings.

Recommendation:

57. No change to the legislation regarding worker standing at employer assessment appeal hearings.

Issue #11A – Annual reporting of the WAO

While the Board and its stakeholders do not wish to prescribe specific reporting requirements for the WAO, it is felt that some Board control over the budget of the WAO is necessary since the Board is responsible for the Compensation Fund. Currently, the Minister of Justice must consult with the Board on the WAO budget; however, the Board has no legislated approval over the budget.

Recommendation:

58. Change section 13(5) of the Act to require the Minister of Justice to prepare the WAO budget (as at present), for joint approval of the budget by the Board and the Minister of Justice and for a timely dispute resolution process (e.g. binding arbitration) in the event of a disagreement over the budget.

Issue #12A – Annual reporting of WCAT, WAO and Employer's Consultant

Adding legislative reporting requirements to the WCAT and WAO would slow down the reporting process as well as add additional cost. The reports of these offices are available now to anyone who wants to view them.

Recommendation:

59. No change to the legislation with respect to the reporting of the WCAT or the WAO.

Issue #13A – Board's notice to employers of a claim for compensation

The legislation currently requires injured workers to report their injuries to their employers and to the YWCHSB. Employers must report injuries to the Board as required by legislation. As part of an internal responsibility system, workers should report all incidents, accidents and near misses to their employer.

Making a legislative change to require the Board to notify the employer of injuries minimizes the importance of the workplace internal responsibility system.

Recommendation:

60. No change to legislation regarding the YWCHSB notifying employers of injuries.

Issue #14A – Processes for release of claims information

Claims information is confidential and extremely personal; therefore, the YWCHSB must be diligent in releasing information to employers in the case of appeals. As is the case at present, employers only receive information relevant to the issue under appeal.

Recommendation:

61. No change to the legislation to allow full employer access to claim files.

Issue #15A – Access to claims files

Where there is a dispute regarding whether certain information on a claim file can be released to an employer, the President/CEO makes the final decision. Unfortunately, if the WCAT disagrees with the President's decision to release the information post-release, it is too late to protect the worker's information. Therefore, a legislative change is proposed to ensure this does not happen.

Where an investigation of an injured worker occurs, sometimes video evidence is collected. This evidence is only placed on a worker's file where the evidence affects a decision or where fraud is found. Placing videos on file regardless of the outcome of the investigation would make all information accessible to the injured worker; however, the existence of an investigation could bias future decision-makers who may be assigned to the file. Therefore, in its new investigations policy (currently out for public consultation), videos are only automatically placed

on the file where the results are used in decision making or where fraud is found (as at present); however, upon request, an injured worker can have access to any video evidence conducted on them.

In the options paper, the WCARP provided an additional consideration – to consider giving the Board the legislative ability to withhold medical information that may be detrimental to the worker's well-being. Stakeholders and the Board disagree with giving the Board such legislated ability.

Recommendation:

62. Amend section 27(5) to ensure a worker can appeal the President's decision under section 27(4) to WCAT and that any information cannot be released until the appeal is finalized.

Issue #16A Implementation of WCAT decisions

The legislation provides for a 30 day timeframe for implementation of WCAT decisions. While this issue was originated by the Board, the Board and stakeholders are now satisfied with the time frame.

Recommendation:

63. No changes to the legislation regarding the timeframe for Board implementation of WCAT decisions.

Issue #17A – Term "adjudicator" in legislation

Specific job titles should not be referenced in the legislation – the YWCHSB may decide to change job titles or to move duties from one position to another. Such specific references quickly date the legislation and tie the hands of the Board with respect to human resource management.

Recommendation:

64. Amend the legislation to remove all references to individual job titles within the YWCHSB and replace with a generic term such as "the corporation" or the "decision maker".

Issue #18A – Choice of gender of medical consultant

When this issue was originally raised, it was in the context of independent medical examinations required for injured workers – not the internal medical consultants used by the YWCHSB.

Where practicable, a worker's choice of gender of physician should be respected; however, this is not an issue for the legislation. Stakeholders and the Board agree that this can be effectively dealt with in Board policy.

Recommendation:

65. No change to legislation regarding choice of gender of medical consultant.

Issue #19A – Board's ability to seek clarification of WCAT decisions

When the Board receives a WCAT decision and is unclear as to the final decision or direction that WCAT is providing, it makes implementation impossible. Therefore, the Board either informally calls or requests written clarification of WCAT decisions. The WCAT is extremely timely in responding to these requests so that the Board can either proceed with implementation or stay a decision for a rehearing. Since this process is working, there is no need for additional legislation to complicate the process.

Recommendation:

66. No change to legislation with respect to seeking clarification of WCAT decisions.

Issue #20A – RTW and employer's obligation to re-employ

All stakeholders and the Board support return to work for Yukon workplaces. The Canadian Medical Association also supports return to work through its policy "The physician's role in returning patients to work following injury or illness," which talks about improved recovery of function, family life and quality of life for workers who return to work while recovering from an injury.

Further, the Board and its stakeholders are firm in the belief that legislative changes to the Workers' Compensation Act are required to enable proactive return to work and re-employment of injured workers. Some may argue that Human Rights legislation already covers such requirements; however, as the Human Rights Commission itself will tell you, workers' compensation requirements complement, not replace, human rights requirements. Workers' compensation boards deal with only two grounds of discrimination (physical disability and mental disability) while the Human Rights Commission deals with all. Also, the Human Rights remedy takes a long time for some and is complaint-driven.

In instituting return to work legislation, the Board and the Human Rights Commission are committed to working together to avoid duplicate remedies and processes. In some jurisdictions, Human Rights will hold their investigation "in abeyance" pending a review by the WCB; in others, Human Rights will not review work-related injury discrimination where a workers' compensation remedy exists. Ensuring that no duplicate processes exist in the Yukon may take a consequential amendment to the Human Rights Act; however, the timing of this submission did not allow for a detailed legal review and opinion on this issue.

In return to work legislation, there are three main "duties" all of which are required in Yukon workers' compensation legislation:

- Duty to Co-operate;
- Re-employment Obligation, and
- Duty to Accommodate.

Duty to Co-operate

The main goals of the duty to co-operate are:

- to maintain communication between the worker and employer;
- to reconnect the worker to the workplace to ensure medical recovery and return to work occur concurrently, and
- to return the worker to the pre-injury employer through **suitable** and **available** employment. Suitable employment is work that meets all of the following criteria:
    - the work is within the worker's functional abilities;
    - the worker has, or is reasonably able to acquire, the necessary skills to perform the work;
    - the work does not pose a health or safety risk to the worker or co-workers, and
    - the work restores the worker's pre-injury earnings, if possible.

  Available work is work that exists with the injury employer at the pre-injury work site, or at a comparable work site arranged by the employer. It does not require a "vacant" position

The duty to co-operate would apply to all workers and all employers and applies while the injured worker is recovering from his or her work-related injury or illness. When a worker can do his or her pre-injury job (or the essential duties of the pre-injury job) during recovery, the employer would be required to pay the worker his or her pre-injury earnings. When the worker cannot perform his or her pre-injury job (or the essential duties of the pre-injury job), but can do suitable

work, the employer would pay the worker's pre-injury wages for the first two weeks of return to work and the Board would pay benefits thereafter.

Penalties for non-cooperation (which would only be determined after a series of opportunities to change the non-cooperative behaviour as defined in policy) for workers would be reduction, suspension or termination of wage loss benefits. For the non-cooperative employer, the penalty would be the worker's wage loss benefits as well as any vocational rehabilitation costs, charged as an assessment for as long as the non-cooperation continues. While the penalties are somewhat severe, the actual duty is not difficult to fulfill but has a major impact on a successful return to work and recovery.

Under the duty to co-operate, workers are required to:

- contact the pre-injury employer as soon as possible after the injury occurs and maintain effective communication throughout the period of recovery or impairment;
- assist the employer, as may be required or requested, to identify suitable and available employment;
- accept suitable employment when identified, and
- give the Board any information requested concerning the return to work, including information about any disputes or disagreements which arise during the RTW process.

For employers, the duty to co-operate means they are required to:

- contact the worker as soon as possible after the injury occurs and maintain effective communication throughout the period of the worker's recovery or impairment;
- provide suitable and available employment, and
- give the Board any information requested concerning the worker's return to work, including information about any disputes or disagreements which arise during the RTW process.

Re-employment Obligation

The re-employment obligation, unlike the duty to co-operate, only applies to employers who regularly employ 20 or more workers. Based on YWCHSB payroll information and utilizing average wages in the Yukon, this obligation would apply to between 160 and 200 employers. This number (20 or more) was chosen since it corresponds to OH&S requirements for larger employers. Also, the re-employment obligation only exists where the injured worker has been in a continuous employment relationship with the employer for one year prior to the injury.

How "regularly employs" and "continuous employment relationship" are defined will be determined in policy.

The duration of the re-employment obligation is two years following the injury, 12 months following the worker's ability to perform the pre-injury job (or essential duties of the pre-injury job) or when the worker turns age 65; whichever is earliest.

So what exactly is the obligation?

Where an employer has a re-employment obligation to an injured worker, and that worker is able to perform his or her pre-injury job (either with or without accommodation) the employer's obligation is to provide the pre-injury job or a comparable job (comparable means comparable in nature and in earnings and would be further defined in policy). An employer who fails to meet the obligation would be subject to a penalty (discussed later in this section). Workers' compensation legislation cannot force an employer to take a worker back – there are only fines for not doing so.

Where an employer has a re-employment obligation to an injured worker, and that worker is able to perform the *essential duties* of his or her pre-injury job (either with or without accommodation) the employer's obligation is to provide the pre-injury job or a comparable job.

Where an employer has a re-employment obligation to an injured worker, and that worker is unable able to perform the pre-injury job or its essential duties but does have the ability to do other work, the employer's obligation is to provide the worker with the first opportunity to accept suitable employment that may become available with the employer.

The penalty for failing to meet the re-employment obligation is a lump sum penalty of the worker's gross wages for up to one year with no maximum compensable cap applied, depending on the remaining duration of the re-employment obligation. For example, a worker earning $100,000 gross per year is not re-employed by his employer after he is finally able to return to his pre-injury job 18 months after his work-related injury (6 months are left in the 24 months obligation period). The employer has a re-employment obligation to this worker since the employer regularly employs 75 workers (more than the 20 threshold) and the worker worked for him for 3 years prior to the injury (more than the 1 year requirement). However, the employer fails to re-employ the worker. The penalty would be $100,000 X 6/12 = $50,000.

The penalty would be levied as an assessment payable and collected as such.

Any re-employment penalties collected from the employer would be paid to the worker as benefits (compensable maximum applies) for remainder of obligation period, up to 12 months. These benefits are paid even if the worker finds another job and are paid until the obligation period expires or the employer meets the re-employment obligation. In this example, the worker's benefits would be

capped by the maximum compensable earnings level and the worker would receive maximum benefits for 6 months.

Stakeholders and the Board also discussed legislative provisions regarding presumption of breach of the re-employment obligation where a re-employed worker is fired within 6 months of re-employment. All agreed that a worker would have 30 days to inform the YWCHSB of his or her termination. After this time, the YWCHSB would not be required to review the request.

Where the termination occurs within 6 months of re-employment, a presumption of breach would exist. This presumption is rebuttable and would put the onus on the employer to demonstrate that the termination was not related to the work-related injury or claim for compensation.

With a termination after 6 months of re-employment, (but still within the obligation period) the burden of proof would be on the YWCHSB to demonstrate that the breach was related to the injury or claim for compensation.

Duty to Accommodate

The duty to accommodate under the proposed workers' compensation legislation would apply to the same employers and workers as the re-employment obligation – they go hand in hand. It is important to note that while these application restrictions exist in workers' compensation legislation, there are no such restrictions in Human Rights legislation – all employers have a duty to accommodate all workers.

In the context of workers' compensation, accommodation means changing the workplace to accommodate the functional abilities of an injured or ill worker. Most accommodations cost nothing and of those that do cost money, the average cost would range fro $800 - $1000.

Some examples of accommodation include, but are not limited to:

- Schedule changes;
- Duty rotation within the job;
- Change in methods;
- Removal, addition, changes to duties;
- Purchase of modifications;
- Capital costs (rare).

Under Human Rights legislation, and in other workers' compensation jurisdictions where the duty to accommodate is legislated, the employer's responsibility is to accommodate to the point of undue hardship. Stakeholders and the Board recommend that purchase costs of accommodation up to $1,000 per claim be paid by the employer with a duty to accommodate and costs beyond that be paid out of the Compensation Fund as determined by the YWCHSB. Such costs would then be borne by employers through the collective liability principle of rate setting.

Functional Abilities Information

In order for return to work to be successful, employers must have access to the functional abilities information of their injured workers. Therefore, the return-to-work legislation must include a requirement for health care providers to provide functional information to the worker, employer and the YWCHSB. Medical information must be protected and provided by health care providers to the worker and the YWCHSB, but not directly to the employer.

Recommendation:

67. Adopt return to work legislation, based on sections 89, 89.1 and 89.3 of the *Workplace Health, Safety and Compensation Act* of Newfoundland and Labrador (NL), to institute:
    - A duty to co-operate for all employers and workers. A change from the NL Act would be that when the worker cannot do the pre-injury job or the essential duties of the pre-injury job, but could work, the employer would pay the pre-injury wages for the first two weeks of return to work and the YWCHSB would pay benefits thereafter;

- A 2 year (maximum) re-employment obligation for employers who regularly employ 20 or more workers to workers with whom they had a continuous employment relationship with for at least one year immediately preceding a work-related injury or illness. A change to the NL Act with respect to the re-employment obligation would be that a worker would have 30 days (versus 3 months) to report a termination following re-employment to the YWCHSB, and
- A duty to accommodate for those with a re-employment obligation. A change from the NL Act would be that the employer would pay the first $1,000 in accommodation purchases and the YWCHSB would pay thereafter.

Issue #21A – Uses of "deeming"

The concept of employment versus employability is a challenging one for every jurisdiction. To specify how this complicated process must work in legislation restricts the ability of the Board and its stakeholders to meeting changing needs and evolving concepts regarding deeming. Through the Policy Working Group, stakeholders have been working with the Board on a new deeming policy. The policy is nearing completion and should be ready for a January 1, 2007 implementation date (based on current progress). Both the Board and its stakeholders are satisfied that this is an issue that should be effectively dealt with through Board policy.

Recommendation:

68. No change to legislation regarding deeming.

Issue #22A – Reimbursement of compensation payments to employers and other insurers

Employers who continue to pay workers following injury help maintain the worker's continuity of income while they wait for an adjudication decision from the YWCHSB. When a claim is accepted, the employer is reimbursed at the compensation rate (75% of gross income to the maximum compensable ceiling); therefore, employers must have paid at least that amount to the worker.

Another issue arises where a worker has insurance which may pay out during the wait for adjudication. In some cases, the insurance will not pay unless the worker agrees to assign his or her workers' compensation benefits so that the insurance company is guaranteed to be reimbursed if the worker's claim for compensation is accepted by the YWCHSB. Section 97 of the Act prohibits a worker from assigning his/her benefits. The Board and stakeholders would like to be able to accommodate injured workers with this insurance dilemma; however, there is a concern about opening up section 97 to other assignments.

Recommendations:

69. Amend section 30 to add wording such as "and the employer shall pay at least that amount to the worker" so that in cases where benefits are payable to the employer, the injured worker receives the benefits to which they are entitled.
70. Consider amendment to section 97 to allow for assignment to insurance companies during claims adjudication but only if the wording can be 100% restricted to such situations.

Issue #23A – Claims management

Claims management is integral to the return to work and recovery of injured workers; however, it is not something that can be legislated. Claims management issues must be dealt with through legislation, policy, procedures, training and supervisory control.

Recommendation:

71. No change to legislation regarding case management.

Issue #24A – Definition of initial treatment site

Under the current legislation, section 45(1) requires the employer to immediately transport and pay for transport of the injured workers to a hospital, medical practitioner or other place that may be required by the worker's condition. The Board and its stakeholders agree that a Board policy can provide clear direction

on the application of this section. Once again, flexibility to deal with changing medical realities in the Yukon is of paramount importance.

With respect to the issue of whether the employer pays directly or the Board pays through the Compensation Fund, stakeholders agree that employers should continue to pay directly. This section of the Act impacts employers in remote locations the most; employers such as outfitters and prospecting companies. For the large majority of employers this is not a large cost and they are not willing to have the Compensation Fund (and their assessments through the principle of collective liability) absorb the high cost of first medical transport for employers who operate remotely.

All agree that employers need to understand their responsibilities with respect to section 45(1) so that they can make arrangements to have emergency transport available and consider how they will fund such costs (e.g. purchase private insurance). A communication effort, in conjunction with a current policy needs to be done by the Board for Yukon employers in this regard.

Recommendation:

72. No change to section 45(1) of the legislation regarding the employer's responsibility to arrange and pay for emergency transportation following a work-related injury.

Issue #25A – Roles and uses of indexing of benefits

Current legislation guarantees at least a two percent increase in benefits (not to exceed the maximum) each year on a worker's anniversary date.

Stakeholders and the Board agree that this guarantee of two percent is not appropriate and that indexing should be tied to the Consumer Price Index (CPI) for Whitehorse and should occur for all workers on January 1st of each year; regardless of anniversary date.

However, while extreme fluctuations in the CPI have not occurred recently, there is a potential for negative inflation as well as very high inflation. Some level of stability is needed; therefore, stakeholders and the Board are recommending no maximum or minimum CPI levels but do recommend an implementation range of 0 – 4% to provide smoothing of inflation below 0% or above 4% over time. This is best explained by using an example.

EXAMPLE
CPI Calculations
2007 - 2012

	Hypothetical Whitehorse CPI	Indexing Applied to Injured Workers' Benefits	Rationale	Indexing Balance
2007	2.2%	2.2%	Falls within 0 – 4% range; no adjustment	0
2008	-0.5%	0%	Adjust to 0% to fall within implementation range.	-0.5%
2009	1%	0.5%	1.0% - 0.5% to adjust for 2008 negative CPI	0
2010	4.4%	4%	Adjust to 4% to fall within implementation range	+0.4%
2011	3.8%	4%	3.8% + 0.4% = 4.2% to adjust for 2010 CPI over max implementation range. Adjust to 4% to fall within implementation range.	+0.2%
2012	3%	3.2%	3% + 0.2% indexing balance	0

Recommendations:

73. Amend section 48(1) to reflect indexing on January 1 of each year on a go-forward basis for all workers regardless of date of injury or anniversary date.
74. Further amend section 48(1) to reflect indexing in accordance with the Whitehorse CPI without maximums or minimums but with a practical implementation range of 0% to 4% to provide for smoothing of extreme CPI rates over time.

Issue #26A – Adequacy of the system for spouses

The worst outcome in the workers' compensation system is the work-related death of a worker. However, it is for such tragedies that the system is most needed. Therefore, the adequacy of benefits for surviving spouses and dependant children is of utmost importance. The Board and its stakeholders have reviewed the current benefit package and feel that the financial remuneration is fair within the context of the system. However, all agreed that surviving dependant spouses should be given retraining opportunities should they wish to pursue them. Further, all agree that counselling services and placement services, when appropriate, be available to dependant children.

Recommendations:

75. No change to the legislation regarding the compensation amounts payable to surviving spouses and dependant children.
76. Amend the legislation by adding a section so that the Board may offer appropriate training or retraining to a surviving dependant spouse and counselling and placement services for dependant children, at the discretion of the Board. The legislation should be enabling so that the Board has maximum flexibility to deal with each fatality appropriately.

Issue #27A – Limitation of legal rights as they relate to vehicles
Issue #28A – Definition of a vehicle

In the WCARP options paper, the Panel questions whether the definition of vehicle needs to change. The stakeholders and Board feel that the current definition, "vehicle means any mode of transportation the operation of which is protected by liability insurance" meets the intention of the Act. Whether the vehicle is a tractor, quad, car, truck, etc. is irrelevant. What matters is whether it carries liability insurance.

Another issue raised in the discussion was whether workers should be given a "right of election" with respect to subrogated claims. That is, should the worker be able to initiate a third party action on their own and forfeit all rights to workers'

compensation benefits (regardless of the outcome of the action) as is the case in some other Canadian jurisdictions? The Board and its stakeholders feel that this should not be permitted in the Yukon as is goes against Meredith's reasons for setting up the system. Workers who choose this route have no income while they recover and could go through a long drawn-out process with insurance companies and perhaps even in court. Meanwhile, there is no one case managing the claim and return to work with the employer is less likely.

Finally, the stakeholders and Board discussed what is an anomaly with respect to subrogated claims under the Yukon Workers' Compensation Act. In this jurisdiction, the Board will initiate third party action on a subrogated file. In determining the amount of the settlement, the Board considers the total cost of the claim (future wage loss, medical, permanent impairment, etc) as well as its legal costs. However, when the insurance company settles, the worker receives 25% of the gross award after legal costs as well as all of his or her benefit entitlement under the Act thereby benefiting more than other injured workers whose work-related injury did not involve a vehicle with liability insurance. In these cases, the Board does not even cover its costs.

Consider the following example:

Mary is a courier who is injured when a tourist driving an RV rear-ends her vehicle at a red light. The RV is insured.

The Board initiates action and estimates the following costs of the claim which is estimated to result in a long recovery time, vocational rehab (doctor says she can no longer drive as her ability to turn her head has been damaged in the accident) and out of Territory medical:

Wage loss:	$200,000
Voc Rehab:	$150,000
Medical:	$180,000
PPI:	$60,000
Legal Costs:	$50,000
Total estimate:	$615,000

The Board requests $700,000 from the insurance company given the uncertainty of Mary's prognosis and over time finally settle on $640,000. Meanwhile, Mary receives wage loss benefits from the Board, is in active physiotherapy and is reviewing her vocational rehabilitation options.

Under the current process, Mary would receive:

Settlement Amount:	$640,000
Less: Legal Costs:	(50,000)
Subtotal	$590,000
X 25% Due to Mary	$147,500.

The Board and stakeholders are recommending that the injured worker receive 100% of the settlement balance after all costs are recovered: legal and compensation costs.

In this proposed change, Mary would receive:

Settlement Amount:	$640,000
Less: Legal Costs:	(50,000)
Less: Claim Costs	(565,000)
Due to Mary	$25,000

Recommendations:

77. No change to the legislation regarding the definition of vehicle.
78. Amend section 56(3) to reflect that the injured worker be entitled to 100% of the settlement in a third party action after all costs (including compensation, medical, legal, etc) are recovered by the Board.

Issue #30A – Compensation Fund within the Yukon Consolidated Revenue Fund
Issue #31A – Financial Administration Act and independence of the Board
Issue #32A – Authority over the Fund

Having the Government of Yukon, in essence, backstop the Compensation Fund, gives a high level of confidence and security to stakeholders in the Yukon. The YWCHSB Board of Directors has complete control over the day-to-day operation of the Compensation Fund with a legislative provision for Cabinet to review any changes to the Board's investment policy which sets the broad parameters for the Board's investment strategy (not changes in the day to day investment choices of the Board). This process adds an extra layer of review for changes to the Investment Policy and is felt to be reasonable given Government's financial commitment to the Compensation Fund.

Recommendation:

79. No change to legislation regarding control or authority over the Compensation Fund.

Issue #33A – Access to employer's safety and claims cost information

The discussion of this issue in the WCARP options paper was very disturbing to stakeholders and to the Board. Terms like "accident prone" represent an outdated way of thinking about workplace incidents. To even consider labelling or discriminating against "accident prone" people violates the Charter of Rights and Freedoms and places employers in a no-win situation. Yukon employers want good information regarding the safety records of their workplace and relevant information regarding issues under appeal: no more, no less. In the case of contractors, it is currently within the employer's right to ask a potential subcontractor for a summary of its safety record during the bidding or tendering process.

Workers who want information about a prospective employer's safety program should ask the employer for a copy of the program during the pre-hiring process.

Recommendation:

80. No change to legislation regarding employer or worker access to employer or worker's safety or claims history.

Issue #34A – Incentive programs

Through recent consultations with stakeholders, the Board introduced a concept for a new incentive program. Unlike traditional experience rating programs which adjust the employer's future assessment rate based on historic cost performance, the proposed incentive program bases rewards on the behaviours of the workplace with respect to OH&S and return to work. To make this program happen, new legislation is needed to enable the Board to pay rewards under such a system.

Stakeholders and the Board do not want prescriptive wording that outlines exactly how the program will work in legislation. By working together, policies will be developed that outline the incentive program(s).
While the Board is not considering a program of merit rating, section 71 can be left in the legislation as it is a may clause. "The board may, by order, adopt a system of merit rating for employers".

Recommendation:

81. Amend the legislation to add a new section that enables the Board to develop, by order, an incentive program that rewards workplaces for their efforts in occupational health and safety and return to work.

Issue #35A – Process for collection of assessment and penalties for late or non-reporting

The Board and its stakeholders are satisfied with the current assessment provisions of the Act regarding reporting. It is a benefit for employers to be able to pay assessments over the course of the year on an actual basis without penalty. If the YWCHSB was to charge interest on actual reporting, the amount would not be large enough to make a significant impact on investment revenue

given our small assessment base. In this time of rising assessment rates, such a move would be extremely detrimental to employers, especially the many small and seasonal employers who take advantage of the actual reporting system.

Recommendation:

82. No change to the legislation regarding penalties for employers who report and pay on actual payroll throughout the year.

Issue #36A – Processes for dealing with fraud

All workers' compensation jurisdictions deal with fraud to some extent: employer fraud (e.g. providing a false description of business to get a lower assessment rate), worker fraud (e.g. claiming compensation for a non-work-related injury), injured worker fraud (e.g. continuing to receive benefits after recovery and return to work), service provider fraud (e.g. charging the Board for 20 treatments when the injured worker only received 10), staff fraud (e.g. setting up false claims to pay themselves), or Board fraud (e.g. claiming per diems for personal time). These examples are provided to show that fraud can happen from any player in the workers' compensation system – not only injured workers as is the general and incorrect, perception.

Currently, the Board has an Investigations Policy out for public consultation which addresses investigations for decision making, information gathering and suspected fraud. Further, the Investigations Policy and the Fraud Policy both state that the Board will investigate all allegations of fraud (the level of investigation is dependant on each situation). Therefore, stakeholders and the Board are satisfied that legislation is not needed to restate this position.

Recommendation:

83. No change to the legislation regarding fraud investigation.

Issue #37A - ATIPP

Stakeholders and the Board are satisfied that the Board's policy GC-13 addresses concerns with respect to requests for information and release of information. The Yukon Information and Privacy Commissioner has determined that the YWCSHB is not a public body under the Access to Information and Protection of Privacy Act; therefore, if changes are to be made, it is under that Act and not the Workers' Compensation Act that change is needed. In any case, the YWCHSB adheres to ATIPP requirements currently.

Recommendation:

84. No change to legislation regarding ATIPP.

Issue #38A – Employer education and representation/Employer's Advocate/Consultant

Employers need education and assistance in order to be full participants in the workers' compensation system. The question is whether that education and assistance should be prescribed in the Workers' Compensation Act. The Board and its stakeholders feel that enshrining a specific role in the Act constrains the ability to deal with changing needs, priorities and employer profiles.

In order to assist employers, the Board approved the staff position of Prevention Consultant which is available full time to assist employers. Further, the Board has and will entertain proposals from employers and employer organizations for assistance. In January, 2006, stakeholders came together to the Board for over $1 million in funding over 5 years for the Northern Safety Network Yukon. Another example: the Whitehorse Chamber of Commerce and the Northern Safety Network Yukon recently submitted a proposal for a small business safety consultant for employers – a proposal which has been approved by the YWCHSB. The Board has demonstrated its commitment to employer education and assistance that meets specific needs through contribution agreements that

promote co-operation, reporting and accountability in a fiscally responsible manner.

Recommendation:

85. No change to the legislation to require an employer consultant/advocate.

Issue #39A – Worker education and representation/Worker's Advocate

The Workers' Advocate Office has a full time job in assisting individual injured workers with claim issues. In 2005, $358,000 of the Compensation Fund was used for this function. The Board currently has responsibility for worker education and training and is fulfilling that role both directly as well as through Prevention Fund partnerships with the Yukon Federation of Labour, for example.

The Board and its stakeholders do not wish for the Board to legislatively abdicate these functions to the Workers' Advocate Office.

Recommendation:

86. No change to the legislation with respect to the Workers' Advocate role regarding education and training.

Issue #40A – Limitation periods for appeals to the Appeal Tribunal and to the Board

Having no appeal limit is an extreme problem in the workers' compensation system in this jurisdiction. Without an appeal limit there is no finality to issues which makes actuarial predictions and rate setting difficult. Without an appeal limit, we see long periods of time without case management but with potential large, retroactive payments and permanent, long term disabilities.

Stakeholders and the Board agree that there must be an appeal limit and have agreed that 24 months from the date of the written decision is a reasonable time frame to introduce an appeal limit. This would apply for internal as well as external appeals. Since this is the introduction of an appeal limit, this issue must be reviewed in the new statutory review of the Workers' Compensation Act.

Recommendation:

87. Amend the legislation to add an appeal limit on internal and external appeals of 24 months from the date of a written decision.

Issue #41A – Employee's right to sue the Board for damages caused or exacerbated by the Board's actions

This issue was originated by workers and has been dropped by workers. The WCARP could find no solution to this issue within the Meredith principles because no solution exists. Neither stakeholders nor the Board wish to return to the litigious state of affairs that existed prior to workers' compensation legislation: that process was not good for workers and was not good for employers.

Issue #42A – Administering prior years' legislation, policy or orders

Legislation changes. This is a reality in all legislative systems and is good. It allows legislation to reflect the current situation, technology, culture and environment. The YWCHSB is set up to be able to deal with historic legislation – an appeal limit, as outlined in issue #40A, will help reduce the complexity of retroactive decisions; however, there will always be old legislation.

The Board initiated policy GC-12 "Transition Policy" to provide clear guidance over what applies to whom from a policy perspective. Legislation provides such direction as well.

To bring all old claims under current policy would be unfair to all workers and employers who received benefits or paid assessments under the old legislation.

Recommendation:

88. No change to the legislation regarding retroactive application of current legislation to all claimants.

Issue #43A – Access to the Board's independent legal opinions

Where a YWCHSB decision maker requests a legal opinion on an issue and that opinion is used in the decision making process, a copy of the opinion is placed on the file (claim or employer) in question, as per a Board directive.

The Board, as any other Board, organization, employer or citizen of Canada (including convicted criminals), is entitled to client/solicitor privileged legal advice. The stakeholders agree that the Board is entitled to this right and it should not be removed.

Recommendation:

89. No change to legislation regarding access to Board's independent legal opinions.

Issue #44A – Definition of disability: including chronic pain and chronic stress
Issue #45A – Disability versus impairment

In the Options Paper, the WCARP discussed coverage for chronic pain and the Nova Scotia Workers' Compensation Board's experience with chronic pain. However, the issues regarding chronic pain in the Yukon are not the same as the issues under review in the Martin v. NS WCB Supreme Court ruling. In Nova Scotia's workers' compensation legislation, compensation benefits in the event of a chronic pain diagnosis were limited to a period of weeks. At issue, was that injured workers with chronic pain were treated differently, or discriminated against, relative to other injured workers with other diagnoses.

Chronic pain is not a work-related injury; however, it may be an outcome of a work-related injury. How the YWCHSB deals with this outcome (or others such as depression, additional injury during treatment, etc) must be dealt with in non-discriminatory policies which can be adjusted to reflect current thinking regarding such outcomes.

Stress is also an issue for policy. The current definition in the Act is satisfactory to stakeholders; however, all recognize that policy direction is needed.

Finally, neither stakeholders nor the Board have issues with the current definition of disability found in the Act.

Recommendation:

90. No change to legislation regarding definitions of chronic stress, chronic pain, disability or impairment.

Issue 46A – Definition of compassion

In the Objects of the Workers' Compensation Act, workers, dependants of deceased workers and employers are to be treated with compassion, respect and fairness. These are the guiding principles of how to treat the users and payers of the system. There is nothing wrong with being compassionate, respectful and fair. If compassion were to be defined, so would the concepts of respect and fairness. Such definitions are not required.

If compassion were to be removed, the result would be that the YWCHSB does not have to act compassionately; a result which is not desirable.

Recommendation:

91. No change to the legislation regarding the definition of compassion.

Issue #47A – Definition of wholistic approach to rehabilitation

W or no W? What is important to stakeholders and the Board is that the entire person is considered during the rehabilitative process. This is the intent of the legislation and this is what is reflected in Board Policy CS-11 "Rehabilitation". The spelling of the word is not an issue for stakeholders or the Board.

Recommendation:

92. No change to legislation regarding the wholistic approach to rehabilitation.

Issue #48A – Special examinations/reviews

The workers' compensation system must be under constant review by the Board and its stakeholders. This process has begun with increased consultation, strategic planning, development of policy priorities, annual audits and periodic statutory reviews. Adding a revolving Office of the Auditor General review to the legislation is (1) inappropriate as the OAG determines their own priorities and (2) unnecessary given the current levels and types of ongoing reviews. Clearly, where there is an issue, an OAG special examination can be initiated by the OAG or requested by the Board or stakeholders.

Recommendation:

93. No change to legislation regarding a revolving OAG special examination.

CONCLUSION

Amongst the 88 issues identified by the WCARP, the following fundamental themes emerge:

- Prevention must remain a priority focus.
- Injured workers are not returning to work and recovering as soon as they can, resulting in unnecessary disability, life disruption and system costs. Return to work and recovery with the meaningful involvement of the injured worker and employer, where appropriate, must occur.
- Consultation with knowledgeable, interested stakeholders is vital to a well-functioning system.
- The legislation must be clear in its intent and flexible in its application to enable the Board to meet changing needs and priorities in a changing world.
- Good, timely and non-bureaucratic processes are needed to enable all stakeholders to access the programs and services of the YWCHSB, WCAT and WAO.

It is in the spirit of these themes that the stakeholders and Board make this submission to the WCARP and it is in this spirit that we ask the WCARP to make their final recommendations to the Minister.

Summary of Stakeholder and Board Recommendations

1. Entire legislation needs to be reviewed so that there is a clear differentiate between the Board of Directors and the YWCHSB itself.
2. No public representatives should be added to the Board.
3. Section 106(2)(c) be repealed to remove the chair of the appeal tribunal as a member of the Board of Directors.
4. The President of the YWCHSB must remain a non-voting member of the Board of Directors in order to effectively fulfill the requirements of the position.
5. No change to section 106(12) with respect to the meeting schedule of the Board.
6. No change to the Act on the voting role of the chair or the chair's duties.
7. See recommendation #3 to remove the chair of the WCAT as a member of the Board of Directors.
8. No change to the Act to include additional Board duties and responsibilities.
9. Change the legislation to make it clear that the President is ultimately accountable to the Board of Directors through the Chair.
10. Amend Section 106(5)(a) to require that the Minister shall appoint employer representatives to the Board of Directors from a list of name(s) of qualified individuals provided by employers and employer organizations.
11. Amend Section 106(b) to require that the Minister shall appoint worker representatives to the Board of Directors from a list of name(s) of qualified individuals provided by workers and worker organizations.
12. No change to legislation regarding process for appointing the chair and the alternate chair.
13. No change to legislation regarding how policies are developed, changed, rescinded or chosen for any of the above.
14. Repeal Section 108(j), which specifies the public policy process required for claims-related policies.
15. Add a new section that requires the Board to consult with stakeholders on all non-administrative policies and that requires the Board to give advance notice of policies under development.
16. No change to the legislation with respect to requiring annual service plans or specific annual report requirements regarding same.
17. No change to section 109 of the Act – Chair and President appearing before the Legislative Assembly.
18. Repeal sections 108 (c) (annual report to Minister by June 30th) and (d) (activity report to Minister 90 days after end of calendar year) regarding current reporting requirements.
19. Create new section 108 (c) with a single annual report requirement that would include audited financial statements to the Minister by April 30th each year.

20. Change section 111(1) to reflect holding a meeting after the tabling of the Annual Report in the Legislative Assembly and at the convenience of stakeholder organizations.
21. No changes to the Workers' Compensation Act with respect to the Board's jurisdiction over the Occupational Health and Safety Act.
22. No legislative changes to create administration cost limits in the Act.
23. No legislative changes with respect to the attraction and retention of key personnel
24. No changes to legislation to require specific rate code assessment/cost reporting structure.
25. No changes to legislation with respect to distribution of administration costs to industry codes.
26. No changes to the legislation regarding transition of rates or rate structure.
27. Change section 105(3) of the Workers' Compensation Act so that the reference to section 81 is removed making Government of Yukon subject to audit as are all other assessed employers.
28. Amend section 3(3) of the Act to reflect the federal retirement age less two years instead of the current reference to "at least 63 years of age or over".
29. Ensure that the issue of age limitation on claimants is included in the next review of the Workers' Compensation Act.
30. No change to the legislation regarding non-profit and charitable organizations covering their volunteers.
31. Amend section 8(1) to include "terminate" compensation along with reduce or suspend; ensuring that the wording reflects the progression associated with termination as the last resort.
32. Amend section 8(1) to reflect the worker's obligation to mitigate the effects of their injury: put the onus on the worker to mitigate rather than the onus on the board to show the worker acted unreasonably.
33. Amend the legislation to give the Board the authority to make, by order, time limits for various stages in the appeal process.
34. No change to the Act regarding time limits to file a claim for compensation.
35. No change to the legislation to allow commuting of benefits.
36. No change to the legislation regarding an award for pain and suffering.
37. No change to the legislation with respect to calculating the maximum non-economic loss award.
38. No change to the legislation regarding the maximum amount of loss of personal property.
39. Amend section 35 of the Act to remove the requirement for disability in order to qualify for compensation for loss of personal property and add "where a worker suffers a loss of personal property as a result of a workplace accident …". Include a definition of accident.
40. Add a new section to the Act requiring the Board to begin compensation on the day following the injury and requiring the employer to pay on the day of injury.
41. No change to legislation with respect to 75% gross earnings benefit rate.

42. Amend a section to allow a 50% CPP Disability benefit offset from pre-injury earnings on a gross from gross basis for workers who become entitled to CPP Disability benefits (including retroactive entitlement) on or after the effective date of the legislative change.
43. No changes to the legislation regarding calculation of a long term rate.
44. No changes to the legislation regarding type of employment income considered compensable.
45. No change to the legislation regarding the worker's benefit rate during vocational rehabilitation.
46. Amend section 40 of the Act to remove the phrase "based on full-time employment" with respect to establishing the minimum compensation amount.
47. Change the Act to have the Board pay annuity funds to spouses and/or dependant child(ren) as specified by the worker.
48. No change to legislation regarding incidental costs for injured workers in rehabilitation.
49. Change section 117 to reflect a revised methodology of calculating the maximum assessable and maximum compensable earnings level based on the Whitehorse CPI.
50. No change to the legislation regarding a process to lodge administrative complaints.
51. No change to section 13 regarding a legislative process to appeal the WAO refusal to assist a worker.
52. Change the legislation to require new evidence (regardless of the type of decision) to be reviewed by the YWCHSB before being considered by the WCAT.
53. No change to legislation regarding a requirement to specifically offer mediation as the method for dispute resolution.
54. Change the legislation to allow the YWCHSB limited standing at WCAT hearings for the purpose of clarifying jurisdiction, correcting the record and ensuring all parties pursuant to the issue can be present.
55. No change to the legislation regarding the jurisdiction of the WCAT or the employer appeal process.
56. Change the legislation to give both the Board and the WCAT the ability to appeal to the Supreme Court whether WCAT decisions are consistent with the Act.
57. No change to the legislation regarding worker standing at employer assessment appeal hearings.
58. Change section 13(5) of the Act to require the Minister of Justice to prepare the WAO budget (as at present), for joint approval of the budget by the Board and the Minister of Justice and for a timely dispute resolution process (e.g. binding arbitration) in the event of a disagreement over the budget.
59. No change to the legislation with respect to the reporting of the WCAT or the WAO.

60. No change to legislation regarding the YWCHSB notifying employers of injuries.
61. No change to the legislation to allow full employer access to claim files.
62. Amend section 27(5) to ensure a worker can appeal the President's decision under section 27(4) and that any information cannot be released until the appeal is finalized.
63. No changes to the legislation regarding the timeframe for Board implementation of WCAT decisions.
64. Amend the legislation to remove all references to individual job titles within the YWCHSB and replace with a generic term such as "the corporation" or the "decision maker".
65. No change to legislation regarding choice of gender of medical consultant.
66. No change to legislation with respect to seeking clarification of WCAT decisions.
67. Adopt return to work legislation, based on sections 89, 89.1 and 89.3 of the *Workplace Health, Safety and Compensation Act* of Newfoundland and Labrador, to institute:
    - A duty to co-operate for all employers and workers. A change from the NL Act would be that where the worker cannot do the pre-injury job or the essential duties of the pre-injury job, but could work, the employer would pay the pre-injury wages for the first two weeks of return to work and the YWCHSB would pay benefits thereafter;
    - A 2 year (maximum) re-employment obligation for employers who regularly employ 20 or more workers to workers with whom they had a continuous employment relationship with for at least one year immediately preceding a work-related injury or illness. A change to the NL Act with respect to the re-employment obligation would be that a worker would have 30 days (versus 3 months) to report a termination following re-employment to the YWCHSB, and
    - A duty to accommodate for those with a re-employment obligation. A change from the NL act would be that the employer would pay the first $1,000 in accommodation purchases and the YWCHSB would pay thereafter.
68. No change to legislation regarding deeming.
69. Amend section 30 to add wording such as "and the employer shall pay at least that amount to the worker" so that in cases where benefits are payable to the employer, the injured worker receives the benefits to which they are entitled.
70. Consider amendment to section 97 to allow for assignment to insurance companies during claims adjudication but only if the wording can be 100% restricted to such situations.
71. No change to legislation regarding case management.
72. No change to section 45(1) of the legislation regarding the employer's responsibility to arrange and pay for emergency transportation following a work-related injury.

73. Amend section 48(1) to reflect indexing on January 1 of each year on a go-forward basis for all workers regardless of date of injury or anniversary date.
74. Further amend section 48(1) to reflect indexing in accordance with the Whitehorse CPI without maximums or minimums but with a practical implementation range of 0% to 4% to provide for smoothing of extreme CPI rates over time.
75. No change to the legislation regarding the compensation amounts payable to surviving spouses and dependant children.
76. Amend the legislation by adding a section so that the Board may offer appropriate training or retraining to a surviving dependant spouse and counselling and placement services for dependant children, at the discretion of the Board. The legislation should be enabling so that the Board has maximum flexibility to deal with each fatality appropriately.
77. No change to the legislation regarding the definition of vehicle.
78. Amend section 56(3) to reflect that the injured worker be entitled to 100% of the settlement in a third party action after all costs (including compensation, medical, legal, etc) are recovered by the Board.
79. No change to legislation regarding control or authority over the Compensation Fund.
80. No change to legislation regarding employer or worker access to employer or worker's safety or claims history.
81. Amend the legislation to add a new section that enables the Board to develop, by order, an incentive program that rewards workplaces for their efforts in occupational health and safety and return to work.
82. No change to the legislation regarding penalties for employers who report and pay on actual payroll throughout the year.
83. No change to the legislation regarding fraud investigation.
84. No change to legislation regarding ATIPP.
85. No change to the legislation to require an employer consultant/advocate.
86. No change to the legislation with respect to the Workers' Advocate role regarding education and training.
87. Amend the legislation to add an appeal limit on internal and external appeals of 24 months from the date of a written decision.
88. No change to the legislation regarding retroactive application of current legislation to all claimants.
89. No change to legislation regarding access to Board's independent legal opinions.
90. No change to legislation regarding definitions of chronic stress, chronic pain, disability or impairment.
91. No change to the legislation regarding the definition of compassion.
92. No change to legislation regarding wholistic approach to rehabilitation.
93. No change to legislation regarding a revolving OAG special examination.