

JUSTICE

Speedily and Humanely Rendered

"Last year I lost my right arm in a sawmill in Cookstown, and I received no compensation whatever for my loss. My wages stopped as soon as my arm was cut off, and I had to make what provision I could to enable me to get better. Since getting better and getting an artificial arm I have had great trouble in getting employment of any description. It is very hard for a man with one arm to get a job when very often there is an over plus on the market of men with two arms... I saw a lawyer about the case and he claimed he didn't think it was worth my while to sue, for the man wasn't worth very much that I was working for, and he didn't see that there was any defect in the machinery, and he thought in the long run I should be the loser if I took action. He said the best thing to do was to let it go, and that is all I got, and I have just had to struggle along as best I could with the one arm."

- Mr. E.C.Hunt, Testimony before Sir William Meredith's Royal Commission on Workmen's Compensation Laws, October 23, 1911.

A System in Crisis?

In September 2010 the Ontario Government announced the establishment of an independent Funding Review Committee. The mandate of the Committee was to "provide advice on how best to ensure the long-term financial viability of Ontario's workers' safety and insurance scheme." The formation of the Review Committee came hard on the heels of the 2009 Final Report of the Auditor General of Ontario wherein it was claimed that Ontario's workers' compensation system was in financial crisis. If this crisis did not get sorted out, the Auditor General wrote, there was a real danger that the financial stability of the system could be fundamentally undermined.

Early in 2011 the Review Committee issued a Green Paper laying out its terms of reference. "The Funding Review," the Green Paper stated, "must focus on the funding and related issues assigned to it. Other concerns about workplace safety and insurance will not be examined."

As it turned out, this focus meant that the Review Committee would look into – and rightfully – experience rating programs, but, strangely, would not take testimony and evidence on coverage. It meant that while presentations on classifications and assessments were in order, listening to injured workers talk about how the practice of deeming was impacting the levels and duration of their benefits, or how Early and Safe Return to Work and Labour Market Re-Entry policies and practices were consistently failing injured workers in their efforts to find safe, good and long-lasting employment, were not.



A "Public" Review

That was the bad news. The good news was that the review process was to be a public one – the Funding Review Committee would travel to different parts of Ontario thereby allowing a wider range of people and organizations to make presentations.

The importance of the "public" nature of the funding review process should not be underestimated. Indeed, it is a welcome renewal of a practice that began in 1900 when Justice James Mavor was asked by the Government to investigate the state of workmen's compensation in Ontario and elsewhere. The next review took the form of Sir William Meredith's Royal



Commission that resulted in the passage in 1914 of Ontario's first "modern" workmen's compensation law. This was followed by Royal Commissions headed by Justice W.E. Middleton (1932), Justice W.D. Roach (1950), and Justice G.A. McGillivray (1967). In the late 1980s the Ontario Liberal Government appointed a major "Task Force on the Vocational Rehabilitation Services of the Workers' Compensation Board." Since that time, save for an aborted Royal Commission in the mid 1990s, all investigations of the workers' compensation system have been private – public participation has been neither permitted nor welcome.

While the reports of these Royal Commissions covered a lot of ground, two topics that were prominent in each have a direct relevance to the current Funding Review.

The first was the existence and operation of Merit/Experience Rating Programs. Although not recommended by Sir William Meredith, and absent from the original 1914 Act, employer pressure resulted in a Merit Rating Plan being introduced in 1917. Variations of this plan were in place until 1938 when they were terminated because of complaints from small employers and because the Commissioners of the Workmen's Compensation Board did not believe there was any association between them and employer efforts to ensure their workplaces were safe and healthy. There was also the fear that they violated the principle of collective liability. In his report,

Justice W.E. Middleton wrote: "Great care would have to be taken in the application of any such merit system because the whole principle of collective liability is based upon the doctrine of average." Importantly, in their reports, both Justice Roach and McGillivray reproduced this passage.

The second topic was that the workmen's compensation act was becoming too "social." This concern came exclusively from employers who complained that injuries and diseases were being compensated that were not work-related, for example, lower back and any one of a number of occupational diseases, and that benefits were too high thus undermining the motive to return to work.

Meredith's Principles

We hear echoes of these employer complaints in the 2009 Auditor General's Report and we are hearing them directly in employer submissions to the Funding Review Committee. Their solutions? Get back to the original purpose of the Act, to the basic economic foundations of Meredith's workmen's compensation system. We need to remember, they state, Meredith's Principles.

Injured workers also want employers and the Workplace Safety and Insurance Board to remember Meredith's Principles. The problem is that not all versions of Meredith's Principles are the same. If we look at the websites of a number of provincial workers' compensation boards, for example, we will find Meredith's Principles listed as no fault, collective liability, security of payment, exclusive jurisdiction, and an independent board. For injured workers Meredith's Principles are no fault, compensation as long as the disability lasts, collective liability – employer funded, the Workers' Compensation Board as a public, independent organization, and the workers'



compensation claims, adjudication and appeals processes to be non-adversarial.

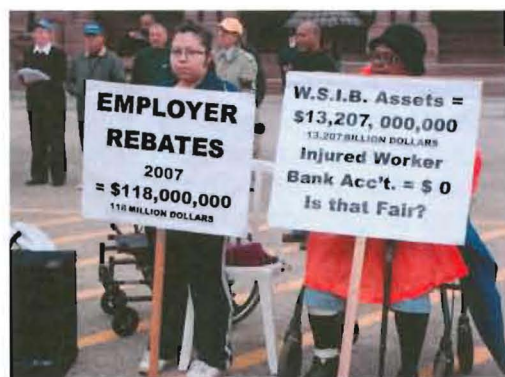
How does one choose between the different versions? By closely studying all of the evidence gathered by Sir William Meredith's Royal Commission. If one does this, the conclusions are clear. Critically, Meredith saw workmen's compensation as a system that would compensate injured workers for as long as their disabilities lasted. It is clear as well that he saw the "no fault" system as based on an exchange of rights: workers were giving up their right to sue their employers for the right to compensation.

Meredith also emphasized the need for the Workmen's Compensation Board to be independent of political pressures. And, he viewed the replacement of the courts with a public, administrative board as key to removing tension and conflict from the workmen's compensation system.

These are Meredith's Principles. They came out of the choices he had to make about who was going to pay for the system, how the system was going to be financed, how long benefits payments would last, and whether the system would be public or private?

Economic or Humanitarian?

They were difficult decisions to make both because the issues were complex and because in making them Meredith understood that he was standing up to the most powerful economic



players of his day - large manufacturers, insurance companies, the railways - who believed that their economic interests were synonymous with the economic, social and political interests of injured workers – in fact, all workers.

In the end, Meredith did not see it that way. He did not see how men like E.C. Hunt would be adequately cared for if compensation payments did not last as long as his disability lasted. This is because Meredith's vision of workmen's compensation was both economic and humanitarian. As he reminded his audiences during the course of his Royal Commission, workmen's compensation was also "social" legislation.

The Funding Review Committee process is, like that of Meredith, Middleton, Roach and McGillivray, a public process. As such, its members have the responsibility to represent the public interest - *not* as economic stakeholders, but taking Meredith's Principles as their touchstone, as thoughtful and compassionate citizens who understand that while workers' compensation systems need to be carefully managed, also believe that they need to be humanely managed.

There is an opportunity here for the members of the Funding Review Committee to restore the lost motto of the workers' compensation system: "Justice speedily and humanely rendered."

Seize the moment.

You can contact the Injured Workers' History Project at the Bancroft Institute for Studies In Workers' Compensation & Workplace Health and Safety, 416-461-2411; Robert Storey, Labour Studies and Sociology, McMaster University, Hamilton, Ontario, L8S 4M4, 905-525-9140.