The "Meredith Principles" - Economic or Humanitarian?

Submission to the WSIB Funding Review Commission

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When this review commission was announced and the terms of reference made public, I was disappointed because I did not see any room for my historical approach to the workers' compensation system in Ontario. But, then Sir William Meredith's *Final Report on Laws Relating To The Liability of Employers To Make Compensation To Their Employees For Injuries Received In The Course Of Their Employment Which Are In Force In Other Countries, And As To How Far Such Laws Are Found To Work Satisfactorily*,[1] was published on your website and I had my entry point into the discussions.

This is because in publishing Meredith's *Final* Report, it seemed to me that you were entertaining discussion/debate on what have come to be known as "Meredith's Principles." In the course of my research into the Ontario workers' compensation system I have become very familiar with Sir William and the content of his *Final Report*. Without question, this is a seminal document in the history of workers' compensation, not only in Ontario, but throughout Canada and in many parts of the world.

However, as I am certain you also know, this report was the culmination of a *process* that covered three years – from 1910 to 1913 wherein Meredith gathered a great many documents, travelled to the distant shores of England, Belgium and France, and listened to and questioned participants in the 27 "Sittings" of his Royal Commission. All of these sources of information weaved their way into Meredith's thought processes, his *Draft Bill*, and his *Final Report.*

As you may also be aware, there is no one version of the Meredith Principles. Not surprisingly, they tend to differ according to the organization/group that is evoking them. If we look at the websites of a number provincial workers' compensation boards, for example, we will find the Meredith Principles listed as no fault, collective liability, security of payment, exclusive jurisdiction, and an independent board. (The web site for your Review Commission omits security of payment.) Those familiar with the workings of compensation systems will understand that this collection of "principles" refer to a system where the accidents that take place in workplaces are no one's fault and that compensation to a worker is guaranteed, that injured workers' benefits are paid from funds collected solely from employers who are grouped into classes, that workers can not sue their employers for negligence, blatant or otherwise, and that the board administering the system is independent of the government and is thus, ideally, outside of direct – and indirect – political influence and pressure. If we examine a recent publication supported by injured workers and a number of their organizations,[2] the Meredith Principles are listed as no fault, compensation as long as the disability lasts, collective liability – employer funded, the Workers' Compensation Board (WCB) as a public, independent organization, and the

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[1] Sir William Meredith, *Final Report On Laws Relating To The Liability Of Employers To Make Compensation To Their Employees For Injuries Received In The Course of Their Employment Which Are In Force In Other Countries, And As To How Far Such Law Are Found To Work Satisfactorily*, Toronto: Queen's Printer, 1913.

[2] IWHP Bulletin #1, *Injured Workers' Day, June 1, 2006.*

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

There is some apparent agreement here: no fault, exclusive jurisdiction, collective liability and an independent administrative board. I say apparent because, for example, trade unions have been on record since the Meredith Royal Commission as opposing the statutory existence of Schedule 2 which, they argue, undermines the principle of collective liability while keeping the door open to employer abuse, i.e., the challenging of claims. Not to obfuscate the historical record, I am fully aware that some employers and employer organizations opposed and still oppose Schedule 2.

And, what of the points of difference? Is payment for as long as the disability lasts truly one of Meredith's principles? Is a "public" workers' compensation system another? And, is a non-adversarial system yet another?

How are we to decide which of these principles are *Meredith's* principles? I think that even a *very careful* analysis of the *Final Report* cannot provide us this surety. However, it is my contention that a very careful analysis of the Meredith Royal Commission transcripts can indeed shed some light on which version of Meredith's Principles carries greater historical validity, and, thus, more contemporary weight. I make this statement because these pages reveal what the most salient issues were, who was advocating for what, and, critically, *they provide a window into the evolution of Meredith's thinking.* For example, what did he think about who should pay for the system at the beginning of his Royal Commission and what did he believe at the end? In sum and substance, my position in this submission is that if we want to understand the salience of the *Final Report* and identify "Meredith's Principles" as he understood them, then we must have a fuller knowledge of the issues on which he had to make decisions. The transcripts provide this knowledge.[3]

Meredith's Principles

By the end of the 27th sitting, Meredith had heard from 222 witnesses who combined to produce 947 pages of written testimony. Twenty-six of these individuals appeared on multiple occasions, so that Meredith actually listened to and sometimes debated a total of 98 different witnesses. Those appearing most often were the principle antagonists: Fred Bancroft, then the Vice President of the Trades and Labour Congress who made 22 appearances, and Frank W. Wegenast, a young lawyer hired by the Canadian Manufacturers' Association (CMA) to collect materials and press their case before Sir William, who made 23

[3] There a few good treatments of the rise of workmen's compensation legislation in Ontario. Please see, R.C.B. Risk, "'This Nuisance of Legislation': The Origins of Workers' Compensation in Ontario," D.H. Flaherty, ed., *Essays In The History of Canadian* Law, Volume II, Toronto: University of Toronto Press, 1981:418-491; Michael Piva, "The Workmen's Compensation Movement in Ontario," *Ontario History*, 67 (1975): 39-56. Eric Tucker, "The Law of Employers' Liability in Ontario: The Search For A Theory," *Osgoode Hall Law Journal*,, Vol. 22, No. 2 (1981): 212-280.

appearances.[4] Although Bancroft managed only one less appearance than did Wegenast, and even when it is considered that other labour representatives made numerous appearances, it is nevertheless the case that in one form or another most of the content, and much of the dialogue of Meredith's Royal Commission, was concerned with the CMA's submission and Wegenast's subsequent elaborations, both on his own and, most interestingly, in response to questions and critical comments by Sir William.

At the start of the Royal Commission hearings there was agreement among all parties that the current law was antiquated and discriminatory towards injured workers in that it made it extremely difficult, if not almost impossible, for them to receive adequate compensation for workplaces injuries. Simply, the common law defences available to employers – the voluntary assumption of risk, common employment and contributory negligence – constituted a virtually impassable barrier for injured workers who took up their right of action in the courts. This is not to say that injured workers never won. Indeed, it was the increasing incidence of injured worker court victories with (for the times) notable awards that served as one prompt for employers to search for an alternative.

The first hurdle was, then, the issue of "fault." As experience with the constitutionality of workmen's compensation laws in Europe and especially the United States illustrated, this could prove to be an intractable problem.[5] That is, compensation laws in the United States had been passed by local state legislatures only to find them challenged and found unconstitutional on the basis that they violated private property rights. The solution was a complex one that essentially involved separating the law of negligence from accidents via acknowledging that the emerging systems of capitalist production had created new, and, most importantly, *inevitable* risks. Such risks, in turn, were bound to lead to inevitable accidents. But, if they were inevitable, how could anyone – employer or employee, be at fault?

Ultimately, "no fault" did not mean that no one was at fault. It meant, rather, that injured workers did not have to prove their employers were at fault in order to obtain access to compensation, nor did employers have to demonstrate either that they were not at fault, or prove, using one of the three common law defences, that their employee was at fault. Critically, however, the insertion of "no fault" into the accident-injury-compensation equation did not mean guaranteed compensation. Meredith wondered aloud on a number of occasions about the problems tied in with the clause in the English workmen's compensation act – "arising out of and in the course of employment." "[T]here will be all sorts of trouble," Sir William stated at one point during the 10th Sitting, "even under this

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[4] Frank Wegenast would later become mayor of Brampton from 1914 to 17 and president of Brampton Board of Trade from 1917 to 1920. He would also serve as the defence lawyer for Dorothea Palmer in 1937-38 who was on trial for distributing birth control information.

[5] There are many analyses of this issue and how it was overcome in the United States. One of the more insightful, is John F. Witt. *Accidental Republic: Crippled Workingmen, Destitute Widows, And The Remaking of American Law*, Cambridge: Harvard University Press, 2004.

law in determining where an accident arose, or an occupational disease occurs in the course of and arising out of the employment"[6]). In a later discussion of this same issue Meredith used an example of a sailor who is found drowned. "He may have gone to the edge of the ship to relieve himself," Meredith outlined, "and fallen overboard, and therefore it would not be under the law. More probably the thing referred to happened while he was doing his duty on the boat; but they held it was conjecture, and they could not recover." Meredith's remedy to such problems was to "make both cases prima facie in favour of the workmen; if it happens during his employment the onus is upon the employer to show that it did not arise in the course of his employment, and if it arises out of the employment to have a similar presumption that it arose during the course of employment? … Now, if there were such a presumption as I suggest then the burden of proof would be shifted, and the employer would have to show that it did not arise out of the course of his employment?[7]

As those who work in the field of workers' compensation today know all too well, Meredith's concerns about this phrase, insofar as it presented new obstacles to injured workers obtaining compensation, were well-founded. Rejection of claim appeals, both at the Board and tribunal levels, regularly turn on determining if the injury and/or disease "arose out of and in the course of employment."

In case you think, Mr. Commissioner, that this brief discussion of what we can term **Meredith's 1st Principle** is not germane to the funding themes of your Commission, I would hasten to argue that one of the reasons why all parties favoured no fault insurance is that it would cut the costs associated with, in the words of Wegenast, "ambulance chasing lawyers" and insurance company investigators. In this regard, all Commission participants, save insurance company representatives, believed that the money saved would find its way into the pockets of injured workers. Getting rid of what Meredith termed "this nuisance of litigation" thus had another hoped-for-benefit: eliminating a source of tense and increasing conflict between workers and their employers.

With agreement on no fault out of the way, what else was at issue?

As it evolved the salient questions/issues – those where it was left to Meredith to make a decision – were the following.

∆ Who was going to pay for the system?

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[6] Sir William Meredith, Minutes of Evidence, Royal Commission On Laws Relating To The Liability Of Employers To Make Compensation To Their Employees For Injuries Received In The Course Of Their Employment Which Are In Force In Other Countries, And As To How Far Such Laws Are Found To Work Satisfactorily, Volume 1, Toronto: Queen's Printer: 424. (The "Minutes of Evidence" were collected in two volumes coinciding with Sittings 1-11 and 12-27.)

[7] Meredith, *Minutes of Evidence, Vol. 1*: 170-71.

∆ How was the system to be financed?

∆ Should workers have to give up their right to sue?

∆ Who would be covered?

∆ Would employers be individually or collectively liable?

∆ How much compensation should injured workers receive?

∆ How long should injured workers be compensated?

∆ Would the system be public or private?

Who will pay?

As is clearly evident, each of these issues had, in one form or another, an economic dimension. Perhaps because this was the case, both Bancroft and Wegenast stated in their presentations and in subsequent debates that their platforms could not be cherry-picked – one item in their platform was dependent on another. Bancroft and the TLC, for example, stated that if they were to give up their right to sue they wanted employers to pay full compensation from the day of the accident with no earning's ceiling and for as long as the injury/disability lasted. For Bancroft and his associates in the labour movement, workers paid enough with the pain and suffering associated with the injury as well as the limitations that may be placed upon the injured worker in terms of future earnings and jobs.

For their part, the CMA, through Wegenast, were adamant that there be a waiting period and that, in addition, injured workers should pay into the system an amount that was commensurate with the percentage of workplace injuries for which workers were themselves responsible. According to Wegenast, that figure was between 25 and 35 percent. Moreover, he argued, workers should contribute as this would mitigate against malingering, would maintain their honour (who would want something for nothing), and would enlist all workers in the campaign for accident prevention. "The whole basis of the compensation system," Wegenast stated as he presented the CMA brief, " is the improvidence of the workmen."[8] As for the length of payments, Wegenast could not fathom a system that would pay injured workers for as long as their disabilities lasted, arguing strenuously for a ceiling on compensable wages and a termination point for benefits.

Given these starkly drawn positions, it was left to Meredith to make some tough decisions. From the transcripts, it does not appear that Meredith gave much thought or credence to labour's demand for full compensation. During the

[8] Meredith, *Minutes of Evidence, Vol. 1:* 387.

Royal Commission he stated many times that he was going to fashion a law that would meet the needs of reasonable people – one that was "fair" to all concerned. In reply to Bancroft's admonition that labour was not going to give up the right to sue without "generous" compensation, Meredith replied that he would assign what was "fair" and that anything more would "shock the conscience of the public." To Wegenast's bold statement that his sponsors would not accept any bill that did not include worker contributions Meredith replied sternly that such a position would leave them out of any further discussions.

In the end, as we know, Meredith, agreeing with labour that injured workers paid into the system by virtue of their lost wages, lost opportunities and loss of enjoyment of life, decided that employers, and employers alone, would fund the system. **This could stand as the 2nd Meredith Principle.**

Payment for how long?

Closely related to who was going to pay were the questions of how much and how long to pay injured workers? Labour's position, as mentioned above, was clear and unequivocal: full compensation for as long as the disability lasted. For their part, the CMA, through Wegenast, put forward the Washington State Compensation law as the model to follow in this regard, i.e., it set maximum benefit levels for all types of injury, including deaths. "Where the injury is only temporary," Wegenast informed Meredith and other members of the audience, "such as the loss of a finger or a hand, the payment is in a lump sum**.** Where the injury is permanent and total there is a sum of $4,000 set aside. Where it is permanent but not total there is a less sum set aside, and it is all provided in the act."[9]

Notwithstanding Wegenast's rather quixotic views of what was, and what was not, a "temporary" injury, the attraction of the Washington State law was the termination points it stipulated with respect to all forms of injury – both temporary and permanent. Even so, Wegenast was careful to couch his support in a note of caution. He had done some "promiscuous inquiry" into the Washington Act, he stated, and had to say that he had not found anyone that was dissatisfied with it. However, he continued, despite the fact that it had the "largest scale of generous benefits of any system in the world the workmen were asking for more, and I think that is a condition that we can hardly expect to cope with."[10]

My reading of the Royal Commission transcripts tells me that Meredith did not give much conscious/verbal thought to benefit levels. In fact, it does not appear that he put much stock in the benefit levels arguments of any of the witnesses who came before him to either advance or critique the various compensation laws then in place in the United States, England or in Europe. Tellingly, in the

[9] Meredith, *Minutes of Evidence, Vol. 2: 235.*
[10] Meredith, *Minutes of Evidence, Vol. 2: 238.*

face of a heated dispute between Wegenast and Mr. P. Techumseh Sherman, at that point Counsel for the National Civic Federation of New York City, about the relative merits of the Washington Act, Sir William ended their interchange in the following way: "I think it is quite likely, he stated, "we will have to wipe out all these experts on both sides and trust to common sense."[11]

In extracting this statement I am keenly aware of how the phrase "common sense" has been politically appropriated in the recent history of Ontario politics. In contrast, for Meredith it would seem that "common sense" was what was "fair" to one and all. This is certainly how he understood the clauses in his Draft Bill relating to the percentage of wages to be compensable, the seven day waiting period, the $2000.00 wage ceiling, and payment for as long as the disability lasted. To be sure, Meredith did not actually put in percentage figures in his Draft Bill; but, during the last two Sittings he did muse that 50 to 55 percent of average wages was an appropriate, a reasonable, rate. "I really think it would be better in the interests of the workingman," Meredith stated, "if we started at 50, and not make the act unpopular." Unpopular with whom Bancroft asked? "With the general public who have to pay for it," Meredith replied. "It is not the manufacturer who pays, you know. I am paying, although I hope I am not influenced by what I contribute."[12] As for the presence of a seven day waiting period, Meredith thought it was not only the best argument against the possibility of malingering, it provided some buffer for the new Board from being overwhelmed with minor claims. Regarding the $2000.00 wage ceiling, it was Meredith's view that any workman earning more than this amount had the financial wherewithal to purchase some insurance.

Meredith's decision to pay injured workers for as long as their disabilities lasted drew the unmitigated wrath of Wegenast and the CMA. In the 26th and 27th Sittings when Meredith's *Draft Bill* was discussed, Wegenast was nothing short of apoplectic about the levels and duration of benefits outlined in the document. "We have not got to the real heart of the bill," Wegenast stormed. "That is, the schedules and the schedule of benefits, but in order to make my own position clear I may say that I know the manufacturers and employers of the Province had not in view for one moment and had not the remotest idea of any such scale of benefits as is proposed in connection with an individual liability… It is scarcely conceivable that any Government or any legislature would, under these circumstances, deliberately adopt a measure absolutely obnoxious to the bulk of the employers of the Province."[13]

Increasingly exasperated with the take it or leave stance on the part of the CMA, Sir William told Wegenast that it was "fallacious to argue because you represent eighty-five per cent of the pay-roll you represent eighty-five per cent of the employers of this country." "I am not speaking of the employers numerically

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[11] Meredith, *Minutes of Evidence, Vol. 2: 236.*

[12] Meredith, Minutes of Evidence, Vol. 2: 532-33.

[13] Meredith, Minutes of Evidence, Vol. 2: 572.

or individually," Wegenast replied. "I think that is important," Meredith continued. Raising the temper of the discussion, Weganest retorted: "It is not important that we should consider the number of employees? Is the Massey Harris Company for one moment to be compared with a small concern? "It has no more rights, in my judgment, than the smallest concern employing three men," was Sir William's comeback. "Possibly the individual employer has no more right to vote," Wegenast opined, "but is the interest of that large concern not to be considered as more important?" "Not as far as I am concerned," Meredith finished. "One interest is not to be considered in any greater or better light than another interest which may be termed a little one-horse shop.[14]

In the end, Meredith's decision on the length of disability payments is directly associated with, first, his understanding of the importance of workers giving up their right to sue, and, second, his view of the role and purpose of workers' compensation legislation. With regard to the first point, the representatives of labour and capital were each very clear in their positions: labour wanted it maintained while business stated that if access to compensation was to be guaranteed and they were, in their view, going to pay the lion's share, they wanted to make certain that they would not have to pay twice. Hence, no worker/employee right of action.

As it happened, labour representatives did not push their position too strongly. Perhaps this was due to a firm and uniform resolve – every labour representative asked by Meredith about giving up this right made the same point about such agreement being contingent on a statutory guarantee to secure compensation. Perhaps it was due as well to their sense that Meredith shared their belief that the common law defences were no longer applicable to the conditions of modern production. In the 1st Sitting, for example, Bancroft stated that "modern thought has done away" with the idea that "there is any such thing as contributory negligence on the part of the employee…[No] man gets hurt today because he wants to get a little money…" [15] Two months later, during the 10th Sitting, Meredith voiced his own opinions about the remaining two planks in the common law defence team. "Was it not a fundamental error," he asked his witness, Mr. Miles Dawson, "to say that a man when entering employment undertook the risks of that employment and the risks of the carelessness of his fellow-servant?" The fellow-servant rule," Dawson began his reply, "is a rule that even from the other standpoint we would all agree should be modified considerably, if not entirely. The assumption of the risk I am not so clear about, your Lordship." Picking up on this comment, Meredith stated: "When it is compulsory for a man to do work he has no choice. He has got to work and no such thing enters his mind that he is

[14] Meredith, *Minutes of Evidence*, Vol. 2: 552.
[15] Meredith, *Minutes of Evidence, Vol. 1*: 145.

taking any risk in going into that particular employment, unless it is a very hazardous one."[16]

Finally, perhaps the labour representatives were prepared to jettison a right that, until fairly recently, had not proven of much value to workers. In the 3rd Sitting held in Cobalt, Meredith found himself in a room packed with miners and trade unionists. One of those present was a representative of the miner's union, Mr. Botley. "I agree with Mr. Commissioner," Botley began, "that it is perhaps one of the most important pieces of legislation that was ever proposed in the Province of Ontario. We regard it, speaking as a Union, as the thin end of the wedge, and I have no hesitation right here in saying that we intend to demand, to ask, for all we think that we can possibly get. We consider that we have been labouring for years in this country under an injustice in that we have been compelled to work for our masters on whatever terms they chose to dictate, in the majority of cases, and then when we were injured we had to have recourse to the courts in which courts we have no representation whatsoever."[17] After some discussion Botley's message was refreshed by Mr. Maguire, a "blacklisted" miner who informed Sir William that while he was not there to talk about the "class struggle," "as a workingman … [he objected[to those provisos in regard to negligence on the part of workingmen, not as a question of the justice or injustice of it, because I must confess that the lines of justice and injustice are very largely lost in our complicated modern system, but for this reason that these provisos as to the negligence on the part of the employer or employee leave the possibility of a law suit, and when we get into law we always know who comes out best. We know the man with the money and the man with the influence comes out on top, and we know the District judge who is supposed to settle this is invariably not a member of the working class, but a member of the wealthy class himself, and the consequence is—." At this point Sir William interrupted Maguire and shot back: "He is the hardest worker of the lot, the Judge; he works all the time."[18]

For these reasons, then, labour was prepared to give up the right to sue their employers in the event of accident and injury. From Meredith's words and actions it would appear that he was in agreement about the meaning and the significance of the exchange. This is certainly how I would interpret Meredith's comments on this issue to Wegenast . Amidst the CMA representative's complaints about the size of the pensions potentially available to injured workers via provisions in the *Draft Bill,* Meredith stated forcefully: "But it would not be reasonable, Mr. Wegenast, to ask the workmen to give up the rights they have got now for what a learned judge called less than a mess of pottage."[19]

Turning to the second point – Meredith's views regarding the nature and purpose of workmen's compensation legislation – we can find in the pages of the Royal Commission instances where Meredith asks the witness before him, as he

[16] Meredith, *Minutes of Evidence, Vol. 1: 424.*
[17] Meredith, *Minutes of Evidence, Vol. 1: 177*
[18] Meredith, *Minutes of Evidence, Vol. 1: 186.*
[19] Meredith, *Minutes of Evidence, Vol. 2: 603.*

did in the case of New York Counselor, Miles Dawson, if a "State insurance system [should] cut workers off at 65 just like private insurance?" [20] There is, of course, no way of knowing, by itself, what the impact of Dawson's answer – "if State has no pension system, then no" – was on Sir William. What is evident, though, is that Meredith's notion of a workmen's compensation law being an economic and a humanitarian law was part of his orientation from the outset of the proceedings. As in his *Final Report,* in the transcripts there can be found instances where Meredith is at some pains to distinguish the "social" nature of workmen's compensation legislation. In the 17th sitting, amidst discussions of whether or not to allow for lump sum payments, Meredith interjected:

> *"I may say now definitely that I shall not recommend any scheme which involves the right to capitalize payments; I mean payments to workmen of the capitalized sum. There should be an opportunity in cases where it is proper to be done for the board authorizing that, just as there is under the British act, but the very basis of this legislation is that it is social, there is no use disguising the fact. One of the main objects of it is to prevent injured employees and their dependents being made a burden upon the public. If you allow the compensation to be paid over in a lump sum it may be squandered, and the result brought about which you would seek to avoid, and one of the primary objects of the legislation would be defeated."*[21]

In another discussion on how to finance the new system, Meredith spoke of as how if this "was in part social legislation" then perhaps "the Government ought to contribute, or that the Province ought to contribute." And, again, in a somewhat tense discussion in the 27th sitting on whether or not pension payments should have maximums, Meredith iterated: "I suppose everybody recognizes, at least I certainly do, that this Bill is more than a mere compensation to workmen Bill. It is social legislation and it is intended to provide for the workman and save the community from bearing the burden of his impairment." Interestingly, Wegenast followed this statement with a "Yes."[22]

For Meredith, then, workers' compensation legislation was social legislation that meant looking after injured workers no matter the duration of the payment. Importantly, Bancroft went to some lengths to both support and distinguish Meredith's view of the "social" nature of workers' compensation legislation from his own. For Bancroft, it was critical to keep in mind that what they were discussing was "accident" not "social insurance." Workers had a right to accident insurance, he stated firmly, by virtue of giving up their right of action. "It seems to be the tendency all over the world," Bancroft informed Sir William, "that the burden in Workmen's Compensation should be a direct burden upon the industry. Social insurance, sickness, death, invalidity and old age seem a different matter,

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[20] Meredith, *Minutes of Evidence, Vol. 1*: 425.
[21] Meredith, *Minutes of Evidence, Vol. 2:* 264-65.
[22] Meredith, *Minutes of Evidence, Vol. 2:* 577-78.

and, everybody, seems to look at it from the standpoint of contribution… When they speak of social insurance they speak of it more as a means whereby the workman is covered for sickness, death and old age as well as accident, and workmen's compensation deals directly with accidents arising out of and in the course of employment. I understand that is what we are considering in Ontario."[23]

So, the employer pays and he/she does so because the nature of their productive forces make a large proportion of accidents unavoidable, even inevitable (this was the "theory of professional risk" expounded by Wegenast), and the employer pays for the length of the disability because, as Meredith outlined to Wegenast in reply to the latter's disbelief and frustration about this point: "You have injured the man; why should all these problematical things enter into it that he might possibly have been injured in some other way if he had not been injured in that way? The man was all right until he got hurt in your establishment."[24] **This would be Meredith's Principle Number 3.**

Financing the system?

If the employer was to pay and to pay for as long as the disability lasted, how were the funds to be raised to make these payments? In other words, how was the system to be financed? As it evolved, this issue had three components: would benefit payments be paid year to year or would they be capitalized; would employers be individually or collectively liable, and, in the discussions on collective liability, there was the issue of whether or not all employers would pay the same rates.

It is fair, albeit somewhat disappointing, to say that labour representatives were not well prepared and/or well versed on these questions at the beginning of the Royal Commission. In fact, as with most other signal issues, they reacted to the positions put forward by Wegenast and the wider business and "expert" communities. Thus it was the CMA position on the above issues that provided the substance for discussion and stirred the pot of debate.

If the CMA, through Wegenast, was adamant about having workers' contribute, they were equally, if not more, determined that their preferred method of financing the system – current cost – should be the one chosen by Meredith and the Government. By "current cost" the CMA and Wegenast meant that annual assessments would be calculated such that they met annual benefit costs – there would be no provision to ensure that benefit payments due to injured workers with permanent disabilities, or even those workers with temporary injuries which carried over into a new year, were collected. The "current cost" method was counterposed to a "capitalized" plan whereby all the costs associated with each and every injury would be assessed and collected in the

[23] Meredith, *Minutes of Evidence, Vol. 1:* 259.
[24] Meredith, *Minutes of Evidence, Vol. 2: 75.*

year of the accident.

In light of all the current controversy surrounding the issue of unfunded liability, it may be surprising to some present here today that the CMA favoured a current cost method of financing the new system. But, they did - consistently and persistently. Indeed, according to Wegenast, no other form of financing the new system was acceptable to Ontario's large employers. They were aware, he informed Meredith, that with this form of payment the costs would rise over the years – just like they had in the German system. The employers he represented did not mind, he told Meredith, that future employers would have to bear the costs of accidents today. In fact, as with the German system, the rise in compensation costs would – sooner rather than later - spur employers to put more resources into accident prevention. It was, thus, a win-win situation: costs would be kept manageable for his sponsors and accident prevention would become a priority which, of course, was the first workmen's compensation principle of the labour movement.[25]

Meredith had trouble with the current cost method from the moment Wegenast introduced it until the end of his Royal Commission. On the one hand, he could not see how deferring such costs could be justified. Would this not unduly burden future employers and maybe prevent some business ventures from starting up? On the other hand, he feared that a current cost system would fail injured workers in difficult economic times, especially those with permanent impairments. As the Commission proceedings wore on, Meredith had pointed questions to the expert witnesses, such as Miles Dawson on the relative advantages and disadvantages of the current cost and capitalized systems of payment. For Dawson, either plan – current cost or capitalization – would work if "the State assumes the burden." Perhaps to the surprise and consternation of Wegenast who had invited him, Mr. S.H. Wolfe, an actuary of the Massachusetts Employees Insurance Association, told Meredith that the current cost system would not work. He preferred the safer and more logical capitalization method. Following this comment Sir William asked Wolfe why "should we bother about costs to future firms under a current cost system as "You and I are living under this injustice. Millions are spent to-day and posterity bears the burden. Now, if that is universal for all the people why is it unfair to apply it to this particular class with regard to the accidents happening this year?"[26] "In attempting to distinguish between the current cost plan in accident insurance and the assessment plan in life insurance," Wolfe replied, "the advocates of the former lose sight of one very important point. The current cost plan is compulsory at the *outset,* but there is no known force which can compel an employer to continue after the cost of production reaches the point where he feels that his continuance is no longer worth while." [27] After this interchange Meredith asked Wegenast if he had heard anything to shake his faith in the current cost plan?" Wegenast's answer "No"

[25] Meredith, *Minutes of Evidence, Vol. 2: 422.*
[26] Meredith, *Minutes of Evidence, Vol. 2*: 149.
[27] Meredith, *Minutes of Evidence, Vol. 2: 150.*

prompted Sir William say: "Your faith must be able to move mountains."[28]

At other points in the proceedings, Meredith and Wegenast debated the relative merits/demerits of the current cost system directly. During the 23rd Sitting, Meredith asked Wegenast "why it would be a sound proposition to allow you where there is permanent disability or total disability just to make monthly payments as you go along." Meredith stopped Wegenast when the latter started to talk about Germany arguing that one cannot compare the two countries: "I do not think there is any ground of comparison between Germany and this country, or any part of this country," Sir William noted. "This is a new country; the industries are not as permanent as they are in Germany; a man is here to-day and gone tomorrow, a fact to be taken into consideration. These things seem to me to have a very material bearing on the question of current cost." "There was no justice," Meredith finished, "in making a man who begins today pay the burden that he had no part in creating, either singly or as a member of a group. It is something more than sentimental." [29]

Meredith's *Draft Bill* did little to resolve this issue – at least in the minds of the members of the CMA. Section 82 read as follows:

> *The Board shall on or before _____ day of _____, 19___, make a provisional assessment on the employers in each class of such sum as in the opinion of the Board will be sufficient to meet the claims for compensation which will be payable by that class during the then calendar year, and to provide a reserve fund of such amount as the Board may deem necessary to pay the compensation payable in future years in respect of claims in that class for accidents happening in that year and also to meet the expenses of the Board in the administration of this Part for the year.*[30]

In Meredith's interpretation, this Section was leaving the issue of current cost to the Board. As Wegenast read it, though, this clause meant mandatory capitalization. In a very cross exchange, Meredith and Wegenast each had their say.

The Commissioner: Do you mean seriously to say that your clients want to make this proposition that that fund shall be at any time left in such a position that it will not be adequate to meet the claims upon it, and that it shall be in such a position that the employers in after years would be loaded down with greater burdens than if they went into the open market and insured themselves?

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[28] Meredith, *Minutes of Evidence, Vol. 2*: 178.
[29] Meredith, *Minutes of Evidence, Vol. 2*: 412.
[30] Sir William Meredith, *Bill, An Act to provide for Compensation to Workmen for Injuries sustained and Industrial Diseases contracted in the course of their employment,* Toronto: Queen's Printer, 1913: 47.

Wegenast : That is not the standpoint from which we are approaching it.

The Commissioner: You are approaching it from no standpoint then.

Wegenast: Surely that puts me in an unfair position.

The Commissioner: I cannot see your position at all.

Wegenast: I am quite willing to go into it. The Board has it in its power at any time to assess for any deficiency. We propose it shall have a reserve for contingencies, but we propose that it shall not build up a reserve calculated to be adequate absolutely to compensate in the future all the accidents in the present.

The Commissioner: There is no such provision in the bill.[31]

In "leaving it to the Board" Meredith was perhaps washing his hands of a subject that could not be completely and satisfactorily resolved. After all, his reference points – workmen's compensation laws around the world – were all relatively new and still far from conclusive in many areas including the optimum methods of financing. Moreover, and critically, Meredith understood what he was fashioning was something that was "experimental." Indeed, he had informed Wegenast earlier in that day's discussions that contrary to latter's fear, his *Draft Bill* would *not* bring an end "to any further experimentation." "My dear sir," Meredith stated, "it is all experiment. It is all empirical legislation."[32]

This last point notwithstanding, it remains the case that in deciding on a composite form of financing, i.e., current cost plus statutory provisions for the maintenance of a reserve fund, Meredith was holding true to his position of "not recommend[ing] any system unless I am perfectly satisfied, as far as my judgment will carry me, that it is absolutely economically sound; if it were not on the balance I would decide against it."[33] What does this mean? It means, I believe, that much like Wegenast and Bancroft who at the beginning saw the principles in their respective platforms as inextricably intertwined, Meredith, by the end of his Royal Commission had brought his social/humanitarian vision of workmen's compensation together with some of the more perplexing economic challenges. He did not recommend a pure current cost plan, not because of his earlier questions about placing undue burdens on future employers, although that played some small part. Rather, he included the controversial – for the CMA - reserve fund because he did not trust the current cost method to meet the needs of injured workers. To put it into current terminology: Meredith accepted the CMA's position that it was not necessary to fully fund the system, but he wanted to give the new Board the statutory powers to make certain that sufficient funds would be available any time they were needed by injured workers.

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[31] Meredith, *Minutes of Evidence, Vol. 2: 567.*
[32] Meredith, *Minutes of Evidence, Vol. 2: 551*
[33] Meredith, *Minutes of Evidence, Vol. 2:* 406.

What kind of liability?

The second component of how the system was to be financed was that of collective versus individual liability. At the outset of the Royal Commission labour representatives favoured the British system of individual liability whereas the CMA and Wegenast came out strongly and uniformly in favour of an all-inclusive collective liability. Sensing a changing mood among their British counterparts with respect to individual liability, Bancroft and his colleagues altered their position very early in the proceedings to that of also favouring collective liability. All seemed copasetic.

The seeming harmony of interests quickly dissolved, however, when Canada's largest – and, arguably really most powerful – employers, the railways, let it be known that they were not interested in being included in any way in any new workmen's compensation system. While far from settled in his views on this topic when the railroad companies made their position evident, Meredith was nevertheless firm in his vision that, with the exception of farm workers and domestics - whom he believed the Legislature would never include in any new law, all industries and businesses should be included in some form. Hence, when the railroad companies altered their position, stating that they would, indeed, be favourable to a new law if they could be individually rather that collectively liable, Meredith pointed to the possibility of such an arrangement if this difference was administrative rather than substantive, i.e., all claims would be handled by the Board, the only difference being that each railroad (or any other individually liable firm) would pay in full the costs of its own accidents.

Labour representatives contested this proposed arrangement. According to Bancroft, labour representatives had found over the years that it was "very hard to get the workmen from big concerns to give evidence in the face of their employers, because after all the employer has the last kick." As a result, he continued, "workers would not feel as free to claim compensation from the company as he would from an Industrial Commission that was appointed by the Crown and which was a public concern."[34] Along with the fear of making claims, there would be, Bancroft stated, the likelihood of such companies contesting claims more often and more vigorously than those employers who were collectively liable. Meredith disagreed: "What you say might be so if it were in heaven that these groups were operating, but I do not know of any human group that would be any less inclined to resist payment merely because it paid its benefit as a group…As a rule the railways act fairly and liberally; as a rule they do not dispute claims." "Not more than anybody else?" Bancroft questioned. "I do not think they do as much" was Meredith's response. "If they are not any better or

[34] Meredith, *Minutes of Evidence, Vol. 2:* 270.

not any worse," Bancroft concluded, "they have no right to be treated differently from anybody else."[35]

The CMA also objected to the establishment of a strand of employers who would be individually liable. One of their arguments was simply that this was a way for the railroad companies to keep the money in their pockets longer – paying out only as need be. A second, more substantive, point of critique involved how the economic advantages associated with collective liability, i.e., spreading the risks and thus decreasing the costs, would be undermined if significant employers were allowed to stand outside of the collective liability umbrella. Importantly, this was also an integral part of the rationale for the CMA's position of having all employers – retail merchants, farmers, and all workers, e.g. domestics, covered by the proposed act.

It could be argued that the issue of collective liability proved to be the most troublesome for Meredith. Here I am not referring to the complex particularities associated with how to group industries – by hazard or product; or how to arrive at the proper assessment rates, etc.. Rather, at issue was the very principle of collective liability itself. In sum, Meredith seemed to have some problems in completely expunging the idea of individual culpability. Throughout the course of his Royal Commission Meredith returned time and again to the question of whether or not a worker, who willfully injured himself, should receive compensation? For example, in his discussion with Miles Dawson, Meredith wondered: "Suppose you had it demonstrated that a man employed in a powder factory had deliberately gone into the factory with a lighted pipe, had blown up the factory and that half a dozen men had been killed, and that was all in the papers, and you proposed to pay that man if he had his leg broken, a couple of thousand dollars." "Would that not shock the conscience of the people?" he wondered.[36] In another example, Meredith, queried Mr. J.H. Boyd, a Counselor-at-Law from Toledo, Ohio, as to the basic principles of a workmen's compensation act. Boyd's response was that it was "an insurance for the workingman and his dependents against economic insecurity arising out of the modern wage system." "As Bismark said," he continued, "it provides that the dependents of persons whose earning power has been interfered with shall not be hampered in being able to get a normal training up to a point where they are able to support themselves without having to fall back upon private or public charity." [37] Not satisfied with this response, Sir William went on:

The Commissioner: Is it a violation of that principle to take out of the fund for the support of the dependents of a man who has brought the injury upon his own head by his own misconduct, and perhaps has injured others, as well as his employer?

Mr. Boyd: Well, it is consistent with this position, that the dependents are in no

[35] Meredith, *Minutes of Evidence, Vol. 2*: 461.
[36] Meredith, *Minutes of Evidence, Vol. 1: 415.*
[37] Meredith, *Minutes of Evidence, Vol. 1*: 333.

way responsible.

The Commissioner: Is that not getting into the region of eleemosynary, rather than the economic field?

Mr. Boyd: No, I think not. There is no great evidence to show that workingmen injure themselves intentionally.

The Commissioner: I am not putting that case at all. The case has been put once or twice here. For instance a locomotive engineer – we will assume the facts to be as I state them – deliberately with his eyes open, and nothing compelling him to do it, passes a signal which says to him to stop. There is another train coming on that track, and the result is that a collision follows and half a dozen lives are lost and thousands of dollars of property destroyed. He breaks his leg. Upon what principle is that man entitled to compensation? I can understand appealing to the generosity of the public for his dependents who are in no way responsible for his act.[38]

Boyd's response - "It is on the ground of the protection of the health, safety and general welfare of the public, because his dependents, no matter whether he is negligent or not, are in many cases apt to become public charges" - was one that would have appealed to Meredith.

Meredith's repeated return to instances of individual responsibility and turpitude – a reference consistent with the version of liberal individualism hegemonic in his day – is, I believe, the bases for the difficulties he had in accepting the basic premise of collective liability, i.e., everyone shares the economic risks regardless if some actors are worse – even willingly worse – than others. In a very heated exchange with the CMA representative's interpretation of the Draft Bill that those employers who did not pay their "insurance premium" were to be individually liable, Meredith stated flatly: "Do not let us get into details."

Mr. Wegenast: That is vital, Mr. Commissioner.

Mr. Commissioner: We are discussing principles.

Mr. Wegenast: I submit it is not fair to suggest that it is a matter of detail.

Mr. Commissioner: Do you mean to say that if a man was liable to contribute to the accident fund and refused to pay his premium that he should be saddled upon the others in his group?

Mr. Wegenast: I have already suggested that very thing.

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[38] Meredith, *Minutes of Evidence, Vol. 1:* 333.

Mr. Commissioner: What?

Mr. Wegenast: That compensation should be paid at all costs and the individual should not be liable, but the liability should fall in every case upon the group whether the insurance premium has been collected or not.

Mr. Commissioner: I think it is a monstrous proposition.

Mr. Wegenast: I am submitting it, and I am submitting it under instructions.

Mr. Commissioner: Supposing the Massey-Harris Company defied this Board and said they would not pay, is it your proposition that all the accidents in their concern must be compensated out of the fund contributed by the other employers?

Mr. Wegenast: Yes.

Mr. Commissioner: I am sorry that is so, because if your objections are all on the same basis I do not think that they require very much consideration.[39]

We can agree with Meredith here. Simply, and critically, Meredith's difficulties with some aspects of collective liability did not extend, as Wegenast seemed to believe, to the rejection of its basic applications. That is, while Meredith's reluctance to completely jettison individual culpability took form in Section 3(b) of his Draft Bill, i.e., denying compensation to injured workers when their injury was "attributable solely to the serious and willful misconduct of the workman unless the injury results in death or serious disablement," Section 87 stipulated that "Where the payments made by the employers in any class are insufficient to meet the amount of any assessment upon the employers embraced in it the deficiency shall be made up by supplementary assessments upon the employers in all the classes…"[40] In other words, all employers would be obligated to make good for those employers who, for whatever reasons, did not pay their assessments. Moreover, Meredith further attenuated his unease with Wegenast's "monstrous proposition" by inserting a provision (Section 72(4)) that where an employer had a greater number of accidents or where "in the opinion of the Board the ways, works and machinery in any industry are defective, inadequate or insufficient the Board may add to the amount of any contribution to the accident fund." [41] In short, Meredith was giving the new Board the authority and power to *penalize* individual employers for poor accident records and faulty means of production.

Incentives?

[39] Meredith, *Minutes of Evidence, Vol. 2: 558.*
[40] Meredith, *Bill*: 48
[41] Meredith, *Bill*: 43.

I emphasize *penalize"* for it is here that we engage the final component of Meredith's workmen's compensation financial schema. As outlined above, Meredith had some issues with the one-for-all, all-for-one theory of collective liability proffered by Wegenast. As also shown above, he addressed his objections by providing for penalties for those employers with above average accident records and/or with subpar plant. *This was a conscious decision on Meredith's part*. At different times during the 27 Sittings Meredith listened to the assembled experts tell him about the best means of motivating employers to better their health and safety standards. According to P. Tecumseh Sherman, for example, while penalizing employers might address some of the problems associated with poor health and safety practices, one had to be careful "at the same time to make the employer who has better conditions feel that he is getting a lower rate... [Y]ou want to hold back an inducement to improve," he related to Meredith. "That is a much more important thing than the penalty; rather than falling behind the average you want the industry to get ahead of the average. It is something like fire insurance, where, for example if you install a certain apparatus in your building you get a lower rate. So in the matter of safety, you want to have in each trade all the factors of safety pretty well understood, and every time an employer makes an advance you want to make it worth his while in the rate.[42]

More instructive information came from a Mr. Hinsdale, an actuary invited by Wegenast to "answer some of criticisms of the Washington system which have been expressed by the men who have appeared here on behalf of the C.P.R. and the liability companies."[43] With regard to our present topic, Hinsdale reported that only the most hazardous employers were included in the Washington Act and that they were grouped – a factor that he believed promoted safety. Importantly, he stated, the Washington Act gave the administrators the power to raise assessments if the aggregate number of accidents rose in any given class of employers. It was this provision, Wegenast pointed out, that precipitated the criticism from Tecumseh Sherman that the Washington Act was "an accident breeder."[44]

Not surprisingly, Hinsdale did not agree with this complaint. Rather, he thought that rates would vary from year to year – sometimes rising, sometimes being lower – and if employers were pleased to see the lower rates in one year he did not "see why they should be disappointed if in some years they should be higher." More importantly, Hinsdale could "not imagine why an employer who finds that his rate is increasing, or who is confronted with a demand for a contribution to the fund would not say to himself, 'what causes all these accidents?' I cannot imagine why he should not immediately want to install every

[42] Meredith, *Minutes of Evidence, Vol. 2: 219.*
[43] Meredith, *Minutes of Evidence, Vol. 2:* 276.
[44] Meredith, *Minutes of Evidence, Vol. 2: 286*

safety device possible, and after he has installed them in his own place, I should think that he would require them to be installed in every other place."[45]

I include this detail of Mr. Hinsdale's thinking as it was almost exactly the thinking of Wegenast. It will still be easy to recall the details of his "monstrous proposition:" the group pays the costs for all accidents in that group whether or not there were economically recalcitrant members of that group. As with Hinsdale, the purpose of establishing and enforcing uniform rates within groups or classes of employers was that it promoted better accident prevention practices. "You put the different manufacturers of agricultural implements together," Wegenast stated, "and charge them all the same rate and one will say, 'Why, we didn't have any accidents and look at that rate, and so-and-so had a lot of accidents, why should we pay that rate?' We are prepared for a good deal of irritation amongst our own members, but still, in the popular phrase, they have got it coming to them. If one employer has a great many accidents and another employer has not there is something wrong…"[46]

The CMA proposal was *not,* then, to reward employers for good accident prevention measures; rather, their position was to provoke action by making the members in any given class or group feel the economic pain caused by other members in that class or group. Collective liability was collective liability. If the employers with the poor/bad accident cost records refused to remedy their practices, it was the CMA's recommendation to Meredith that they be inspected and sanctioned by Safety Association inspectors that they proposed would be established by the new act and funded by the government.

In Section 97 of his *Draft Bill* Meredith did provide for the establishment of employer associations geared towards accident prevention and for the part or whole payment of experts or inspectors of these associations if they "sufficiently represent[ed] the employers in the industries represented in the class…"[47] He did not, however, give these experts or inspectors the powers the CMA and Wegenast had desired, i.e., to enforce Association rules and provincial safety standards. That he did not do so was attributable to his stance that such was the role and responsibility of the existing factory inspectorate who held that authority via provincial statute. In short, for Meredith, factory inspection was a public not a private concern.

In the final analysis, the system was to be financed via assessments from employers grouped into classes by products produced with possible sub-classifications designed to accommodate varying degrees of hazards within those classes. This was the collective liability schema demanded by the CMA. What Meredith added to it were penalties for poor performers. This would be the **4th Meredith Principle.**

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[45] *Ibid.*
[46] Meredith, *Minutes of Evidence, Vol. 2: 90-1.*
[47] Meredith, *Bill*: 52.

What kind of Board?

Turning to the topic of public versus private, there was never much question but that the new system would be a "public" one. Labour wanted it. According to Joseph Gibbons, one of the labour representatives and Bancroft's principle sidekick, the great advantage of "State insurance is that unlike "the insurance companies that are not in business for their health … the State is not there to make a profit. I have no doubt that if they found that the scale were too high they could adjust them, and it would be insurance at cost to both parties. I think that is the advantage of State insurance."[48] Employers, with the recent successful history of public power in Ontario, wanted it. And, given his "prejudice" against "these accident companies, pure accident. They put insurance on you and charge you a premium of so much a thousand for a number of years, and when you happen to reach a particular age not only does your premium go but the whole of your insurance goes, and they won't carry you at all"[49] – Meredith wanted it. Where they had their work cut out for them was in, first, calming the fears of some business spokesmen that a state workmen's compensation system was both socialist and bound to fail; and, second, figuring out how its "independence" would be assured.

With regard to the first issue, Meredith was "jarred" by a miner in Cobalt who "seem[ed] to indicate that he believes that war between the employer and employee is a natural condition, and apparently a condition that he does not see much harm in. Now, I think that is a most terrible state of things."[50] He was even more taken aback, however, by representatives of farmers and retail merchants who saw any form of state workmen's compensation as synonymous with socialism. Mr. Gordon Waldron, a barrister, appeared before Meredith early in the Royal Commission with a warning that the farmers did not want this "class legislation" that they were hearing about. "You see socialistic ideas are propagated and they work out in these assertions which you gentlemen make in a way which shocks me," he said, "not only as a representative of the farmers but as a member of society. I saw it in the papers and I was amazed that Ontario was listening to statements such these. We have heard them made by socialists in Paris and in Berlin, but to find here in Ontario men are saying that they demand to be relieved of what everybody else must put up with, is surprising."[51]

Meredith heard similar opinions and fears a bit later in the Commission proceedings from a Mr. E.M. Trowern, who put himself forward as a representative of the Retail Merchant's Association. He had heard, he told Sir William, that the Act "shall cover all employments and all the employees of the Province. Of course that takes in salesmen as well as saleswomen and clerks.

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[48] Meredith, *Minutes of Evidence, Vol. 1*: 210.
[49] Meredith, *Minutes of Evidence, Vol. 2: 182.*
[50] Meredith, *Minutes of Evidence, Vol. 1: 196*
[51] Meredith, *Minutes of Evidence, Vol. 1*: 257.

Then it says that compensation shall be given for all injuries received arising out of and in the course of employment. That is pretty sweeping. Then that compensation shall be given to those who are disabled, or those who receive their injuries arising out or which are the result of being engaged in a specified occupation, the said disablement or injuries being regarded in the nature of occupational diseases. To my mind that is very sweeping. Then the entire cost of compensation shall rest on the employer. That is a little socialistic to my mind… Then there shall be State insurance in connection with the compensation act. That divides the thing into two classes."[52]

Two things about "State insurance" worried Mr. Trowern: first, it would "remove responsibility from the individual" with the result that "you are beginning to make that individual careless" and "lots of accidents [are] caused by carelessness and negligence;" and, second, "If the Government are not able to force those [private insurance] companies to do the right thing, how can they by any possible means undertake to operate a thing themselves? That has always been to my mind a weak spot in public ownership… If a civic government cannot insist upon private corporation living up to a duty that it is supposed to do, and is required by its license to do, and is incorporated to do, do you think the Government itself can do it?[53]

Sir William was quick to dismiss Trowern's concerns - asking him if he had "been awake for the last ten years in Toronto?"[54]- a not-to-subtle reference to the recent spate of municipal ownership initiatives that were operating quite successfully. He also informed Trowern that he seemed "to be worse than the socialists" as he was against everything. "I am afraid it will be a hard thing to meet the views of retailers if you represent them. You seem to be very hard to please…You must increase you confidence in your fellow-man; you have no confidence in him at all."[55]

This did not mean, however, that Meredith had no concerns with "state insurance." For one thing, he was not very certain about what it actually was, i.e., was state insurance akin to public ownership, as Trowern inferred and feared, or, was it state administration? "When you speak of State insurance let us see what that means," Meredith related to Dawson. "It is suggested here that it is not State insurance, but the management of the fund by the State - the collection of the fund, the adjusting of the claims and the administration of it. I suppose that is a form of State insurance."[56]

Satisfied that this was the form of "state insurance" being talked about, and sensing an agreement between labour and business that this was not only an

[52] Meredith, *Minutes of Evidence, Vol. 1*: 51.
[53] Meredith, *Minutes of Evidence, Vol.1*: 56.
[54] Meredith, *Minutes of Evidence, Vol. 1*: 59.
[55] Meredith, *Minutes of Evidence, Vol. 1*: 63.
[56] Meredith, *Minutes of Evidence, Vol. 1*: 421.

acceptable but a highly preferred form, Meredith was free to ruminate on a few of his more practical concerns such as how a state administrative board would go about collecting funds from employers – would this not require a small army of people to go about the province visiting employers and receiving their payments. If so, it could well amount to an administrative nightmare. In keeping with his concern for the "public" aspect of "state insurance," Meredith was also worried, as his reading of the German system revealed, about the amount of "fraud upon the community by dishonest claims."[57] In the end, as with a number of other practical issues, e.g., the number and types of people the new board would have to hire, Meredith left these issues for the future board to decide.

A "state insurance" workmen's compensation system was not necessarily an independent workmen's compensation system. At least, that is what my examination of the transcripts reveals. That is, in the discussions about the benefits of a state administered system, there were those who voiced their concern about how a "public" system could be more susceptible to political influence.

Wegenast headed the list of those who expressed the most concern about the autonomy of the future Board. It will be recalled that when Wegenast presented the CMA program he stated that if "there is any one point I would like to emphasize more than all others it is this, that so far as we are concerned these principles and our recommendations are interdependent, mutually dependent. We could not support the general proposition if any one of half a dozen or a dozen features were altered or were contrary to our ideas of the general scheme." For example, according to Wegenast, their recommendation of a State administered system was dependent both on the adoption of the current cost plan and "on the adoption of our recommendation with regard to the personnel **of** the Commission." "In popular parlance," Meredith replied, "you want the earth and a little more. Do you want to name the Commission?[58]

Wegenast's answer that the CMA did not wish to name the Commission is a topic we will revisit later. "It is a delicate subject to discuss," Wegenast said, "but my instructions are to place our views before you in such a way that there can be no mistake as to what they are. Our idea is that the Commission should in the first place be removed as far as possible from partisan influence." Once again Meredith's response bordered on the sarcastic: Where is it going to live? In heaven?" " We say as far as possible," Wegenast replied. "We know there are Commissions in this country that are outside of politics, to use a popular expression. We know there are Commissions that are not outside of politics. We desire without analysing terms too closely to have this Commission outside of politics. I state in my brief it should be independent of the Executive, as independent I may say as the judiciary.[59]

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[57] Meredith, *Minutes of Evidence, Vol. 1*: 210.
[58] Meredith, *Minutes of Evidence, Vol. 2*: 86.
[59] *Ibid.*

Sir William's somewhat caustic responses to Wegenast aside, he was alive to the issue at hand. After all, before he was the Chief justice of Ontario, and before he was appointed to head this Royal Commission, he had been leader of the Ontario Conservative Party from 1879 to 1894. Meredith thus understood all too well the vicissitudes of formal political party life as well as the twists and turns of political winds. In fact, Meredith was no doubt chosen for his then current job as Commissioner, in part because of his experience in the area, and but also because of his enduring friendship with Premier Sir James Witney. In short, Meredith was both knowledgeable and politically connected.

So, we should assume that Sir William Meredith knew what needed to be done to ensure the administrative sovereignty of his new Workmen's Compensation Board. He did this, I think, in two ways. The first was at the level of handling claims. Section 60(1) read:

> *The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other processes or proceeding in any court or be removable by certiorari or otherwise into any court.*[60] *(40)*

The insertion of this clause completed the job of removing workmen's compensation claims from "this nuisance of litigation." While, as many here will be aware, embedding this type of singular authority in the hands of the WCB would ultimately prove so problematic that an independent appeals tribunal was established in 1985, at this moment it must have seemed – if I may be allowed the pun – the judicious thing to do.

Two other clauses reinforced the independence of the Board in its day-to-day operations. Section 79(1) gave the Board the power to inspect the establishments of all employers covered by the Act for the purposes of ascertaining their degree of safety, while 79(2) provided for penalties "not exceeding $500" if these inspections were hindered and/or obstructed in any way. Again, as subsequent developments have demonstrated, both with this and the Factory Act inspectorates, such clauses in statutes do not always translate into effective forces for improving workplace health and safety or in guarding against strong employers and pervasive and systematic political pressures.

The other level involved a careful stickhandling through the complexities of legislative and administrative divisions of labour and authority. At one point in the debate on his Draft Bill, Meredith informed Wegenast that he "was entirely against" a breakdown that saw the new Board being relegated to the

[60] Meredith, *Bill*: 40.

administration of important decisions made by the Legislature, e.g., the setting of assessment rates, deciding who or who would not be included in the Act, and into which classes industries would be placed. "If this Board is not fit to be entrusted with that," Meredith exclaimed in what was unquestionably an exasperated tone, "it is not fit to be entrusted with anything."[61] To be sure, Meredith qualified this authority by including in his Draft Bill the provisions that such decisions would subject to the review and approval of the Lieutenant-Governor-In-Council. This was right and necessary, Meredith stated, because the Legislature had the legitimate authority over decisions that impacted the wider public domain. "The Government of the day … is responsible for the Board," he told Bancroft, "and if the Board is not responsible to public opinion there is a way of getting at it." [62] When Wegenast responded that he did not think the Board would want this kind of power, Sir William cautioned him: "It would never do to have it the subject of legislation every time; you never could get on with that."[63]

Ultimately, though, Sir William rested his case for the autonomy of the Board on the integrity of the people who would run it. A "good board" for Sir William was a Board composed of "men who would not be influenced by political considerations." Men, he continued, you could trust as safely as you would "twenty judges."[64] In a discussion with Bancroft in the 25th Sitting about how the lack of appeal of Board decisions meant that "the constitution of the Board becomes of great importance," Meredith replied in the affirmative: "Of course everything depends on the constitution of the Board; if it is a bad Board the whole thing will be a failure."[65] Of course, Meredith's political experience meant that he understood these "good men" might need some insulation from the political winds that were bound to buffet them about at times. Consequently, he wrote into his Draft Bill that their appointments would be for a period of 10 years, renewable up to the age of 75.

A "public" workmen's compensation system administered by an autonomous Board. One did not work without the other. This would be the **5th Meredith Principle.**

Non-Adversarial?

Current injured workers' organizations claim that the relationship between injured workers and the Workers' Compensation Boards of the past 20-30 years has been characterized by increasing tension and conflict. They point to the rising number of claims that are being rejected upon application as stemming

[61] Meredith, *Minutes of Evidence, Vol. 2*: 564.
[62] Meredith, *Minutes of Evidence, Vol. 2*: 492.
[63] Meredith, *Minutes of Evidence, Vol. 2*: 493.
[64] Meredith, *Minutes of Evidence, Vol. 2*: 218.
[65] Meredith, *Minutes of Evidence, Vol. 2*: 510.

from an informal practice they term “starting from no.” As a result the internal appeals system is constantly in use as is the independent external tribunal. So, too, the various return to work and labour market training policies and programs that have been introduced over the last two decades have often pitted injured workers against their adjudicators, the various agencies that have been paid large sums of money to re-train and re-educate them, and, significantly, their employers.

The legislation that Sir William Meredith was commissioned to research and introduce was supposed to fashion legal measures that would eliminate the tension and conflict that had developed as a result of the old employer liability laws. As we have seen, this was a goal in which all participants were keenly interested. As we have also seen, this was thought to be achieved with the adoption of the concept of “no fault” that theoretically released injured workers from the double helix of proving they were not to blame for their injury accident at the same time as they needed to prove that their employers were. Further, it was felt that once this legally induced and nurtured acrimony had melted away the path would be clear for workers and their employers to join hands in further developing their mutual interests in accident prevention. It was to be, to use a current phrase, a win-win situation.

This is not the time or place to address the issue of what has gone wrong. Rather, I must try, as I have done with the other subjects, to determine if a non-adversarial workmen’s compensation system is indeed one of Meredith’s Principles. In so doing, the first point that requires emphasis is that Meredith was far from naïve. He understood, as we noted above, that defining “no fault” with “arising in or out of the course of employment” would give rise to claim recognition disputes. The English experience was an emphatic illustration of the problems that could and did stem from this seemingly innocuous phrase. He was also vaguely aware that within this realm some forms of injury would be more troublesome than others when it came to establishing this relationship. At one point in the final Sitting Meredith presciently noted that “there are so many injuries that a man might sustain that are not easily located. It is difficult perhaps in these spinal troubles to tell whether a man is really suffering as he thinks he is, or whether it is something else. That is a class of case where it is difficult to get at the extent of the injury.”[66] During the same Sitting Meredith, in discussions about payment for permanent disabilities, signaled, again somewhat presciently, that this would be the “difficult ground, the fighting ground.”[67]

So, Meredith was aware that his Act would not do away with all disputes. But, he did think, I would hold, that his suggested legislation would get at and positively alleviate the foundational causes or worker/employer disputes.

How would this be done? By removing the huge power imbalance that existed

[66] Meredith, *Minutes of Evidence, Vol. 1*: 195.
[67] Meredith, *Minutes of Evidence, Vol. 2*: 599.

between workers and their employers when it came to addressing workplace injuries. The introduction of the concept of "no fault" removed the weight of the common law defences from one side of the scales of justice – one could almost see them adjusting to a more even balance. In the Royal Commission, labour representatives told Sir William, and Sir William listened, that they were fundamentally disadvantaged when it came to exercising their right of action. Meredith did cite cases where workers had been successful – including in his own court. But, it is clear that he nevertheless sympathized with the arguments laid out by trade union representatives that the economic and legal resources available to injured workers paled in comparison to those available to their employers.

The other way his legislation would address the tensions and conflicts would be via the Worker's Compensation Board. Meredith no doubt believed, correctly for the first seven or eight decades anyway, that no fault legislation would for all intents and purposes remove employers from front lines of the workmen's compensation system. They might complain about which class they were placed into, or their rates of assessment, but the day-to-day adjudication issues would be of little or no interest. This development would be of great benefit to injured workers who, finally, would have a standing and permanent institution whose mandate was to address their claims on an ongoing basis. Unlike having their "day in court" where they knew, as Bancroft and other labour representatives related, the balance of forces were stacked against them, the Workmen's Compensation Board was there to "Speedily and humanely" give them "justice."

A non-adversarial process is the **6th Meredith Principle.**

Conclusion

Allow me to turn, finally, to my conclusion.

To rewind, Meredith was presented with the following questions to address.

∆ Who was going to pay for the system?

∆ How was the system to be financed?

∆ Should workers have to give up their right to sue?

∆ Who would be covered?

∆ Would employers be individually or collectively liable?

∆ How much compensation should injured workers receive?

∆ How long should injured workers be compensated?

∆ Would the system be public or private?

Sir William's decisions on these questions produced six principles.

No fault.

Employer pays.

Injured workers receive benefits for as long as their disabilities last.

Collective liability.

Public system with independent board.

Non-adversarial.

In my view, this is the list that should appear on the website of the Workplace Safety and Insurance Board and thus be the guiding principles of this Commission.

As my finish, I want to spend a bit more time on the 5th principle. Meredith's choice of a workmen's compensation system that was state-administered was not, in itself, a controversial decision – at least among the major participants and their organizations. Rather, the concerns revolved around how to establish and maintain the autonomy of the new board. In the course of the Royal Commission there was no stronger advocate for an independent Board than Frank Wegenast, the representative of the Canadian Manufacturers' Association who wanted this body to be "outside politics." Sir William Meredith, an experienced ex-leader of the provincial Conservative Party, warned his youthful colleague, that complete political independence could only be found in "heaven." As we outlined, for Sir William, the key to autonomy was to find good, honourable men to fill the executive positions.

As it has turned out, the men who filled the executive positions within the WCB from 1915 to the 1950s had their autonomy sorely tested. I will use the example of merit/experience rating as an illustration.

The ink was barely dry on the 1915 Act when the CMA came knocking on the doors of the WCB asking for the implementation of a merit rating scheme. Recall, please, that Justice Meredith had considered the use of incentives and decided against them. Nevertheless, merit systems of one form or another operated from 1917 to 1932 and again from 1933 to 1937. They fell into disuse in the 1940s and only to be picked up again in the early 1950s again at the insistence of the Ontario chapter of the CMA. What is significant to point out about these various plans is that they were implemented in the face of strong skepticism on the part

of the WCB executive members. A few examples are worth noting.

o In a letter dated 19 December 1924, from WCB chairman, Samuel Price to E.S.H. Winn, the Chairman of the British Columbia Workmen's Compensation Board, Price voiced his objections to merit rating. "I really feel that merit rating is a pretty difficult and in some ways a rather unsatisfactory matter to deal with," Price wrote. "We have it here in deference to the wishes, or what we believed to be the wishes, of a large majority of the employers – I am not sure whether or not we would have it really of our own choice." [68]

o In the mid 1930s, a CMA-sponsored "Differential (Preferential) Rating Plan was cancelled by the Board Executive when the it worked to the marked disfavor of small business. In a memo to, M.M. McBride, Minister of Labour, Mr. John Harold, WCB Chairman, explaining why the Board cancelled the plan, Harold wrote: "I feel that what I have stated above will show how unjust and inequitable this system of Differential (Preferred) Rating has worked out and how fundamentally unsound it is as imposed on the principle of collective security. The Workmen's Compensation Act was brought into being as a social measure for the benefit of all affected by it. It should remain so and not be treated as a thing that can be made use of for the benefit of a certain group of employers who, no doubt, are earnestly concerned in accident prevention work but who also may be said to have a monetary interest in the matter." [69]

o An unsigned 1947 WCB memo to the Lumberman's Association laid out his problems with merit and demerit rating. "The various attempts under merit and demerit rating have all proven to be failures because of the arbitrary taking of accident costs as a basis without consideration of the circumstances and have no direct relation to the behavior of the employer." And: "The claim was made that the system was justified because of its effects on accident prevention, but a review of the results in imposing penalties demonstrated it was most ineffective in reaching the employer with bad experience… In a very small percentage of penalty charges could it be demonstrated that the plan has operated with any effect whatever in hitting the pocket-books of those who had been responsible for heavy losses."[70]

o An unsigned early 1950s WCB memo to Mr. E. E. Sparrow, Chairman, WCB entitled "Canadian Manufacturers' Association Experience Rating Plan and the Background For Its Application." "Supporters of experience rating still contended, of course, that its application would stimulate accident prevention efforts and reward the employer who is most active in this field. The latter point is, of course,

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[68] S. Price to E.H.S. Winn, 9 December 1914. Archives, Workplace Safety and Insurance Board, Merit Rating Files.
[69] John Harold to M.M. McBride, 18 May 1938. Page 11. Archives, Workplace Safety and Insurance Board, Merit Rating Files.
[70] Untitled Memo, 6 November 1947. Archives, Workplace Safety and Insurance Board. Merit Rating Files.

obviously true but no one has ever demonstrated that the first part of this contention will result." And: "While experience rating is used in other Canadian provinces, the purpose for it is largely to interest employers in accident prevention work since in these cases the Board has the direct responsibility for accident prevention. Here in Ontario, where under Section 115 this responsibility is vested in industry, there is some food for thought concerning the advisability of undue emphasis on experiencer rating. *In other words, is it wise to suggest that employers require payment to do a good accident prevention job?"* [71]

These documents clearly suggest that the executive members of the WCB did not favour the implementation of merit/experience rating plans. These documents show that large employers invariably got their way – albeit not always as quickly as they hoped.

This was not the Board independence Meredith envisioned. As opposed to the local member of the Legislature who wrote a letter to the Board Chairman on behalf of a constituency member who had been injured at work and was having some problems with the WCB, such plans *institutionally* privileged the private economic interests of employers over the humanitarian needs of injured workers, and, in so doing, violated the "social" and "public" dimensions of his vision. For as we will remember, the major purpose of workmen's compensation legislation was to put in place safeguards for workers such that injury would not force them into poverty where they would become burdens to their families and their communities. Like Mackenzie King's approach to industrial disputes developed a few years after Meredith's Royal Commission,[72] Sir William saw the "public" – through the Legislature – as having a distinct role to play. In this vein, recall his advice to Fred Bancroft not to insist upon "generous" compensation as that would "shock the conscience" of the public. Recall as well his stern comment to Wegenast that the public interest was of far greater importance than the interests of large companies such as Massey-Harris.

In an interview I conducted recently with a senior WSIB official I was told that during the period 1995 to around 2005 the workers' compensation system got away from doing its job of looking after injured workers. Although this person could not, or would not, come right out and say it, the inference was that the political agenda of the government of that day – as exemplified in the passage of Bill 99 – shifted the ground under the workers' compensation system from the public domain to the private sphere. Recall that Meredith cautioned Wegenast that "It would never do to have… [workmen's compensation] the subject of legislation every time; you never could get on with that." Recall as well Meredith's exclamation to Wegenast – when the young barrister laid out the CMA plan as a

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[71] Unsigned Memo, "Canadian Manufacturers' Association Experience Rating Plan And The Background For Its Application." Nd. Archives, Workplace Safety and Insurance Board. (Author emphasis.)

[72] William Lyon Mackenzie King, *Industry and Humanity: A Study in the Principles Underlying Industrial Reconstruction*, Boston: Houghton Miffin, 1918.

non-negotiable package – "Do you want to name the Commission? And, Wegenast said no. Well, that was not quite the truth. In the CMA draft bill presented to Meredith the administering board was to be named the "Industrial Insurance Commission."

As we know, Meredith went on to entitle his *Draft Bill* a Workmen's Compensation Act and the body to administer it the Workmen's Compensation Board. As a compendium to this you will have read in the *Final Report* that he did not like the insurance term "premium." He preferred the word/term "assessment."

This is because, I think, Meredith understood the public/private divide represented by these two words. Meredith saw "assessment" rates being set by the WCB, sanctioned by the government of the day, and transferred as benefit payments to injured workers – a more or less automatic and guaranteed flow. "Premiums," he understood, are closely associated with private insurance, and, as we are all aware, Meredith certainly was, insurance is contingent – maybe you will get it, maybe you will not.

Dr. Arthurs, as the Commissioner of this Funding Review you are a part of a public review process. As such, you represent a renewal of the tradition established first in 1900 when Justice Mavor[73] was asked to examine and report on the workmen's compensation system then in place. This process of public inquiry was carried on by Sir William Meredith, Justice W.E. Middleton in 1932[74], Justice Wilfrid D. Roach in 1950,[75] and Justice George A. McGillivray in 1967.[76] But this was the last of it. From Justice McGillivray's Royal Commission forward – with the exception of the aborted mid 1990s Royal Commission headed by Lynn Williams – all government/WCB sanctioned and paid for reviews of the workers' compensation system have been private – and this includes the early 1980s reviews by Professor Paul Weiler.[77]

So, Mr. Commissioner, you represent a welcome renewal of the public inquiry process, and, as such, I believe you have a responsibility to represent the public interest – *not* as economic stakeholders, but taking Meredith's Principles as your touchstone, as a thoughtful and compassionate member of a public that understands that while workers' compensation systems need to be carefully managed, they also need to be humanely managed.

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[73] Justice James Mavor, Report On *Workmen's Compensation For Injuries*, Toronto: Warwick Bros & Rutter, 1900.
[74] Justice W. E. Middleton, *Report Of The Commissioner On The Matter Of The Workmen's Compensation Act*, Toronto, Herbert H. Ball, 1932.
[75] Justice J. D. Roach, *Report On The Workmen's Compensation Act*, Toronto: Baptist Johnston, 1950.
[76] Justice George A. McGillivrary, *Report of the Royal Commission In The Matter Of The Workmen's Compensation Act*, Toronto, 1967.
[77] Paul Weiler, *Reshaping Workers' Compensation For Ontario*, Toronto, 1980; *Protecting the Worker from Disability: Challenges for the Eighties*, Toronto, 1983; *Permanent Partial Disability: Alternate Models For Compensation*, Toronto, 1986.

Over the past 30 years the Ontario workers' compensation system has forsaken the social/humanitarian heritage bequeathed by Meredith. Somewhere along the line the WCB's motto – "Justice speedily and humanely rendered" – disappeared from the letterhead.

In Chief Justice Meredith's era the law was at a crossroads. "Modern" industrial times did not fit well with laws that indemnified owners and employers at almost any cost. Meredith knew that the industrial, the legal and the social had slipped dramatically out of sync. In his *Final Report* there is a passage which I am certain you have heard already and which I am equally certain you will hear again.

> *In these days of social and industrial unrest it is, in my judgment, of the gravest importance to the community that every proved injustice to any section or class resulting from bad or unfair laws should be promptly removed by the enactment of remedial legislation and I do not doubt that the country whose Legislature is quick to discern and prompt to remove injustice will enjoy, and that deservedly, the blessing of industrial peace and freedom from social unrest. Half measures which mitigate but do not remove injustice are, in my judgment, to be avoided.*[78]

We are at a similar crossroads now. The current workers' compensation law is fundamentally out of sync with Meredith's Principles. In formulating his *Draft Bill* Meredith stood up to that group in society who believed that because they were the most economically powerful they should get what they wanted.

I have only one recommendation, Mr. Commissioner: Carpe Diem.

[78] Meredith, *Final Report*: 15.