

Employer Community Submission to the Workers' Compensation System Review

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BC Care Providers Association
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British Columbia Restaurants and Food Services Association
BC Road Builders and Heavy Construction Association
BC Sand, Stone and Gravel Association
BC Maritime Employers Association
BC Trucking Association
Building Owners and Managers Association of British Columbia
Building Supply Industry Association of BC
Canada West Ski Areas Association
Canadian Association of Petroleum Producers
Canadian Franchise Association

Canadian Fuels Association
Canadian Home Builders' Association British Columbia
Canadian Manufactures & Exporters
Construction Labour Relations Association of BC
Council of Construction Associations
Council of Forest Industries
Concrete BC
Convenience Industry Council of Canada
Electrical Contractors Association of BC
go2HR
Line Contractors Association of BC
Mining Association of British Columbia
Mechanical Contractors Association of BC
Northern Regional Construction Association
Petroleum Services Association of Canada
Progressive Contractors Association
Restaurants Canada
Retail Council of Canada
Roofing Contractors Association of BC
Southern Interior Construction Association
Tourism Industry Association of BC
Urban Development Institute
Vancouver Island Construction Association
Vancouver Regional Construction Association

July 19, 2019

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EMPLOYER COMMUNITY SUBMISSION TO PATTERSON REVIEW OF THE BC WORKERS COMPENSATION SYSTEM

Executive Summary

This submission is endorsed by 46 sectoral and cross-sectoral business organizations which collectively represent small, medium and large businesses in virtually all aspects of the British Columbia economy. Balanced WorkSafe policies and practices support healthy, safe and productive workplaces.

On March 3, 2019, the BC Minister of Labour, Hon. Harry Bains, announced a review of the Workers' Compensation system. The government news release issued at the time of the announcement stated that the overarching goal of the review is to increase the confidence of workers and employers in the workers' compensation system by undertaking a formal review. The Minister appointed retired labour lawyer Janet Patterson to conduct the review.

In the Terms of Reference that were subsequently released, Ms. Patterson is tasked with reviewing a number of factors within the system with the stated goal to make the system more worker-centric. The actual Terms of Reference are, in our view, somewhat vague and open to speculation in their interpretation. Not knowing the precise scope of the review, the Employer Community offers the following submission based on the extensive collective technical and legal experience of the signatory organizations. As required, the Employer Community will make further follow up submissions as Ms. Patterson's process unfolds.

The following submission responds sequentially to the Terms of Reference for this Review which are appended to this document.

I. Opening Comments

At the outset, we wish to make the following comments with respect to the "scope of review" and "cost" of funding the Workers' Compensation system:

(i) The "scope" of the Review

Notwithstanding that the scope of the current Review has been identified as "focused", "narrow", and "limited" the Employer Community is unclear as to what the actual scope of the Review encompasses. With one exception, we have not been advised of any specific issues the Reviewer will be focusing upon under the various Items set out in the Terms of Reference for the Review. The one exception is that the Reviewer has advised us that she will be considering the issue of the "duty to accommodate", which we have addressed below.

Given the Employer Community’s desire to be genuinely engaged in the Review process, we ask that as the Reviewer develops the scope of her focus regarding the particular issues she intends to consider under the various Items of the Terms of Reference, that she provide us with the specificity of these issues and allow us a reasonable opportunity to provide our perspective and input with respect to these issues.

(ii) The “cost” of funding the B.C. workers’ compensation system

When we asked the Reviewer if she would be considering the costs that would be associated with any of the recommendations she might make under the Terms of Reference, the Reviewer responded that the Terms of Reference did not include any reference to “costs”, and that the issue of “costs” is outside of her focus. The Employer Community strongly disagrees with the Reviewer’s view on this point.

We submit that the cost of funding the B.C. workers’ compensation system is an intrinsic and integral aspect of the “historic compromise” which is the genesis of that system, that a balance must be drawn between the level of benefit entitlement for disabled workers and the costs to Employers of funding the system, and that this balancing of interests is predicated on disabled workers receiving fair (but not full) protection against economic loss.

It is the view of the Employer Community that the Terms of Reference for the present Review did not have to include any specific response to “costs” to bring the issue of costs within the Reviewer’s focus.

II. Policies and Practices Relating to Supporting Injured Workers Return to Work

In regard to “policies”, given the overlap between this Term of Reference and the previous review conducted by Paul Petrie which led to his March 31, 2018 Report, we have reiterated our previous comments in response to the Petrie Report to the effect that the Employer Community is supportive of Mr. Petrie’s overall vocational rehabilitation objective of restoring an injured worker to suitable employment with his/her injury Employer as close as possible to the worker’s pre-injury earnings.

In regard to “practices”, responses we received from the Employer Community overlap with Terms of Reference – Item #1(d), and are addressed under that Term of Reference.

In addition to the above, the Reviewer sought comment on the following three issues related to the “Duty to Accommodate”:

- Is the “duty to accommodate” concept required to be imported into the *Act*?

The duty to accommodate a disabled worker is a fundamental tenet of human rights principles which already applies to all Employers – the concept is not required to be

explicitly imported into the *Act*. The Employer Community has a significant concern with the potential for an overlap of jurisdictions between the two regimes encompassed by human rights legislation and by workers' compensation legislation.

- Whether or not it is required to be imported into the *Act*, is it a good practice to do so?

The Employer Community does not believe it would be a "good practice" to import the duty to accommodate concept into the *Act*. We believe the primary responsibility for the adjudication and enforcement of an Employer's duty to accommodate should remain within the human rights regime. That said, we do believe that the two regimes should administratively work, on a co-operative basis, to ensure that any duty to accommodate concerns which may arise are addressed in an effective and timely manner.

- If the "duty to accommodate" concept is imported into the *Act*, what related issues may arise?

If the "duty to accommodate" concept is imported into the *Act*, we submit that the related limiting principle of "undue hardship" (and the factors considered in the assessment of undue hardship), and the associated duties on Unions and workers to reasonably facilitate, participate, and co-operate in the accommodation, must also be explicitly imported into the *Act* for the purposes of awareness, clarity and certainty of consideration/application. In addition, the legislation should set out significant consequences for an injured worker's failure to meet his/her obligations.

The Employer Community is also of the view that because duty to accommodate/undue hardship disputes are often quite complex, and would likely require a significant expenditure of the review and appeal systems' time and resources to determine, they are better left to adjudication under the specialized human rights regime.

Further, due to the nature of the duty to accommodate, not all Employers have the same resources and capacity to re-employ injured workers. Accordingly, if the duty to accommodate concept is imported into the *Act*, Employers with small business operations should be excluded from the obligation.

Finally, under this Term of Reference the Reviewer wanted to hear from Employers regarding their Return to Work ("RTW") programs that are working well. We have provided a summary of responses received from the Employer Community which included that such programs should engage the injured worker early in the RTW process, and the process should be collaborative between all parties.

III. Evaluation of Current WorkSafeBC Policy and Practices through a Gender-based Analysis Plus (GBA+) Lens.

The Reviewer did not provide any insight regarding any specific focus or issue under this Term of Reference to which she would want the Employer Community to provide a response. Nor on its face does this Term of Reference provide any guidance as to what input or assistance the Employer Community could provide. Accordingly, no submission has been made regarding to this Term of Reference.

IV. Modernizing WorkSafeBC's Culture to reflect a Worker-Centric Service Delivery Model

We do not know the specific focus of this Term of Reference and do not perceive what input or assistance we could provide to the Reviewer at this time. No submission has been made regarding this Term of Reference.

V. Recommendations Dealing with Improved Case Management of Injured Workers.

Based on input received from the Employer Community, recurrent issues related to the case management of injured workers were identified as including the following:

- (i) Communications between Employer representatives and Board Officers do not always occur in a timely or forthcoming manner, particularly when an Employer is seeking information and/or assistance from the Board Officer (such as information on the injured worker's functional abilities and restrictions/limitations) to develop an early RTW plan for the injured worker.
- (ii) In regard to decisions of Board Officers: (1) claims are often being accepted and wage-loss payments made without consideration to selective/light duties which the Employer has available for the injured worker; (2) decisions often lack detail regarding how the Officers arrived at their decision, leaving the Employer with no choice but to commence a review of the decision to ascertain the basis of the decision.
- (iii) Board Officers should take a coordinating approach to ensure that injured workers and their medical practitioner(s) participate/co-operate with the Employer in developing an RTW/accommodation plan for the worker.

VI. Specific Steps Required to Increase Confidence of Workers and Employers in the Workers' Compensation System (Including, but not limited to the Fair Practices Office)

The Employer Community identified four areas as key elements required to maintain and increase their confidence in the B.C. workers' compensation system:

(i) Sustainable costs for the funding of the workers' compensation system

It is essential that the costs to Employers in funding the system remain financially sustainable and economically competitive with other jurisdictions.

(ii) Consistent, predictable and clear decision-making

The Employer Community believes that consistency, predictability and clarity of decision-making is an essential foundation to ensure confidence in the system among all stakeholders.

(iii) Effective and timely communications

WorkSafeBC must take the appropriate steps to ensure timely and effective communications occur between the first level Board Officers and Employers throughout the case management of an injured worker's claim – particularly in those situations where the Employers are seeking information from, or the assistance of, Board Officers in order to develop an early RTW plan for the injured worker.

(iv) Competent and knowledgeable staff

In order to increase the Employer Community's confidence in the B.C. workers' compensation system, WorkSafeBC should be constantly striving to improve the competency and knowledge of its workforce, and to retain experienced staff by ensuring they have manageable caseloads.

In regard to the Fair Practices Office ("FPO"), we only received two responses from the Employer Community regarding their experiences and both identified a negative experience arising from their utilization of the FPO.

VII. Other Urgent Compensation Issues not addressed in the Final Report to the Board of Directors of WorkSafeBC on the Unappropriated Balance in the Accident Fund

Notwithstanding our requests for a copy of the final report (the "Bogyo Report") referred to in this Term of Reference, at the time of preparing this submission we have not yet received a copy of the Bogyo Report. Accordingly, we have asked the Reviewer to confirm if the Bogyo Report is still part of her overall Terms of Reference and, if so, to confirm that she will provide a copy to the Employers' Forum, when she receives it, with sufficient time to allow us to fully consider the Report and respond to this Term of Reference.

EMPLOYER COMMUNITY SUBMISSION TO PATTERSON REVIEW OF THE BC WORKERS COMPENSATION SYSTEM

This submission is endorsed by 46 sectoral and cross-sectoral business organizations which collectively represent small, medium and large businesses in virtually all aspects of the British Columbia economy. Balanced WorkSafe policies and practices support healthy, safe and productive workplaces.

On March 3, 2019, the BC Minister of Labour, Hon. Harry Bains, announced a review of the Workers' Compensation system. The government news release issued at the time of the announcement stated that the overarching goal of the review is to increase the confidence of workers and employers in the workers' compensation system by undertaking a formal review. The Minister appointed retired labour lawyer Janet Patterson to conduct the review.

In the Terms of Reference that were subsequently released, Ms. Patterson is tasked with reviewing a number of factors within the system with the stated goal to make the system more worker-centric. The actual Terms of Reference are, in our view, somewhat vague and open to speculation in their interpretation. Not knowing the precise scope of the review, the Employer Community offers the following submission based on the extensive collective technical and legal experience of the signatory organizations. As required, the Employer Community will make further follow up submissions as Ms. Patterson's process unfolds.

The following submission responds sequentially to the Terms of Reference for this Review which are appended to this document

I. OPENING COMMENTS

1. The "scope" of the Review

It is our understanding that the "scope" of the present Review is intended to be limited in its focus. For example, we refer to:

- (i) In its initial news release regarding the Review on April 3, 2019, the Government identified five topics which the Review would assess. The fifth topic referred to:
 - any potential amendments to the *Workers Compensation Act* arising from this focused review. (Emphasis added)
- (ii) The Reviewer has referred to the scope of her review as being limited.
- (iii) At a meeting of the Council of Constriction Associations of B.C. on June 6, 2019, the Minister of Labour referred to the Review as being a narrow review which is designed to improve the efficiencies of WorkSafeBC, to improve the navigation of claims through the

workers' compensation system, and to review WorkSafeBC's practices – and not to make wholesale changes to the workers' compensation system.

Notwithstanding the intended limited or narrow focus of the current Review, the Employer Community is unclear as to what the actual scope of the Review encompasses. In particular, and subject to the exception noted below, the Employer Community is not aware of what specific issues the Reviewer will be focusing upon under the various Items set out in the Terms of Reference for the Review. Accordingly, in the sections which follow, we were only able to raise general comments, if any, in response to each of the six Items set out in the Terms of Reference.

The one exception involves the issue of the “duty to accommodate”. The Reviewer met with representatives of the Employers' Forum on April 26, 2019. During that meeting, the Reviewer advised she would have a specific focus, under Terms of Reference – Item #1(a), on the issue of the “duty to accommodate”, and she then identified three questions on which she would focus. As a result of being advised of the Reviewer's specific focus on this issue, we are able to provide below (in Part II, dealing with Terms of Reference – Item #1(a)) our comments and responses to each of the three questions raised by the Reviewer.

The Employer Community desires to be genuinely engaged in the Review process. In particular, we seek a real opportunity to provide our perspective and input on the issues of significance to the B.C. workers' compensation system which the Reviewer will be considering under the Terms of Reference for this Review. Accordingly, as the Reviewer develops the scope of her focus regarding the particular issues she intends to consider under the various Items of the Terms of Reference for the Review, we would request that the Reviewer provide us with the specificity of these issues, and allow us a reasonable opportunity to provide our perspective and input with respect to these issues.

2. The “cost” of funding the B.C. workers' compensation system

During the April 26, 2019 meeting with the Employers' Forum, the Reviewer was asked whether she would be considering the costs that would be associated with any of the recommendations she might make under the Terms of Reference. The Reviewer responded that the Terms of Reference did not include any reference to “costs”, and it therefore was the Reviewer's view that the issue of “costs” is outside of her focus. The Employer Community strongly disagrees with the Reviewer's view on this point.

We submit that the cost of funding the B.C. workers' compensation system is an intrinsic and integral aspect of the “historic compromise” which is the genesis of that system. Pursuant to the “historic compromise”, workers gave up the right to sue their own Employers (as well as other Employers and workers covered by the legislation) in Court and to seek damages for all economic and non-economic losses they had incurred as a result of the work-related injury or illness. In return, workers were provided protection against income losses arising from a work-related injury or illness, regardless of fault.

For their part, Employers were required to fund, on a collective basis, the workers' compensation system which provided the no-fault benefits to disabled workers. In return, Employers were protected from legal actions being brought by disabled workers.

We submit that this “historic compromise” envisions a balance to be drawn between the level of benefit entitlement for disabled workers and the cost to Employers of funding the workers’ compensation system. We further submit that this balancing of interests is predicated on disabled workers receiving a fair (but not full) protection against economic loss arising from a work-related injury or illness; and on the Employers providing the funding for the system which is viable and sustainable.

We further submit that this balancing of interests pursuant to the “historic compromise” has been adopted in all Canadian jurisdictions. In particular, all jurisdictions in Canada have based their workers’ compensation system on the concept of providing less than full protection from economic loss suffered by a disabled worker. For example, in every Canadian jurisdiction (with the exception of the Yukon), the workers’ compensation system is structured to replace a percentage of the disabled worker’s net earnings – at a percentage which is less than 100%. In particular:

- In 6 Canadian jurisdictions (including B.C.), the percentage of earnings for benefits is based on 90% of the worker’s net earnings; and
- in 5 Canadian jurisdictions, the percentage of earnings for benefits is based on a percentage of the worker’s net earnings which is less than 90% (ranging from 75% - 85%).

(Note: As indicated above, the Yukon is the lone exception where the percentage of earnings for benefits is based on 75% of the worker’s gross earnings.)

Furthermore, all Canadian jurisdictions have established a maximum wage rate (i.e., a cap on the disabled worker’s earnings) upon which compensation benefits can be paid to the worker.

It is the view of the Employer Community that the Terms of Reference for the present Review did not have to include any specific reference to “costs” to bring the issue of costs within the Reviewer’s focus. To the contrary, we submit that the cost of funding the B.C. workers’ compensation system is an intrinsic and integral aspect of the system, and accordingly cannot simply be disregarded or dismissed on the basis that it was not specifically referred to in the Terms of Reference.

II. POLICIES AND PRACTICES RELATING TO SUPPORTING INJURED WORKERS RETURN TO WORK (Term of Reference #1(a))

1. The “Policies” used in the workers’ compensation system relating to supporting injured workers return to work

We perceive that this focus on WorkSafeBC’s policies, related to supporting injured workers return to work, overlaps the previous review conducted by Paul Petrie which led to his March 31, 2018 Report entitled “Restoring the Balance: A Worker-Centred Approach to Workers’

Compensation Policy” (the “Petrie Report”). Petrie described the focus of his review on page 2 of his Report:

The focus of this review is on identifying policy options within the bounds of the current legislation for consideration by the Board of Directors to ensure a worker-centred approach that maximizes recovery from the workplace injury or disease and returns injured workers to safe, productive and durable employment.

In his Report, Petrie made several recommendations, regarding specific vocational rehabilitation policies set out in Chapter 11 of the Board’s *Rehabilitation Services and Claims Manual* (the “*Claims Manual*”), to support a worker-centred approach to the return to work of injured workers.

The Employers’ Forum presented a letter dated June 1, 2018 (which was endorsed by 26 sectoral and cross-sectoral business organizations which collectively represent small, medium and large businesses in virtually all aspects of the British Columbia economy) to the Minister of Labour and the Chair of the Board of Directors of WorkSafeBC, wherein several comments and areas of concern were raised regarding the recommendations made in the Petrie Report. For the purposes of the current review by the Reviewer with respect to the policies used in the workers’ compensation system relating to supporting injured workers return to work, we reiterate our comments on page 2 of our June 1, 2018 letter referred to above:

When considering Petrie’s Report from the above described perspective of a “worker-centred approach”, we are supportive of Petrie’s overall vocational rehabilitation objective of restoring an injured worker to suitable employment with his/her injury Employer as close as possible to the worker’s pre-injury earnings. To this effect, we are in general concurrence with the focus of Petrie’s recommendations regarding the issue of “Vocational Rehabilitation and Return to Work Support”. However, we are also of the view that there are many significant details which WorkSafeBC will need to work out in developing the appropriate policy revisions in order to achieve this overall objective. In this regard, we are willing and available to provide our assistance and input to WorkSafeBC as it proceeds through its established Consultation process with the stakeholders regarding the implementation and/or revision of policies in this area.

2. The “Practices” used in the workers’ compensation system relating to supporting injured workers return to work

We received numerous replies from the Employer Community in response to our request for comments/concerns regarding issues related to the improved case management by WorkSafeBC of injured workers (as per Terms of Reference – Item #1(d)) and, in particular, with respect to the practices used in the workers’ compensation system relating to supporting injured workers return to work (as per Terms of Reference - Item #1(a)). As the responses we received from the Employer Community overlap between these two separate Terms of Reference, we will be addressing their comments/concerns under Terms of Reference – Item #1(d), Part V below.

We do note that there are several Vocational Rehabilitation pilot projects which are either currently underway at the Board, or are to be undertaken by the Board at a later date. As a general comment, the Employer Community supports the Board undertaking pilot projects in the Vocational Rehabilitation area. However, we are of the view that the Board must involve the Employer Community at the outset in the development and implementation of Vocational Rehabilitation pilot projects to ensure they are workable and effective.

3. The “Duty to Accommodate”

During the April 26, 2019 meeting with the Employers’ Forum representatives, the Reviewer advised that she would have a specific focus, under Terms of Reference – Item #1(a), on the issue of “Duty to Accommodate”. In particular, the Reviewer identified the following 3 questions on which she would focus:

- (i) Is the “duty to accommodate” concept required to be imported into the *Workers’ Compensation Act* (the “Act”)?
- (ii) Whether or not the “duty to accommodate” concept is required to be imported into the *Act*, is it a good practice to do so?
- (iii) If the “duty to accommodate” concept is imported into the *Act*, what related issues may arise?

We provide our comments and responses to these “duty to accommodate” issues in the sections below.

(a) General Comments

In its February 1, 2018 decision in *Quebec (Commission des normes, de l’équité, de la santé et de la sécurité du travail) v. Caron* (the “*Caron Decision*”), the Supreme Court of Canada (“SCC”) described the employer’s duty to reasonably accommodate someone with a disability as “a core and transcendent human rights principle” (at para. #20); and that the duty to reasonably accommodate disabled employees is “a fundamental tenet of Canadian labour law” (at para. #22).

The Employer Community acknowledges that they have a duty to reasonably accommodate a worker who has a physical and/or mental disability – regardless as to whether the cause of that worker’s disability was work-related or not. As noted by the SCC in the *Caron Decision*, this duty is a core and transcendent human rights principle.

However, the Employer Community also has a significant concern with the potential explicit importation of the “duty to accommodate” concept into the *Act* – a concern which arises from the scenario that there would then be an overlap of jurisdictions between the two regimes encompassed by human rights legislation and by workers compensation legislation. We will elaborate upon this concern when responding to the second of the above noted questions raised by the Reviewer.

(b) Is the “duty to accommodate” concept required to be imported into the *Act*?

The duty to accommodate a disabled worker is a fundamental tenet of human rights principles which already applies to all Employers – the concept is not required to be explicitly imported into the *Act* so as to extend the duty’s application to those Employers covered by Part 1 of the *Act*. In the *Caron Decision*, the SCC acknowledged that the Employer’s duty to accommodate exists when applying the provisions of the injured worker legislation in Quebec – notwithstanding that the legislation did not expressly incorporate the duty to accommodate concept.

In our view, what is required is that WorkSafeBC must ensure that its first level of Board Officers who deal with claims involving the return to work of injured workers, and in particular the Board’s Vocational Rehabilitation Consultants (“VRC”), are aware of the human rights obligations on Employers, disabled workers and other workplace participants in accommodating the return to work of disabled workers.

(c) Whether or not the “duty to accommodate” concept is required to be imported into the *Act*, is it a good practice to do so?

The short answer to the above question is – No, the Employer Community does not believe it would be a “good practice” to import the duty to accommodate concept into the *Act*. We provide the following elaboration in support of the Employer Community’s view:

- (i) As noted previously, the duty to accommodate is a core and transcendent human rights principle which is already entrenched as part of BC (and Canadian) law – through the legislation and jurisprudence of the BC human rights regime, as well as an evolution of significant Court decisions - particularly by the SCC. Accordingly, importing the duty to accommodate concept into the *Act* would create an overlapping of jurisdictions between the two separate regimes – the human rights regime and the workers compensation regime. The Employer Community is concerned that this overlapping of jurisdictions would result in divergence of views between the two regimes concerning how the duty to accommodate concept should be interpreted and applied to disabled workers. Such divergence of views would then lead to frustrations, uncertainties and controversies for the participants within the BC workers’ compensation system – which, in our view, would not constitute a “good practice” to be imported into the *Act*.
- (ii) The two regimes have different purposes. The workers’ compensation regime is a mandatory, no-fault compensatory system focused upon injuries and illnesses arising out of and in the course of a worker’s employment. The human rights regime has a broader goal safeguarding fundamental rights, including the prevention of discrimination based on any prohibited ground under the legislation - which encompasses the duty to accommodate concept. Each regime has developed its own specialized knowledge and expertise to meet their respective purposes. In particular, the human rights regime has developed the specialized understanding, knowledge and expertise to address any duty to accommodate issues which may arise involving a disabled worker – which, in our view, the workers’ compensation regime does not have.
- (iii) The human rights regime’s jurisdiction to address duty to accommodate concerns involving injured workers is inclusive of, but much broader than, the scope of the

jurisdiction of the workers' compensation regime. In particular, the human rights regime would not distinguish between a disabled worker who had suffered a work-related injury and a disabled worker who suffered a non work-related injury.

By way of example, assume Employer A has two workers who each have been involved in a car accident which has caused a serious back injury to that worker, which would require the Employer to take significant steps to accommodate the return to work of each of the two workers. Assume further that one of the car accidents (involving Worker B) arose out of and in the course of the worker's employment; while the other (involving Worker C) was not work-related.

In the above scenario, the human rights regime would have the jurisdiction to deal with any duty to accommodate concerns which may arise for either or both disabled workers – whereas the workers' compensation system would have the jurisdiction to only deal with any concerns that Worker B may raise. Taking this scenario one step further, what would occur in the circumstances if Employer A could only reasonably accommodate one of the two disabled workers, with Worker B's duty to accommodate concerns being dealt with within the workers' compensation system and Worker C's concerns being dealt with within the human rights regime? How would Employer A be expected to fulfill its duty to accommodate obligations if each of the two regimes placed divergent, and potentially inconsistent, obligations on Employer A?

(iv) In a similar vein, workers may suffer from multiple disabilities – which may include both work-related and non-work-related injuries. For example, assume:

- Worker D suffers from a non-work-related psychological disability which Employer E has taken significant steps to accommodate;
- Worker D subsequently suffers a physical injury at work which precludes Worker D from being able to perform the accommodated work with Employer E;
- Employer E would need to accommodate the combination of both the initial non work-related psychological disability and the subsequent work-related physical disability in order to implement a return to work program for Worker D; and
- Employer E advances the position that it could accommodate Worker D's subsequent physical disability, but that Worker D's initial non work-related psychological disability precluded Employer E from being able to implement any further reasonable accommodations for Worker D.

In the above scenario, where would the jurisdiction lie if Worker D wanted to challenge Employer E's determination that the combination of the subsequent work-related physical disability and the initial non work-related psychological disability precluded Employer E from being able to fulfill its duty to accommodate Worker D's return to work? In our view, no jurisdictional issue would arise if the duty to accommodate concept was not imported into the *Act*. In such circumstances, the human rights regime would clearly have

the jurisdiction to deal with Worker D as a whole – regardless of the work-related vs. non work-related causes of any particular disability which Worker D may have.

- (v) We submit that the Petrie Report supports the premise that the human rights regime in BC should remain the primary jurisdiction to adjudicate any concerns which injured workers may have regarding their Employers’ duty to accommodate their return to work. In particular, we refer to the following passages on pages 21 and 22 of the Petrie Report, under the heading “Duty to Accommodate”:

While the Act is silent on a duty to accommodate, employers have the duty to accommodate to the extent of undue hardship under the BC Human Rights Code. And during the Board’s vocational rehabilitation process employers, workers and unions are expected to comply with the Human Rights legislation and associated policies.

After referring to “a new development in the law on this matter” (due to the SCC’s *Caron Decision*), Petrie continued (on page 22 of his Report):

The second lesson from *Caron* is that it is important for the Board to respect the jurisdiction of the Human Rights Tribunal while at the same time meeting its own responsibility to workers under section 16 of the Act. The Human Rights Tribunal has a primary responsibility and the tools to adjudicate the duty to accommodate under their legislation and the Board should not infringe on that jurisdiction. The Board must respect the rights and obligations of employers and workers under the Human Rights legislation and must be transparent in articulating that respect.

The final point I take from *Caron* is that the Board’s support to employers and workers in meeting their obligations under the duty to accommodate should harmonize to the extent possible with that obligation under the Human Rights legislation without infringing on it or interfering with it. This approach is consistent with the Board’s current commitment under section 16 of the Act. It can also assist the worker and employer in achieving a just accommodation in a way that avoids a protracted and adversarial dispute before the Human Rights Tribunal.

In light of *Caron*, it is important for the Board to explicitly recognize the duty to accommodate under the Human Rights legislation while respecting the separate jurisdiction of the Human Rights Tribunal to enforce its legislation without interference from the Board.

To summarize, the Employer Community does not believe it would be a “good practice” to import the duty to accommodate concept into the *Act*. Instead, we believe that the primary responsibility for the adjudication and enforcement of an Employer’s duty to accommodate the return to work of a disabled worker should remain within the human rights regime.

That said, we do believe that the workers’ compensation and human rights regimes in BC should administratively work, on a co-operative basis, to ensure that any duty to accommodate concerns which may arise, regarding the return to work of a worker who has suffered a work-related disability, are addressed in an effective and timely manner. In this regard, we raise the following two suggestions which may be of assistance in achieving this objective:

- (i) WorkSafeBC should work with the recently established BC Human Rights Commission to develop a training program for first level Board Officers who deal with claims involving the return to work of injured workers, and in particular the Board’s VRCs, regarding the human rights concepts and principles associated with the obligations on Employers, disabled workers and other workplace participants in accommodating the return to work of disabled workers.
- (ii) WorkSafeBC, the BC Human Rights Commission and the BC Human Rights Tribunal should work closely together to develop and implement an administrative process to ensure that any issues which arise within the workers’ compensation regime, with respect to duty to accommodate the return to work of a disabled worker, are resolved in a consistent, effective and timely manner within the human rights regime.

(d) If the “duty to accommodate” concept is imported into the *Act*, what related issues may arise?

The Employer Community believes that there are several related issues that would need to be addressed if the “duty to accommodate” concept is imported into the *Act*.

- (i) The Employer’s duty to accommodate is not unlimited. As stated by the SCC in the *Caron Decision* (at para. #25), the duty to accommodate’s “scope in any particular case is defined by the symmetrical concepts of ‘reasonable accommodation’ and ‘undue hardship’”. The SCC further stated (at para. #27) that “the duty to accommodate requires accommodation to the point that an employer is able to demonstrate ‘that it could not have done anything else reasonable or practical to avoid the negative impact on the individual’”. Finally, we refer to the following quote (at para. #26) from an earlier 2008 decision of the SCC in *Hydro-Quebec*:

... The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work.

If the “duty to accommodate” concept is imported into the *Act*, we submit that the related limiting principle of “undue hardship” must also be explicitly imported into the *Act* for the purposes of awareness, clarity and certainty of consideration/application.

- (ii) Following on point (i) above, we submit that the factors to be considered in the assessment of undue hardship should also be imported into the *Act* – again to meet the purposes of awareness, clarity and certainty of consideration/application. In this regard, we refer to the 1990 SCC decision in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, where a list of “some of the factors that may be relevant” in considering what constitutes undue hardship was identified in para. #62:

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar – financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the Employer’s operation may influence the assessment of whether a given financial cost is undue or the

ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.

In its Final Report dated January 20, 1999, the Royal Commission on Workers' Compensation in British Columbia (the "Royal Commission Final Report") identified several factors which it considered to be of "particular significance" when assessing the concept of "undue hardship" (in Volume II, Chapter 1, entitled "The Adequacy of Benefits" at pages 46 and 47):

It is clear that the employer's obligation to re-employ and the obligation to accommodate an injured worker must be subject to reasonable limits. Human rights law generally recognizes that this obligation does not extend to situations where it would impose "undue hardship" on the workplace parties. That term is not one that can be exhaustively defined. Suffice to say, each case must be determined on its own merits, but a number of principles have emerged which can guide the determination. The commission has identified the following factors which it considers to be of particular significance, noting the weight attached to any particular factor will necessarily vary from case to case:

- financial costs;
- interchangeability of work force and facilities;
- size of operation;
- safety concerns, including the magnitude of risk and who bears it;
- disruption of a collective agreement;
- employee morale;
- disruption to the public;
- effect on contractual obligations;
- business efficiency and competitiveness; and
- availability and extent of supplementary funding for the accommodation.

The Royal Commission subsequently recommended (in Recommendation 137(g)) that "the factors to be considered in the assessment of undue hardship should be set out in the *Workers Compensation Act*".

We believe it is important to reiterate that the lists of factors identified by the SCC and the Royal Commission are not intended to be "exhaustive". We submit that this premise must also be imported into the *Act* when specifying the factors to be considered in the assessment of undue hardship.

- (iii) The concept of the "duty to accommodate" is not focused solely on the responsibility and obligations of the Employer – it also extends to the disabled worker and to other workplace parties, such as a Union with which the Employer has a Collective Agreement in force and effect. This principle of the duty to accommodate extending beyond the Employer

was captured by the SCC in the following passages from its 1992 decision in *Central Okanagan School District No. 23 v. Renaud* (at paras. #43 and 44):

- 43 The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. ...

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus, in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

- 44 This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. ... The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

If the duty to accommodate concept is incorporated into the *Act*, we submit that all multi-party aspects associated with that concept should be explicitly imported – in particular, the responsibilities and obligations which apply to the disabled worker. The duty to accommodate the disabled worker's return to work requires the reasonable facilitation, participation and co-operation of the disabled worker in the accommodation process. We submit that this obligation to reasonably facilitate, participate and co-operate should be imported into the *Act* so that disabled workers are clearly aware that the duty to accommodate their return to work is not predicated on their personal choice to determine whether or not they wish to be accommodated and/or into which accommodated position the disabled worker will return.

Furthermore, assuming that the disabled worker's obligations to reasonably facilitate, participate and co-operate in the accommodation process are imported into the *Act*, we submit that the legislation should also set out significant consequences for the disabled worker's failure to meet his/her obligations – such as the reduction or suspension of the benefits to which the disabled worker would be otherwise entitled under the *Act* – so as to encourage meaningful facilitation, participation and co-operation on the part of the disabled worker.

- (iv) As noted in point (ii) above, the size of the Employer's operation is one of the factors which has been identified as being relevant in assessing what constitutes undue hardship. The Royal Commission Final Report considered this issue in Volume II, Chapter 1 ("The Adequacy of Benefits") at page 48:

The commission does not believe that all employers have the same capacity to re-employ injured workers. Very small employers are less likely than larger employers to have the financial capacity or sufficient alternative employment opportunities to make these re-employment and reasonable accommodation provisions viable.

The Royal Commission accordingly recommended that Employers with fewer than 20 workers should be relieved of these obligations.

The Employer Community concurs with the conclusion reached by the Royal Commission that Employers with small business operations will likely not have the financial resources and/or sufficient alternative employment opportunities to make the duty to accommodate viable in their circumstances. Accordingly, if the duty to accommodate concept is imported into the *Act*, we submit that Employers with small business operations should be excluded from the application of that obligation.

- (v) The Employer Community is also concerned about the significant impact the importation of the duty to accommodate concept into the *Act* would likely have on the existing review and appeal systems in the BC workers' compensation regime. We foresee the potential for a significant number of disputes – raised by either the disabled worker and/or the Employer – arising from an initial determination made by a first level Board Officer with respect to the application of the duty to accommodate/undue hardship concepts to that disabled worker/Employer. Duty to accommodate/undue hardship disputes are often quite complex, and would likely require a significant expenditure of the review and appeal systems' time and resources to determine. In the view of the Employer Community, this is yet another reason to not import the duty to accommodate concept into the *Act* – but instead to leave the adjudication and enforcement of duty to accommodate issues within the human rights regime, which has the specialized knowledge and expertise to deal with these issues.

4. Effective Return to Work Programs

During the April 26, 2019 meeting with the Employers' Forum representatives, the Reviewer advised that she wanted to hear from Employers regarding their Return to Work (“RTW”) programs that are working well. We therefore have canvassed the Employer Community seeking their input on what makes their RTW programs effective and successful. We summarize below the responses we received from the Employer Community:

- (i) An effective RTW program is not a stand-alone program – it is a component of an overall effective and successful Disability Management Program (“DMP”) within the Employer's organization.

The key elements of an effective and successful DMP include:

- A strong emphasis on disability prevention (for example, an effective health and safety program that focuses on preventing workplace injuries);

- A strong focus on health promotion (such as work/life balance programs; physical activity promotion; life habit assessments; educational workshops);
 - Early identification of an employee’s disability, and organizational encouragement for the employee to seek timely medical/health services;
 - A sustained commitment to the safe and early return to work of injured employees;
 - An organizational structure that commits to and sustains the objectives of the DMP (senior leadership demonstrate strong commitment and support to the organization’s wellness strategies and initiatives; everyone in the organization is accountable for the success of the DMP; the implementation of a timely communication strategy to inform all employees of the goals and objectives of the DMP);
 - Collaboration among all stakeholders is essential (for example, the creation of a disability management committee, with members trained in disability management competencies and best practices; in a unionized environment, ensuring there is senior Union support for the DMP initiatives).
- (ii) Engaging the disabled employee early in the RTW process – i.e., early intervention – is a key element to a successful RTW strategy. It allows the Employer to obtain necessary information from the employee and his/her medical practitioner(s) in order to identify the employee’s functional abilities and restrictions/limitations, and to find potential accommodated measures or modified job duties to facilitate the employee’s RTW.
- (iii) Adoption of a formal RTW program, supported by policies and procedures that are communicated to all employees in the organization. In a unionized environment, senior Union support of the RTW program is a key element for its success.
- (iv) An effective RTW program should take a collaborative approach to RTW planning and coordination. For example, the Employer may provide the employee with an Abilities Form, with a letter indicating the potential work opportunities for the employee, which the employee would take to his/her doctor, which assists in the communications between the Employer and the employee’s doctor through the employee. Once the completed Abilities Form is received from the employee’s doctor, a collaborative approach can be taken between the persons involved in the RTW process (i.e., the employee, an Employer representative, a Union representative, a medical or other health care professional, a WorkSafeBC representative, etc.) to devise a RTW plan which supports the employee during rehabilitation from his/her injury while also being productive at work.
- (v) A regular review and progress of the employee’s RTW plan needs to occur and be revised if required.
- (vi) Reasonable job accommodations or modified job duties are a necessary aspect of an effective RTW program.

- (vii) In cases involving work-related injuries, WorkSafeBC can expedite the treatment or services which the employee may require (such as specialist appointments; MRIs; surgeries; Occupational Rehabilitation Programs; etc.) which assists the RTW process by mitigating the time the employee is away from work waiting to receive the required treatment or service.

III. EVALUATION OF CURRENT WORKSAFEBC POLICY AND PRACTICES THROUGH A GENDER-BASED ANALYSIS PLUS (GBA+) LENS - Terms of Reference #1(b)

During the April 26, 2019 meeting with the Employers' Forum representatives, the Reviewer did not provide any insight regarding any specific focus or issue under this Term of Reference to which she would want the Employer Community to provide a response. On the face of the Term of Reference itself, we do not perceive what input or assistance we could provide by way of a response.

Nevertheless, should, upon further consideration of this Item, a specific focus or issue come to the Reviewer's mind upon which she would like to receive our input and comments, please advise us and we would provide a response within a reasonable time frame from the receipt of the request.

IV. MODERNIZING WORKSAFEBC'S CULTURE TO REFLECT A WORKER-CENTRIC CULTURE AND SERVICE DELIVERY MODEL - Terms of Reference #1(c)

Similar to Item #1(b), we do not perceive what input or assistance we could provide to the Reviewer at this time by way of a response. However, we once again would provide a response to any specific focus or issue which the Reviewer may want to raise with us during her deliberations on this Item.

V. RECOMMENDATIONS DEALING WITH IMPROVED CASE MANAGEMENT OF INJURED WORKERS – Terms of Reference #1(d)

We have canvassed the Employer Community seeking their input regarding issues related to the improved case management of injured workers by WorkSafeBC. There were several recurrent themes raised by the Employer Community in response to this Item which we will elaborate upon below.

- (i) The most frequently raised concerns by the Employer Community related to the adequacy of the timing and/or contents of communications between an Employer representative and a Board Officer with respect to some aspect of Board case management of the Employer's injured worker. For example, concerns were raised that Board Officers often do not

answer their phones or return the calls in a timely manner, if at all, or leave recorded messages saying they will return your call in 3 – 4 business days. The timeliness of communications was raised as a particular concern by Employers who were seeking information from and/or the assistance of Board Officers in order to develop an early RTW plan for the injured worker.

In the view of the Employer Community, this is an unacceptable business practice, and is definitely not a “worker-centred” approach with respect to dealing with inquiries involving the case management of injured workers. The Employer Community suggests that the use of email by Board Officers, who are involved in the case management of injured workers, to communicate with injured workers and their Employers would be one potential resolution to this concern.

(ii) Many of the concerns raised by the Employer Community involved the Board’s case management with respect to the Employer’s RTW initiatives. Examples of these concerns include:

- Although some Board Officers are very good at working with Employers with respect to early RTW initiatives, the perception of the Employer Community is that many are not. These Board Officers are often viewed as working on claim files at their own pace and timing regardless of any attempt by the Employer to initiate an early RTW plan for the injured worker.
- The Employer Community has encountered reluctance on the part of Board Officers to provide the Employer with information that the Officer has, regarding the injured worker’s functional abilities and restrictions/limitations, so as to enable the Employer to consider the development of an early RTW plan for the worker. The Employer Community cannot understand why a Board Officer would not disclose the requested information to the Employer when the objective is to seek to have an early RTW plan developed for the worker with his/her Employer.
- The Employer Community has raised concerns regarding the inconsistent application by Board Officers of Policy Item #34.11 of the *Claims Manual* (“Selective/Light Employment”). Although this Policy Item states that “the Board supports selective/light employment as an important component of a worker’s rehabilitation and recognizes the value of maintaining an injured worker’s proactive connection to the workplace”, the Employer Community has advised that Board Entitlement Officers will often accept a worker’s claim, and have wage-loss payments made, without giving any consideration to selective/light duties employment opportunities which the Employer had made to the injured worker.

(iii) With respect to improvements that could be made by WorkSafeBC regarding the case management of RTW initiatives, the Employer Community offers the following suggestions:

- Board Officers need to share information regarding the injured worker’s functional abilities and restrictions/limitations on a timely basis when requested by the Employer in order to develop an RTW plan for the worker.
 - There is a need to have injured workers and their medical practitioner(s) participate/co-operate with the Employer in developing an RTW/accommodation plan for the worker. The Employer Community believes that Board Officers are in the best position to take a coordinating approach with the Employer, the injured worker and the worker’s physician in order to reach this objective.
- (iv) Concerns have been raised that Board Officers have been increasing the referrals of injured workers to external Occupational Rehabilitation Programs in circumstances where an RTW plan could have been developed and implemented through the Board Officer’s collaboration with the Employer, the injured worker and the worker’s treatment provider(s).
- (v) Concerns have been raised that a significant number of experienced staff have either left/retired from WorkSafeBC, or on the verge of doing so; and that other staff are new and inexperienced in their positions. We believe that the Board needs to retain experienced staff by ensuring they have manageable caseloads – so as to avoid burnout and turnover.
- (vi) Concerns have been raised regarding what one Employer referred to as WorkSafeBC frequently “reinventing their service delivery models”. An example was raised regarding changes made in the Board’s Mental Health Unit which resulted in delays in the adjudicative process for mental health claims.
- (vii) Concerns were also raised regarding the growing number of decisions provided by Board Officers which had a significant lack of detail regarding how the Officers arrived at their decisions to accept a worker’s claim (as contrasted to the review and appeal level decisions which would provide greater detail in support of their determinations). This lack of detail explaining the Board Officer’s decision often would leave the Employer with no other choice but to commence a review of the decision so as to ascertain the basis of the decision and determine if it was supportable by the evidence and if the applicable Board policies had been properly considered and applied.

VI. SPECIFIC STEPS REQUIRED TO INCREASE CONFIDENCE OF WORKERS AND EMPLOYERS IN THE WORKERS’ COMPENSATION SYSTEM (INCLUDING BUT NOT LIMITED TO THE FAIR PRACTICES OFFICE) – Term of Reference #1(e)

1. Confidence in the Workers’ Compensation System

The Employer Community has identified the following four areas as key elements required to maintain and increase their confidence in the B.C. workers’ compensation system.

(a) Sustainable costs for the funding of the workers' compensation system

As discussed in the opening section of this submission, pursuant to the “historic compromise” Employers are required to fund, on a collective basis, the B.C. workers' compensation system which provides no-fault benefits to disabled workers. We submit that the costs associated with funding the B.C. workers' compensation system must be economically viable and sustainable – in other words, the level of benefit entitlement for disabled workers must be balanced against the cost to the Employers of funding the system.

It is the strongly held view of the Employer Community that there is only so much cost which the Employer Community can reasonably be expected to bear by way of funding of the B.C. workers' compensation system and, at the same time, remain economically viable in terms of being able to maintain and grow their business operations and remain competitive in today's global economic environment.

The premise of building a strong sustainable economy was emphasised as a commitment made by the current B.C. Government following its election in 2017. For example, Premier John Horgan provided Mandate Letters to the incoming Ministers in his Government's Cabinet. In his July 18, 2017 Mandate Letter to the Minister of Labour, Premier Horgan set out three key commitments that had been made to British Columbians. The third commitment was described by Premier Horgan as follows:

Our third key commitment is to build a strong, sustainable, innovative economy that works for everyone... (Emphasis added)

We submit that the concept of building a “sustainable” economy requires one to consider the overall impact of the cost/tax burden faced by an Employer in B.C.'s current economic environment – and not just on an individual component of that overall burden, such as the assessments paid by the Employer Community to fund the workers' compensation system. We refer to the following two examples to illustrate this point.

First, we refer to the recent article on pages A1 and A2 of the June 25, 2019 edition of the Vancouver Sun, under the headline of “B.C. businesses struggling despite strong economy: poll”, and the sub-headline of “Owners blame employee costs, new taxes for lower bottom line”. The opening paragraph of this article reads:

B.C. businesses say costs increases are forcing them to increase prices, cut staff and hold off on expansion, even as economic growth in the province outstrips the national average.

One of the cost increases recently incurred by Employers in B.C., which is specifically referred to in the article, is the “new employer health tax” which came into effect in January 2019. (Pursuant to this new “Employer Health Tax” (EHT), most B.C. Employers with an annual payroll of \$500,000 or more are required to pay the EHT to fund the costs of providing medical and public health services to B.C. residents. For those Employers in B.C. with a total annual payroll greater than \$1,500,000, the amount of the EHT paid by that Employer will be 1.95% of its annual payroll.)

As noted in the Vancouver Sun article, the B.C. Chamber of Commerce (using its BCMindReader.com survey platform) joined with Postmedia to check on hundreds of private businesses, public-sector businesses and non-profit organizations, with the following goal:

The goal was to dig into why, for example, 79 per cent of participants said the cost of doing business has worsened and 49 per cent said their confidence in B.C.'s economy declined in the last year.

The article then attributed the following statements to Val Litwin, the President and CEO of the B.C. Chamber of Commerce:

Val Litwin, president and CEO of the Chamber, described a “split reality” where economic growth in B.C. is described as strong and yet, in speaking directly with businesses, there are not only “clouds on the horizon” but ones “right overhead”.

“The economic experience is a culmination of past events”, he said.

But looking ahead, businesses are becoming “bogged down” by rising costs and regulatory burdens.

Second, there has recently been ongoing media coverage regarding the financial sustainability of another insurance system in B.C. – that involving the ICBC vehicle insurance regime. It is our understanding that ICBC has reported losses of approximately \$2.2 Billion in the past two years. Describing the situation at ICBC as a “financial dumpster fire”, and noting the need to maintain a “financially stable” ICBC, the Attorney General for B.C. has placed limits on benefit payments by ICBC for certain injuries. At the same time, ICBC’s request to increase basic insurance rates 6.3% was approved and took effect in April 2019. Accordingly, ICBC’s current unsustainable financial situation has led to reduction of benefits under the vehicle insurance scheme at the same time that the costs for the funding of benefits have increased at a significant rate.

We submit, in the event that the costs associated with providing benefit entitlements to disabled workers under the B.C. workers’ compensation system is left unchecked, a similar state of financial unsustainability, as is currently faced by ICBC, is not beyond the realm of reality for WorkSafeBC in the not-too-distant future. We submit there can be no dispute that the B.C. workers’ compensation system had previously experienced a similar financially unsustainable scenario as is currently faced by ICBC. In particular, we refer to WorkSafeBC’s precarious financial position prior to the 2002 amendments to the *Act*, as set out in the following passage on page 5 of the March 11, 2002 “Core Services Review of Workers’ Compensation Board – Major Law and Policy Issues Final Report” prepared by Alan D. Winter (the “2002 Core Services Review”):

In reviewing the financial information provided to me by the WCB, I have been convinced that the current workers’ compensation system in BC is becoming unsustainable. The WCB incurred a deficit (unaudited) in 2001 of \$286.8 million. If the status quo of the current system is maintained the WCB projects further deficits in 2002 (of \$422 million), 2003 (of \$301 million), 2004 (of \$251 million) and 2005 (of \$181 million). These projections will result in the WCB assuming an unfunded liability in 2002 of

approximately \$288 million, which will continue to grow to an overall unfunded liability of approximately 1 billion dollars by the end of 2005.

We submit that Employers who are faced with an overall cost/tax burden in B.C. (including the costs associated with funding the B.C. workers' compensation system), which renders their business operations financially uncompetitive and/or unsustainable in today's global economic environment, will be left with one of three undesirable options:

- (i) move the business operations out of B.C. to a jurisdiction which provides the Employer with a more competitive advantage in terms of its cost/tax burden;
- (ii) increase its prices for its products/services, reduce the level of its staffing and/or other staff benefit entitlements, and/or hold off on potential expansion of the business operations; or
- (iii) cease its business operations altogether.

In summary, in order to maintain and increase the Employer Community's confidence in the B.C. workers' compensation system, it is essential that the costs to Employers in funding that system remain financially sustainable and economically competitive with other jurisdictions.

(b) Consistent, predicable and clear decision-making

The Employer Community believes that consistency, predictability and clarity of decision-making within the B.C. workers' compensation system is an essential foundation to ensure confidence in the system among all stakeholders. The importance of consistency in administrative decision-making was commented upon by the SCC in its 1993 decision in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)* (at paras. #59 and 60):

- 59** While the analysis of the standard of review applicable in the case at bar has made clear the significance of the decision-making autonomy of an administrative tribunal, the requirement of consistency is also an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law. Professor MacLauchlan notes that administrative law is no exception to the rule in this regard:

Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense and good administration."

...

- 60** In the same vein Professor Comtois writes:

[TRANSLATION]...it [consistency] helps to build public confidence in the integrity of the administrative justice system and leaves an impression of common sense and good administration. It might be added, as regards administrative tribunals exercising quasi-judicial functions, that the specialized nature of their jurisdiction makes inconsistencies more apparent and tends to harm their credibility.

...

The importance of providing consistent and predictable decision-making is similarly recognized by WCAT in its *Manual of Rules of Practice and Procedure* (“MRPP”). For example, the following is stated under Item 1.4, entitled “Guiding Principles”:

WCAT will strive to provide:

- (a) predicable, consistent, and efficient decision –making;

...

We also refer to Part 17 of the *MRPP*, entitled “WCAT Decision Making”. In particular, in Item 17.2.1 (“Hallmarks of Quality Decision Making”), paragraph (f) recognizes that a good decision

strives to be consistent with the general approach in other WCAT decisions affecting similarly situated parties and issues, or provides a rationale for not being consistent with other WCAT decisions affecting similarly situated parties and issues.

In addition to decision-making in the workers’ compensation system being consistent and predicable, the Employer Community believes it is equally important for decisions at all levels within the system to be clear - from the perspective of the evidence, upon which the decision-makers’ findings of fact are made, being readily identified within the decision, as well as the basis upon which the decision-makers reached their determinations. We submit that the confidence in the workers’ compensation system is eroded when the recipients of the decisions must either infer from the ultimate conclusion as to how the decision-makers reached their determinations, or commence a review/appeal in order to obtain disclosure of WorkSafeBC’s claim file to ascertain the basis upon which the decision was made.

The importance of providing clarity in decision–making is recognized in WCAT’s *MRPP*. For example, Item 1.4(c) (“Guiding Principles”) states that WCAT will strive to provide “succinct, understandable and high-quality decisions”. Similarly, the following attributes of a “good decision” are set out in Item 17.2.1 (“Hallmarks of Quality Decision Making”):

A good decision:

...

- (b) identifies a clear set of relevant findings of fact fairly drawn from the evidence;

...

- (e) identifies and applies relevant law and policy, including WCAT precedent panel decisions;

...

- (h) makes the panel’s reasoning clear and understandable and leads to a logical conclusion that resolves the issues;

...

We submit that consistency, predictability and clarity in decision-making is an essential element which fosters and enhances confidence in the integrity of the B.C. workers’ compensation system; whereas inconsistent, unpredictable and unclear decision-making has the opposite effect of eroding the credibility of, and confidence in, the workers’ compensation system.

The Employer Community fully adopts the following principles set out in Item 17.2.2 (“Decision-Making Principles”) of WCAT’s *MRPP*:

WCAT seeks to provide a decision-making process which is demonstrably fair, efficient, and accessible. WCAT aims to provide well-reasoned and high-quality decisions which clearly explain the basis for the conclusion reached. Clarity, consistency, and predictability are key values.

In the view of the Employer Community, the above principles must be applied at all levels of decision-making within the B.C. workers’ compensation system. We submit that ensuring consistency, predictability, and clarity in decision-making throughout the B.C. workers’ compensation system not only promotes a worker-centred approach to the system, but also enhances the confidence in the integrity of the system among all stakeholders.

(c) Effective and timely communications

As identified previously, when responding to Terms of Reference – Item #1(d), the concerns most frequently raised by the Employer Community related to the adequacy of the timing and/or contents of communications between a representative of the Employer and a Board Officer with respect to some aspect of the Board’s case management of the Employer’s injured worker – particularly in those situations where the Employers are seeking information from, or the assistance of, Board Officers in order to develop an early RTW plan for the injured worker. We submit that the Employer Community’s confidence in WorkSafeBC is greatly eroded when the Board Officer(s) involved in the case management of one of the Employer’s injured workers refuses/neglects to return the Employer’s call, fails to do so in a timely manner, or at all, and/or declines to provide the Employer with relevant and available information, particularly with respect to the development of an early RTW plan for the injured worker.

The Board’s *Claims Manual* recognizes the need for, and value of, early intervention with respect to the RTW of an injured worker with his/her pre-injury Employer. For example,

the following is stated in Policy Item: C11-85.00 (“Vocational Rehabilitation Principles and Goals”), under the heading “Quality Rehabilitation”:

The mission of the Board with respect to vocational rehabilitation services is to provide quality interventions and services to assist workers in achieving early and safe return to work and other appropriate rehabilitation outcomes. Quality rehabilitation requires individualized vocational assessment, planning, and support provided through timely intervention and collaborative relationships to maximize the effectiveness of rehabilitation resources and worker-employer outcomes. (Emphasis added)

Similarly, we refer to the following “guiding principles of quality vocational rehabilitation” as set out on page 2 of Policy Item: C11-85.00:

The guiding principles of quality vocational rehabilitation are:

1. Vocational Rehabilitation should be initiated without delay and proceed in conjunction with medical treatment and physical rehabilitation to restore the worker’s capabilities as soon as possible.

...

5. Vocational rehabilitation is a collaborative process, which requires the involvement and commitment of all concerned participants.

...

Finally, we also refer to the following “goal of vocational rehabilitation” as set out on page 3 of Policy Item: C11-85.00:

The goals of vocational rehabilitation are:

1. For workers with a temporary total disability, the goal is to assist injured workers in expediting recovery and return to work with the pre-injury employer. As these workers are considered unable to perform their pre-injury employment due to the disability, the goal is to return a worker to work with the pre-injury employer in a selective/light employment, a graduated return to work or a modified return to work arrangement.

We submit that timely interventions and collaborative relationships in the case management of an injured worker’s claim cannot be achieved without effective and timely communications between the first level Board Officers involved in the claim file and the affected stakeholders – which must include the Employer of the injured worker. In order to increase the confidence of the Employer Community in the B.C. workers’ compensation system, it is the view of the Employer Community that WorkSafeBC must take the appropriate steps to ensure timely and effective communications occur between the first level Board Officers and Employers throughout the case management of an injured worker’s claim, and particularly with respect to initiatives involving the early RTW of injured workers with their pre-injury Employers.

(d) Competent and knowledgeable staff

We submit that all stakeholders benefit from, and have more confidence in, the B.C. workers' compensation system when the WorkSafeBC staff with whom they interact are competent and knowledgeable in their positions. As noted previously (in our response to Terms of Reference – Item #1(d)), there is a concern among the Employer Community that a significant number of experienced staff have left/retired from the Board, or on the verge of doing so.

In order to increase the Employer Community's confidence in the B.C. workers' compensation system, it is the view of the Employer Community that WorkSafeBC should be constantly striving to improve the competency and knowledge of its workforce, and to retain experienced staff by ensuring they have manageable caseloads.

2. The Fair Practices Office

As Item #1(e) of the Terms of Reference specifically identified the Board's Fair Practices Office ("FPO") as a focus for the Reviewer, we have canvassed the Employer Community seeking any comments they may have regarding their involvement with, and the services provided by, the FPO. As we have received only two responses to our inquiry, we are assuming that the Employer Community does not have any significant contact with the FPO.

That said, the two responses we did receive did not identify a positive experience arising from the Employer's utilization of the FPO. In one scenario, the Employer contacted the FPO to raise the Employer's concern that the Board Case Manager and Client Service Manager were dealing with an issue concerning an injured worker of the Employer which the Employer believed was unrelated to the worker's accepted condition. The Employer has advised that both the Case Manager and the Client Service Manager have barely spoken to the Employer representative since that time, and the relationship continues to be a "frosty" one. As the Employer representative then stated in her response to our inquiry – "I would think long and hard before using the Fair Practices Office again".

The second scenario involved an Employer who contacted the FPO to raise the Employer's perceived concern that the Board Case Manager was providing horrific service and overlooking critical information. The Employer representative stated that the FPO did nothing to address the Employer's concern, other than suggesting the Employer call the Client Service Manager.

VII. OTHER URGENT COMPENSATION ISSUES NOT ADDRESSED IN THE FINAL REPORT TO THE BOARD OF DIRECTORS OF WORKSAFEBC ON THE UNAPPROPRIATED BALANCE IN THE ACCIDENT FUND – Terms of Reference #1(f)

1. The Bogyo Report

It is our understanding that the "final report to the Board of Directors of WorkSafeBC", as referred to in Item #1(f) of the Terms of Reference, is the Final Report prepared by Mr. Terry Bogyo (the

“Bogyo Report”) – which we understand was provided to the Board of Directors of WorkSafeBC in December 2018. Notwithstanding our requests for a copy of the Bogyo Report to be provided to the Employers’ Forum (so as to provide sufficient time for the Employer Community to consider the contents of the Bogyo Report, and to then provide our perspective and input in response to the specific issue raised in Item #1(f) of the Terms of Reference), at the time of preparing this submission we had not yet received a copy of the Bogyo Report.

In response to our May 10, 2019 letter to the Reviewer, formally requesting a copy of the Bogyo Report be provided, Trevor Hughes, Deputy Minister for the B.C. Ministry of Labour, provided an email to the writer (as well as several other named individuals, which included the Reviewer), which advised that the Employers’ Forum’s request will be handled by the Ministry. Deputy Minister Hughes’ email then stated the following:

It is our intention to release the report to you (which the Minister and Ministry are still reviewing and on which no decisions have yet been made); however, there is a process that the Minister and I must go through internally before that can happen. We are actively working on that process now and hope to be able to report back in a couple of weeks about the status of release. We do understand timing is an issue for your ability to participate in the process currently underway led by Janet Patterson. It is our intention to complete our process in enough time to allow you to have the Bogyo report, but I cannot commit at this time to a specific date.

As noted above, the Employers’ Forum has not yet received a copy of the Bogyo Report. Accordingly, we can only assume the following:

- (i) the process that the Minister and Deputy Minister must go through internally (as referred to above in Deputy Minister Hughes’ email) has not yet been completed; and
- (ii) the Reviewer has similarly not yet received a copy of the Bogyo Report, for the same reasoning that has been provided to the Employers’ Forum by Deputy Minister Hughes.

In these circumstances, we would request the Reviewer to respond to the two following points:

- (i) As the Bogyo Report has not yet been released by the Minister/Deputy Minister, is Item #1(f) still part of the Reviewer’s overall Terms of Reference?
- (ii) If so, we request the Reviewer confirm that a copy of the Bogyo Report will be provided to the Employers’ Forum, when received by her, with sufficient time to allow us to fully consider the contents of the Bogyo Report, and to then provide our perspective and input in a written submission in response to Item #1(f) of the Terms of Reference.

2. “Other urgent compensation issues”

It is obviously impossible for the Employer Community to provide any response at this time as to whether they perceive there are “any other urgent compensation issues” that were not addressed in the Bogyo Report, since we are not aware as to what compensation issues may have been addressed in the Bogyo Report, let alone what compensation issues, if any, Mr. Bogyo may have characterized as being “urgent” in their need to be addressed.

Notwithstanding the above, we want to raise the following 2 comments for the Reviewer's consideration:

- (i) The Employer Community questions whether there are currently any "urgent" compensation issues within the B.C. workers' compensation system (whether or not addressed in the Bogyo Report). It is our perception that the overall level of compensation benefits provided under Part 1 of the *Act* are comparable to those provided in other jurisdictions in Canada.
- (ii) The issue as to whether the Reviewer perceives any other compensation issues, that were not addressed in the Bogyo Report, as being "urgent" is one on which the Employer Community would request the opportunity to specifically provide its input and perspective. In order to do so, we would request that the Reviewer provide us with the specificity related to any compensation issues which the Reviewer perceives as being "urgent", and a reasonable opportunity to provide a further written submission regarding these issues.

VIII. CONCLUSION

We greatly appreciate this opportunity to provide the Reviewer with our comments and concerns regarding her review of the Workers' Compensation System. As noted on several occasions in this submission, we look forward to further discussions with the Reviewer.

Should you require an elaboration or further information with respect to any matter dealt with in this submission, we would request that you contact Doug Alley, the Managing Director of The Employers' Forum at doug@employersforum.org or (778) 265-8813.

Sincerely,



A handwritten signature in blue ink, appearing to read "Doug Alley".

Doug Alley
Managing Director



A handwritten signature in blue ink, appearing to read "Greg D'Avignon".

Greg D'Avignon
President & CEO



A handwritten signature in blue ink, appearing to read "Richard Truscott".

Richard Truscott
Vice President,
BC & AB



A handwritten signature in blue ink, appearing to read "Val Litwin".

Val Litwin
President & CEO



A handwritten signature in blue ink, appearing to read "David Crawford".

David Crawford
Interim CEO



[Signature]
Chris Gardner
President



[Signature]
Kelly Scott
President



[Signature]
Jeff Guignard
Executive Director



[Signature]
Tyson Craiggs
1st Vice President



[Signature]
Caroline Andrewes
President & CEO



[Signature]
John Beckett
Vice President – Training,
Safety and Recruitment



[Signature]
Reg Ens
Executive Director



[Signature]
Dave Earle
President & CEO



[Signature]
Daniel Fontaine
CEO



[Signature]
Damian Stathonikos
President



[Signature]
Chris Atchison
President



[Signature]
Thomas Foreman
President



BRITISH COLUMBIA
HOTEL ASSOCIATION

[Signature]
James Chase
President & CEO



[Signature]
Christopher Nicolson
President & CEO



[Signature]
Ian Tostenson
President & CEO



[Signature]
Brad Herald
Vice President,
Western Canada



David Black
Director, Government
Relations & Public Policy



Anne Kothawala
President & CEO



Rob Hoffman
Director, Government &
Stakeholder Relations



Deborah Cahill
President



Neil Moody
CEO


Arlene Keis
CEO

Andrew Wynn-
Williams
Divisional Vice
President, BC


Chris Grajek
President

Ken McCormack
President & CEO



Michael Goehring
President & CEO



Dave Baspaly
President & CEO



Dale Miller
President



Susan Yurkovich
President & CEO



Scott Bone
CEO



Carolyn Campbell
Executive Director



Patrick Delaney
Vice President,
Health & Safety



Paul de Jong
President



Walt Judas
CEO



Mark von Schellwitz
Vice President,
Western Canada



Anne McMullin
President & CEO



Greg Wilson
Director
Government Relations



Rory Kulmala
CEO



Bryan Wallner
CEO



Fiona Famulak
President



Jason Henderson
CEO

Appendix – Terms of Reference

Proposed Terms of Reference for Workers' Compensation System Review

Whereas the *Workers Compensation Act* (the Act) was born out of a compromise between BC's workers and employers in 1917, where workers gave up the right to sue their employers or fellow workers for injuries on the job in return for an employer funded no-fault insurance system;

And whereas the last comprehensive review of the Act took place in 2002, and the last significant amendments to the Act were made in 2002 and 2003;

And whereas there have been significant changes in workplaces, the economy and the workforce of British Columbia over the past 16 years;

And whereas the Premier's July 2017 mandate letter to the Minister of Labour includes the following direction:

Review and develop options with WorkSafeBC to increase compliance with employment laws and standards put in place to protect the lives and safety of workers.

And whereas the Confidence and Supply Agreement from May 2017 contains the following commitment at Section 2 (d):

Improve fairness for workers, ensure balance in workplaces, and improve measures to protect the safety of workers at work so that everyone goes home safely and that workers and families are protected in cases of death or injury.

And whereas the Minister has directed the chair of the Board of Directors of WorkSafeBC to effect a systemic culture shift to ensure the workers' compensation system is more "worker centred", that injured workers be treated with compassion, respect and dignity, and that increases confidence in the system;

And whereas the Minister has supported this systemic culture shift by:

- Refreshing the Board of Directors of WorkSafeBC, including a new chair.
- Clearly articulating the needed culture change within WorkSafeBC itself to improve services, with a focus on injured workers who need care, compassion and respect while they recover.
- Directing the WorkSafeBC Board to remind employers of their responsibilities and accountability to reduce workplace injuries and death under the Act and the *Occupational Health and Safety Regulation* (OSHR).

Appendix – Terms of Reference

Directing the WorkSafeBC Board to review its Rehabilitation and Claims Services policies to determine if there are policies that could be amended to ensure a worker-centred approach which resulted in a report published on April 25, 2018 by Paul Petrie entitled "Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy". The report contains 41 recommendations for change which has led to the development of a workplan to engage interested stakeholders in a process to implement as many of the recommendations as possible. Stakeholder consultation is underway on the 2019-2021 workplan.

- Amending legislation (Bill 9-2018) to add a presumption for first responders who experience trauma as a result of their work and which results in a diagnosed mental health injury/disorder.
- Considering development of a regulation to expand coverage for the Bill 9 presumption to other occupations, including nurses and dispatchers (and call-takers) who support first responders.
- Directing the WorkSafeBC Board to prepare a report on the background and options available to WorkSafeBC under the WCA to manage the unappropriated balance in the Accident Fund.
- Leading a cross-ministry working group, with involvement and input from WorkSafeBC, to better protect people and the environment from the dangers of asbestos. A report for consultation and input was released December 19, 2018.
- Working to review how government, WorkSafeBC, and the Criminal Justice Branch should respond to serious injuries and fatalities of workers in light of Bill C-45 (2004).
- Working to support WorkSafeBC's implementation of a 5-year prevention strategy as part of its Strategic Plan to reduce workplace injury, disease and death and have BC become the safest jurisdiction in Canada for workers.

Now, therefore, the Minister directs that a review of the workers' compensation system be undertaken as follows:

1. Subject to further direction from the Minister of Labour, the review will assess the following specific issues:
 - (a) The policy and practices used in the workers' compensation system relating to supporting injured workers return to work.
 - (b) An evaluation of current WorkSafeBC policy and practices through a Gender-based Analysis Plus (GBA+) lens.
 - (c) Modernizing WorkSafeBC's culture to reflect a worker-centric service delivery model. This model should incorporate a best practices, research-supported approach to managing physical and mental injuries caused by the workplace.
 - (d) Recommendations dealing with issues related to the improved case management of injured workers.
 - (e) What specific steps are required to increase confidence of workers and employers in the workers' compensation system, including but not limited to the Fair Practices Office, and in the other services provided by WorkSafeBC.

Appendix – Terms of Reference

- (f) Whether there are any other urgent compensation issues that were not addressed in the final report to the Board of Directors of WorkSafeBC on how to manage the unappropriated balance in the Accident Fund.
2. A report will be provided to the Minister by September 1, 2019 and may include recommendations for amendments to the Act.
 3. The review will be undertaken by an individual (Janet Patterson) with expertise in the workers' compensation system, who is appointed by the Minister and who will approach the review in an independent, impartial, and balanced manner.
 4. The funding for the review, including the reviewer's compensation, will come from WorkSafeBC and will be administered by the Minister of Labour. WorkSafeBC will provide administrative and research support to the review.
 5. The reviewer will determine their own procedures, including the format for reporting out to the Minister and communications with stakeholders. It is expected that the review will engage in consultations with and receive submissions from interested employer and union/worker stakeholders from all regions of the province, including hearing from injured workers who choose to come forward to the reviewer. The reviewer will work with the Ministry to design the stakeholder consultation process.
 6. The reviewer will provide a draft of the final report to the Minister of Labour to review and provide input on prior to finalizing the report. The Minister of Labour will make the final report public after a reasonable period of time to review and consider it.

Given under my hand this 4th day of March, 2019.



Honourable Harry Bains, Minister of Labour