

# 2013 – 2016

## Comprehensive review of New Brunswick's Workers' Compensation legislation



Phase II

### Consultants' report

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# Forward

1. WorkSafeNB and the Government of New Brunswick have begun a three-phase, comprehensive review of workers' compensation legislation. It has been more than 20 years since the legislation has undergone a comprehensive review. The process is a collaborative effort between WorkSafeNB and the Department of Post-Secondary Education, Training and Labour (PETL), co-sponsored by the president / chief executive officer and the deputy minister, respectively.
2. The objective of the review is to ensure that the New Brunswick workers' compensation system appropriately addresses the needs and realities of current and future workplaces and strikes the appropriate balance between adequate compensation for injured workers and employers' fiscal interests.
3. A steering committee was established to oversee the review. The president / chief executive officer and the general counsel for WorkSafeNB and the deputy minister and assistant deputy minister, labour and policy at PETL, form the steering committee. Consultants and a subject matter expert were retained for both phases.
4. Phase I began in May 2013 with a report on what was heard during the consultation process released in October 2013. Phase II began in July 2015.
5. The final report on Phase II as prepared by the consultants, Rachel Bard, Ellen Barry and Brian D. Bruce, was presented to the steering committee in November 2015.

# Consultation process

6. The consultation process has as its objective the gathering of input from stakeholders. In both Phase I and II, two independent consultants were engaged to meet with stakeholders and to report back to the steering committee. Their mandate was to summarize, without passing judgment, the opinions expressed by the stakeholders.

## Phase I

7. A discussion paper on the three topic areas to be reviewed during Phase I was mailed to 220 of PETL's and WorkSafeNB's stakeholders, including employers, unions, universities, colleges, regional health authorities, non-profit organizations and chambers of commerce. The three topic areas were governance structure and mandate of the Appeals Tribunal; whether there should be an internal dispute mechanism; and, calculation of benefits under ss. 38.11(9) of the *Workers' Compensation Act*. Stakeholders were invited to submit briefs / comments as well as meet with a two-person panel.
8. Forty-six written submissions were received and 26 meetings were held with 62 individuals, including 17 injured workers, in five regions: Grand Falls, Bathurst, Fredericton, Saint John and Moncton. The consultants also met with the WorkSafeNB board of directors.
9. Following completion of Phase I, the *Workers' Compensation Act* was amended to create a new Appeals Tribunal that is external, separate and independent from WorkSafeNB. This was accomplished by the introduction of the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*, which received Royal Assent on May 21, 2014, and which came into force on April 1, 2015. In addition, through administrative changes, an internal review office has been established at WorkSafeNB, and the Workers' Advocate Service has been enhanced.

## Phase II

10. A process similar to that used in Phase I was used for Phase II. PETL and WorkSafeNB published three discussion papers on the following topic areas for which input from the public and stakeholders was requested:
  - the governance structure of WorkSafeNB;
  - Workers' and Employers' Advocates Services;
  - section 38 (benefits) of the *Workers' Compensation Act*.

These papers are available on the provincial government's Citizen Engagement and Consultations website:

- [www.gnb.ca/consultations](http://www.gnb.ca/consultations)

11. PETL invited 264 stakeholders to submit comments and / or to meet with the consultants. To ensure that the voice of the injured worker would be heard, letters were sent to all MLAs asking them to encourage any injured worker known to them to participate in the consultation process.
12. Thirty written submissions were received from workers, employers, associations, injured workers and others. In addition, 22 stakeholder meetings were held with 44 individuals, including injured workers, in five regions: Bathurst, Edmundston, Fredericton, Moncton and Saint John.
13. During the consultation process, the board met with the panel and submitted a document outlining recommended changes. This document was received after most of the consultations were held. Stakeholder comments in this report do not reflect their reaction to the board's recommendations. The recommendations are now on the WorkSafeNB website:
  - [www.worksafenb.ca](http://www.worksafenb.ca)

14. In addition to providing a summary of the comments and recommendations received from stakeholders on topics identified for discussion in Phase II, this report outlines comments received on topics ranging from the impact of workplace injuries on individuals to suggestions for improving operational efficiencies. Although these comments on other topics, found in the Supplementary Comments section of this report, do not specifically address the three areas under review in Phase II, they are relevant to the overall objective of providing improved services to injured workers.

# Governance of WorkSafeNB

## Introduction

15. The governance structure of WorkSafeNB is established in section 8(1) of the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*, which reads as follows:

- 8(1)** The affairs of the Commission shall be administered by a board of directors consisting of the following persons who shall be appointed by the Lieutenant Governor in Council
- (a)** Chairperson of the board of directors who, in the opinion of the Lieutenant-Governor in Council, is not representative of either workers or employers,
  - (a.1)** a Vice-Chairperson of the board of directors who, in the opinion of the Lieutenant-Governor in Council, is not representative of either workers or employers,
  - (b)** four or more persons who, in the opinion of the Lieutenant-Governor in Council, are representative of workers,
  - (c)** four or more persons who, in the opinion of the Lieutenant-Governor in Council, are representative of employers

**8(1.1)** The number of persons appointed under paragraph (1)(b) and the number of persons appointed under paragraph (1)(c) shall be equal.

16. The discussion paper, with respect to the governance structure of WorkSafeNB, asks the following question:

How well does WSNB compare to other Canadian jurisdictions in terms of: the structure of the board of directors, board membership, policy development and stakeholder input?

The abbreviation WSNB refers to WorkSafeNB.

## Background

17. The WorkSafeNB board of directors is made up of a chair, a vice-chair, four (or more) members representative of workers, and, four (or more) members representative of employers. The president / chief executive officer is designated as a non-voting member of the board. All voting board members, including the chair and vice-chair, are appointed by Cabinet for terms up to four years. They are eligible for reappointment for one additional term. Across Canada, chair appointments vary from three to five years, and member appointments vary from two to four years with the option of reappointment for one additional term.

18. According to the discussion paper, the equal representation model for a board is shifting across the country. Four boards have equal representation among workers, employers and the public. Six boards require equal representation between workers and employers. One board requires worker representation and also requires that an actuary and a health-care professional be on it. Another board does not impose any conditions on membership. In British Columbia, consideration is being given to ensuring that at least two board members have demonstrated occupational health and safety experience. Membership on boards across Canada ranges from five to 15.

19. Each year, the board has four business meetings and six policy meetings to authorize new policy as well as review and adjust existing policy. Policies in a workers' compensation system form the foundation for interpreting the *Workers' Compensation Act* and the processes to be followed. Staff must apply the board's policies. Policies are also a primary communications tool between the board and New Brunswickers. The policies may be found on WorkSafeNB's website for review:

- [www.worksafenb.ca](http://www.worksafenb.ca)

Each year, the board also establishes a five-year strategic plan and identifies risks facing the organization.

## Board size and composition

### Input from stakeholders

20. The majority of stakeholders who commented on the size of the board believed that the current size is appropriate. In fact, representation was made by both employer and worker groups to keep the composition of the board at four worker and four employer members. Employer groups argued that the current option of appointing more members is not necessary and requested that the words “or more” be deleted from ss. 8(1) (b) and (c). This suggested amendment was also proposed by the board.
21. There was essentially no support for adding either additional members or substituting a worker or employer representative with someone who would have an actuarial, medical or other background as described in the discussion paper. There was, however, support to include an individual who is an injured worker or who had experienced an injury, either as a worker or employer representative. This recommendation was made by representatives of injured workers and a private sector employer.
22. Some stakeholders noted that non-unionized workers were not represented on the board. One employer stakeholder suggested that non-union members could be selected from injured workers who attended the rehabilitation centre. A large private sector employer did recommend that the board be expanded to include two additional members who would represent unorganized labour and small business.
23. A large unionized public sector employer proposed that the number of unionized employee representatives should equal the number of employer representatives from unionized workplaces. It noted in its submission that these union and employer representatives from unionized workplaces could address the complexities that are not seen in non-unionized environments.
24. The issue of the competency of board members was raised by a number of stakeholders who supported a competency or skill-based board. Selection criteria could include competencies typically acquired through experience in the fields of health, safety, compensation and risk management as well as demonstrated leadership skills. Manitoba was referred to as a possible model.
25. The ability of the individual member to represent appropriately his or her constituents was seen as an overriding criterion by employer and worker stakeholders. For this reason, stakeholders emphasized the need for appointments to be free from political interference and conflict of interest.
26. The board recommended that ss. 8(1.2) of the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*, which states that the president / chief executive officer is a non-voting member of the board, be repealed. The board believed that removing this section would help clarify the respective roles of the board and the president / chief executive officer. The board maintained that it is responsible for creating the vision, direction and policies for WorkSafeNB, while the president / chief executive officer is responsible for managing the day-to-day operations. The president / chief executive officer would, however, continue to be present at board meetings as the link to the operations of WorkSafeNB.

## Board appointments and terms

### Input from stakeholders

27. Many stakeholders did not believe there was any need to change the length of appointments. The New Brunswick Federation of Labour, however, did indicate a concern regarding the inability of members to serve again after their reappointment. The federation of labour proposed that all members of the board, including the chair, be appointed for three years, eligible for reappointment for a second term and, after a three-year break in service, be eligible for a further two terms.



28. The board recommended amending the legislation so that the first term of office for a member would be extended from four to five years and the term of any reappointment would be for three years. According to its submission, new board members have a steep learning curve, and the additional one year on the initial appointment would allow a member, once experienced, to contribute for a longer period.
29. The board and the federation of labour also recommended allowing current board members to continue to serve following their term expiry date until a replacement member has been appointed. The issue of timeliness in the appointment of members, including the chair, was raised by other stakeholders.
30. One stakeholder, the New Brunswick Nurses Union, did support limiting appointments to two terms but recommended that the reappointments of the chair and vice-chair be subject to the approval of the board to ensure continued impartiality to employers and workers.
31. The staggering of board appointments was recommended by both the Coalition of New Brunswick Employers and the board. This was supported by other stakeholders.
32. A number of stakeholders had comments about how board members are selected and appointed. Most stakeholders representing workers or employers believed that board members should be nominated by the stakeholders. The larger worker stakeholders, such as the federation of labour, believed they should appoint the worker board members. The Coalition of New Brunswick Employers believed that stakeholders should nominate members but that government should appoint them. Some stakeholders noted that the current 30 days for individuals to apply for vacant board positions was too short.
33. The nurses union noted that in the past the labour movement would select one of the worker representatives. At that time, there were five worker and five employer representatives. The union supported a return to the practice of having the labour movement select a worker representative, and it believed that union representatives are best able to speak on behalf of the maximum number of workers.
34. In its submission, the board recommended the legislation be amended to require its members be appointed by the Lieutenant-Governor in Council on the recommendation of WorkSafeNB. The board believed it must have the authority to identify the people best qualified to carry out the mandate of WorkSafeNB.
35. The board also requested that language be added to the legislation requiring that its members be permanent residents of New Brunswick at the time of their appointment and that they continue to maintain residency in the province throughout the term of appointment. In addition, the board recommended that the legislation be amended to remove the requirement that the Lieutenant-Governor in Council approve the board's hiring of the president / chief executive officer. One other stakeholder identified residency as an issue and did refer to the need for the president / chief executive officer to be appointed on an indeterminate basis.

## **Effectiveness / functionality**

36. As noted earlier, the importance of WorkSafeNB maintaining its independence from government was stated by several stakeholders. The federation of labour stated in its submission that WorkSafeNB, "...must be structured to be a stakeholder driven organization with employers and workers being the two key stakeholder groups." It went on to state: "...it is imperative that both play a major role in the decision-making and, insofar as possible, decision-making be by consensus."
37. The Coalition of New Brunswick Employers stated: "...it is inappropriate for government to make decisions that impact the organization (and its financial stability) without the approval of the stakeholders." It also stated: "Good decision-making at the board level requires a full discussion and consensus by the stakeholders." The coalition also expressed the view that the legislation should state that a quorum be an equal number of employer and

worker representatives and, where there is an unequal number, only an equal number of votes should be cast. Some stakeholders indicated that to ensure the effectiveness of the board, annual reviews of board members' performance should be put in place.

38. Many stakeholders expressed interest in more opportunities for consultation with the board. One private sector employer suggested that a formal process such as a stakeholder conference be held every three years to solicit feedback. Other stakeholders indicated a lack of opportunity for consultation between them and the board. One stakeholder organization suggested that the minutes from board meetings should be posted on WorkSafeNB's website.
39. The board recommended that a provision be added to the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*, requiring that the Government of New Brunswick and WorkSafeNB maintain a Memorandum of Understanding that outlines their specific roles and responsibilities in this partnership. The purpose of this Memorandum of Understanding would be to allow the two organizations to work effectively together for the benefit of both.

# Workers' and Employers' Advocates services in New Brunswick

## Introduction

40. The positions of Workers' Advocate and Employers' Advocate are established in ss. 83, 83.1 and 83.2 of the *Workers' Compensation Act*, as follow:

83.1(1) The Lieutenant-Governor in Council may appoint one or more persons employed within the Department of Post-Secondary Education, Training and Labour as a Worker's Advocate, to assist any worker, or any dependent of a worker, in respect of any claim being advanced by him or her for compensation.

83.1(2) A Worker's Advocate may examine all files, records and other material of the Commission that relate to the injury or death in respect of which the claim is made.

83.1(3) The Commission shall make an annual grant to the Department of Post-Secondary Education, Training and Labour equal to the cost, including salaries and administration, of providing the services of Worker's Advocates under this section.

83.2 (1) The Lieutenant-Governor in Council may appoint one or more persons employed with the Department of Post-Secondary Education, Training and Labour as an Employer's Advocate, to assist any employer in respect to any claim being advanced for compensation by a worker employed by the employer, or by a dependent of the worker, and any related concerns of the employer in respect of assessment, charges and similar matters.

83.2(2) An Employer's Advocate may examine all files, records, and other material of the Commission that relate to that employer or the injury or death in respect of which the claim is made.

83.2(3) The Commission shall make an annual grant to the Department of Post-Secondary Education, Training and Labour equal to the cost, including salaries and administration of providing the services of Employer's Advocates under this section.

41. The discussion paper identifies the Workers' and Employers' Advocates Services as the second item to be considered for review during Phase II. Under this second item, the following three questions have been identified for consideration by stakeholders:

- How can Advocates Services for employers, injured workers and their dependants be improved?
- Where should the office or offices of Advocates Services be located?
- Can the wording of the Advocates' legislation mandate be improved to better support employers and injured workers in New Brunswick?

## Background

42. The Workers' Advocates provide advice and assistance to injured workers or their dependants who may question or dispute a decision of WorkSafeNB in relation to a claim for worker's compensation under the *Workers' Compensation Act* or the *Occupational Health and Safety Act*. Services primarily include:

- providing information about relevant legislation and WorkSafeNB policy;
- providing advice on whether a claimant or dependant has a basis for an appeal based on knowledge of the legislation, WorkSafeNB policies and the experience of past Appeals Tribunal decisions; and

- consulting with WorkSafeNB staff as well as preparing and making oral presentations of arguments before the Appeals Tribunal on a claimant's or dependant's behalf.

There are 11 Workers' Advocates working out of six locations: Bathurst, Edmundston, Fredericton, Miramichi, Moncton and Saint John.

**43.** The Employers' Advocates provide advice and assistance to New Brunswick and out-of-province employers on a cost-relief basis. They also provide advice on issues related to workplace injuries and deaths, and they may represent their interests before the Appeals Tribunal. Services primarily include:

- providing advice to employers on their rights and obligations under legislation and WorkSafeNB's policies, including presentations to employer groups;
- responding to employers' complaints on workers' compensation issues through consultation with WorkSafeNB representatives; and
- assisting employers as either respondents or appellants through the preparation and oral presentation of arguments before the Appeals Tribunal.

There are four Employers' Advocates working out of four locations: Bathurst, Dieppe, Fredericton and Saint John.

**44.** The essential job requirements for Workers' and Employers' Advocates are a related university degree and experience, knowledge and expertise in:

- the principles and processes of administration law;
- New Brunswick's workers compensation legislation and the policies and procedures of WorkSafeNB;
- a wide range of legal, medical and other technical resources; and
- written and oral advocacy techniques.

Neither Workers' nor Employers' Advocates are required to be lawyers.

**45.** Stakeholders who participated in the public consultations held in the fall of 2013 under Phase I expressed the views that the Advocates Services had experienced workload pressures causing delays in service for injured workers. In response, the Department of Post-Secondary Education, Training and Labour (PETL) conducted an internal performance improvement review of Workers' Advocates Services in the spring of 2014 that brought some enhancements and a new service delivery model implemented in 2014-15. This included the following elements:

- consolidation of the management of the services provided by Workers' and Employers' Advocates in one administrative unit, Advocates Services;
- a new case management system (database) to ensure consistency and to track the delivery of services to employers and injured workers;
- new service standards for responding to initial calls (48 hours) and file assessment (30 calendar days);
- the number of Workers' Advocates' positions was increased to 10 to better manage caseload and reduce wait time for file assessment and filing appeals;
- an additional five Workers' Advocates were being hired to address the backlog;
- a new bilingual intake process that includes a 1-800 number was put in place;
- a new triage process was developed; and
- two new dedicated intake positions were created.

**46.** Further enhancements, planned for 2015-16, include:

- investment in professional development, including certification in administrative justice and crisis intervention;

- development and distribution of online and print information products for employer and injured worker clients on the appeals and dispute resolution processes under the new amendments to the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*;
- development of client relations based on best practices that include greater in-person contact; and
- holistic case-managed service provision for injured workers and their dependants, including assistance and dispute resolution from the beginning of a claim before it goes to appeal.

## **Input from stakeholders**

47. Comments on the Advocates Services were received from stakeholders representing both employers and injured workers as well as from the Advocates Services at PETL and WorkSafeNB. While some stakeholders had did not have any comments about the services, most acknowledged the value of the services as well as the professionalism and dedication of those who perform the work. The majority also had some comments in the three areas under consideration.

## **Areas for improving services**

### **Advocates Services**

48. The WorkSafeNB board of directors recommends a yearly reporting and meeting with the Advocates Services to exchange information to ensure service excellence to its clients and stakeholders.
49. The Canadian Union of Public Employees (CUPE) and the New Brunswick Federation of Labour believed that WorkSafeNB and PETL should seek input directly from the Advocates Services about how injured workers, their families and the employers could be better served.
50. We heard favourably from some stakeholders about the provincial government's effort to enhance professional development programs for advocates. In addition, they would like to have access provided to lawyers for the more complex legal issues. While the enhancement is underway, concern was expressed by a stakeholder representing injured workers that there are continuous lengthy delays in accessing the Advocates Services. It was suggested that an internal dispute mechanism could help expedite the adjudication of claims.
51. The Law Society of New Brunswick cautioned that advocates not provide services beyond their scope of practice and avoid practices that are within the scope of the regulated legal profession. To address this concern, the law society said it:

...would welcome an opportunity to work with the Department of Post-Secondary Education, Training and Labour to see if we can agree on a job description that the LSNB would be willing to exempt from the definition of 'practice of law' found in the *Law Society Act, 1996*, similar to what was done in Ontario.

The abbreviation "LSNB" mentioned above refers to the Law Society of New Brunswick.

The law society further stated:

By reaching this accommodation, this will regularize the current practice of the Workers' Advocates Office and remove any unnecessary restrictions on the provision of this service.

### **Employers' Advocates**

52. A number of employer stakeholders referred to the lack of awareness by employers of the services offered by the Employers' Advocates.

53. Currently, as referenced in the discussion paper, about 24% of employers use the Advocates Services when proceeding to the Appeals Tribunal. The other 76% generally retain their own counsel. One large public sector employer suggested that the low use of Advocates Services be explored further to determine whether it is a result of an access issue for employers.
54. With only four Employers' Advocates covering the province, the Retail Council of Canada felt that employers are limited in their ability to benefit from this valuable resource. Whereas the Coalition of New Brunswick Employers questioned the disparity of four Employers' Advocates compared to 10 Workers' Advocates, the Vitalité Health Network claimed that the support for the employer is not equitable. Vitalité also recommended accentuating support and education for employers not only during appeals but in all phases of the process, such as during the adjudication of files and the drafting of letters of objection to accident claims with the view to avoid proceeding to the Appeals Tribunal.
55. While the quality of the work performed by the Employers' Advocates was not questioned, some stakeholders expressed that their contribution is limited to being reactive in assisting employers with appeals because of their low numbers.
56. Several stakeholders commented that, with additional resources, the Employers' Advocates could expand their role and engage in a more proactive outreach to help employers improve health and safety in workplaces as well as provide employers with training in claims management; advice regarding occupational health and safety procedures; and assistance with consultation on government policy consultations.
57. CUPE also raised the concern regarding the employer's failure to submit a completed Form 67 – Report of Accident or Occupational Disease – within the three working days following an accident and how it creates additional work for the Advocates Services. CUPE suggested that the *Workers' Compensation Act* and policies be changed ...“to install a progressive punishment system for employers that fail to adhere to their requirements.”

## **Workers' Advocates**

58. Stakeholders applauded the recent enhancements made to Workers' Advocates Services. However, further increases in the number of Workers' Advocates were suggested to help injured workers earlier in the process and dependants who are left fending for themselves after the fatality of their spouse. As an example, incorporating an active offer approach to injured workers or dependants encountering difficulty in processing their claim or clarifying their entitlement would be a way of improving the service.
59. Furthermore, several stakeholders noted that the workload of the Workers' Advocates Services has been strained due to the number of injured workers having to go through the appeal process to receive the compensation to which they are entitled. Worker stakeholders called on WorkSafeNB to change its policy about the acceptance of claims. The New Brunswick Building Trades Union recommended:
- ...that there be a review of the current claim processing system within WorkSafeNB to decrease the rejection rate of valid claims, which will also result in a reduction of appeals, thereby easing the burden on the existing advocates.
60. From the Workers' Compensation Appeals Tribunal's (WCAT) perspective, the operation of the Advocates Services directly affects the operation of WCAT. It was noted that the existing backlog of cases before the Appeals Tribunal can be attributed in part to the lack of advocates; the request for postponement of scheduled cases experienced in 2014; and the period in 2015 when the Appeals Tribunal was being restructured. A majority of the injured workers who appeal are represented by Workers' Advocates (75%). WCAT believed it is necessary for the Workers' Advocates to assist all injured workers who wish to be represented by an advocate. It will be important on a go-forward basis for the Advocates Services to be able to meet the demand.

## Location of the Advocates Services offices

61. While a few stakeholders recognized the cost saving advantages of consolidating the office location of the Advocates Services, most shared the opposite view. Some expressed the need for a more balanced approach to the structure and funding as well as maintaining a certain level of separation between the Workers' and Employers' Advocates.
62. The building trades union went as far as recommending "... (1) that the government reject the creation of a centralized office for Workers' Advocates; and (2) that any regional office structure be placed at strategic locations that would not place an excessive travel burden either for the advocates or injured workers within a specific region"
63. Another relevant quote from the federation of labour was: "We live in a mostly rural province with practically no public transportation, especially in the Northern part of the province. To ask injured workers who have been denied benefits, to travel even further for services will put an additional financial burden, which they cannot afford, on them or their families."
64. One worker stakeholder indicated that with the low intake of the Employers' Advocates Services, reducing the number of locations from four to one or two would be acceptable. Another suggested outsourcing claim management to third-party providers.

## Mandate in legislation

65. Some stakeholders wanted to expand the mandate and level of independence of the Advocates Services in relation to WorkSafeNB. Unifor provided the following comment:

That WorkSafeNB should not only strengthen services but also ensure that the Workers' Advocate Service is seen and behaves as independent of the Board. This includes budgets for independent medical reviews, budgets for independent experts and the capacity to investigate existing and new evidence.

66. Other stakeholders said the Employers' Advocates' mandate should be broadened to include proactive reaching out to the employer community, promoting awareness of employers' occupational health and safety obligations, including providing assistance and training to employers in dealing with orders issued under the *Occupational Health and Safety Act* and policy consultation.
67. Some stakeholders opposed an increased mandate and workload without adequate staffing and recommended that any addition to the mandate of advocates result in a consequent increase in their number. Several stakeholders made reference to the Nova Scotia advocates' system and suggested that there would be benefit in reviewing their legislation as well as their capacity to provide proactive outreach services. The board recommended the *Workers' Compensation Act* be amended as follows:
  - 1) A system of information sharing where an annual report on the activities, volumes and functions of the workers' and employers' advocates are provided to the WorkSafeNB Board of Directors no later than July 1 of each year
  - 2) An annual meeting between WorkSafeNB and the Advocates' Services to discuss their activities and issues of mutual interest.

# Review of section 38 (benefits), *Workers' Compensation Act*

## Introduction

68. The discussion paper notes that the core benefits and entitlements available to injured workers are found within section 38 of the *Workers' Compensation Act*. The questions related to section 38 identified for discussion during Phase II include:

- How well does WorkSafeNB compare to other Canadian jurisdictions in terms of type and number of benefits provided in section 38?
- How can section 38 be redrafted to make it more readable?
- Does section 38 strike the necessary and appropriate balance between adequate compensation for injured workers and employers' fiscal interests?
- Does section 38 adequately address the issues raised in the New Brunswick Court of Appeal's decision in the matter of *J.D. Irving Ltd. (Sussex Sawmill) v. Wayne Douthwright and Workplace Health, Safety & Compensation Commission*, 2012 NBCA 35?

69. Stakeholders were also asked in the discussion paper to make input on the following specific topics that are addressed in section 38:

- Loss of Earnings benefit;
- Spousal dependent (survivors') benefits;
- Three-day waiting period;
- Collateral benefits (top-ups);
- Annuity or pension benefits paid at age 65;
- Permanent physical impairment;
- Estimated capable earnings (deeming).

## Loss of Earnings benefit

### Background

70. Currently, ss. 38.11(2) of the Act requires that an injured worker be compensated in an amount equal to 85% of his or her net loss of earnings. In comparing the percentage of net loss of earnings received by injured workers, the discussion paper notes that none of the Maritime Provinces bases the loss of earnings benefit on more than 85% of net income. Ontario is also at 85%, but Quebec and the western provinces are at 90%.

71. The "maximum annual earnings" that can be considered by WorkSafeNB when calculating an injured employee's net loss of earnings is established in ss. 38.1(3) as an amount equal to one and one-half times the New Brunswick Industrial Aggregate Earnings, defined in ss. 38.1(1). Earnings in excess of this maximum amount are not insured under the *Workers' Compensation Act*.

72. In New Brunswick, the maximum insurable (compensable) earnings for 2015 was \$60,900, which was higher than in Nova Scotia (\$56,800) or Prince Edward Island (\$52,100) and just slightly less than Newfoundland and Labrador (\$61,615). The maximum compensable earnings in other provinces, from Quebec west, were significantly higher: Quebec (\$70,000), Ontario (\$85,200), Manitoba (no maximum), Saskatchewan (\$65,130), Alberta (\$95,300) and British Columbia (\$78,600).



73. There are, therefore, two important criteria to consider in comparing the loss of earnings benefit in workers' compensation legislation in the various Canadian jurisdictions: (1) the maximum annual earnings that are insured; and, (2) the percentage of estimated loss of earnings that are compensable.

### **Input from stakeholders**

74. Almost unanimously, employer stakeholders making representations supported maintaining the compensation rate at 85% of the injured worker's net loss of earnings. The general feeling was that the compensation rate of 85% compares favourably with other jurisdictions across Canada. Secondly, some argued that studies have shown that there must be a differential between pre-injury earnings and compensation to ensure that the injured worker has a motivation to return to work. Restaurants Canada in its written submission commented as follows:

The current benefit level of 85% of net earnings achieves this balance of compensating injured workers while establishing an insurance deferential. Benefits in New Brunswick are in line with other jurisdictions and on the high end of the benefits in Atlantic Canada.

Restaurants Canada went on to make the following point regarding indexation of long-term benefits:

Injured workers in New Brunswick also benefit from the fact that New Brunswick is one of only four provinces in Canada where long-term benefits are fully indexed to inflation.

75. In contrast, many of the worker stakeholders, such as the Injured Workers' Advisory Committee, supported restoring the compensation rate to 90% of the estimated loss of earnings where it had been in New Brunswick prior to 1993 when it was reduced because of the negative financial position of WorkSafeNB. It was argued by worker stakeholders that the low assessment rate in New Brunswick and the funding surplus leaves room to provide additional resources to injured workers. Further, it was noted that the majority of other jurisdiction in Canada pay 90%. The New Brunswick Federation of Labour, in its written brief, supported the increase to 90% for the following reasons:

Reducing benefits below 90% of net on the grounds that the after tax incomes of workers in receipt of benefits are supposedly not significantly impacted ignores other important considerations. These include the injured worker's possible loss of pension contributions and credits, vacation and E.I. coverage, as well as childcare and transportation obligations. Nor is there any accounting for the personal hardship associated with workplace accidents such as pain and suffering and job impacts.

76. The WorkSafeNB board of directors, in Recommendation 21 of its submission, proposed that the compensation paid to injured workers remain at 85% of loss of earnings. Its recommendation was based on a jurisdiction comparison of wage loss protection that shows the Atlantic Canada percentages ranging from 75% to 85%, Ontario at 85% and Quebec and Western Canada at 90%. No estimate of the cost of raising the percentage to 90% was provided by WorkSafeNB.

77. As noted earlier, the maximum annual earnings in New Brunswick, as defined in ss. 38.1(1), was \$60,900 in 2015. There were very few, if any, specific comments by employer stakeholders relating to the maximum annual earnings limit on which benefits are based. One of the employer stakeholders, BIRD, noted that the maximum amount of compensable earnings in New Brunswick is higher than in the other Maritime Provinces, but it did not object to this. It was felt that the reason for it was based on the amount of industrial and natural resources development industries in New Brunswick compared to the other Maritime Provinces.

78. Some of the worker stakeholders argued that the maximum annual earnings that can be compensated should be increased. The New Brunswick Nurses Union noted that nurses, who are being paid at the upper range of a nurse's salary, will only receive 70% of their average net earnings if their actual salary is used in the calculation

process, as opposed to the 85% an injured worker earning less than \$60,900 in 2015, the maximum annual earnings for that year, would receive. The union made the following argument that the principle of security of payment requires maximum annual earnings be increased:

NBNU believes that a significant negative difference between a worker's pre-injury salary and the Loss of Earnings Benefit they receive while on workers' compensation is a violation of the principle of security of payment, a founding principle of workers' compensation laws in Canada. Where compensation benefits are intended as income replacement for a worker who is unable to work due to workplace injury, payment to that worker cannot be considered to be secure when the benefit is unfairly below their working wages. In order to uphold the principle of security of payment, NBNU believes the maximum annual earnings used to calculate Loss of Earnings Benefits should be raised to a more fair level.

The abbreviation "NBNU" mentioned above refers to the New Brunswick Nurses Union.

79. The Injured Workers' Advisory Committee went further to recommend that there should be no cap on benefits paid. It did suggest, however, that the move to 100% of earnings could be started gradually by increasing the cap to \$75,000.
80. The board, in Recommendation 13 of its submission, proposed that the maximum annual earnings in New Brunswick be increased from 1.5 to 1.75 of the New Brunswick Industrial Aggregate Earnings. As an example, if the 1.75 multiplier were to become effective in 2016, the maximum compensable earnings would be \$72,100 as opposed to \$61,800 if the current formula is maintained. In terms of costing, employers with employees whose incomes are in the new higher range of maximum insurable earnings will have to pay assessments on this increased compensation range. The increased assessment from those employers will basically offset any increased compensation payments. It is not estimated what effect this increase would have on the average assessment rate for New Brunswick. It is estimated that the annual cost increase of this change for self-insured employers will be \$500,000 combined with an increased liability of \$3.318 million. Under the *Firefighters' Compensation Act*, employers will incur an annual increased cost of \$30 per firefighter and an increased liability of \$933,900. Of the claims currently being managed by WorkSafeNB, about 9% of injured workers have earnings that are above the maximum annual earnings. WorkSafeNB did not indicate what percentage of these injured workers with earnings above the current maximum annual earnings limit would fully fall within the new proposed maximum.
81. The board, in Recommendation 16 of its submission, proposed ss. 38.11(12) of the *Workers' Compensation Act* be amended to require a consistent annual review of compensation for loss of earnings on the anniversary date that loss of earnings began. Currently, ss. 38.11(12) requires an annual review take place on "the anniversary date of the injury or recurrence of the injury." This date does not always coincide, however, with the date when the actual loss of earnings and, necessarily, the loss of earnings benefit began. Occasionally, there may only be a few weeks between the commencement of compensation and the requirement for an annual review. The proposed amendment is intended to correct this situation so that the annual review always occurs on the anniversary of the date that the loss of earnings benefit began.

## Spousal dependent (survivors') benefits

### Background

82. The discussion paper describes the current spousal dependent benefits in New Brunswick as follows:

Spousal dependent benefits are paid in differing amounts depending on the date of death. Since 1998, surviving spouses have received 80 percent of the deceased worker's net pre-accident earnings to a maximum set in legislation on a monthly basis for the first year after death. The maximum amount of insured earnings is calculated under the same formula as for insurable

earnings for injured workers. Within one year after the death, the surviving spouse must elect to receive one of two available benefit streams. WorkSafeNB pays for the surviving spouse to receive independent financial advice before making this election. Under one option, the spouse is paid at 85% of the deceased worker's average net earnings less Canada Pension Plan ("CPP") to age 65. Under another, a lump sum payment is made to the spouse and monthly payments are made to each child who was a dependent of the deceased worker.

How spousal dependent benefits across Canada are administered is different in each jurisdiction. Most are based on a percentage of the deceased worker's average net earnings (70 to 90%). Some, such as Saskatchewan and Alberta, have a minimum monthly rate for a period and help the spouse become gainfully employed. The compensation rate in other provinces, such as Ontario and British Columbia, is based on the age of the surviving spouse.

## Input from stakeholders

**83.** There was limited input from stakeholders on this topic. Two worker stakeholders, the federation of labour and the Canadian Union of Public Employees (CUPE), proposed that the current percentage of the deceased worker's average net earnings be raised to 90%. CUPE argued that with nationally low assessment rates and a well-funded program there is no justification for not being able to fund to 90% of a deceased worker's lost earnings. Another stakeholder, speaking in favour of the current benefits for survivors, pointed out that New Brunswick is one of only four jurisdictions where the dependent spouse benefits are automatically indexed to the percentage increase in the consumer price index.

**84.** Another worker stakeholder, Unifor, questioned why, following the *Douthwright* decision, CPP was being deducted from the net earnings of the deceased employee when calculating the benefit to be paid to the surviving spouse. The justification given for the continuation of this deduction following the *Douthwright* decision is that it is specifically provided for in ss. 38.91(1.1) of the *Workers' Compensation Act*. It reads as follows:

Any compensation or benefits payable by the Commission under section 38.51, 38.52, 38.53 or 38.6 to a dependent, other than a dependent child, shall be reduced by the amount that person is entitled to receive under the *Canada Pension Plan* relative to the death.

There is no similar wording in the *Workers' Compensation Act* applying to injured workers. As this difference in the formula used to calculate the average net earnings for an injured worker and the net earnings for the surviving spouse of an injured worker was not specifically raised in the discussion paper, there was no input from stakeholders as to whether ss. 38.91(1.1) should be amended to bring it in line with the *Douthwright* decision or whether there are other justifications for the difference in the formula.

**85.** A spouse of a deceased injured worker noted that she had obtained an extension of the deadline for making a choice between the two plans offered to survivors because of the complex issues that needed to be resolved in making her choice. She also noted that as a surviving spouse of an injured worker, she is not eligible for household upkeep allowances that her husband would have been entitled to if he had survived and become disabled. She proposed that the spouse of the deceased injured worker be entitled to the same benefits.

**86.** The board, in Recommendation 24 of its submission, proposed that the *Workers' Compensation Act* be amended to replace the two benefit plans for surviving spouses with one plan containing the following benefits:

- 85% of the deceased worker's loss of earnings from the beginning of the claim and until the surviving spouse attains age 65, with no family income test; and
- 10% to be set aside for the purchase of an annuity at age 65

It was noted by WorkSafeNB that improvements to burial and related expenses in 2012 made the distinction in the two current plans less distinguishable than before. WorkSafeNB further noted that the proposed amendment would improve the benefit, reduce the uncertainty of choosing between benefit plans, and better align with other jurisdictions and with the model for injured worker benefits in New Brunswick.

## Three-day waiting period

### Background

87. The discussion paper describes the current provisions relating to the three-day waiting period as follows:

There is currently a requirement in New Brunswick that an injured worker go three days without employment-related pay after an injury. This provision does not apply to any injured worker who is admitted as an in-patient to a hospital after the workplace accident, nor does it apply to police and firefighters. An injured worker who remains off work due to the injury for more than 20 working days is reimbursed for the three days of pay. Likewise, if an injured worker returns to work but has a recurrence of the same injury within 20 working days that worker is not required to undergo a further three day waiting period.

The Maritime Provinces are the only jurisdictions in Canada that have a waiting period whereby the worker is not paid immediately following an injury. The waiting period is 2 days in both Prince Edward Island and Nova Scotia.

### Input from stakeholders

88. Most stakeholders making representations addressed this issue. The majority of the worker stakeholders favoured eliminating the waiting period, arguing that New Brunswick is only one of three provinces that continue to impose this requirement. T.A. Barron, in his written submission, raised the following questions:

Why should a worker who sustains an injury within the workplace, whose recovery is less than 20 working days, be subject to no benefit entitlement for these 3 days? The question to be asked is: what was the logic to this legislative change and what purpose did it serve?

The New Brunswick Building Trades Union, in its submission, also asked that the waiting period be eliminated.

89. CUPE, in its brief, argued that the waiting period does a terrible disservice to workers and should be eliminated. CUPE went on to explain the particularly difficult situation that employees working a varied schedule have in relation to the waiting period:

Our members have reported that for those who do not work a regular shift schedule, the wait may be even longer than 3 days.

They have also reported that at present, if an injured worker works a varied schedule (Ex: 4 days on, 4 days off), then WorkSafeNB considers all 7 days of the week as potential working days and the equivalent to 3/5 day or 60% wait period is calculated to be 4 days.

Then the injured worker has to lose 4 consecutive work days before they become eligible for compensation. Additionally, the avg. gross weekly wage is pro-rated over 7 days instead of the actual avg. of the days per work week they work.

The Injured Workers' Advisory Committee recommended that no changes be made to the waiting period on the basis that it was fair to both injured workers and employers.

90. Interestingly, employer stakeholders were more or less evenly split as to whether the waiting period should be retained or eliminated. The Retail Council of Canada spoke in favour of the waiting period for the following reasons:

Similar to an insurance program, the three-day waiting period should be considered like a deductible, which helps to protect the system from frivolous and small compensation claims. Such protection helps to keep minor incidents from affecting an overall experience rating. Retailers feel that the current three-day waiting period protects the system while still being compassionate to those in legitimate need of the system.

91. The majority of the cities that made representations were in favour of eliminating the waiting period. It was noted in a submission from the City of Fredericton that the waiting period had already been eliminated for police and firefighters. In contrast to the argument that the waiting period discourages abuse of the compensation system, it was noted that an employee who is injured may tend to stay out for 20 days to avoid the three days of lost pay. Others argued that some workers do not report an injury as they cannot afford to lose three days of pay. The City of Edmundston also recommended the elimination of the waiting period.

92. NB Power, in its submission, made the following point:

As indicated in your Discussion Paper, the Maritime Provinces are the only jurisdictions in Canada that have a waiting period, whereby the worker is not paid immediately following an injury. NB Power supports the elimination of this waiting period so that employees do not lose earnings, for which they are never reimbursed, as a result of injury.

93. The board, in Recommendation 11 of its submission, proposed the waiting period be reduced from three days to two, with all other provisions remaining the same. The rationale for this recommendation is that it would align the requirement with that in Nova Scotia and Prince Edward Island, the only other provinces with a waiting period. It is estimated that the cost of this change on the assessment rate would be between \$0.05 and \$0.25 for assessed employers. The estimated cost for self-insured employers is between \$500,000 and \$3.4 million. WorkSafeNB, in its submission, provided a detailed breakdown of the cost of entirely eliminating the waiting period as well as the cost of reducing it to one or two days. The actuarial evaluation, done for the Comeau report in 2008, indicated that the cost can only be estimated within a broad range, with the extreme scenario for eliminating the waiting period, suggesting it could require a significant increase in assessment rates.

94. It is noted in the commentary accompanying the WorkSafeNB recommendation that a waiting period existed in the New Brunswick legislation from its commencement in 1918 until 1975, when it was effectively removed. The three-day waiting period was introduced in 1993, and lost time claims declined by approximately 50% at that time. It was argued that a waiting period is consistent with the Meredith principles relating to the creation of workers' compensation in 1913 and promotes fairness and balance with respect to the financial burden faced by workers and employers.

## **Collateral benefits (top-ups)**

### **Background**

95. The discussion paper summarizes the current treatment of collateral benefits as follows:

In New Brunswick, an injured worker is allowed to earn a maximum of 85% of his or her pre-accident net earnings through a combination of compensation benefits and financial payment/wages. Although an employer may make additional financial payments to the injured worker who is receiving compensation benefits (Top-Up), legislation requires reduction of compensation benefits so that the combined total received by the injured worker does not exceed 85% of pre-accident net earnings.

Four jurisdictions do not allow for top-ups: Newfoundland and Labrador, Prince Edward Island, Manitoba and New Brunswick. Other jurisdictions either allow for top-ups within their legislation or are silent on the topic.

96. The section of the *Workers' Compensation Act* governing top-ups or supplements is ss. 38.11(9), which was addressed in Phase I. The consultant's report for Phase I outlines the response of stakeholders at that time when the focus was on the recently released *Douthwright* decision by the New Brunswick Court of Appeal. The conclusions reached by the court are quoted in that report.
97. The *Douthwright* decision determined that CPP retirement benefits could not be used to reduce a workers' compensation entitlement under the *Workers' Compensation Act*. The decision, however, has raised subsequent questions as to whether certain other remuneration, income replacement or supplementary benefits received from the employer or an employment related source such as sick leave, vacation leave, bonuses and other payments, often referred to as top-ups, should be deducted from a worker's loss of earnings benefit pursuant to ss. 38.11(9) of the Act.
98. Following the release of the *Douthwright* decision, WorkSafeNB Policy 21-215: *Supplements to Compensation* was issued on July 26, 2013. It replaced an earlier version of the same policy. The purpose of the update was to make Policy 21-215, which provides principles that interpret ss. 38.11(9) and ss. 38.2(2.5) of the *Workers' Compensation Act*, consistent with the *Douthwright* decision. Under Policy 21-215, compensation benefits are reduced based on the following test:

WorkSafeNB reduces loss of earnings benefits when:

- The remuneration is earned and received by the injured worker for the same period during which compensation is paid;
  - The remuneration is from the employer or an employment-related source;
  - There is no requirement to reimburse the remuneration; and
  - The combination of benefits and remuneration exceeds 85% of pre-accident net earnings.
- All four parts of this test must be satisfied to reduce benefits.
99. Policy 21-215 goes on to provide that estimated capable earnings, employment insurance benefits and employer-sponsored disability benefits shall be deducted from the compensation benefit. Policy 21-215 further provides that the compensation benefit should **not** be reduced as a result of an employee receiving the following remuneration:

Remuneration received during the worker's compensation period but earned prior to the compensation period shall not be deducted from loss of earning benefits. Examples include but are not limited to:

- Vacation pay;
- Bonuses; and
- Sick leave benefits.

Although Policy 21-215 is being enforced, questions have been raised by some stakeholders whether it accurately reflects the intention of the court in the *Douthwright* decision.

## Input from stakeholders

100. With respect to sick and disability pay, the majority of employer and worker stakeholders felt it was inappropriate for injured workers on compensation to receive sick and disability pay while in receipt of compensation benefits based on 85% of their pre-accident net earnings. Vitalité Health Network, in its written submission, emphasized the importance of understanding the terms on which sick leave is provided to employees as

these specific terms may influence the application of the principles set out in the *Douthwright* decision. The following comments (an unofficial English translation) from the brief submitted by Vitalité are reflective of many stakeholders:

Review the decision and Policy or the interpretation of WorkSafeNB in order to delete sick days from the definition of 'sources of revenue'. It is possible that for certain organizations, sick days are a negotiated source of revenue in their collective agreement or under their employment contract. However, the sick days are considered like insurance at Réseau de Santé Vitalité and the government. In fact, at voluntary or retirement departures, the sick bank is not paid out as a revenue source. Therefore, we question the fact that this is attributed to the revenue source prior to the accident. We are of the view that WorkSafeNB went too far in its interpretation.

Receiving sick days and benefits from WorkSafeNB at the same time is not logical in our opinion. The employees receive more revenue by being sick than at work. This is a financial burden on the employer and a double payment to the employees and it must stop. It should be noted that the provincial employees' long term disability plan (LTD), managed by Medavie, does not allow one to benefit from both sick leave benefits and LTD at the same time. The same logic should be applied by WorkSafeNB.

If this recommendation is not followed, we recommend that employees must be paid (85%) by WorkSafeNB and obtain an equivalent 'top up' with banked available sick days to a maximum of 100% of salary.

- 101. Not all stakeholders, however, were in agreement that sick leave and other supplements should be deducted from the loss of earnings benefit. The Injured Workers' Advisory Committee recommended that no remuneration earned by the injured worker should be deducted from benefits. As a rationale for the recommendation, it submitted the following comment:**

If the remuneration was earned by the injured worker, it is theirs and should not be deducted from loss of earnings benefits. It should be up to other programs or employers to determine if they need to make changes to their systems to account for injured workers receiving several benefit types at the same time, *i.e.*, an injured worker receiving sick pay and compensation benefits. It is up to the employer to make changes to their policy if they do not wish this situation to occur.

**In discussion, the committee clarified that, in making this recommendation, it was not arguing that sick leave should not be refunded to the employer.**

- 102. Horizon Health Network made the following comment regarding sick time and vacation time:**

Injured Horizon employees are currently being told that they have the right to access pre-accident earned sick time and/or vacation time during the length of their WorkSafeNB claims. While this may be permissible in some circumstances, such as to allow those who earn greater than the maximum insured benefits to receive a full 85% of their pre-injury earnings, employers should have the discretion whether to allow employees to draw from these benefits. Receipt of earnings greater than the 85% permitted under the legislation could be a disincentive to a timely return to work.

- 103. There were fewer comments from stakeholders whether vacation pay and bonuses should be deducted from an injured worker's net earnings, although the inference was that many saw them in the same category as sick and disability pay. There was no discussion, however, as there was with sick pay, as to whether the contractual right to vacation pay and bonuses resulted in them being defined as revenue earned prior to commencement of compensation benefits.**



104. The Canadian Life and Health Insurance Association Inc., which also made submissions during Phase I on this topic, commented on the difficulty it had encountered in providing employment insurance benefits to injured workers. Although it makes every attempt to avoid interfering with the requirement that injured workers can only receive compensation payments equating to 85% of their pre-accident net earnings, it continues to run into difficulties in providing insurance benefits that are not found to be in breach of the three-day waiting period and/or the benefit claw-back provisions found in ss. 38.11(9) of the *Workers' Compensation Act*.
105. Several stakeholders expressed concern that employers should be able to top up or compensate an injured worker for the difference between his or her pre-accident net earnings and what the worker receives in compensation from WorkSafeNB (85% of the workers' pre-accident net earnings). If ss. 38.11(9) prohibits this type of top-up, it was argued it should be amended. Their position was that the employer should be able to do it. Other stakeholders argued that employers should, at least, be able to top up an injured worker for income that the worker had earned in excess of the maximum compensable earnings (\$60,900 in 2015) under the *Workers' Compensation Act* for which the worker cannot be compensated by WorkSafeNB.
106. The following quotations provide insight into the strong feelings that many stakeholders had about the question of top-up:

**Canadian Union of Public Employees**

If an employer decides that they want to help injured workers above what the existing workers' compensation insurance provides, the worker should not be penalized for this and the WorkSafeNB should not be making a financial gain from such top-ups. In short, insurance should be paid out at the promised rate, regardless of what other financial help an employer wants to offer their workers.

To remedy this issue, CUPE calls for changes to the *Workers' Compensation Act* that remove all restrictions on additional or 'top-up' payments to injured workers. An additional option is that insurance payments are changed immediately to replace 100% of lost wages so that a top up is not required.

Restrictions against top-up constitutes outright interference with the free collective bargaining process and the right of workers to freely negotiate all terms and conditions of employment. The measure in question is unfair to injured workers and should be removed.

**Unifor**

We recommend to remove all restrictions on salary top-ups and to allow individual employers and workers to determine the payments, if any, in excess of legislated benefit levels.

Also, we recommend ensuring that workers receiving compensation benefits as well as CPP Disability Benefits will not have their workers' compensation benefits reduced.

**BIRD**

With regards to Collateral benefits (top-ups), we feel that WorkSafeNB should compensate injured workers to the 85% threshold they are entitled to as well as allowing their employer to top-up. We do not feel that the employee should be penalized for working for an employer who is willing to provide this benefit. Additionally, we are concerned that the restriction is not well-controlled, where, we are unsure if any audits pertaining to this practice are performed by WorkSafeNB or if the frequency in which these audits are performed is adequate.



### **New Brunswick Nurses Union**

New Brunswick is only one of four jurisdictions that do not allow for top-ups. NBNU recommends changes to legislation to allow for top-up under free collective bargaining. This will be particularly pressing for NBNU's members if the Maximum Assessable Earnings in New Brunswick is not raised to allow professionals, such as nurses, who earn above those levels to receive benefits closer to their actual net loss of earnings.

### **Restaurants Canada**

Restaurants Canada supports provisions that do not allow workers to be topped-up above the 85% threshold of their earnings. Top-ups or collateral benefits are counterintuitive to the principle of an earnings differential between pre and post-accident income and can encourage injured workers to remain on claim. This is evidenced by an increase claims frequency and duration in Nova Scotia preceding the allowance of top-ups in 1999.

Top-ups are also unfair because it creates two classes of workers, those with top-ups and those with none. Workers should be treated similarly.

### **Retail Council of Canada**

The current worker's compensation benefit level of 85% of net earnings (up to a maximum amount) achieves a good balance. RCC would not support allowing the use of collateral benefits to 'top-up' a worker's net earnings above the 85% threshold as there would not be enough incentive for all injured workers to return to work post-recovery.

**107. The board, in Recommendation 12 of its submission, proposed that the supplements issue be addressed as follows:**

- a) Sub-section 38.11(9) of the *WC Act* be repealed; and
- b) A new section be added to the *WC Act* to explicitly address those types of remuneration that are to be offset from loss of earning benefits and considered supplements to compensation.

**Remuneration that would be considered supplements to an injured worker's compensation under the *Workers' Compensation Act* and, therefore, deducted from it would include: actual earnings; sick and disability pay; employment insurance; vacation pay; and employer top-ups. In its submission, the board also proposed a clause be added to the new legislation to allow it to assess and determine whether similar types of remuneration should be classified as supplemental income.**

**108. The board provided the following rationale for its recommendation to list the supplements indicated:**

The intent of the supplements legislation is for WorkSafeNB to use employment-related remuneration to offset loss of earnings benefits so that the total combination of compensation and remuneration does not exceed 85% of the pre-accident net earnings. Structuring benefits in this way provides financial support to workers as they recover while minimizing any disincentives for returning to work. Studies have demonstrated that a safe return to work is an important part of an injured worker's therapy and long-term health. Research also indicates that not working can double or triple the chances of poor physical and mental health, and increase mortality rates by 20%.

**109. The board, in making this recommendation, saw it as a way of bringing certainty to dealing with the treatment of these identified supplements so as to avoid long delays in receiving a determinative court ruling on them under the *Douthwright* criteria. It should be noted, however, that many worker stakeholders during Phase I were not in favour of amending ss. 38.11(9) for fear the new legislation would not respect the principles established by the court in the *Douthwright* decision.**

110. An analysis of the sick leave benefit, as set out in the quotation earlier in this report from Vitalité, argues that whether a supplement, such as sick leave, would meet the criteria established in the *Douthwright* decision might vary depending on the contractual terms establishing the supplement. The recommendation from the board that it be given the authority to assess similar types of remuneration and determine whether it they should be considered supplemental income would likely raise similar concerns that there are no criteria on which the contractual terms of the supplement could be analyzed.
111. The board reviewed amounts received by injured workers under the CPPD. It was noted that since 1982, any compensation payments received by injured workers have been reduced by the same proportion of CPPD benefit received for the compensable injury. These reductions are specifically required by ss. 38.91(1) of the *Workers' Compensation Act*. WorkSafeNB indicated that this requirement is similar to other Canadian compensation systems, although the percentage by which compensation benefits are reduced may vary – Manitoba, New Brunswick and Ontario will deduct up to 100%. The board, in Recommendation 17 of its submission, proposed that no changes be made in the wording of ss. 38.91(1) and 39.91(1.01).

## Annuity or pension benefits paid at age 65

### Background

112. Subsection 38.22 provides that when an injured worker is on workers' compensation for more than two consecutive years, WorkSafeNB must set aside an additional amount for the worker to offset any CPP retirement benefits or private pension plan benefit losses incurred by the insured worker because of the duration of the injury. The amount set aside is 10% of the injured worker's benefit eligibility. Surviving spouses have the option of two benefit plans. Under one plan, 5% is set aside for the purchase of an annuity. Under the second one, 8% is set aside. When the injured worker reaches age 65, he or she must buy an annuity with the funds.

### Input from stakeholders

113. The majority of stakeholders who made input on this topic appeared to agree with the Restaurants Canada submission that the 10% of an injured workers' benefit eligibility set aside for a pension annuity is appropriate. It is noted that this is on the upper end of amounts set aside in the various Canadian jurisdictions. Some stakeholders suggested that injured workers should have the ability to increase this amount through personal contributions if they so choose. Others argued that as these moneys are intended to reflect the injured worker's pension benefits, there should be a guarantee that the pension annuity will create a similar type of return.
114. Some of the worker stakeholders were concerned with the negative interest that may be incurred on these moneys being set aside by WorkSafeNB in an investment account. T.A. Barron noted that in a recent decision the Appeals Tribunal concluded, that although it may have been intended when ss. 38.22(9) was drafted that negative interest could be applied to reduce an injured workers pension account, the language used does not allow for it.
115. The board set out three recommendations in its submission relating to annuities:
- In Recommendation 24, it proposed that the amount set aside for the purchase of an annuity for a surviving spouse be increased to 10%, the same percentage as is set aside for an injured worker.
  - In Recommendation 18, it proposed that ss. 38.22(9) of the *Workers' Compensation Act* be amended to clarify that negative interest may be included in the "...average yield rate of the investment portfolio."
  - In Recommendation 19, it proposed changing the requirement in ss. 38.22(12), which allows WorkSafeNB to make a lump sum payment to a worker, rather than requiring the worker to purchase an annuity, if the annual payment from the annuity would be less than \$500 (which roughly equates to a lump sum payment of \$7,200). The proposed amendment would change the requirement from a minimum annuity amount to a minimum lump sum payment equal to 50% of the New Brunswick Industrial Aggregate Earnings. For 2015, the New Brunswick Industrial Aggregate Earnings was

\$40,615, which would equate to a minimum lump sum payment of \$20,308. This recommendation was made because of the difficulties injured workers have in finding financial providers from which they are able to purchase annuities of smaller amounts.

## Permanent physical impairment

### Background

116. If an injured worker suffers a permanent physical impairment as a result of a workplace accident or occupational disease, he or she is entitled, under ss. 38.11(17) and 38.2(8) of the *Workers' Compensation Act*, to a lump sum payment in recognition of his or her loss of opportunity. This payment is based on an assessment of the worker's level of impairment. It is not based on his or her loss of income. In 2014, the minimum lump sum payments in Canada ranged from \$500 in New Brunswick and Prince Edward Island to \$32,182 in Ontario. The maximum lump sum payment for 100% permanent physical impairment in New Brunswick in 2014 was set at \$60,100, the same amount as the maximum annual earnings for that year. The maximum awards in Canada ranged from \$38,000 in Manitoba to \$86,588 in Alberta. An injured worker who has been assessed for and has received a permanent physical impairment award may be re-evaluated if his or her condition worsens. His or her level of total impairment is assessed by an independent medical examiner certified by the American Board of Independent Medical Examiners.

### Input from stakeholders

117. The New Brunswick Nurses Union, in its written submission, recommended that the minimum lump sum award be increased from \$500 to \$1,500, which would bring New Brunswick into the general Canadian average. Further, the union indicated it would support a decision to allow the worker to convert the lump sum impairment award to an annuity if the award is greater than a certain significant level. Although the union, in its brief, made reference to an amount of \$15,400 as a suggested level based on the current practice in Manitoba, it is noted that WorkSafeNB has recommended an amount of \$20,308 for a pension annuity under ss. 38.22(12).
118. T.A. Barron, in his written submission, was critical that New Brunswick has the only legislation in Canada that does not provide permanent physical impairment awards for chronic pain. New Brunswick will only provide compensation if there is evidence that the chronic pain is directly related to the impairment. It was recommended that New Brunswick follow the Nova Scotia model of legislative changes that have instituted awards for chronic pain.
119. The board, in Recommendation 22 of its submission, proposed there be no change in the wording of ss. 38.11(17) and 38.2(8) of the *Workers' Compensation Act*, which provide for an award for a permanent physical impairment. In the rationale for its recommendation, WorkSafeNB noted that it supports an award of a separate lump sum, regardless of any rate loss that an impairment may have caused, as it can reasonably be assumed there are necessary expenditures that have been caused by the impairment.
120. The board, in Recommendation 23 of its submission, proposed the Permanent Physical Impairment Rating Schedule Regulation be amended to reflect current best practice. It included a spreadsheet to explain this recommendation.

## Estimated capable earnings (deeming)

### Background

121. Subsection 38.11(12) of the *Workers' Compensation Act* provides that the compensation to be paid for loss of earnings shall be the worker's average earnings, as previously determined by WorkSafeNB and adjusted on an annual basis, less the earnings that it is estimated an injured worker is capable of earning at a suitable occupation. This calculation is sometimes referred to as deeming. WorkSafeNB deducts the estimated capable

earnings from an injured worker's average earnings, as previously determined, whether or not the worker has been able to find work. WorkSafeNB's Policy No. 21-210: *Calculation of Benefits* defines an injured worker's estimated capable earnings by examining whether the worker is earning remuneration after the injury and also by considering if he or she can earn remuneration at a suitable occupation when ready to return to work.

122. The compensation payable to an injured worker, as noted during the earlier discussion on loss of earnings benefit, is based on a percentage of the worker's pre-accident net earnings. In calculating the actual compensation for loss of earnings payable to an injured worker one must deduct any earnings from an employment related service. "Loss of earnings" is defined in ss. 38.1(1) as average net earnings less "...the earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining the injury..." Subsection 38.11(2) more simply states that "...the Commission shall pay compensation to the worker in an amount equal to eighty-five per cent of the estimated loss of earnings."

This concept of estimated capable earnings is also addressed in ss. 38(1)(f) of the *Workers' Compensation Act*, which applies to compensation for injuries incurred before 1982. It states:

- (f) where deemed just, the impairment of earning capacity may be estimated from the nature of the injury, having always in view the worker's fitness to continue the employment in which he was injured, or to adapt himself to some other suitable occupation.

### **Input from stakeholders**

123. The majority of the employer stakeholders making submissions on this topic recommended that there be no change in the practice with respect to estimated capable earnings. One of the strongest statements in favour of the current practice was made in the submission from the Coalition of New Brunswick Employers:

The Coalition submits that no change be made to the manner in which the legislation addresses this issue. Again, it is important to recognize that the workers' compensation system is not an employment insurance program. Employment insurance is jointly funded by workers and employers; workers' compensation is solely employer funded and was never intended to provide employment security.

It is also the view of the Coalition that local labour market conditions should be irrelevant to the deeming process. Otherwise, workers in different parts of the province may receive different levels (or duration) of benefits for similar injuries. The Coalition supports an objective, justifiable deeming process which does not consider the availability of alternate employment in any particular geographic area of the Province.

**Restaurants Canada was also a strong supporter of the deeming process:**

There has always been much criticism by organized labour and injured workers about deeming. Deeming is not unique to New Brunswick. It is a practice carried out in all Canadian provinces except one and is an essential part of an earnings loss compensation system.

124. In contrast, many of the worker stakeholders felt that the compensation received by injured workers should only be reduced when they are in receipt of compensation for work performed. This position was reflected in the written submission from CUPE:

The reduction of benefits to an injured worker who is unable to find work in a different vocation after recovery is punitive to workers (with the exception of an injured worker, who, without good reason, declines a 'bona fide' offer of employment or retraining).

CUPE went on in its submission to argue that the deeming process should be removed from the calculation of “loss of earnings” as defined in ss. 38.1(1) of the *Workers’ Compensation Act* and replaced with the words “...the earnings that the worker is receiving from employment.” A similar position was taken by Unifor, which felt that natural justice is not achieved by estimating capable earnings but rather by the ability of the worker to earn.

125. The New Brunswick Federation of Labour, in its brief, strongly expressed its opposition to the deeming process as follows:

Reducing the benefits of permanently disabled workers deemed fit for non-existent jobs is grossly unfair and must be stopped. The *WC Act* should be changed to eliminate deeming other than in those special circumstances where an injured worker, without good reason, declines a ‘bona fide’ offer of employment or retraining. Until a real job becomes available that the injured worker can perform safely, we believe he/she should remain on full compensation benefits.

126. T.A. Barron, in a report to the Minister about a study of barriers to employment experienced by injured workers, noted as follows (at pages 11 - 12):

Deeming for an occupation that WorkSafeNB estimates an injured worker can do is one of the most important concerns as addressed by the individuals consulted who experienced a workplace accident. In fact, 40% of injured workers were deemed to do a job that, in the majority of cases, they were simply not adequately skilled to do, or simply could not perform because of their injury, while others were deemed capable to execute the exact same occupation in which they experienced their workplace accident and this option never translated to a long-term solution.

127. The position taken by many of the worker stakeholders was that the onus should be on WorkSafeNB to show there are viable work opportunities for injured workers. They saw the practice as assuming that injured workers will be able to obtain employment that they have been deemed capable of performing.

128. The board made two recommendations related to estimated capable earnings. Firstly, in Recommendation 17 of its submission, the board proposed ss. 38.11(12) of the *Workers’ Compensation Act* be amended to require that estimated capable earnings be indexed as part of the annual review. It was noted by WorkSafeNB that although legislation requires that average earnings be indexed annually by the percentage change in the consumer price index, this requirement does not apply to estimated capable earnings. WorkSafeNB indicated that all Canadian jurisdictions, except New Brunswick and British Columbia, index earnings capability in some form.

129. Secondly, the board, in Recommendation 20 of its submission, proposed a new subsection under ss. 38.1 of the *Workers’ Compensation Act* to clarify that estimated capable earnings are remuneration in the calculation of loss of earnings. It was noted by WorkSafeNB that there has been a long standing practice to include estimated capable earnings in the calculation of benefits.

## Non work-related conditions

130. Although not listed in the discussion paper as a topic to be addressed during Phase II, the issue of “non work-related conditions” must be seen as potentially affecting the calculation of benefits under section 38 of the *Workers’ Compensation Act*. This impact on the calculation of benefits may result from the interference that non work-related conditions can cause in the rehabilitation process and the ability of the injured worker to return to work. It is an issue that has been specifically addressed in the submissions of T.A. Barron and WorkSafeNB during Phase II.

131. In its submission, WorkSafeNB noted that section 7 of the *Workers' Compensation Act* outlines the process to be followed when a pre-existing condition is aggravated by a workplace accident. If this happens, the pre-existing condition becomes part of the compensable condition and is managed by WorkSafeNB. It is treated the same as any other type of compensable injury. If the pre-existing condition has not been aggravated by the injury, the pre-existing condition is not part of the compensable condition.
132. A problem may arise, however, if a pre-existing condition that has not been affected by a workplace injury interferes with the ability of the injured worker to participate in the rehabilitation process, temporarily or permanently, and/or with the ability of the worker to return to work within the normal timeframe. In such a case, WorkSafeNB describes the pre-existing condition as entirely personal in nature with no link to the workplace accident. In some situations, WorkSafeNB suspends the loss of earnings benefit until the worker is able to resume rehabilitation or return to work.
133. T.A. Barron, in his submission, claimed that WorkSafeNB should not be able to suspend benefits when a worker is unable to pursue his or her rehabilitation program due to a secondary condition. He referred to this situation having been addressed by the New Brunswick Court of Appeal (*Kelley v. New Brunswick Workplace Health, Safety and Compensation Commission*, 2009 NBCA 30). The court determined that WorkSafeNB "...has the authority to suspend a claimant's benefits only in specifically prescribed circumstances." The court referred to those circumstances being described in ss. 41(16) of the *Workers' Compensation Act*. This subsection refers to a worker who "...persists in dangerous and unsanitary practices imperilling or retarding his cure, or whenever he refuses to submit to such medical treatment and surgical aid as the Commission may deem necessary for his cure."
134. The board, in Recommendation 14 of its submission, proposed explicit legislation be added to the *Workers' Compensation Act* providing direction on how claims should be managed when non work-related conditions arise. It recommended adding a section that would require:
1. Non work-related conditions first be accommodated during the rehabilitation of a workplace injury.
  2. If accommodations are not possible, benefits would be suspended until the injured worker is able to resume rehabilitation. In these circumstances, the injured worker is given 30 days notice before benefits are suspended.
  3. If it is unlikely that the injured worker would resume rehabilitation, or if the non work-related condition becomes the primary reason that the worker is not able to return to work, WorkSafeNB will pay benefits for the entire work-related injury based on the estimated healing time as recognized by generally accepted medical evidence.

# Supplementary comments from stakeholders

135. While the following comments are not specifically addressing the three areas under review in Phase II, there is some relevancy to the overall intent of improving services to injured workers.

## **Ombudsman of New Brunswick**

136. We would be remiss by not highlighting the Ombudsman's submission of viewing this phase as a "tremendous opportunity to modernize and improve WorkSafeNB." According to the Ombudsman:

It requires more than tweaking the existing structure but a reform that will re-establish the Meredith principles and an equitable, fair balance between the interest of the employers and the injured workers. The Ombudsman argues that a significant altering of the philosophy and culture of the Corporation is required.

137. The Ombudsman offered three recommendations that focused on: the reinvention of the workers' compensation system to meet the needs of the 21st century; detailed independent audits to determine value for money; and, require that WorkSafeNB's direction be reviewed every 10 years.

## **Workers' Compensation Appeals Tribunal (WCAT)**

138. The chair of WCAT also informed the panel of two oversights in the new legislation that need to be corrected. The first matter involves the issue of Reconsideration of cases. In the past, WCAT had done 15 to 20 Reconsiderations per year when information was not available at the initial hearing that would substantially affect the decision reached by the Appeals Tribunal. WCAT has received a legal opinion that it no longer has the legislative authority to hear Reconsiderations because of the recent legislative changes that separate it from WorkSafeNB. The second oversight is the failure to provide legislative authority to the chair of WCAT to delegate certain administrative functions to staff.

## **Premier's Council on the Status of Disabled Persons**

139. The Premier's Council on the Status of Disabled Persons agreed that the legislation requires modernization to ensure that the New Brunswick workers' compensation system appropriately addresses the needs and realities of current and future workplaces and strikes the appropriate balance between adequate compensation for injured workers and employers' fiscal interests. It considered this review an opportunity to improve both the level of service and the outcomes for injured and disabled workers, and it offered a series of principles to guide the process.

## **New Brunswick Association of Speech Language and Audiology**

140. The New Brunswick Association of Speech Language and Audiology expressed concern about occupations that pose a hearing hazard. It emphasized the need for prevention to enforce safety measures to protect hearing loss in the workplace; standards for audiogram/hearing tests and hearing aids; and direct access to properly trained professionals.

## **New Brunswick Veterinary Medical Association**

141. The New Brunswick Veterinary Medical Association raised concerns about the Form of Election letter sent to employees who have reported animal bites. It was suggested that WorkSafeNB produce a fact sheet to accompany the letter so that the employer and employee are properly informed of the option of claiming



compensation from WorkSafeNB or taking legal action against the animal owner. It was also noted that members of association lack information about the coverage for volunteers or co-operative students injured while at the veterinary clinics.

### **Grand Bay Workers' Rehabilitation Centre**

142. The Rehabilitation Centre was referred to by worker stakeholders and injured workers as a service that needs improvement. While WorkSafeNB said the centre has a 77% satisfaction rating, stakeholders say injured workers are hesitant to provide negative comments for fear of their benefits being affected. T.A. Barron went as far as recommending that an inquiry be conducted.

### **Agriculture Alliance of New Brunswick**

143. Three issues of particular concern to the Agriculture Alliance of New Brunswick were:

- a) If an employee is employed for more than six months and one day, the employer is charged the premium of a full-time employee even if he or she is only seasonal.
- b) Employers need to count family members as employees, which factors into the overall numbers; i.e., if it is a small mom and pop business run by a family with one worker, it is made to pay premiums based on number of family members employed.
- c) If you have even one claim against you, the employer's premiums increase significantly, as if they had multiple claims.

### **Post-Traumatic Stress Disorder (PTSD) and mental health / illness**

144. The Canadian Union of Public Employees (CUPE), in a letter dated July 17, 2015, asked that the *Worker's Compensation Act* be amended to recognize PTSD as the serious occupational disease that it is. Mention was made that, in the past year, paramedics, as an occupational group, have seen several suicides. Other worker stakeholders brought to the panel's attention the need for New Brunswick to fall in line with other jurisdictions by including the presumption of PTSD and mental health / illness as an occupational disease, as well as increasing the number of cancers from 10 to 14 under the *Firefighters' Compensation Act*. They also called for enhanced injury prevention measures; violence and harassment prevention in the workplace; and, recognition that injured workers are subject to psychological impairment and chronic pain.



# Appendix

## Targeted consultations

### Briefs and comments

The following is a list of briefs and comments received, representing workers, employers, professional associations, injured workers / dependants and others.

### Employer organizations:

1. Coalition of New Brunswick Employers
2. Retail Council of Canada (RCC)
3. Restaurant Canada – Atlantic Regional Office
4. City of Edmundston
5. Agriculture Alliance of New Brunswick
6. Horizon Health Network
7. Vitalité Health Network
8. NB Power
9. Canadian Federation of Independent Business (CFIB)
10. City of Fredericton
11. New Brunswick Road Builders and Heavy Construction Association
12. McCain Foods (Canada)
13. BIRD – Health and safety coordinator

### Worker organizations:

14. Canadian Union of Public Employees – New Brunswick (CUPE)
15. New Brunswick Building Trades Union (NBTU)
16. New Brunswick Federation of Labour
17. New Brunswick Nurses Union (NBNU)
18. UNIFOR

### Others:

19. Advocates Services, Department of Post-Secondary Education Training and Labour (PETL)
20. Ombudsman of New Brunswick
21. Law Society of New Brunswick
22. New Brunswick Association of Speech Language Pathology and Audiology
23. Injured workers and dependants (four)
24. Injured Workers' Advisory Committee (IWAC)
25. WorkSafeNB board of directors
26. Workers' Compensation Appeals Tribunal (WCAT)
27. New Brunswick Veterinary Medical Association
28. Barron T Labour Relations Inc.
29. Premier's Council on the Status of Disabled Persons
30. Fredericton Chamber of Commerce
31. Canadian Life and Health Insurance Association
32. Senior instructor – University of New Brunswick