

Legislative Review of
Workers' Compensation

Workers' and Employers' Advocates Services in New Brunswick

Discussion Paper

May 2015

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Introduction

The modern concept of workers' compensation has its origins in Germany, Great Britain and the United States between the late 1800s and early 1900s. In Canada, workers' compensation had its beginnings in Ontario when Mr. Justice William Meredith was appointed to a royal commission to study this area in 1910. His final report, known as the Meredith Report, was produced in 1913.

There were five basic cornerstones to the original workers' compensation laws known as the "Meredith Principles." These cornerstones, which have survived to a greater or lesser extent, are as follows:

- No-fault compensation: workers are paid benefits regardless how the injury happened.
- Security of benefits: a fund is established to guarantee funds exist to pay benefits.
- Collective liability: covered employers, on the whole, share liability for workplace injury insurance.
- Independent administration: organizations that administer workers' compensation insurance are separate from government.
- Exclusive jurisdiction: only workers' compensation organizations provide workers' compensation insurance.

These principles are referred to as the historic compromise in which employers agreed to fund workers' compensation and, in turn, injured workers surrendered their right to sue their employer for their injury.¹

Subject

WorkSafeNB, formerly known as the Workplace Health, Safety and Compensation Commission, is a Crown corporation under Part IV of the Public Service. It is responsible for the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*, the *Occupational Health and Safety Act*, the *Firefighters Compensation Act*, the *Blind Workmen's Compensation Act*, the *Silicosis Compensation Act* and regulations. WorkSafeNB is administered by a board of directors consisting of a chair, a vice-chair and an equal number of worker and employer representatives. The president / chief executive officer is a non-voting member.

Although WorkSafeNB is an independent body, the Minister of Post-Secondary Education, Training and Labour is responsible for the legislation. The board of WorkSafeNB reports to Cabinet through the Minister with respect to administrative and financial accountability.

1 http://awcbc.org/?page_id=59

WorkSafeNB, as well as the structure of the board of directors, was established under the *Workplace Health, Safety and Compensation Commission Act* in 1994.

In April 2013, the provincial government announced the initiation of a comprehensive review of New Brunswick's workers' compensation legislation. This review is a multi-phase initiative and a collaborative effort between the Department of Post-Secondary Education, Training and Labour and WorkSafeNB.

Phase II of the legislative review includes:

- Governance structure for WorkSafeNB;
- Workers' and Employers' Advocates Services; and
- Section 38 (benefits) of the *Workers' Compensation Act*.

This document discusses the advocates services provided to employers and injured workers and their dependents. The Advocates Service is being enhanced to ensure that it conforms to the requirements of the new appeals and dispute resolution processes, and to incorporate best practices implemented in other Canadian jurisdictions.

Question: In addition to the elements identified in this discussion paper, do you have other ideas for improving Advocates Services for employers, injured workers and their dependents?

2. Background

Reporting through the Director to the Assistant Deputy Minister – Labour and Planning, Advocates Services functions under the Department of Post-Secondary Education, Training and Labour and works independently from WorkSafeNB and the appeals tribunal. The services provided by the advocates are free and bilingual.

2.1 Legislative provisions

The positions of the Workers' Advocates and the Employers' Advocates are established under the *Workers' Compensation Act* and appointed by cabinet. The costs of Advocates Services, including salaries and administration, are funded through the Accident Fund, with WorkSafeNB providing an annual grant to the department.

Under Section 83.1 (1) of the *Workers' Compensation Act*, the mandate of the Workers' Advocates is:

to assist any worker, or any dependent of a worker, in respect of any claim being advanced by him or her for compensation.

Under Section 83.2(1) of the *Workers' Compensation Act*, the mandate of the Employers' Advocates is:

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 that worker, and any related concerns of the employer in respect of assessments, charges and similar matters.

2.2 Common job requirements

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

- The principles and processes of administrative 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' Advocates nor Employers' Advocates are required to be lawyers.

2.3 Workers' Advocate Service

Reporting to the Director, Advocates Services, Workers' Advocates provide advice and assistance to injured workers or their dependents who may question or dispute a decision of WorkSafeNB in relation to a claim for workers' compensation under the *Workers' Compensation Act* or the *Occupational Health and Safety Act*. There are 10 advocates working out of six locations: Bathurst, Edmundston, Fredericton, Miramichi, Moncton and Saint John.

Services primarily include:

- Providing information about relevant legislation and WorkSafeNB policy;
- Providing advice on whether a claimant or dependent 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, preparation and oral presentation of arguments before the appeals tribunal on a claimant or dependent's behalf.

Workers' Advocates handle more than 700 new cases per year and represent injured workers and their dependents at more than 300 appeals tribunal hearings per year. About 80 per cent of the appeals brought by workers are assisted by Workers' Advocates. Others obtain community-based services, retain their own legal counsel or represent themselves during the process.

2.4 Employers' Advocate Service

Reporting to the Director, Advocates Services, the Employers' Advocates provide advice and assistance in English and French to New Brunswick and out-of-province employers on cost relief and issues related to workplace injuries and deaths, and they may represent their interests before the appeals tribunal. There are four Employers' Advocates working out of four locations: Bathurst, Dieppe, Fredericton and Saint John.

Services primarily include:

- Providing advice to employers on their rights and obligations under legislation and the WorkSafeNB's policies, including presentations to employer groups;
- Responding to employers' complaints on workers' compensation issues through consultations with WorkSafeNB representatives; and
- Assisting employers as either respondents or appellants through the preparation and oral presentation of arguments before the appeals tribunal.

Employers' Advocates handle more than 300 new cases per year and represent employers at about 130 appeals tribunal hearings per year. About 24 per cent of employers use the services of Employers' Advocates in their appeals. The remainder, generally, retain their own counsel.

3. Jurisdictional review

3.1 Services for workers

With the exception of Quebec, some form of adviser or advocate services to workers is available in all Canadian jurisdictions. In New Brunswick, Saskatchewan and the Yukon, the service is termed "advocate," while in other jurisdictions it is called "adviser."

Alberta and Newfoundland and Labrador are the only jurisdictions in which the service is not covered by legislation. In Alberta, the service is internal to the workers' compensation board and functions as an internal appeal process. In Newfoundland and Labrador, the service is provided by the federation of labour.

In Nova Scotia, the staffing complement includes a mix of lawyers and non-lawyers; only lawyers may represent clients at the appeals tribunal and in court.

The services are generally funded through the provincial/territorial workers' compensation boards, except in Saskatchewan and the Yukon, where it is government-funded.

For the most part, the frequency of use of workers' advisers/advocates is high across the country, except in Ontario where only 13 per cent of workers make use of them. New Brunswick has the third-highest frequency of use of Workers' Advocates with 78 per cent of appeals.

For further information about workers' advocate services across Canada:

- <http://www.cawaa.org/>
- http://www.ccohs.ca/oshanswers/information/worker_advisor.html

3.2 Services for employers

Advocates services for employers are available in five provinces: British Columbia, New Brunswick, Newfoundland and Labrador, Ontario and Prince Edward Island. These services are generally funded by the workers' compensation system and offered at no cost, although similar services are also available through employer groups.

For the most part, the frequency of use of Employers' Advocates is low. In New Brunswick, it stands at 24 per cent. The four jurisdictions where this service is offered have indicated that employers usually retain their own legal representation or represent themselves.

For further information about advocates' services across Canada:

- http://www.employeradviser.ca/en/documents/report/en_oea_across_canada.pdf

4. Enhanced Advocates Services

Due to increased demand for service, the workload of Advocates Services has increased steadily in recent years:

- In 2013-14, Workers' Advocates handled 38 per cent more hearings than in 2009-10 (370 versus 268); and
- In 2013-14, Employers' Advocates handled 59 per cent more hearings than in 2009-10 (180 versus 113).

In addition to workload pressures, concerns about delays in service for injured workers emerged from the public consultation held in the fall of 2013 under the Workers' Compensation Comprehensive Legislative Review. To address these issues, the Department of Post-Secondary Education, Training and Labour conducted an internal performance improvement review of the Workers' Advocate service in the spring of 2014.

4.1 Enhancements to date

As a result of the performance improvement review and research into the best practices of other jurisdictions, a new service delivery model was implemented in 2014-15. This includes the following elements:

- Consolidation of the management of the services provided by Workers' Advocates and Employers' Advocates in one administrative unit, Advocates Services, headed by a Director reporting to the Assistant Deputy Minister – Labour and Planning;
- A new case management system (database) has been created to ensure consistency in delivering services to both employers and injured workers; and, to better track the progress of individual cases and of the service overall;
- New service standards for responding to initial calls (48 hours) and file assessment (30 calendar days);
- The number of Workers' Advocates positions has been increased to 10 to better manage caseload and reduce wait times for file assessment and filing appeals and an additional five advocates are being hired to address the backlog; and
- As of September 2, 2014, a new bilingual intake process has been put in place to address the volume of requests for the services of the Workers' Advocates. This is providing better service overall in handling the initial calls to the Workers' Advocates, including providing referrals and general information about client's rights and responsibilities and what to expect in an appeals process. The features of the new intake process include:
 - Establishment of a 1-800 number for province-wide Workers' Advocate service requests in both French and English;
 - Development of a new triage process; and
 - Two new dedicated intake positions to manage the initial calls from potential clients.

4.2 Plans for continued enhancement of Workers' Advocate services

In 2015-16, the Department of Post-Secondary Education, Training and Labour is building on the successful enhancements made to the service delivery model to date and the best practices of other jurisdictions. Components include:

- Investments in professional development, including certification in administrative justice and crisis intervention;
- The 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*.

- Developing client relations based on best practices that include greater in-person contact; and
- Holistic, case-managed service provision for injured workers and their dependents, including assistance and dispute resolution from the beginning of a claim before a claim dispute goes to appeal.

5. Issues for consideration

5.1 Location of service

Workers' Advocates work out of six regional offices, and the Employers' Advocates work out of four. In other jurisdictions:

- The Workers' Advocates have one or two regional offices, with the exception of Ontario and British Columbia, which have 15 and 8 respectively. In Nova Scotia, which has roughly the same number of injured worker clients, the Workers' Advocates work out of offices in Halifax and Sydney and travel to their clients and attend hearings as needed; and
- Employers' Advocates in British Columbia and Ontario work out of eight and nine offices, respectively. In Nova Scotia and Prince Edward Island, they work out of a single office.

Based on the experience of other jurisdictions, concentrating advocates offices in one or two locations has a number of benefits. It allows for the development of a community of practice among advocates and case conferencing, which strengthens the service overall. It also reduces costs and maximizes administrative efficiencies.

Questions: What are the benefits of the current location of Advocates Services? Should consideration be given to consolidating Advocates Services in one or two locations?

5.2 Legislation

As outlined earlier, legislation allows for the administration of Workers' and Employers' Advocates by the Department of Post-Secondary Education, Training and Labour independently from WorkSafeNB and the appeals tribunal. This guarantees the independence and impartiality of the advocates in carrying out their mandates on behalf of their clients.

Questions: Is the wording of the Advocates' mandate in legislation sufficient? Can the legislation be improved to better support employers and injured workers in New Brunswick?

Conclusion

This discussion paper on Workers' and Employers' Advocate Services is one of three topic areas under Phase II of the legislative review of workers' compensation in New Brunswick.

We welcome your comments, ideas and suggestions on this discussion paper as well as other ideas for improvement to the Advocates Services of WorkSafeNB. Please provide your feedback to the Department of Post-Secondary Education, Training and Labour at:

Email: wclr@gnb.ca

Fax: 506-453-3618

Online: www.gnb.ca/consultations

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The deadline for submissions is September 25, 2015.

Information collected from consultations

The information you provide will be administered in accordance with New Brunswick's *Right to Information and Protection of Privacy Act*. Therefore, you should not include information about other parties (such as employers or other employees) or any other information from which other parties could be identified unless their permission has first been obtained.

All personal information and comments received are directly sent to the consultation panelists. They are not publicly posted on the Government of New Brunswick website.

At the end of the consultation, the panelists will submit a final report. You may choose to have your personal information shared in the report. When you submit your comment(s), **please provide your written consent** for the panelists to include any or all of the following information in its final report:

- Your name;
- Your title or position;
- The name of your organization;
- The location of your organization;

- Word-for-word quote(s) of your comment(s); and
- A paraphrase of your comment(s).

If you do not provide consent to the disclosure of any of the above information, the co-panelists will include your comment(s) in a summary that will not identify you or your organization.

Thank you for taking the time to participate.

