

# The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

June 15, 2004

An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.

6 pages

## Policy Advocacy at the WSIB

### *Things Don't Just Happen – They're Made to Happen*

#### L.A. Liversidge Paper Presented at *Advanced Workers' Compensation Advocacy Conference of the Ontario Bar Association*

The following is the modified text (most footnotes omitted) of a paper presented by L.A. Liversidge at the May 10, 2004 Ontario Bar Association Conference, "*Advanced Workers' Compensation Advocacy*"

#### **The WSIB is a "government in miniature"**

The Workplace Safety & Insurance Board ["WSIB" or the "Board"] is charged with an enormous task of mass adjudication, benefit and disability administration, employer tax administration, which includes setting premium rates and collecting premiums, and investment fund maintenance.

The *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Sch. A., as amended [the "WSIA"] confers upon the Board exclusive jurisdiction to manage this complex and intricate system, which is responsible, in financial terms, for the redistribution of billions of dollars every year, and in human terms, for the well being and support for hundreds of thousands of Ontarians.

In 2002 the WSIB paid out over \$2.6 billion in benefits, had overall expenses of over \$4.0 billion, and collected \$1.8 billion in employer premiums.

The Board employs over 4,400 employees, registers over 345,000 claims, maintains 14 offices throughout the Province, and assesses premiums against 185,000+ employers. Almost 4,000,000 workers are covered by the workplace safety and insurance scheme ["WSI"] with insured earnings of over \$127 billion. Over a third of premiums collected go towards a past debt (known as the unfunded liability). The Board runs and/or finances the WSI internal judicial system, and funds free advocacy for selected parties.

The scheme is governed by a Board of Directors which has the power to establish policy, recommend legislative and regulatory change, approve operating budgets, and set premium rates. While the WSIA provides overall guidance, the statutory instructions are typically broad, imprecise and open for interpretation. These interpretations, be they on individual cases or on broad policy questions affecting entitlement or taxation guidelines, are not benign. These are

significant far-reaching decisions that have enormous consequences, and as such, are politically charged, and carry with them all of the qualities and peculiarities of political decisions, yet, still flow from an enabling statute over which ultimate political dominion rests with the legislature. While the WSIB is ultimately responsible for establishing policy, the external and independent Workplace Safety & Insurance Appeals Tribunal ["WSIAT" or the "Appeals Tribunal"] is the final arbiter on individual cases,<sup>1</sup> and influential in policy review if policy is inconsistent or *ultra vires* of the WSIA.<sup>2</sup>

The Board taxes, establishes "laws", regulates behaviours, dispenses justice and benefits. The WSIB is surely a "government in miniature".<sup>3</sup>

And, as a "government in miniature", those attempting to influence or advocate policy change must use the full arsenal of skills, methods, ways and means that are unleashed and set loose towards influencing government policy. "Things don't just happen. They're made to happen."<sup>4</sup> WSI advocates maintain a unique stance in the WSI system to "make things happen".

#### **What is Advocacy?**

There is no over-arching definition of policy advocacy. Policy advocacy is situational. It is organic. It adjusts. It responds. More often than not public policy participation is born out of a defensive position.<sup>5</sup>

Advocacy is certainly the pursuit of influencing outcomes - including public policy and resource allocation decisions within political, economic, and social systems and institutions - that directly affect people's lives. Advocacy has purposeful results: "to enable social justice advocates to gain access and voice in the decision making of relevant

<sup>1</sup> WSIA, s. 123.

<sup>2</sup> WSIA, s. 126(4).

<sup>3</sup> In accordance with the description by Hudson N. Janisch, "The Choice of Decision Making Method: Adjudication, Policies and Rulemaking", *Administrative Law*: "the administrative tribunal is government in miniature" at 260.

<sup>4</sup> President John Fitzgerald Kennedy, Remarks (April 9, 1962) 50<sup>th</sup> Anniversary of the Children's Bureau

<sup>5</sup> A. Hegel, "Advocacy on the Agenda – Preparing voluntary boards for public policy participation" (2003) Human Resources Development Canada, ISBN 0-9733191-2-7, at p. 3.

institutions”, and to “change the power relationships between these institutions and the people affected by their decisions, thereby changing the institutions themselves”.<sup>6</sup> Advocacy has been described as “much a frame of mind as it is a set of skills or knowledge”,<sup>7</sup> and is the act influencing behaviour or opinion, corporate conduct, or public policy and law.<sup>8</sup> Advocacy supports, pleads or defends a cause to create a shift in opinion or environment. *Effective advocacy leads change.*

It has been suggested that contemporary governments (and by extension, government institutions), are no longer as active or capable of formulating and evaluating policy as in past eras. A host of reasons have been advanced to explain this phenomenon, from a shift to more ideological policy making to lack of policy development funding.<sup>9</sup> As government (and government institutions) becomes less able to engineer policy change, more responsibility rests with the external policy advocate.

The act of advocacy, as a form of free speech, has been described as an essential part of democracy.<sup>10</sup> Thus, if it is the case that the cause is a noble one, a less than effective advocacy would be a less than noble expenditure of one’s labour.

Based on the experience of this writer, effective policy development at the WSIB is based as equally on the justice of one’s cause as it is on the effectiveness of one’s advocacy. While sound, well planned advocacy is rarely able to promote bad ideas and lead to “bad” policy, ineffective advocacy often is fatal to the advancement of otherwise sound idea and “good” policy development. To be right is not enough. To make change happen, one must marshal the power of one’s contacts, skills, and tactics and channel those qualities so that they intersect with opportunity. Recognizing opportunity is one skill. Creating opportunity is yet another. Effective advocacy requires both.

### What is policy?

Policy can be described as “a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions” and a “high-level overall plan embracing the general goals and acceptable procedures especially of a

<sup>6</sup> Advocacy Institute “What is Advocacy?” (2001) Webpage ([www.advocacy.org/definition.htm](http://www.advocacy.org/definition.htm))

<sup>7</sup> A. Hegel, “Advocacy on the Agenda – Preparing voluntary boards for public policy participation” (2003) Human Resources Development Canada, ISBN 0-9733191-2-7, at p. 4.

<sup>8</sup> Hegel at p. 17.

<sup>9</sup> B. Guy Peters, “THE POLICY CAPACITY OF GOVERNMENT - RESEARCH PAPER No. 18”, Canadian Centre for Management Development (June 1996) ISBN 0-662-62188-3, at p.1.

<sup>10</sup> Joint Tables, “Supplementary Paper A: Education, Advocacy and Political Activity,” Working Together: A Government of Canada/Voluntary Sector Joint Initiative: Report of the Joint Tables (August 1999)

governmental body”.<sup>11</sup> Public policy is a set of inter-related decisions, taken by public authorities, concerning the selection of goals and the means of achieving them.<sup>12</sup>

The WSIB recognizes that policy must reflect the following principles: accountability, authoritativeness, comprehensibility, effectiveness, economy and efficiency, fairness, integrity, openness and principled decision making. Yet, at the end of the day, according to the Board, a “policy is a document published in a policy manual”.<sup>13</sup> Once certain ideas are codified in a document, and receive the appropriate hierarchical endorsement, they receive an elevated prominence, in a legal and practicable context.

Advocacy fuels the process of moving an idea through the imperfect and erratic journey from thought to the sanctification of official sanction. The adoption of policies is one of the most significant ways in which an administrative agency, such as the WSIB, can ensure its decision-making processes reflect certain values.

Significant policy change requires a recognition that either values have changed or that policies never met their intended mark, or more ambitiously, inspire a change in underlying values themselves.

If these are the reasons why ‘policies’ are adopted, what are the essential characteristics for policies to perform their purposes effectively? The Board considers that in order for a policy to be effective, it must be recognized as authoritative, intended to be widely and consistently applied and readily accessible to all participants in the system, both within and outside the Board.<sup>14</sup>

Public policy making is a “set of processes . . . from which a choice is to be made,”<sup>15</sup> which at a minimum can be implemented successfully and which actually reaches the goals set for it.<sup>16</sup>

### How does one advocate public policy change?

As a first principle, as trite and clichéd as it may appear, effective public policy advocacy starts with a commitment to seeking out and achieving an opportunity for justice. In the

<sup>11</sup> A. Hegel, “Advocacy on the Agenda – Preparing voluntary boards for public policy participation” (2003) Human Resources Development Canada, ISBN 0-9733191-2-7, at p. 11.

<sup>12</sup> Government of Canada, Voluntary Sector Initiative (Canada), “A Code of Good Practice on Policy Dialogue” (October 2002) ISBN 0-662-32843-4, at p.3.

<sup>13</sup> WSIB website

<http://www.wsib.on.ca/wsib/wsbsite.nsf/public/PolicyWhatIsPolicyConsultation> (last accessed April 28, 2004)

<sup>14</sup> Ontario, What is “policy” for the purposes of s.126 of the Workplace Safety and Insurance Act, 1997, WSIB Consultation Document, January, 2001, at p.5.

<sup>15</sup> John W. Kingdon, *Agendas, alternatives and public policies* (Boston: Little, Brown, 1984) p. 3.

<sup>16</sup> B. Guy Peters, “THE POLICY CAPACITY OF GOVERNMENT - RESEARCH PAPER No. 18”, Canadian Centre for Management Development (June 1996) ISBN 0-662-62188-3, at p. 9.

context of public policy development, justice has been defined as “one common standard of dignity and opportunity for all”.<sup>17</sup> After this, public policy advocacy becomes process. Through the fair manipulation of process one achieves change. Public policy development is, at its core, political.

While politics has been described as the “art of the possible”,<sup>18</sup> “politics is not an exact science”.<sup>19</sup> While policy advocacy remains an art, there are basic rules or truths to adhere to if one is to be successful. These apply as much to WSI policy advocacy as any field.

**Rule No. 1:** Advance solutions, not problems. Be constructive. By solving the system’s problem, you will solve your client’s problem.

**Rule No. 2:** Don’t burn your bridges (unless you never need to go back).

**Rule No. 3:** Be patient. You’re in for the long haul.

**Rule No. 4:** Know the players.

**Rule No. 5:** Be known to the players.

**Rule No. 6:** Be solid on your position – identify the issue, organize and secure your support, identify your adversary and be prepared for the response before it happens.

**Rule No. 7:** Be realistic, pragmatic and flexible: the public policy arena can be unpredictable.

**Rule No. 8:** Think in a broad context – one policy impacts another and that another (and so on).

**Rule No. 9:** Humanize the issue – how does it impact real people? Principle is not enough.

**Rule No. 10:** Leave yesterday’s solutions to yesterday. Be innovative, fresh and inventive.<sup>20</sup>

### **Influencing WSIB discretion**

Discretion has been defined as being whenever “the effective limits on (an official’s) power leave him free to make a choice among possible courses of action or inaction”,<sup>21</sup> as simply the “exercise of human judgment”,<sup>22</sup> or

<sup>17</sup> B. Murphy, “Beyond The Politics Of The Possible - Corporations and the Pursuit of Social Justice”, Forum organized by Concordia University Institute of Management and Community Development (June 2002), at p. 5, in referencing Andrea Dworkin, *Right-wing Women*, Perigee Books (Putnam), New York, 1983.

<sup>18</sup> Spoken by many and attributed to Otto Von Bismarck (1815–1898), Prussian statesman. remark, Aug. 11, 1867. Quoted in *Complete Works*, vol. 7 (1924).

<sup>19</sup> Also attributed to Otto Von Bismarck (speech, Dec 18, 1863, to Prussian legislature)

<sup>20</sup> “To have the results you’ve never had, you must do what you’ve never done”, Pierre Ducasse upon running for the leadership of the New Democratic Party of Canada, January, 2003. “Insanity: doing the same thing over and over again and expecting different results”, attributed to Albert Einstein.

<sup>21</sup> Kenneth Culp Davis, “Discretionary Justice” (University of Illinois Press, Urbana and Chicago) 1971 at 3.

<sup>22</sup> Nathalie des Rosiers and Bruce Feldthusen, “Discretion in Social Assistance Legislation” (1992) 8 *Journal of Law and Social Policy* 204 at 209.

as “whenever an official makes a choice among possible courses of action”.<sup>23</sup> Of course, public officials do not have an unfettered discretion and must conform to the “rule of law” and are governed by an enabling statute. The concept of “rule of law” though is broad and confused, and statutes rarely are capable of completely solving complex issues,<sup>24</sup> and must export authority to ensure individualized justice is raised beyond a mere potential.

At the core of influencing policy is the art of appealing to the administrative discretion of officials. To do this, one’s advocacy must be focused towards the appropriately empowered WSIB official. This requires a precise understanding and intricate awareness of not only the organizational structure of the Board, but where the delegation of real authority lies.

### **Who’s who at the WSIB – where does “change authority” lie?**

WSIB organizational charts set out the intricate and complex labyrinth that is the contemporary WSIB. A valid cause directed to the wrong official is ruinous. Going over the wrong official’s head, for the wrong reasons, may bring a fleeting success on a single issue, but this transitory accomplishment will be long replaced by a future intransigence and lack of cooperation. Within the context of policy advancement, Board officials must be viewed as allies not adversaries, although the latter is the more likely state of nature, with the former requiring constant cultivation and nurturing.

The art of advocacy though requires more than directing issues to the appropriate level of decision authority. In reality, on issues of significance, decision making is effectively left to the exclusive purview of the Chair and/or Chief Executive Officer, and ultimately, to the Board of Directors. However, the nature of the process is not to simply advance an articulate and just argument for change to the higher echelons of the Board. The issue must be championed within existing structures, in a manner respectful of internal power relationships. Middle management, which will be ultimately charged with the responsibility to implement change, must be brought in, must buy in, and must stay in the change process.

<sup>23</sup> Lorne Sossin, “Redistributing Democracy: An Inquiry Into Authority, Discretion and the Possibility of Engagement in the Welfare State (1994) *Ottawa LR* 1 at 11.

<sup>24</sup> Davis, *supra* note 21 at 20 “What happens over and over is that a legislative body sees a problem but does not know how to solve it; accordingly, it delegates the power to work on the problem, telling the delegate that what it wants is the true, the good, and the beautiful – or just and reasonable results, or furtherance of the public interest. Then the delegate, through case-to-case consideration, where the human mind is often at its best, nibbles at the problem and finds little solutions for each little bite of the big problem”.

### Three steps to change

While there are any number of approaches that the skilled policy advocate may engage, there are three basic steps to every problem.

#### ***Before the process: positioning the advocate and laying the foundation***

Before any of them may be placed into play though, a basic foundation must first be put down. The advocate championing any issue must be recognized and respected by the players, and must bring a solid reputation into the game. An established and mature network of contacts must be in place, usually built through policy committee involvement, involvement in high profile cases, and public and intellectual input into a variety of WSI issues. In other words, the advocate must be, and must be seen to be, an expert in the field, and one who is at least on equal footing to the WSIB players themselves, if not a notch or two above many of them. While not impossible, effective policy advocacy is difficult for the neophyte even when armed with the ideal case. Access to the portals of change is determined by more than simply the rectitude of one's issue.

#### ***Step 1: Identify the problem and the solution***

The first step perhaps is the most important – identify the issue and identify the desired result. Remember, the nature of the process requires more than simply identifying problems – a problem must be re-defined as an opportunity for the WSIB to achieve its objects. Be clear on the desired outcome and identify exactly what is being sought. Be specific. Be precise.

#### ***Step 2: Develop support***

The second step involves developing position support – firstly, developing constituency support and secondly developing support within the WSIB. While a single issue arising from a single case may well be sufficient to result in policy change, this is unlikely. Even if such is the case, under those circumstances, the avenues for change are limited to official adjudication processes. To be most effective, an issue, which certainly may be “discovered” in a single case, must be handled in a such a manner as to attract the interest of other stakeholders, usually through existing coalitions or associations. The advocate must broaden the interest.

Once constituency support is established, support must be garnered within the WSIB. While policy decision making authority is left to the exclusive domain of the upper executive echelons of the WSIB, middle management may well share the advocate's position. In fact, it may be the case that middle WSIB management have held a similar policy view for some time, but have been unable to advance that proposition through internal channels through want of official opportunity and lack of internal standing. The WSIB has not acquired notoriety for being the hotbed of self-directed innovative change.

External advocates are more likely to be able open the doors to the executive wing for the middle WSIB manager

than the middle manager directly. Such is simple organizational reality. Therefore, cultivating lower managerial support and developing a principled alliance with the middle WSIB executive group adds power to the thrust of the proposition. While more often than not that foray to attempt to develop middle management support will bear little fruit, even if an alliance is not formed at that level, the issue is introduced, positions set out, and the long process to cultivate a change in organization perspective constructively begins.

#### ***Step 3: Establish and implement the plan***

In reality, effective policy advocacy at the WSIB is rarely distilled into a few clearly defined steps. Every plan must maintain a certain fluidity and be able to adjust and respond as circumstances will inevitably change. Additionally, it is rare for a plan to embrace a single focal-point of action. Concurrent plans, which overlap and which remain interconnected is commonplace and the norm. Most plans are in reality “design build” efforts, in constant motion as circumstances change and new situations arise. A policy issue for example may present itself in a matter before the WSIAT and it may be the presence of that individual case which may assist in garnering broader based constituency support. In addition, an issue advanced in a case which has s. 126(4) potential appeal (although as noted below – the power of s. 126 has been rarely deployed), often ramparts the policy change case within the WSIB. Board officials respond to a serious case advanced in a serious manner.

#### **The available approaches to effect change**

Within the structure of today's WSI system, there are innumerable approaches through which to cultivate and champion change.

#### ***Advancing an issue through adjudication channels***

Mr. R. Ellis, the inaugural Chair of the Appeals Tribunal, at the *Workers' Compensation Board of Ontario 75<sup>th</sup> Anniversary Symposium* stressed the significance and importance of adjudication in the development of workers' compensation:

“The first thing that struck me is the importance – really the central role that the problem of adjudicating workers' compensation issues has played in the development of the workers' compensation system over the years. It was really the problem of adjudication – dissatisfaction with the way in which the courts were adjudicating the issues in personal injury matters relating to workmen – that created the idea of a separate workers' compensation system”.<sup>25</sup>

Policy-making by trial-type adjudication has a number of advantages over rule-making, in that it is flexible, deals with particulars, gives opportunities to examine hypothetical instances, and it makes the discussion of alternatives available to those affected by any policy.

<sup>25</sup> Ontario, “The Workers' Compensation Board of Ontario 75<sup>th</sup> Anniversary Symposium, September 20-21, 1989”, Robert Elgie, Chairman and Alan Wolfson, Vice-Chairman of Administration at 16.

While adjudication is not likely superior to rule making in advocating policy change, it is no less important. Rules must always be subject to review, revision and attack,<sup>26</sup> and what better way to expose the deficiencies of an established rule than through a thorough, fair and comprehensive adjudication process. Adjudication has the added advantage in that it allows for a gradual appreciation of the intricacies of a particular issue to emerge over a reasonable period of time. A single adjudication, contrary to a specific aspect of a rule need not necessarily result in the immediate abandonment of that rule. A remarkable consistency is more likely to result, as decision makers have the chance to refine rules, and as importantly, understand where rule making need not apply.

However, the capacity to effect change through adjudication is reduced under the current statute as the Appeals Tribunal is required to apply Board policy.<sup>27</sup> Under the 1985 Act and the Pre-1998 Act, the Appeals Tribunal arguably had broader powers than under the current Act. Under the 1985 Act, the Appeals Tribunal was tripartite in structure [s.86b], and required a Vice-Chair, and not less than two members to be equal in number and representative of employers and workers to constitute a quorum [s.86d]. The Appeals Tribunal was given jurisdiction to hear “all appeals from decisions, orders or rulings of the Board” [s.86g(b)], as well as some matters expressly conferred upon it [s.86g(a)]. The Appeals Tribunal had the same authority to decide cases as did the Board [s.86g(3)], could vary any Board decision within its jurisdiction [s.86l(1)] and was as well governed by a privative clause [s.86g(3)].

However, it was s.86n which dealt with the essence of the adjudicative relationship between the Board and the Appeals Tribunal, and the manner in which that relationship was managed, created a (short-lived) advocacy opportunity.

Occasional conflict was clearly contemplated as the Appeals Tribunal would come across instances in which it disagreed with the Board’s application or interpretation of the statute. Section 86n set out the following procedure: i) where a decision of the Appeals Tribunal turned upon an interpretation of policy or law, the board of directors of the WCB could, in its discretion, review and determine the issue of interpretation [s.86n(1)]; ii) following this review the board may direct the Appeals Tribunal to reconsider the matter in light of its determination [s.86(1)]; iii) the Board is required to allow “parties likely to be affected” an opportunity to make oral or written submissions [s.86n(2)]; and iv) the Board must publish its reasons [s.86n(3)].

<sup>26</sup> James T. O’Reilly, “Administrative Rulemaking” (McGraw-Hill Book Company, Colorado) 1983 at 31, “Rulemaking is a process rather than a product.”

<sup>27</sup> WSIA, s. 126(1).

### Mandate of the Appeals Tribunal

The mandate of the Appeals Tribunal was considered to be a “re-hearing” rather than an appeal in the traditional sense,<sup>28</sup> with the assignment being: i) “Did the Board get the facts right?; ii) Did it get the medical facts right?; iii) If so, is the Board’s conclusion concerning the consequences which follow from those facts based on a correct interpretation of the Act?; iv) If the answer to any of these questions is “no”, what consequences does the Act specify, given the correct conclusions of the facts?”<sup>29</sup> The Appeals Tribunal did not possess the discretion to routinely review Board policy, only if the Board’s disposition is compatible or not with the Act.<sup>30</sup>

Over time, once the institutional view of the Appeals Tribunal had emerged (recognizing that it may take several decisions for the issue to be fully canvassed), a continued difference between the Board and Appeals Tribunal would be intolerable and certainly beyond the contemplation of the Act. The Act simply could not contemplate two distinct and parallel streams of case disposition, where appellant tenacity and resource availability mattered more than the true merits of the case. The Appeals Tribunal Chair offered only three options in these circumstances: i) an Appeals Tribunal-initiated change in its position; ii) an 86n review; or iii) a board of directors’ decision to bring the Board’s position into line with the Appeals Tribunal’s position.<sup>31</sup>

### Is the Appeals Tribunal’s policy review role adjusted under the WSIA?

The prevailing view is that the WSIA, through s. 126(1), constrains the capacity of the WSIA to review Board policy. While this interpretation is clearly borne out by institutional practice since the proclamation of the WSIA, I disagree with this analysis. In fact, the current structure arguably creates a greater opportunity for the Appeals Tribunal to review Board policy.

Under the WSIA, if the Appeals Tribunal, in a particular case, concludes that a Board policy of which it is notified is inconsistent with, or not authorized by the Act, or does not apply to the case, the Appeals Tribunal is able to refer the case to the WSIB Board of Directors Board for its review.<sup>32</sup> The Board will then issue a direction, within 60 days.<sup>33</sup>

In effect, the WSIA and the WSIB maintain very similar roles in principle, under the WSIA that both institutions held pre-1998. Under the Pre-1998 Act, the Appeals Tribunal would not decide a case in a manner contrary to prescribed Board policy unless the policy was in effect *ultra vires*. The same remains true today. The only distinction under the

<sup>28</sup> See WCAT Decision No. 24I [1988], 1 W.C.A.T.R. 93 at 118 (Technical Appendix: Explanation of the Tribunal’s Adjudication Process).

<sup>29</sup> WCAT First Report, 1985 – 1986, at 5.

<sup>30</sup> WCAT First Report, 1985 – 1986, at 5.

<sup>31</sup> *Ibid.*

<sup>32</sup> WSIA, s. 126(4).

<sup>33</sup> WSIA, s. 126(8).

WSIA is that the Appeals Tribunal is unable to actually make a decision contrary to Board policy. However, the Appeals Tribunal is required to refer cases to the Board of Directors if the “policy is not authorized by the Act”, or if it is inconsistent with the WSIA. Since the WSIA requires that every case is to be considered on its individual merits and justice<sup>34</sup> and as policy cannot fetter the discretion of the decision maker in an administrative justice regime, where policy constrains the decision maker, or where a rigid policy of the WSIB creates an unfair result, the Appeals Tribunal is able to, and arguably required to, refer such a policy to the Board of Directors.

All the WSIA did was change *how* the Board became involved. Before the WSIA, the Board decided if it was to become involved. Under the WSIA, the Appeals Tribunal involves the Board. In both instances, policy is reviewed.

Yet, under the WSIA there have been very few cases where the Appeals Tribunal referred a case to the WSIB Board of Directors. It appears as if very few appellants are requesting s.126(4) referrals, and it is equally apparent that the Appeals Tribunal has not, through its own initiative, made such referrals. Section 126(4) is an unexploited advocacy tool.

#### ***Advancing an issue through established consultation channels***

A requirement to consult is a core ingredient to checking discretion. However, consultation is able to take on many various forms, from “notice and opportunity to participate” at one end of the spectrum (what I will describe as the minimum content consultation), to actually involving those affected by a rule or policy in the formation of the rule.<sup>35</sup> To effectively consult, an agency must ascertain the array of various interests within the agency’s sphere of authority.<sup>36</sup>

At various times, the Board was a model consultative agency, and at others, was loathe to allow interested stakeholders any meaningful opportunity to participate, and at still others, consulted so expansively on every conceivable issue, that the agenda became so congested it suffered from advanced grid-lock.

While in the past, written policy was less significant than actual practice, after the advent of the Appeals Tribunal, the Board began in earnest to develop comprehensive policies on a host of emerging and longstanding issues. The Board established a policy department<sup>37</sup> and developed a

consultation protocol that called for the participation of an impressive array of stakeholder groups.

Consultation provided the Board with the best capacity to address the interests of its full constituency, although there was an increasing flavour with the Board’s senior management that consultation was a distraction. At one point it became clear that the Board’s Administration was “stuffing too much into the goose” and the process froze up. The problem, was not that there was not still some continuing commitment to consult, but, the system became so congested, it stalled.

A formal consultation process though had the effect of disciplining stakeholders to advance responsible and thoughtful positions.

The Board has never abandoned its commitment to consult, and the Board utilizes several stakeholder “advisory committees”. However, while in the past the policy agenda usually was in response to actual issues being litigated in the system (stress, chronic pain entitlement, accident definition, etc.), the agenda is now set entirely by the WSIB. Rather than leading the process, stakeholders are required to respond to the Board’s initiative. While participation in such an exercise is not without influence, it lacks the power of a combined adjudicative and policy review joint initiative of the type possible under past administrations.

The most effective contemporary advocacy model to explore represents an intelligent mix between adjudication, consultation and policy review. The challenge today is to cultivate WSIB corporate interest. A multilateral style is essential.

The advocate must firstly establish the legal integrity to the position. A real case (or cases) must present themselves. However, reliance on the appeals system to remedy a policy deficiency is riskier today. Not only may the Appeals Tribunal not recognize the policy argument and refuse to refer to the Board pursuant to s. 126, but, the Appeals Tribunal may grant the appeal for other grounds. In other words, the impugned policy may survive intact.

The policy advocate is wise to pull several advocacy strings together. Through the single case, constituency interest may be cultivated, which sets the stage for a concurrent policy assault while a case is proceeding through the appeals process.

#### **Summary**

The capacity to influence WSIB policy is limitless. Most importantly, the need to influence policy ever presents itself. The WSIB cannot do it on its own. The experienced WSI advocate has a serious role to play. By channelling one’s energies thoughtfully, by mobilizing interest, and by setting out to shape policy, “*things will be made to happen*”.

<sup>34</sup> WSIA, s. 119.

<sup>35</sup> John Mark Keyes, “Power Tools: The Form and Function of Legal Instruments for Government Action”, Canadian Journal of Administrative Law and Practice 10 C.J.A.L.P. 133 at 151.

<sup>36</sup> Law Reform Commission of Canada, “*Administrative Law - Independent Administrative Agencies*” (Minister of Supply and Services, Ottawa) at 98.

<sup>37</sup> Strategic Policy and Analysis Division which included the following departments (branches): Strategic Policy; Operational Policy; Communications; Medical and Occupational Disease

Policy; Research and Evaluation; Planning and Analysis; Corporate Data and Consultation (WCB Annual Report 1990 at 8).