

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

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Workplace Safety & Insurance Reform *The WSIB is a “Government in Miniature” But it lacks the accountability of government*

There is a better way: Three bold reform steps to higher WSIB accountability and system stability

The WSIB taxes, runs an internal judicial system, de facto legislates: It is truly a Government in Miniature

The Workplace Safety & Insurance Board [“WSIB” or the “Board”] is charged with the enormous task of mass adjudication, including the administration of a sophisticated administrative justice regime, benefit and disability administration, employer tax administration, (including setting the rates and collecting the premiums), and investment fund maintenance.

The *Workplace Safety & Insurance Act* [“WSIA”] gives 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.

Governed by a Board of Directors, the WSIA provides overall guidance, but the 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.

The Board *de facto* legislates (its policies do not require legislative approval and are not reviewable in any court), sets tax rates, collects taxes, dispenses justice, with almost complete autonomy. The WCB is surely a “*government in miniature*”.

Yet, the WSIB is not held to account in the manner of a government

Yet, the present structure of the Ontario WSIB lacks essential elements of accountability. Whatever accountability measures are in place, they do not proximate, by any measure, the required standards assessed within the context of the scope of mandate of the Board.

While taxpayers control governments, WSI stakeholders have no control over the Board – except that which the Board itself permits

Taxpayers ultimately control governments. Taxpayers select governments. Workplace safety and insurance [“WSI”] stakeholders have very little influence over the Board – other than that which the Board itself *permits*.

The system is based on a presumption that the Board will always work in the public’s interest – What if it doesn’t?

The prevailing theory of WSIB governance seems to be as simple as this – there is no need for strict accountability levers, as there is a strong presumption that the Board will *always* act in the public interest. In other words, ***WSIB governance is principally an act of faith.***

The elected government does not, should not and cannot control the Board

Notwithstanding that the Board is a creature of statute, the government itself lacks significant control over the Board, both by legislative design and for reasons fuelled by political pragmatism. The government and the Minister of Labour exercise benign controls through the appointment process, a Memorandum of Understanding, the (never used) capacity to issue policy directives, and the ability to request value for money audits.

While the Board is independent of government (and rightly so), governments will act in face of widespread discontent

By design, the Board must operate politically independent of any government. Politically, governments will normally act only after a groundswell of discontent has galvanized into demands for reform. Government action, is therefore, understandably at its core, reactive to public pressure – yet, public pressure only becomes visible long after discontent has matured and grown into a political force. With respect to WSI change, governments act only at time of crisis, and only then, with a broad brush.

Eventually WSIB disconnect with the public will result in a loss in confidence

When the institutional interests of the WSIB become disconnected with the core interests of its stakeholder public, the resulting loss in confidence will, over time, evolve into a

political force. However, unless intricately allied with its stakeholder public through strict accountability features, this disconnect is inevitable. ***Change is therefore constant, but frenetic, fuelled by discontent.*** Not at all an ideal recipe for calm governance and incremental change.

The eccentricity of WSI reform

The last three decades have been witness to remarkable reforms

The Ontario WSI system enjoys a fascinating contemporary history of reform spanning the last three decades. Moving forward is risky without understanding the dynamics behind these past reforms. Staying still is riskier. While much progress has been made, and while the system of 2006 bears little resemblance to the system of 1976, at its core, the system of today remains subject to the same forces as the system of thirty years ago.

At its core, WSI is about a social contract – not an insurance contract

While the most recent slate of reforms [Bill 99 – 1997], profiled the term “*workplace insurance*”, and while insurance has always been the essential feature of workers’ compensation, at its core the WSI system remains a dynamic social contract between capital and labour. *Insurance is but the tool that binds that contract.* Essential to this contract is a continued requirement and perception of systemic fairness – for both groups, management and labour.

Two truths are constant – loss of constituent confidence will spark protest and change; and the Board cannot maintain constituent confidence in the long term

If WSI reform history has established two constant truths they are this - the systemic inequitable treatment of a core constituency will result in a loss of confidence which will spark a formidable and persistent quest for fairness, and the Board as presently and historically structured, is unable in the long term, to maintain constituent confidence.

Absent external influence, the Board is not a champion of change – the Board is the guardian of the status quo

The Board is not a champion of change. Never has been. The Board as presently structured will always be the guardian of the *status quo*. While the *status quo* will always be in a state of adjustment, forces external to the Board have historically been the exclusive source of change.

Any major change since 1970 has been externally driven

While change is a precursor to progress, and while the system has made substantial progress over the last thirty years, that change has generally been uncontrolled and reactionary to contemporary factors.

The 1970s: Customer service and organizational changes

The 1970s responded to an environment of growing “rights based” discontent through the establishment of the Aird Task Force, which championed customer service changes at the Board. Even with a senior member of the Aird Task Force becoming Board Chairman (Michael Starr),

the Board was unable to adequately respond to increasing discontent.

1970s organizational changes did not quell growing worker discontent – demands grew for major reforms

By the end of the decade, the government of the day commissioned an in-depth review by Prof. P.C. Weiler, which presented the blueprint for the next two set of massive structural reforms.

The 1980s: A focus on worker equity

After an extensive (and unprecedented) public consultation process, which included the publishing of a reform White Paper, extensive legislative committee debates culminating in an extensive Standing Committee Report, significant change focused principally on worker equity. 1985’s Bill 101 made great strides in accountability and fairness with the establishment of the Appeals Tribunal and a Representative Board of Directors. Coincident with this design change were complimentary administrative changes, and a corresponding “*changing of the guard*”. A new *status quo* was in place.

A new stakeholder empowerment (short lived) began to take root

The reform dynamic continued during the new regime. The new *status quo* of the mid-1980s gave rise to a new stakeholder empowerment. ***Make no mistake – stakeholder empowerment was not a Board initiative*** – it was nothing less than a central feature of the new *status quo*, with roots directly linked to the political demands advanced in the early 1980s.

External demands for change culminated in a revamped benefit system

The demands for substantive reform still fuelled by worker equity considerations during the late 1980s culminated in a dramatic adjustment of the benefit delivery model [1990’s Bill 162], reforms spurred by an ongoing political interest, ***with absolutely no foothold in any Board initiative.*** ***Stimuli for change were as they are now – external to the WSIB.***

Board and political leadership was confused in the early 1990s

By the mid-1990s, with the political direction for change confused, the then new *status quo*, was unable to match the change dynamics of the recent past, and without deep rooted stakeholder support, the legislative reforms of 1995 (Bill 165) were not sustained.

This gave rise to new external demands for change in the mid-1990s

These were quickly supplanted by the 1998 statute (the current WSIA), and again a new *status quo* emerged, with a re-ordering of WSIB priorities – financial sustainability, prevention and individual responsibility.

While the new *status quo* adjusted to these new challenges during a period of significant change and restructuring, throughout this transition some of the lessons of the past were lost.

The Board of Directors was no longer directly accessible

Stakeholder participation principally guaranteed through an engaged and representative Board of Directors, an essential and prominent feature since the mid-1980s, was supplanted by a tight central control over the external dialogue. While structurally deficient, the imperfections of the new *status quo* went largely unnoticed only because direct stakeholder access was encouraged and centrally promoted. Moreover, accountability for the systemic changes arising from the 1998 reforms, was largely personally, not structurally, assured presenting paradoxically one of the most accountable regimes overall.

Commitment to positive change has waned in last 2-3 years; neglect will create renewed demands

Over the past two-three years though, the commitment to change has waned, as the 1998 reforms matured and in the absence of a new political champion for change. Yet, the need for incremental adjustment persists (always). Neglect to stakeholder demands (worker and employer) will result in a net loss of stakeholder confidence, which will inevitably give rise to a renewed call for massive change.

Five simple truths emerge from an examination of the story of contemporary reform over the last thirty years:

Truth No. 1: All reform is externally driven – the WSIB does not drive change. The Board *administers* change.

Truth No. 2: The old status quo is replaced by a new status quo. One era does not transform into the next. Each WSI reform era is distinct and identifiable. Every new *status quo* eventually wears thin and is replaced.

Truth No. 3: Each reform phase is preceded by a period of significant stakeholder discontent, eventually acquiring political potency, and culminating in massive change, legislatively focused.

Truth No. 4: WSI reform is never smooth – it is divisive and tumultuous and anything but controlled.

Truth No. 5: The end of one era of reform simply marks the beginning of another era of reform. The system does not progress smoothly – it moves in “jerks”.

There is a better way: Three Bold Steps

The 1970s sparked a new focus on client service; the 1980s on worker equity; and the 1990s on financial sustainability. ***The 2000s mark the need for higher governing accountability, and with a more accountable system, the opportunity to end the treadmill of turbulent chaotic reform.*** A new, better way is possible.

Reform Essential No. 1: A new WSIB Board of Directors:

The catalyst for system stability rests squarely in governance accountability. The start is the Board of Directors. A new untried model is not needed. The best method has already been tested – the representative, pro-active, community focused Board of Directors of the late 1980s, the essential features of which were: i) a strong, policy focused Chair presiding over engaged stakeholder nominated Board

members; ii) a commitment to community outreach through regular extensive formal discussions with stakeholder leaders; iii) stakeholder access to WSIB agenda and background material. In short, a dynamic and informed continual senior dialogue with WSIB Board members.

Reform Essential No. 2: An engaged “arms-length”

Minister of Labour: Measurable accountability is essential yet, historically lacking. Accordingly, Board officials and the Board of Directors, are not held to account for achievements – the only measurement is process focused. The Minister of Labour has the capacity through the **Memorandum of Understanding [WSIA, s. 166], policy directives [WSIA, s. 167] and Value for Money Audits [WSIA, s. 168]** to establish quantifiable objectives.

Objectives must be “holistic” and sensitive to competing WSI interests. For example, achieving full funding at the expense of higher premium rates is an illusory and facile objective. A ***workable and meaningful five year plan*** is an effective means to hold the Board’s administration to account – but – ***only if it itself is grounded in stakeholder accountability.*** **Stakeholder accountability materializes only with direct and meaningful input through a dynamic representative Board of Directors.** In short, a sense of design partnership between the Board administration, the Board of Directors, the stakeholder community and the Minister of Labour, is a critical component to sustainable WSI administration.

Reform Essential No. 3: A conduit for incremental change is required – I propose a routine five year external review:

The WSIA is a static piece of legislation until and unless subject to periods of politically inspired reform. Currently, there is no viable means to address the need for incremental adjustment and change. **At present, change is massive or non-existent – feast or famine.** A regular systematic large scale external review, reporting directly to the Ontario legislature, facilitated by a panel of persons with impeccable credentials (past or current members of the judiciary, with direct stakeholder participation) conducted at five year intervals, will allow for a perpetual opportunity to address statutory and administrative shortcomings, before a crisis and the inevitable political lobbying drives the agenda. This simple innovation ensures that WSI reform becomes routine, less partisan, and most importantly, considered without an impending crisis of confidence.

Summary: A higher standard of public accountability, delivered through several independent but connected theatres of interest, will ensure a more vibrant and sustainable WSI system that is able to respond to evolving demand absent a political crisis, without forsaking the benefits of an interest based model. A higher standard of accountability, fuelled by enhanced stakeholder participation and expectations, moves the critic from detractor to partner. ***All of this is immediately possible with a minimum of legislative adjustment.***