The Liversidge *e*-Letter

An *Executive Briefing* on Emerging Workplace Safety and Insurance Issues

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Does WSIB have the moral authority to increase premiums for 2011 or 2012?

If true to its "Fair Warning" declaration, perhaps not

WSIB has broad legal authority to increase premiums

The *Workplace Safety and Insurance Act* ["WSIA"] bestows a very powerful discretion on the Workplace Safety & Insurance Board ["WSIB" or "Board"] with respect to employer premiums. In fact, the Board pretty much enjoys an unfettered and absolute discretion to set employer premium rates. The WSIB Board of Directors ["BOD"] is empowered to "*establish policies concerning premiums payable by employers*" **[WSIA, s. 159(2)(a)]**. The only real limit on the Board's powers is that it must "*act in a financially responsible and accountable manner*", act in good faith and exercise the "*care diligence and skill of a reasonably prudent person*" **[WSIA, s. 163]**, and maintain the insurance fund so that "*it is sufficient to make the required payments under the insurance plan as they become due*" and "*so as not to burden unduly*" employers in future years **[WSIA, ss. 96(2),(3)]**.

As I set out in the September 18, 2009 issue of **The Liversidge *e*-Letter**, **"*For 2010 WSIB reaps startling windfall from Statistics Canada*"**, the WSIB establishes the amount of premiums, premium rates, and the method to calculate premiums **[WSIA, s. 81]**.

The economic power of WSIB taxes long recognized

As far back as 1983, the financial health of the Board (i.e., the linkage between the unfunded liability ["UFL"] and increasing employer premiums) and the "*ability of Ontario's employers to carry on business*" was linked to the "*continued strength of the province's economy*" **[WCB 1983 Annual Report]**. This point was reinforced as late as October 1st, when the Minister of Labour advised the House "*We understand that there is a balance between how we set premium rates for employers and the impact to employers*."

Yet, government has little direct say

Yet, the government has little say in either the Board's funding strategy or year-to-year employer premiums. While a full debate on the pros and cons of this will be left for another day, the government only has two controls over WSIB policy. The first is through the **Memorandum of Understanding** ["MOU"] between the Board and the Minister of Labour **[WSIA, s. 166]**, and the second is through specific **policy directions** issued by the Minister **[WSIA, s. 167]**. Other than that, the government has no control over the Board (although Cabinet may direct the Board to increase premiums if the insurance fund is insufficient **[WSIA, s. 96(4), (5)]**). With respect to funding policy and premium rates, s. 167 has never been engaged. And, with respect to the MOU, there is no public acknowledgement that the government and the Board have entered into any agreement with respect to rates or funding ("arms length", remember?).

WSIB's "*Fair Warning*"

All this brings us back to the Board's "***Fair Warning***" issued during the 2010 premium rate "consultation". Refer to the August 21, 2009 issue of **The Liversidge *e*-Letter**, **"WSIB issues "Fair Warning": *If WSIB's economic situation does not improve it will consider future rate hikes*"**. I still question the timing of the warning. As I pointed out on August 21st, the WSIB doesn't have a long-term funding plan since it declared the obvious - the 2014 full funding plan was toast. For the better part of a year I have suggested that the Board arrange a funding summit with Ontario's business leaders. Now, let us examine a little more closely what the Board said:, "*if the WSIB's **economic situation does not improve**, we will have to consider introducing premium rate increases in the future*" **[WSIB News Release July 27, 2009]**.

I don't think there is a secret plan to hike rates

First, while I don't think there is any secret plan to increase rates, some suggest the Board is trying to set the stage for a future rate hike if "needed". To his credit, under Chair Mahoney's leadership since 2006, there have been no "across the board" (pun intended) hikes in the aggregate premium rate. For 2010, there was a *slight increase* in the average premium (since no declines in premium rates were permitted and some industries saw rate increases). As I explained in the August 21, 2009 issue of **The Liversidge *e*-Letter**, "*I have no quarrel with the 2010 premium policy*". I noted then that WSIB Chair Mahoney was right on the mark when he said, "*The costs of running Ontario's workplace*

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safety and insurance system have been impacted by recent increases to benefits, by poor investment returns, and by the current global financial crisis." In the **December 31, 2008 issue of The Liversidge *e*-Letter**, I noted that the ***"Board's investment implosion, coupled with increasing claim demands and declining revenues create a perfect storm***".

WSIB confident in its ability to fund obligations

That said, the Board must still present a very compelling case for rate hikes, and, in my respectful view, ***as a direct result of the "fair warning" the Board will have a tough time constructing that solid case***. Let us not forget that while on the one hand the Board is wringing its hands over the impact of last year's market melt-down, on the other hand, it is the clear, considered, and one must conclude *prudent opinion* that things are not too dire at all. We need not look any further than the **2008 WSIB Annual Report** for some reassurance. We learn that notwithstanding that the Board is "*in the midst of a global financial crisis of unprecedented proportions*", it nonetheless is "*in a strong position to cement a practical, future-focused strategy to mitigate today's economic challenges*" **[Chair's Message, p. 5]**. Moreover, "*despite the economic challenges . . . the WSIB's ability to fund the ongoing obligations of the workplace safety and insurance system remains secure*" **[President's Message, p. 7]**. (If the Board's assessment is proved wrong that will soon be known and is another matter indeed.)

So, things are bad, but not catastrophic. At the time the WSIB issued the "*fair warning*" and when the 2008 WSIB Annual Report was written, the most up-to-date statement on the "economic situation" of the WSIB was set out in the "**2009 First Quarter Report to Stakeholders, For the Quarter Ended March 31, 2009"** ["March 31st Report"]. (Refer to the June 23, 2009 issue of **The Liversidge *e*-Letter**, **"WSIB 2009 1st Quarter Report"**.)

March 31, 2009 is a reasonable "benchmark" – UFL sat at $12.38 billion

So, March 31, 2009 is a reasonable benchmark from which to measure the WSIB "economic situation". ***So, how were things as at March 31, 2009?*** Remember, no matter how bad, "*the WSIB's ability to fund the ongoing obligations of the workplace safety and insurance system remains secure*" **[WSIB 2008 Annual Report, p. 7]**. On March 31, 2009, the WSIB "accident fund" had about $12.573 B in assets (March 31st Report, p. 4) and $24.953 B in liabilities, accounting for a March 31, 2009 UFL of $12.38 B. Of the Fund's assets, roughly $5.9 B was in equities (about 46% of the total assets; the distribution - 28% domestic; 41% US; 31% global).

Since then, WSIB's "economic situation" *has* improved

While we have no recent report on the state of the Board's finances, a few reasonable presumptions allow for a realistic "ballpark" estimate. Since March 31, 2009, the TSX has jumped about 30%. Based on that it is reasonable to presume that the Board's equities increased by at least, say 25% over the same period. That would put the Board's equity growth in the $1.5 B range, pushing the Board's assets towards $14.1 B, ***which would reduce the UFL by an impressive 12% to the $10.9 B range***. High, but compared with the March 31st $12.38 B, and even December, 2008's $11.469 billion, better. (Of course, the Board's fortunes jump about daily with the ebb and flow of the markets.)

Here is the overall point – the WSIB issued a "*fair warning*" that premiums may have to increase "*if the WSIB's economic situation does not improve.*" **Well, the Board's "economic situation" *has* improved**. So, if a $11.469 billion UFL was not enough to force a premium hike and a $12.38 B UFL equally wasn't, and as the Board's "*economic situation*" has improved, it would be tough indeed for the Board to muster the moral authority to spearhead a premium hike in either 2011 or 2012, and still maintain credibility.

My prevailing advice – *Get on with the funding summit*: This discussion boils down to a very simple point – in the absence of a long-range funding plan, the Board's "*fair warning*" jumped the gun. The well-established and traditional consensus focused protocol of reaching out in a *partnership* with Ontario's employers is the better, and only, way to go. I remain of the view that until there is a renewed funding plan, *accepted by Ontario business*, the Board has no moral authority to increase employer premiums ***or even introduce the idea of future premium hikes***.

"Fair warnings" should be set aside and attention focused on a new long-term plan

What is needed is not "fair warnings" or press notices, but instead a strong and unequivocal commitment from the Board to immediately organize a high level funding summit with business stakeholders to *collaboratively* develop future funding *and related* plans. I don't envision a process defined by a few meetings with the usual suspects. What is needed is a brand new method – a broadly defined, *ongoing*, elaborate process in which the Board participates as a partner, providing resources *and* full disclosure. *By the way, this process has been tried before and with great success*. It is pretty much what transpired in 1983/4 when the 2014 thirty year funding plan was first established.

***The "Mahoney Review"* likely to address funding issues**

I have every confidence that the now long-awaited "*Mahoney Review*" will address the critical issue of WSIB viability. As I explained in the March 10, 2009 issue of **The Liversidge *e*-Letter**, **"Chair Mahoney's Consultation: *Time to get Back to Basics*"**, while I don't expect a cry of "***Eureka!***", I do expect that it will contain some suggestions for a new funding dialogue. I suggested that the best result of the Mahoney Consultation would be the start of a "*never-ending conversation*" that demands responsible participation and a sense of WSIB/stakeholder partnership. *The clock is ticking*. The process I envision will take time, commitment and a lot of energy. There is no instant solution. A new consensus with Ontario's employers is now long overdue. I suggested it a year ago. ***It's time.***

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