

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

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

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New Approach to Employer Disputes *WSIB relaxes “pay now – appeal later” rule*

WSIB implements recommendations from last year’s *Standing Committee* report

Not perfect – but certainly better – and fairer

Lost in this Spring’s hubbub surrounding experience rating [“ER”] was a quiet but significant announcement by the Workplace Safety & Insurance Board [“WSIB” or “Board”]. Effective April 7, 2008 the Board put in place two new policies for employers caught up in premium based disputes with the Board.

Before these changes, employers appealing unfair assessments had to pay now – appeal later

Before this, when faced with an increased assessment considered unfair to the employer, the position of the Board was firm – *pay now – appeal later*. I always considered this exceedingly unfair, especially since many of these increased assessments were incorrect and later overturned.

For smaller employers even if they won – they lost

Especially for the smaller enterprise, even if the appeal was won, much harm was still done. The increased assessment still had to be paid. *Immediately*.

As reported in the February 28, 2007 issue of **The Liversidge e-Letter**, during my appearance before the *Standing Committee on Government Agencies* I commented on several problems with what I have called “*the business end of the Board’s business*”. One complaint dealt with this issue – the “*pay now, appeal later*” policy of the Board. This is what I said:

... the Canada Revenue Agency withholds collection while a taxpayer is appealing a CRA ruling (CRA Information Circular, 98-1R2). The WSIB has no similar provisions – it demands payment upfront. This difference is a powerful one. It means that unfair and incorrect WSIB tax rulings, many retroactive in force, even if later found to be unjust and incorrect, could well force an Ontario business to the brink of insolvency. Changing this one heavy-handed practice would go a long way to restoring fairness to the WSIB taxation scheme

More on the Board’s response to that suggestion a little later. During my appearance at the *Standing Committee*, I made other suggestions, several of which, to its credit, have been acted upon by the Board:

Recommendations for positive change

Now four simple, easy to implement solutions:

One: The WSIB Board of Directors should conduct a high level review of the Board’s Audit and Collection departments. Leadership, change and a new way is needed.

Two: Senior WSIB officials must become more directly engaged in issues brought to their attention, and not just pass them “down the line”. *Just sometimes* the complainant might be right and *just sometimes* the Board might be wrong.

Three: The Board should immediately restore the *Voluntary Registration Program*.

Four: The Board should follow the CRA lead and suspend collection activity while an assessment is being actively appealed.

An update on the four suggestions

On the high level audit, this isn’t happening, at least at the Board level. A limited and more narrow review has been triggered at the senior official level but seems stalled.

On the need for Board officials to become more directly engaged in significant issues, I can report some progress here.

On the Voluntary Registration Program [“VRP”], through the direct and vigorous leadership of the WSIB Chair, the Hon. Steven Mahoney, the Board moved at warp speed on this. As I reported in the March 12, 2007 issue of **The Liversidge e-Letter**, Chair Mahoney committed to reinstate the VRP. He then followed through. Later in the year, the Board announced the return of a new VRP, but as I noted in the November 5, 2007 issue of **The Liversidge e-Letter**, it didn’t go far enough. Under the new VRP, an employer *not registered at all* voluntarily coming forward will not be prosecuted and premiums are payable from the beginning of the year only.

Employers not complying at all get a better deal than those in partial compliance – this makes no sense

As I explained in the November 15, 2007 issue of **The Liversidge e-Letter**, the principles of the VRP only apply to non-registered employers. An employer that has been registered but is only partially in compliance is outside the scope of the VRP. *This makes little sense*. That class of employers should have the opportunity to come forward and “clean up their record” in the same way as the fully non-compliant employer. **Frankly, it simply sends the wrong**

message when an employer that is not in compliance at all gets a better deal than an employer that is partially in compliance.

On the suggestion that the Board should suspend collection activity while an assessment is being actively appealed, some progress has been made. The Board's initial response was interesting. At first, the Board said it *couldn't* do it, that in fact the *Workplace Safety and Insurance Act* expressly prohibited such an action. "Not so" I responded. The WSIA said no such thing. Eventually the Board agreed.

The Board then affirmed its existing policies (pay now – appeal later) which in the Board's view "ensure that those that are insured pay their fair share". In other words, the Board took the position that it "can" accept my suggestion but it simply "won't".

That was early May, 2007. Then the *Standing Committee* released its report on May 28, 2007 and recommended that "the WSIB adopt the Canada Revenue Agency practice of suspending collection activity while an assessment is being actively appealed". **New ball game.**

The Board spent the rest of the year looking into this and promulgated new policies in April 2008 [Operational Policy Document (OPM) 14-04-05, Employer Collections, Alternate Payment Arrangements and OPM 14-02-16, Credit Interest on Appeals].

Now when an employer is appealing a WSIB premium issue, the employer may request to post an irrevocable letter of credit (LC) for the full amount of the disputed premium, or negotiate a phased payment plan. The WSIB will suspend collection activity while the appeal is active. If the employer's appeal is unsuccessful, the employer is required to pay all outstanding amounts immediately, including any accrued or applied interest charges.

The new policies are not bad at all

Kudos again to the Board and especially to the Board's Director of Policy, Mr. Joe Morsillo, who fast-tracked this at a time I know he was facing several conflicting priorities. *Good work overall.*

The new policies are really not bad at all. They are not perfect, and I prefer the CRA approach, which I think is fairer for the smaller business that will be forced to "eat-up" its available credit to keep the WSIB wolf away from the door. But this approach is much fairer to the "pay now – appeal later" approach.

While progress is being made, without the Standing Committee process, nothing would have changed

The VRP idea was pushed for years – it went from a lousy idea to a great idea in one day. The WSIB was not at all eager to move on this until I suggested it before the *Standing Committee*, even though I raised the VRP issue literally for years on end to no avail. The Board rejected it time after time. I mention it before the *Standing Committee* and the idea immediately gets legs. *Why the difference?*

The Board also outright rejected the CRA approach until the *Standing Committee* adopted it. It was just as good an idea before the *Standing Committee* endorsement.

On the ER debate, the Board did not move until the Toronto Star got hold of the story

We saw something similar throughout the ER debate as chronicled in a series of *The Liversidge e-Letter* earlier this year. That story is still fresh in most people's minds. We all know that after the *Toronto Star* profiled a series of stories using the backdrop of actual cases, the WSIB announced both immediate changes to its ER program and the commencement of a high level fast-track review.

Yet, the facts behind the *Star* articles were already well known to the Board. They were already "on the record". As I said in the April 29, 2008 issue of *The Liversidge e-Letter*, "the Ontario Federation of Labour ["OFL"] brought the *exact* stories profiled by the *Toronto Star* to the Board's attention last October with the release of its report, "The Perils of Experience Rating: Exposed!". The OFL report did not tell similar stories – *the OFL told the exact same stories as did the Toronto Star and told them 5 months earlier.* If elements of ER policy were "nonsense" (as a very senior WSIB official publicly announced) why did the changes not commence then?"

The lesson? A process that publicly spotlights policy pitfalls is essential to responsible policy reform

As I noted again on May 6th, the ER "debate" reaffirms that the "Board does not move until it is pushed". This is the connecting thread to all of these events and stories.

There is a better way

There is a better way. I first introduced this in the April 3, 2006 issue of *The Liversidge e-Letter, Workplace Safety and Insurance Reform* and repeated this general theme when I appeared before the *Standing Committee* last year. This is what I said then:

The longer-term picture – WSI reform

At its core, WSI is not an insurance contract but a social contract between capital and labour. *Insurance is but the tool that promotes that contract.* Essential to this contract is a continued requirement and perception of system fairness – for both groups, management and labour. **If three decades of WSI reform history has established two constant truths they are these. First, the loss of confidence of a core constituency will spark a petition for reform. Second, the Board is unable in the long term to maintain constituent confidence.**

Ongoing WSI reform is inevitable, but it is neither smooth or incremental - it is divisive and tumultuous. Change is massive or non-existent. Feast or famine.

There is a better way. A conduit for incremental change is required. I propose an ongoing external review, reporting directly to the Ontario Legislature. This will allow for a perpetual opportunity to address statutory and administrative shortcomings. This simple innovation ensures that WSI reform becomes routine, less partisan, and considered absent a crisis of confidence, while still ensuring political oversight. This would enhance stakeholder participation and move the critic from detractor to partner. I am convinced more than ever that a new way is needed – a better way.

The system needs the aid of a dynamic reform process

What all of this simply means is this – the Board and government need assistance on big picture reform. This has always been the case, and always will. A structured reform process would allow a smoother, less political mechanism through which to channel ideas. *It makes sense. It's time.*