The Liversidge *e*-Letter

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

July 14, 2004 **An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.** **5 pages**

Advocating Change at the WSIB: *Be Principled; Be Fair*

The Winds of Change Are Blowing: Effectiveness of Business and Labour Lobby Will Turn on Principled Position Development

Governance changes will lead policy change

Likely within the next several weeks, and certainly by the end of the summer, the Workplace Safety & Insurance Board ["WSIB" or the "Board"] will be transformed. Several new members will be added to the Board of Directors ["BOD"], including a new Chair. A new President and CEO will be appointed. Once in place, it is likely that other changes to the Board administrative structures will emerge within a short period of time.

These leadership and governance changes do not come a moment too soon. High level policy issues, not the least of which is the establishment of 2005 premium rates, are beginning to back up. The Occupational Disease Advisory Panel Chair's Report ["The ODAP Report"] will require BOD review and policy approval later this year. The long-term funding strategy will likely undergo some review, and the recent Minister of Labour audit of the WSIB will ensure the focus of the new Board turns to a new approach of fiscal and managerial accountability.

Ontario WSI at a crossroads (a positive one)

The Ontario workplace safety and insurance ["WSI"] scheme is undeniably at a crossroads. While in the past, phrases such as "at a crossroads" usually meant a coded message for potential disaster, this time, the message is more positive.

While the system faces many challenges, and all is not perfect, the WSI system is not teetering on the brink of disaster. In fact, today's system, when compared to that which was in place only twenty years ago (when it clearly was "at a crossroads"), is infinitely fairer, is on the road to be better funded, and possesses a greater sense of direction towards the future than at any time in its history.

The amount of positive change over the course of the last twenty years has been nothing less than remarkable.

(*continued on page 2*)

Early Notice: Fall 2004 L.A. Liversidge Client Update and Executive Briefing:

October 19, 2004

Set aside October 19, 2004 (morning) in your calendar now.

You do not want to miss this update

Over the next few months the following will happen:

- ✓ **A new Chair *and* a new President will be appointed to the WSIB.**
- ✓ **A new WSIB Board of Directors will be in place.**
- ✓ **The WSIB will have consulted on 2005 premium rates and premium levels likely will be set.**
- ✓ **The WSIB funding strategy will be reviewed.**
- ✓ **Direction set for experience rating reform.**
- ✓ **Consultation on the ODAP Report completed.**
- ✓ **The Minister's audit will continue its impacts, as the Board becomes more accountable.**

In short, the system will be transformed from what we see today.

2004 will prove to be a milestone year.

To ensure you stay up-to-date, attend this briefing, exclusive and complimentary to L.A. Liversidge clients.

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At the moment, unlike in past eras, there is no equity crisis and there is no funding crisis

The two big pressure points, worker equity and financial stability, while perhaps not wrestled to the ground, are no longer points of crisis.

The system is fairer for workers

Two decades ago, disabled workers were faced with a meat-chart benefit scheme so imperfect that many workers were tragically under-compensated, with others being over-compensated. After a lengthy period of political turmoil, and after much study, the system responded (in 1990) and adjusted with a fairer benefit model focusing more on the individual circumstances of the individual worker – ending systemic under-compensation.

At the same time, the system also turned its attention to rehabilitation and worker reinstatement, themes which remain very much a part of the fabric of today's WSI scheme. Workers acquired limited rights of reinstatement and the attentions and resources of the system turned toward early and safe return to work, an approach experiencing continual development and change today.

As importantly, with the appearance of the Appeals Tribunal in 1985, the Ontario appeals system rose from one harshly (and rightly) criticized to become an archetypical example of an administrative justice regime. The *rule of law* arrived to the WSI scene.

System funding is no longer at a crisis

Twenty years ago, the WSIB developed a long-term funding strategy aimed at curtailing the then (just) emerging unfunded liability ["UFL"]. This called for several years of sharp increases in employer premium rates, agreed to and supported by employers. The expected gains were long in coming. Ten years ago, the system was still very much in a crisis. Accident rates were down and declining, yet employer premium rates were still on the incline as was the UFL. It was not until more recent times that both premium rates and the UFL dipped. While some financial pressures returned in the Fall of 2002, these were largely attributed to poor (and world-wide) investment declines and sharp increases in medical costs, a phenomenon common to other jurisdictions and insurance systems.

While financial pressures persist, a financial crisis does not

Make no mistake about it, there are real and serious financial pressures and issues facing today's WSI system. However, there is no crisis of the type of years past. While not long ago the very sustainability of the system was at risk, today, the issue is one of fiscal management choice. While a financial misstep could again place the scheme in a state of crisis, we are not there now, nor is the system likely to repeat the questionable policies and approaches of the past.

Critical times spawned aggressive partisan lobbying

Understandably, at times of crisis, when faced with urgent and pressing issues, both the worker and employer lobby have responded accordingly and quite aggressively. The period of change in the 1980s was largely focused on worker inequity, whereas, the period of change in the 1990s, once the system was fairer to injured workers, turned its attention to financial issues – premium rates and the UFL.

Common to both eras though was the autonomous approach of both constituencies. With few exceptions, change was not a cooperative or joint effort between labour and management. Calls for change were typically advanced independently, with little, if any, dialogue between the two core constituencies. At this juncture, there is an opportunity for this to change.

The WSI system is healthier today – for workers and for employers – as a consequence an opportunity for a cooperative approach presents itself

It is undeniable that the system is better today than it was twenty or even ten years ago. This creates an opportunity for positive future change. With no immediate or urgent crisis facing the system, there is an unprecedented opportunity for both camps – labour and management – to advance an agenda for change intersecting on points of pure principle.

Labour and management agree on core WSI principles

Without a doubt, at their core, labour and management agree on the basic tenets of the Ontario WSI system. Both want fair, efficient and effective benefits for injured workers. Both want the system to be financially sustainable over time – neither worker pensions or future generations of business should be put at risk. Both want the system to be affordable – the costs of a WSI system should not be a millstone on financial growth and job creation. Both want fair and efficient dispensation of claims – an unfair scheme burdened by backlogs and legalisms benefits no one.

Can labour and management agree on platforms of change?

In short, there is still agreement on the basic tenets of WSI which have survived for almost a century. The questions of the hour are this: *Can labour and management agree on platforms for change? If yes, how is that agreement most likely to be cultivated and nurtured?*

The WSIB BOD must assume a leadership role in developing labour/management consensus

Let me address the latter question first. It is not likely that labour and management will coalesce through on their own without a significant impetus. In my view that catalyst will likely come, if it comes at all, from the WSIB BOD, and only then if the governance of the Board is restructured. While the experiment of a pure bi-partite BOD exposed the failings of such an approach (in the early 1990s the bi-partite BOD was stalemated on every significant issue), a representative BOD of the type and structure in place from 1985 to 1990 proved to be a very successful formula.

This time around, I propose some adjustments – full-time business and labour representatives, with other part-time members with medical, investment and legal expertise.

The persistent presence of the unfunded liability impedes consensus development

The presence of the UFL remains a significant impediment to the development of a labour/management consensus on most issues. It is difficult, as but one example, to explore new means to pre-fund compensation for occupational disease so long as approximately one-third of all employer premiums goes towards the UFL. Employers, since they pay the bills, implicitly understand the power and constraining effect of the UFL. So long as there is an UFL, and so long as it continues to pose a serious financial drain on employer premiums, Ontario must temper change to fit within this fiscal reality. For the foreseeable future, change must be assessed through a financial prism clouded by the ubiquitous UFL.

Therefore, from a perspective of pure principle, labour should be as supportive of the efforts to wrestle the UFL to the ground as management. Moreover, simply raising premiums to fuel the decline of the UFL is counter-productive if premiums rise to the point of impacting business investment and job creation decisions, an always delicate balance.

Unless there is a strong and mutual labour/management commitment towards the UFL policy, it will be difficult to promote "big picture" agreement.

A review of the labour "platform for WSI reform" - there is nothing singularly unreasonably presented

As readers are aware, labour representatives have developed a platform for WSI reform [see **June 4, 2004 issue of The Liversidge *e*-Letter**]. In some quarters, this has sparked what some may categorize as an over-charged initial response. Upon careful reading however, there is nothing singularly unreasonable set out in the labour platform, and viewed from a principled perspective, many of the labour proposals are not at all distinguishable from the broad employer perspective of what the system should look like. Undeniably there are differences, and certainly it is unlikely that there will be a full concordance on the finer points of the WSI system.

However, as it is clear that a reform agenda is being formulated, and as it likely the case that management and labour still agree on the basic tenets of the Ontario WSI system, the advancement of this agenda for reform should be viewed as an opportunity to cultivate agreement.

If faced with a strong labour/management consensus on any issue, the WSIB BOD and the Government must respond to the moral authority of that consensus. Let me address some of the labour issues and provide a very brief (and admittedly insufficient) response:

Provide a decent standard of living for injured workers through full indexing, restore 90% of net, no CPP deduction, dental and drug benefits, and a living retirement plan*. Commentary:** The underlying principle of fair compensation is universally held. Therefore, the starting point of the debate is one of agreement. ***On 90% of net, it was long-recognized (before the change to 85% of net) that for short-term claims, at 90% of net, workers received more than pre-injury net wages (because WSI benefits are non-taxable). The move to 85% of net was not engineered, to my understanding, to reduce costs, rather is was designed to address the taxation anomaly for short-duration claims. There is likely room for a principled discussion on this issue. ***On the CPP issue***, the principle is one of "double-dipping" for the same disability. If there are individual application anomalies discovered, there likely would be room for discussion. ***On dental and drug plans***, of course for costs arising out of a compensable injury, they are all covered now. To expand the system for general living expenses, though likely will be viewed as going well past the parameters of the system. The issue may be linked to the 90% of net issue (above), and addressed in that fashion. ***On a living retirement plan***, the present system actually provides retirement benefits even to injured workers who had no such plan at time of injury. By any standard, this is fair. If there are principled reasons for modifications to the current arrangements, there is likely room for dialogue.

Cover all workers.* Commentary:** This is a long-standing issue and one that has attracted policy comment in all quarters. The prevailing business viewpoint, as I understand it, agrees to filling all "coverage gaps". The reality is that many workers not covered under the Ontario WSI system are adequately covered under other insurance schemes. The other reality is that there are many groups of uninsured workers who are not adequately protected at all. This must change. Refer to the **June 26, 2002 issues of The Liversidge *e*-Letter, "*Coverage Under the WSIA for Independent Operators – Full Coverage and Full Independence" and ***"Coverage Under the WSIA: Is it time to consider a private insurance model?"***, which canvass the question in some depth. I personally hold the view that all workers and independent contractors should be protected and covered by the scope of benefit protections available under the WSIA. In other words, the benefit levels and provisions set out in the WSIA should be the "floor of benefits" available to all workers and independent operators. However, I am also of the view that the time has long passed when the WSIB should be the exclusive insurer. This is what I said in June, 2002 in response to the WSIB "Coverage Paper":

Possible positions on the question of coverage:

Coverage Option 1: Status quo: The absence of a rational method to include or exclude industries or workers is the Achilles heel in the *status quo*. This does not necessarily mean that all presently excluded industries should be included.

Coverage Option 2: **Full WSIB coverage for all Ontario "workers"**: This approach is intellectually enticing and easy. It certainly advances consistency however, may not be addressing a real problem. It is clear that a constituency for the full coverage argument has never been assembled. If full coverage was a preferred and needed option, it surely would have risen to the top of the agenda at a time when pressure for momentous structural

reforms of the WSI scheme were at their peak and the political climate ripe for far reaching system transformation. It did not. While it is undeniable that inequities and irrationalities flourish in the current scheme, history has likely established that universal coverage may be too large a hammer for what is likely a small nail.

Coverage Option 3: Mandatory coverage on a proven "needs" basis: This approach is consistent with historic positions advanced by the business community, and entirely consistent with the organizing philosophy of "*included unless excluded*". While the default should be coverage, if a rational argument, stringently tested, can be advanced for exclusion, an industry should be excluded. The social objective being sought should be complete worker coverage – not preservation of the WSIB as an insurance monopoly. Exemptions should be rare and the bar for exclusions should be set very high. Theoretically, if the Board is run efficiently, and sets the insurance standard, industries which otherwise may meet the exemption criteria, may elect to be covered under the WSIB for price and efficiency considerations. Exemptions should be addressed on an application basis and currently covered industries should be provided with the same opportunity as non-included industries to argue for exclusion. Funding issues should be an integral aspect of the analysis. The insurance carrier for the excluded industry must be funded within the same parameters of the WSIB fund.

The Royal Commission on Workers' Compensation in British Columbia began reviewing British Columbia's workers' compensation system in November, 1996 and completed its study in January, 1999. Volume 2, Chapter 3 of its report, entitled *The Scope of Compensation Coverage in British Columbia: Who is Covered?*, includes several recommendations regarding the amendment of the *B.C. Act* that would, in the Commission's view, make the assessment of status process easier. The following is excerpted from the Royal Commission Report:

Exemptions

Exclusions should only be granted under exceptional circumstances where it is demonstrated that inclusion would not fit the purpose and intent of the Act.

The matrix advanced in the BC Royal Commission Report is useful. In effect, unless an excluded industry is able to demonstrate that it is enrolled in a scheme that provides equal benefits [as measured against the full gamut of WSIB benefits presently available], equal incentives and equal legal characteristics, the industry should be included.

The coverage debate has been stalled and is one that warrants revival.

***Recognize all occupational disease*: Commentary:** Of course, there is a principled agreement here, but a distinctive definition as to what constitutes an "occupational disease" ["OD"] (Refer to the **June 29, 2004 issue of The Liversidge *e*-Letter**). This is an essential debate, and one which must re-open the under-pinning social contract. I remain of the view that the obstacle here is not one of legal definition but one of funding. The current funding model simply cannot deliver fairness to *either* employers *or* workers on the question of compensation for OD.

Recognize stress*:** Of course, with the release last October of the Supreme Court of Canada decision ***Nova Scotia (WCB) v. Martin, the constitutionality of section 13(4) of the *Workplace Safety and Insurance Act* [the "WSIA"] will inevitably be tested in the future. [Refer to the **November 14, 2003 issue of The Liversidge *e*-Letter**]. It may well be held that it is unconstitutional to exclude stress claims in the manner directed by s. 13(4). Business and labour will be well served to initiate discussions to formulate a workable policy on stress. In the early 1990s, the WCB BOD attempted to develop a policy on stress and failed (due to the bi-partite structure of the BOD at the time). Stress entitlement, one way or the other, will again become a core issue and must be addressed.

***Provide real jobs with job security, or full benefits, put an end to "deeming" and enforce the Human Rights Code.* Commentary:** The entire early and safe return to work process may warrant some attention – but generally, the present model works fairly well. Employers have issues as well, particularly with respect to labour market re-entry programs. A dialogue on this issue would be well-timed.

Strongly enforce Health and Safety laws and ensure effective prevention, rather than reward employers with experience rating.* Commentary: *On OH&S laws, employers support fair enforcement and a focus on prevention. There is agreement here. ***On experience rating***, there is fundamental disagreement. However, it is appropriate to step back and review the effectiveness of Ontario's experience rating programs, with respect to delivering on accident prevention and earlier return to work [see the **March 26, 2004, April 2, 2004 and June 8, 2004 issues of The Liversidge *e*-Letter**].

***Provide health care and support services to all injured workers:* Commentary:** Unless there is a hidden request in this demand, employers, as a matter of principle, should agree. In fact, it is in the area of the provision of health care for injured workers that is not only one of the fundamental design features of the WSI system, but one which has attracted a system focus for the last decade and a half (since the "*medical rehabilitation strategy*" of the late 1980s). One of the core design benefits is the creation of a *de facto* reserved stream of medical services for disabled workers, running in tandem with, but quasi-independently of, the public health care system. Employers generally support preferential medical treatment for injured workers to expedite recovery, and thus, avoid return to work delays. The provision of effective health care therefore is a point of principle upon which there should be agreement. As readers of **The Liversidge *e*-Letter** are aware however, in recent years, WSIB medical costs have experienced an inexplicable upward swing. This cost trend warrants review so that the underlying causes are identified and addressed, if necessary.

***Fundamentally review and reform the support provided to severely injured workers such as those who require attendant care.* Commentary:** How the WSI scheme and the WSIB treats those most seriously disabled and thusly, those most in need, defines the actual and moral viability of the system. Therefore, from a point of principle, if there are areas of deficiency or areas of inadequate support with

respect to those very seriously disabled, they should be uncovered and corrected, immediately.

Be accessible, supportive, prompt, not time limited, and offer free representation. **Commentary: *On being accessible, supportive and prompt:*** No matter how fair the system design, or well intentioned the program, or how well reasoned the decision at the end of the line, if resources are not accessible, or if delays pervade the process, the system is not fair. Period. On this point of principle, workers and employers would agree. ***On time limits***, I do not at all oppose changes to the limitation periods in the WSIA. In my opinion, six months is quite unworkable. For the informed and represented litigant, they do not usually pose a problem. Most "potential" appeals are filed in time because the provisions of the WSIA are technically adhered to simply by filing a form letter providing notice of intent to appeal. This means that appeals that never proceed, and those that are unlikely to proceed, are initiated simply to preserve appeal rights. This also means that the person who runs afoul of the limitation period is usually the uninformed, un-represented or unsophisticated appellant (or respondent because limitation periods apply for cross appeals as well), which is the very class of individual for which, one would think, the system has the most interest in preserving legitimate appeal rights. It must be noted however, that the limitation periods at the Board and at the Appeals Tribunal are open to extension at the discretion of the Board and/or Appeals Tribunal [WSIA, ss. 120(1)(b) and 125(2) respectively] and therefore are not true time limits at any rate.

Interestingly, a computer search with the key words "time limit" brings up over 1,700 appeals, which seems to be an extraordinary volume, which in itself, signifies a problem.

The best case to advance, in my respectful view, is to extend limitation periods to two years. A two year limitation period also conforms with the principles of the *Limitations Act*, 2002, S.O. 2002, c. 24, which became operable January 1st of this year. A two year time limit achieves the policy goals desired, without imposing unduly restrictive time periods within which to appeal. A WSI appeal, it must be remembered, right up to the final level, is pretty much a *de novo* process, more trial than appeal.

On free representation, the system at the present time, provides free representation through the Office of the Worker Adviser ["OWA"], for workers who are not represented by a trade union [WSIA, s. 176(1)], whereas free representation for employers through the Office of the Employer Adviser ["OEA"] is provided for employers with less than 100 employees [WSIA, s. 176(2)]. This seems to be a sensible approach. This approach supports the principle of "free representation" for WSI appeals on a non-financial tested "needs basis". If unionized, representation appears to be expected to be from the union directly. It seems then that the principle advanced in this request has been long agreed to, and is now a part of the fabric of the modern WSI system. If though there are service delivery issues to attend to, then those are the issues that should be placed on the table.

Overall, the labour "demands" are in line with employer principles

Overall, it seems to be the case that from a principled perspective the "requests" advanced by labour, are in line with the principled employer perspective. There are differences in execution and in definition with respect to some issues, but, there appears to be continued and mutual support for the basic tenets of which underlie the modern WSI system.

As stated earlier though, the single most important factors impacting the future of the Ontario WSI system rests with what has happened in the past – the creation and perpetuation of the UFL. The UFL must be dealt with – it is in both the immediate and long-term interests of labour and management to have the UFL brought down to its knees, in a manner that does not place *needless* upward pressure on premium rates.

Labour and management would be well advised to form a united approach to the long-term WSI funding strategy. It is in labour's interests as much as management's that the system is reasonably priced, is sustainable in the long-term and is debt free. Once the albatross of the UFL is lifted, the system can be far more creative and focused on addressing such pressing issues as disease funding, and other administrative features such as enhanced worker (and employer) representation, and other service delivery issues. Until then however, progressive movement will be forever stalled, with the UFL acting as a deadweight on the legitimate expectations of all stakeholders.

***Remember*: Mark Your Calendar:**

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