The Liversidge *e*-Letter

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

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Coverage Under the WSIA

WSIB Releases Coverage Discussion Paper

Is it time to consider a private insurance model?

A Commentary: Does the Board's paper go far enough? Will this debate conclude?

Introduction

On January 21, 2002 the WSIB released a consultation paper, "*Coverage Under the Ontario Workplace Safety and Insurance Act*". The Coverage Paper presents a general overview of the pressing coverage issues facing the workplace safety and insurance ("WSI") system, and while no concrete proposals are advanced, it leans towards adoption of a full coverage scheme similar to other Canadian jurisdictions.

The Board provides the following rationale for the review: i) the current coverage system is out of date and needs to be updated; ii) the current system has varying levels of coverage for different Ontario businesses; iii) not all Ontario workers have access to fair and adequate disability insurance; and, iv) there is also a public perception that the WSIB system is complex and complicated and needs clarity. The purpose of the review, in the words of the Board, is:

> **". . . to engage all interested workplace parties, from uncovered and covered industries, in an informed and open discussion about the need for reform of the current coverage provisions of the Act. One of the primary objectives in undertaking this consultation is to determine the fairness of the current coverage system and what may need to be done to reduce its complexity while, at the same time, trying to ensure there is a level playing field among Ontario employers".**

Thumbnail Statutory Overview: The Ontario Scheme

Under the Ontario *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, as amended, [the "Act" or "WSIA"] the insurance plan only applies to every worker who is employed by a Schedule 1 or Schedule 2 employer. It does not apply to casual workers or outworkers [s.11(1)]. Executive officers of a corporation are excluded [s.11(2)], although upon application, the Board may declare independent operators, sole proprietors, partners [s.12.(1)] and executive officers [s.12(2)] to be workers. An employer means every person having in his, her or its service under a contract of service another person engaged in work. An independent operator means a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any workers for that purpose. Worker means a person who has entered into or is employed under a contract of service [s.2(1)].

The insurance plan applies to every Schedule 1 employer and Schedule 2 employer including the Crown and a permanent board or commission appointed by the Crown [s.67]. Every Schedule 1 employer shall pay premiums to the Board [s. 88(1)] and is not individually liable to pay benefits directly to workers [s.88(2)], whereas every Schedule 2 employer is individually liable to pay the benefits [s.90(1)], and shall reimburse the Board for any payments made on behalf of the employer under the insurance plan [s.90(2)], plus a fair share of the Board administrative expenses [s.85(1)]. In addition, the Board may require the Schedule 2 employer to capitalize payments to a survivor [s.90(3)], and if considered necessary a Schedule 2 employer may be required to pay a deposit [s.92(1)] or obtain insurance for an amount specified by the Board and with an insurer approved by the Board [s.93(1)].

For Schedule 1 employers, the Board shall maintain an insurance fund [s.81(1)], shall apportion premiums among classes, subclasses and groups of employers [s.81(2)] and shall establish premium rates [s.81(3)] which may vary for each individual industry [s.81(4)].

A worker employed by a Schedule 1 employer, is not entitled to commence an action against any Schedule 1 employer, a director, executive officer or worker employed by any Schedule 1 employer [s.28.(1)] and a worker employed by a Schedule 2 employer is are not entitled to commence an action against the worker's Schedule 2 employer and a director, executive officer or worker employed by the worker's Schedule 2 employer [s.28(2)]. "Uninsured workers" may bring an action for damages against his or her employer [s.114(1)].

Overarching Coverage Philosophy: *What industries should be included? What industries should be excluded?*

Background:

Canadian workplace safety and insurance schemes, while once fundamentally similar, now are divided between two over-arching organizing philosophies. One philosophy dictates that all industries are included by statute unless

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explicitly excluded by statute, regulation or policy. The other approach is to exclude all industries unless the industry is *explicitly included* by statute or regulation. Ontario falls under the "explicitly included" approach.

The Board argues that the current approach gives rise to a lack of consistency and there is no rational basis for some industries to be covered while others are not. As new industries emerge, they are automatically excluded from workplace safety and insurance coverage. Non-covered industries fall into two groups - those industries explicitly excluded by the statute and those industries simply not listed in the statute (principally financial institutions).

Jurisdictions organized in the "included by statute unless explicitly excluded" method:

British Columbia: [The Act] applies to "all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the board"[1]

Alberta: "This Act applies to all employers and workers in all industries in Alberta except the employers and workers in the industries designated by the regulations as being exempt".[2]

Saskatchewan: "This Act applies to all employers and workers engaged in, about or in connection with any industry in Saskatchewan except those industries excluded by a regulation of the Lieutenant Governor in Council or by section 10".[3]

Quebec: "This Act applies to every worker to whom an industrial accident happens in Quebec or who contracts an occupational disease in Quebec and whose employer, when the accident happens or the disease is contracted, has an establishment in Quebec".[4]

New Brunswick: "Subject to subsections (3) and to section 6, this Part applies to all employers and workers in or about any industry in the Province".[5] The *New Brunswick Act* also allows for the exclusion of an industry which does not have throughout its operation in the year at least three workers employed [Regulation 82-79 (O.C. 82-360)].

Prince Edward Island: "This Act applies to all workers and employers engaged in, about or in connection with, any industry in the province except those workers, employers or industries excluded under subsection (2) or by the regulations".[6]

Newfoundland: "This Act applies to workers and employers engaged in, about or in connection with an industry in the province except those industries, employers or workers that the Lieutenant-Governor in Council may exclude by regulation".[7]

Territories: Yukon; Northwest Territories; Nunavut.[8]

Canadian jurisdictions organized under the "*industries excluded unless included*" philosophy:

Manitoba: "This Part applies to: (a) the industries or employers that, under section 73, are within the scope of this Part for the purposes of assessment".[9]

Ontario: "The insurance plan applies to every worker who is employed by a Schedule 1 employer or a Schedule 2 employer";[10] s.67: "The insurance plan applies to every Schedule 1 employer and Schedule 2 employer including the Crown and a permanent board or commission appointed by the Crown".[11]

Nova Scotia: "This Part applies to employers and workers engaged in, about or in connection with any industry prescribed by the Governor in Council by regulation".[12]

Discussion points from the WSIB Coverage Paper:

The Board posits that the current approach gives rise to a lack of consistency. Coverage is largely a product of historical circumstance rather than a rationalized process. There is no rationale basis for some industries to be covered while others are not. For example, accountants are covered whereas lawyers are not. There is a growing list of "grey" areas in the current scheme. With emerging industries it is difficult for employers and workers to know if they are covered or not. Since, in Ontario, coverage is defined under the "explicitly included" model, as new industries are developed, they are automatically excluded from workplace safety and insurance coverage. The percentage of labour force covered has been shrinking (from 80% in mid-1980s to 70% today) and the Board projects that over the next 10 years the coverage base may be reduced by a further 5-10%. This places increased overhead costs on remaining employers,[13] and may lead to the classification structure becoming unstable and more contentious with fewer rate groups.

Non-covered industries fall into two groups:

Those industries explicitly excluded by the statute (covers 10 industries – barbering; educational work; veterinary work; dentistry; funeral directing; photography; taxidermy; etc.).[14] Those industries simply not listed in the statute (principally financial institutions). This represents approximately 1.025 million "non-covered" workers.

The Coverage Paper refers to Weiler's 1980 study[15] indicating that Weiler said that there was little justification for continuing to maintain enclaves of non-coverage.

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[1] British Columbia *Workers' Compensation Act*, RSBC 1996, s. 2(1)
[2] Alberta *Workers' Compensation Act*, 1981, c. W-16, s.9(1)
[3] Saskatchewan *Workers' Compensation Act*, S.S. 1979, amend., s. 3(1)
[4] *An Act Respecting Industrial Accidents and Occupational Diseases*, R.S.Q., c. A-3.001, s.7
[5] New Brunswick *Workers' Compensation Act*, c. W-13, s.2(1)
[6] PEI *Workers' Compensation Act*, R.S.P.E.I. 1988, c. W-7.1, s.2(1)
[7] Newfoundland *Workplace Health, Safety and Compensation Act*, R.S.N. 1990, c. W-11, s.38(1):
[8] Yukon *Workers' Compensation Act*, 1992, c. 16, s.2; NWT *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, s.8(1); Nunavut *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, s. 8(1)
[9] Manitoba *Workers' Compensation Act*, R.S.M. 1987, c. W200, s.2
[10] Ontario *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, as amended: s.11.(1).
[11] Ontario *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, as amended: s.67.
[12] Nova Scotia *Workers' Compensation Act*, 1999, c. 10, s.3(1)
[13] It is assumed that the Board is referring to increased overhead by way of proportional responsibility for the unfunded liability. The Board does not address the question as to why the administration overhead would not commensurately decline with the decline in employer participation.
[14] O. Reg. 175/98, s.3
[15] Weiler: Ontario, Report to the Minister of Labour, "Reshaping Workers' Compensation for Ontario", Weiler, 1980 ["Weiler"]

NOTE: This is true, but, incomplete. Weiler also said, "*To me, at least, there is little justification for such enclaves. Candidly, though, I received no complaints about this gap from employees or worker groups in these industries. Perhaps the Board might take the initiative in seeing whether there is an appetite for workers' compensation in these remaining service industries*" (Weiler, pp. 31-32). The Coverage paper also made extensive reference to Sir William Meredith's 1913 Royal Commission Report,[16] which also canvassed the issue of why some industries were excluded (in Meredith's cases, in the initial design). Meredith outlined thoughts very similar to that of Weiler's 80 years later.[17] A similar conceptual thread connects both Meredith and Weiler – expanding coverage should be industry specific and based on direct need.

1993 WCB Coverage Paper:

The Board's coverage paper is not a new initiative. In a December 10, 1993 WCB Coverage paper, "*Coverage Under the Workers' Compensation Act*", very similar if not identical concerns were cited. The paper addressed the following coverage principles: i) consistency; ii) equity; iii) simplicity/efficiency; iv) adequacy of payments.

Possible positions on the question of coverage:

Coverage Option 1: Status quo: The absence of a rationale 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

[Board] policy states that exemptions under section 2(1) of the Act are granted only to classes of industry or occupation and not to individual persons or businesses, unless the person or business constitutes the entire industrial or occupational group.

Exclusions should only be granted under exceptional circumstances where it is demonstrated that inclusion would not fit the purpose and intent of the Act, described as: the prevention of injuries and occupational diseases; the payment of compensation for earnings losses resulting from injuries and diseases up to a maximum wage rate, medical expense reimbursement and rehabilitation provisions; the limitation of coverage to employment relationships and activities; provision of no fault compensation in lieu of the right to sue; and the characterization of compensation as a cost of production for products and services marketed by the employer rather than a charge on the taxpayer.

The policy also sets out certain factors which, in themselves, are not sufficient to result in a general exemption order being made. These include: the wishes of employers and workers; the size of the employer's operations; the fact of coverage already existing through private disability plans; and the degree of risk of injury.

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.

[16] The full title of which is, "Ontario, Final Report on Laws Relating to the Liability of Employers to Make Compensation to their Employees for Injuries received in the course of their employment which are in force in other countries, The Honourable Sir William R. Meredith, C.J.O". (1913)

[17] "There is, I admit, no logical reason why, if any, all should not be included, but I greatly doubt whether the state of public opinion is such as to justify such a comprehensive scheme and it is probable that when the question of bringing these industries within the scope of the act has to be considered it will be found that provisions somewhat different from those which are applicable to the industries which it is proposed now to bring within it will be necessary". (Meredith at 9)

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. Board worries of attrition of the current scheme should not be too persuasive. The Board's administration should be dynamic – it should expand or contract as demands dictate. Concerns over spreading the existing unfunded liability over remaining firms can be addressed through exit policies and pricing strategies.

The Board's Coverage Paper suggests that the Board's program should be "seen as cost competitive in the current market place" (at 10). Competitive qualities can only be measured in a competitive environment. Industries should be allowed to replicate the same precise coverage through competing insurance means. However, if any currently covered schedule 1 industry becomes eligible to leave schedule 1 and provide alternative comparable coverage, full accountability remains for the pro-rata share of the unfunded liability. Any structural changes which may result from this review must ensure that there is no unfair shifting of current burdens. There must be no shirking of any level of liability exposure. The WSIA will set the terms of coverage and the Board will police compliance.

Schedule 2 funding concerns:

Discussion Points from the WSIB Coverage Paper:

Schedule 2 Employers are individually liable and represent 500,000 compulsorily covered workers. The Board asserts that there is a lack of clarity as to whether certain operations are covered under Schedule 1 or 2. Experience rating has diminished the financial safety incentive distinctions between Schedule 1 and 2. Experience rating provides a blend between collective and individual liability.

Right of action issues:

Currently Schedule 1 workers can sue Schedule 2 workers and companies; Schedule 2 workers can sue anyone but their employer. There is a lack of consistency.

Several Schedule 2 organizations which moved into Schedule 1 have moved back to Schedule 2 compounding Schedule 1 erosion issues.

Presently inadequate funds are on hand to cover costs of Schedule 2 liabilities. The WSIB is unaware as to provisions in place by Schedule 2 employers to cover liabilities. Exposure concerns are largely related to "private sector" Schedule 2 companies. Discussions have been ongoing with Schedule 2 participants.

Reference to Meredith:

The Board suggests that Meredith was of the view that two schedules were a temporary measure and coverage was restricted so as to not place an undue administrative burden on the new system. What Meredith actually said was:

"If it had been practicable to do so without impairing the efficiency of the collective system I should have preferred to include a larger number of industries in schedule 2 in order that with the two systems working side by side experience might demonstrate whether the collective system or that of individual liability was preferable, but I have not been able to satisfy myself that the exclusion from schedule 1 of any considerable number of the industries included in it would not impair the efficiency of the collective system, and I have therefore excluded from it only the industries enumerated in schedule 2. Although but a small amount of industries are included in that schedule the operation of the two systems will afford some evidence as to which is the better". (*Meredith Report*, at 8-9)

Possible Positions on Schedule 2:

Schedule 2 funding concerns:

Schedule 2 Employers are individually liable and represent 500,000 compulsorily covered workers. The Board asserts that there is a lack of clarity as to whether certain operations are covered under Schedule 1 or 2 and suggests that experience rating has diminished the financial safety incentive distinctions between Schedule 1 and 2. The Board asserts that there are presently inadequate funds on hand to cover costs of Schedule 2 liabilities. This latter assertion, at the very least, is too broad to be a catalyst for change, and at the very most, is misleading to the point of being incorrect.

Schedule 2 Option 1: Continue *status quo*: While the Board suggests that the structure of Schedule 1 and 2 was a seemingly temporary measure, the mere survival of the current regime for almost a century, on its own presents a compelling argument for the *status quo*. The Board's concern over the potential for private sector Schedule 2 failure, merger or acquisition, in the contemporary economic climate is likely easily addressed within the present model, and certainly within our proposal, without abandoning Schedule 2 as an organizing concept. There should remain a distinction between public and private players in Schedule 2.

Schedule 2 Option 2: Enforce current statutory requirements for funding assurances: One option is to simply require stringent enforcement of the provisions of the current Act which address the long term financial integrity of Schedule 2 (capitalize survivor payments [s.90(3)]; deposit [s.92(1)]; obtain insurance [s.93(1)]). Under no circumstances should Schedule 2 be an attractive alternative on the basis of it being systemically under-funded. This in fact has been the focus of WSIB and industry initiative.

Schedule 2 Option 3: Fold Schedule 2 (non-public) into Schedule 1: This is the intellectually comfortable position. It is easy, but may needlessly upset a workable and appropriate method to fund workplace injury.

Schedule 2 Option 4: Focus on coverage rather than the delivery mechanism: Again, the focus should be full funded coverage. The "test for exclusion" should be applied to all present Schedule 2 non-public organizations. By providing the Board with the opportunity for competition, the Board will retain institutional motivation to be efficient.