The Liversidge *e*-Letter

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

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L.A. Liversidge Appearance before Standing Committee on Government Agencies *WSIB Under Review*

A focus on the business end of the Board's business

Yesterday, I appeared before the ***Standing Committee on Government Agencies*** of the Ontario Legislature as it set its sights on the operation of the Workplace Safety & Insurance Board ["WSIB" or "Board"]. I will be presenting readers of **The Liversidge *e*-Letter** with a more in-depth review of the Committee's proceedings very soon. In this issue, I am setting out a summary of the remarks which I presented to the Committee.

Introduction and comment on evolution of Ontario workplace safety and insurance

My name is Les Liversidge. I have been active in the Ontario workplace safety and insurance ["WSI"] system for over thirty-three (33) years in one capacity or another, from Board employee, independent consultant, and now, lawyer, with a practice focused on WSI matters. With me is Ms. Odelia Gudge, an associate lawyer with my firm, and who represents a new generation of legal activism in this field.

Over my career, I have been witness to a remarkable evolution in the law itself, in the way the Board operates, and in the expectations of the public. ***By any measure, the WSI system of 2007 is infinitely superior to the system of 30 years ago***. ***But, it is still less than it can be***.

Make no mistake – it has *always* been the public's expectations that has driven reform. Dissatisfaction, eventually boiling into discontent, ultimately acquires a political potency which explodes into action.

Over the last thirty (30) years, the Board itself has rarely led change, absent external pressure. Reform has flowed from influences external to the WSIB. This was true in 1985 (the Progressive Conservative *Bill 101*, which created the Appeals Tribunal and a Representative Board of Directors) and 1990 (the Liberal *Bill 162*, which scrapped the unfair "meat chart" method of compensation, replacing it with a fairer "wage loss" method), when decades of worker injustice eventually, and rightly, bubbled over into political action , which resulted in a fairer system, more responsive to the needs of injured workers. (*continued page 2)*

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This remained true in the mid-1990s when the financial viability of the system was a real concern. The objects of the Board were made clearer and a focus towards accident prevention and return to work was emphasized (the Progressive Conservative *Bill 99*), a prominence which continues today.

While we see a Board far superior to the Board of 30 years past, many of the lessons of the past still remain unlearned. This afternoon, in the very few minutes available, I will focus on the evidence of this continuing phenomenon, of a Board that still does not always listen well to emerging criticisms and which does not always resolve budding problems.

Rather than simply spouting off a litany of long-standing complaints, ***for every complaint I highlight here today, I bring a serious and reasonable recommendation***.

A comment on WSIB leadership

I want to touch on **two prime themes** – the business end of the Board's business, and a better mechanism for ongoing reform and change.

But, first, I would like to comment on WSIB leadership. I listened carefully to Mr. Mahoney this morning. I have seen Mr. Mahoney active on this file in years past, and I continue to be impressed with his innate capacity to understand, and his passion for injury prevention and worker dignity.

I have already seen, first hand, the impact of his style – **the Board *is* responding**. Like his immediate predecessor, Mr. Glen Wright, his dedication to injury prevention is inspiring. As far as leadership of the Chair, the Board is in excellent hands.

But, one question has always perplexed me – in an organization of over 4,000 people, active over 90 years, that has its mandate prescribed in statute, that impacts most working Ontarians, *why does the one position at the top determine pretty much everything*? The answer to that question lends some insight into the strengths (*the ability to implement change with a change in the Chair*) and the weaknesses (*the inability of the Board administration to respond to emerging issues*) of the current WSIB.

The Chair is able to set the tone, the style and the priorities of the organization, but realistically, the reach is limited to the big over-arching issues. It is the other 4,000 people that put everything in motion. But, all too often, the "smaller problems" simply do not get addressed until they ferment long enough and become "big problems". ***It doesn't have to be this way***.

The business side of the Board's business

Right now, the Board is administratively weak with what I call "*the business end of the Board's business.*" The big issues - premium rates and funding strategies - rightly acquire priority. But, it is the *implementation of employer tax policy* that impacts smaller business the most, and it is in this arena that the Board performs poorly.

Audit and Collections

I have detailed six (6) examples of real experiences with the Board's taxation and employer audit functions (*ed.: The examples are found at page 3 - in upcoming issues of* **The Liversidge *e*-Letter**, *I will be providing additional commentary on these cases*). I have more. **These are not odd-ball off-the-wall examples of obscure WSIB mistakes, that are easily corrected once brought to the attention of the appropriate officials**. ***These are blatant examples of a deep-rooted problem. In even those cases which were eventually corrected, the obstacles and intransigence against obtaining a fair result were almost insurmountable***.

Senior WSIB officials just do not have a hearing ear to the root cause of these problems, preferring instead to treat each one as if it was just an unfortunate, but isolated, misstep. *If only this was the case*. But, a more credible thesis is that these problems are reflective of a systemic problem. ***To be frank – when dealing with the day-to-day taxation of smaller business, the Board sometimes is a bit of a bully***.

Last year, I recommended "*an operational review of WSIB Audit*." I still recommend this action. I understand the reticence to accept the broad scope of my thesis. A constraining scepticism is not necessarily undesired. My allegations though are particularly pointed when assessed against the backdrop of published WSIB "*fairness declarations*". The pledge in these documents is so far off the scope of what is actually occurring on a day-by-day basis, I would, if I were an *uninformed* observer, be equally sceptical. My suggestion of a high level review was rejected, although I have not given up my plea.

The fundamental question that must be asked is this: "***Do these circumstances have any other reasonable or plausible explanation other than the thesis which I am advancing?***" Objectively assessed, the answer to that question must be a categorical "no".

These examples are not simply a few isolated problems – they are archetypical examples of a deep-seated and entrenched manner of doing business that runs counter to the publicly declared values of the Ontario WSIB, to the governing principles set out in the *Workplace Safety and Insurance Act* and basic principles of fairness and administrative justice. **In short, these cases are not in themselves the problem — they are merely reflective of the problem**.

Employer classification – round pegs in square holes

While the process setting employer tax rates is generally fair, how tax classifications are applied to individual cases often is not. It is sufficient to note that the Board has developed a very complex system of taxation that mirrors the diversity of Ontario business. Simplicity is not possible. Common-sense and reasonable application though is essential. Often, it is elusive.

The Board is very adept at placing the round peg in the round hole (the majority of cases) but, breaks down when it tries to force the square peg. ***But, try it does***.

I can beleaguer this Committee with endless examples, but this problem perhaps is best illustrated in a letter addressed to this Committee by Mr. Les Mandelbaum, President of Umbra Ltd., a Canadian business success story, which I encourage members of the Committee to read. To make a very long story short, this company was unfairly assessed, was convinced the Board simply "*made a mistake*" but was taken aback when efforts at senior level communications *over several years* were ineffective and just "*passed down the line*".

Incorrect WSIB classification decisions are not benign – they do more than affect corporate profits – as in this case, they affect jobs. Until recently, the Board was washing its hands of this problem. Thanks to the efforts of Mr. Mahoney, the Board is now reconsidering its approach. But for the tenacity of this company and the intervention of Mr. Mahoney though, the result would have been different. Canadian jobs would have been lost.

This is *not* an example of the system ultimately working. The system would be working if senior Board officials listened in the first place, and applied a common-sense approach to problem solving, and realized that unique situations require unique solutions. ***The problem and solution are no more complex than that – reasonable discretion, reasonably applied***.

Instead, in this type of case, Board officials tangle employers up in red tape and strangle them with rules designed for very different situations.

The WSIB & the Canada Revenue Agency

Of late, the Board has been eager to promote a joint initiative with the WSIB and the Canada Revenue Agency ["CRA"], to ensure increased employer compliance. No one can quarrel with that objective. *Employers who do not pay their premiums should be found out and duly assessed*.

While the WSIB/CRA initiative ought to continue unabated, the Board foolishly abandoned its own ***Voluntary Registration Program*** ["VRP"] which allowed for fairer treatment of non-compliant employers who *voluntarily* came forward.

As a result, and as I explained in a recent senior communication to the Board, "*those employers that voluntarily come forward and those that wait to be found out are treated exactly the same way*". **This is ridiculous**. Employers who voluntarily come forward should be treated better than those that wait to be found out. This is not just simple justice – this is prudent administration.

The Board seems to be modelling the taxation end of its business after the CRA. For example, the CRA's "**Fairness Pledge**" is almost identical to that of the Board's.

Within the context of fair process though, the CRA and the WSIB distinguish themselves on one determinative element – **the CRA withholds collection** while a taxpayer is appealing a CRA ruling. CRA does not take collection activity or legal action on a disputed balance until 90 days after the date the CRA *Appeals Division* mails a notice confirming or varying the assessment under objection. If a taxpayer appeals a decision to the *Tax Court of Canada*, CRA does not take any legal action until the court mails its decision or the appeal is withdrawn (**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, as it would allow time for incorrect taxation rulings to be put right, without undermining the ability of the company to continue to do business.

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.

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 a routine five year large scale 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 (See April 3, 2006 **The Liversidge *e*-Letter, Workplace Safety & Insurance Reform, "*The WSIB is a Government in Miniature*")**.

Actual cases which reflect a culture of unfairness within the Board's audit and collections departments

***Audit Fairness Issue No. 1*: Company No. 1** had been operating in Ontario for more than fifty (50) years. During that period, **Company No. 1** had been consistently informed by Board officials that it was not subject to compulsory coverage. Surprisingly, **Company No. 1** was audited by the WSIB in 2004 and advised in October, 2004 that *contrary to decades of official advice from the Board*, **Company No. 1** was subject to compulsory coverage after all. The Board demanded immediate payment of $250,000 for retroactive premiums. Board officials simply waved away the past decades of advice from the Board as "*an error in previous correspondence*". This was not some "rogue ruling" – this was communicated to **Company No. 1** by senior WSIB officials, who made it clear that they were not willing to discuss the merits of the Board's decision, nor willing to change it. **Company No. 1** felt unjustly treated and retained legal counsel. Within a few weeks following contact of counsel with the WSIB President, the Director of the Transportation Sector reversed the original Audit decision and cancelled the $250,000 retroactive assessment. Without the aid of counsel, the result would have been different.

Audit Fairness Issue No. 2*:** Still with **Company No. 1**, while the quarter million dollar retroactive assessment was cancelled, **Company No. 1** was still required to report as a trucking company creating a new liability in the area of $300,000 per annum, *even though **Company No. 1** neither owned nor operated a single truck*. Counsel immediately appealed on the basis that the insurance premium was grossly out of proportion with the insurance risk. After an extensive dialogue transpiring over a period of almost a full year, the Board eventually saw reason and capitulated, agreeing that **Company No. 1** was grossly over-assessed. The premium was reduced 95%, from $300,000 per year to about $15,000. The premium differential was equal to the operating margin of **Company No. 1**. ***Unfair audit classification decisions are not benign. They affect the capacity for Ontario business to engage in business. In this case, this unfair classification would have *caused* the demise of **Company No. 1.** Without the aggressive and focused advocacy of legal counsel, to put it colloquially, "**Company No. 1** was toast". A company with lesser resources would have been unable to retain the level of legal services necessary to correct this clear injustice. More likely, a small firm would have simply faded away.

Audit Fairness Issue No. 3*:** In 2002, **Company No. 2** was audited and informed that it must report *all* of its payroll as a "trucking company" (RG 570 – 2002 premium rate: $5.60 per $100 of payroll) and not as a "warehouse" (RG 560 – premium rate: $2.99 per $100 of payroll), even though **Company No. 2** was clearly just that – a warehouse. **The WSIB attempted to boost the premiums for the warehouse wages by a whopping 87%! *The reason proffered: Even though the Board has previously *officially* recognized **Company No. 2** as a warehouse operation (employing a hundred warehouse employees), as it had one (1) single truck (maintained for customer service reasons) this shifted the business activity from a warehouse to a trucking company. Being faced with an injustice from the Board's Auditor, **Company No. 2** retained legal counsel. **It took more than three (3) years to resolve this matter**. During the course of that 3-year period, the Board *eventually* changed its position and held the warehouse payroll should be assessed as – *guess what* – a warehouse. While this case was eventually resolved satisfactorily, in the absence of retaining counsel, the results would have been quite different. It took extraordinary advocacy activity to effect a fair and just resolution in this case.

***Audit Fairness Issue No. 4*:** **Company No. 3**, a well-established small Ontario business, was audited by the WSIB in the summer of 2004. **Company No. 3** management were informed that retroactive adjustments to its classification would likely result in an immediate payment demand in excess of $35,000. Feeling unfairly treated, **Company No. 3** took the unusual step of hiring legal counsel who informed the Board that the Auditor's decision will likely cause irreparable damage and result in the immediate lay-off of many of the company's employees, all because the WSIB Auditor did not at all understand the nature of **Company No. 3's** operations. While it took more than a year, during which time several re-visits from the Board Auditor were demanded and arranged, as well as meetings between legal counsel and the Auditor, the matter was eventually satisfactorily resolved. The root problem however — a lack of thoroughness and the institutional eagerness to increase employer premiums — persists. While it was essential for this small business to retain legal counsel to preserve their interests and protect their rights, this and any Ontario small business *should* be able to rely upon the competence and professionalism of WSIB Audit to thoroughly assess a company's circumstances, particularly in *any* instance where an audit is going to result in an increase in premiums.

Audit Fairness Issue No. 5*:** **Company No. 4**, an Ontario small business, underwent a routine audit by the Board. The WSIB Auditor concluded that a number of "independent contractors" were not "independent operators", but rather, were deemed to be "workers". On its own, there is nothing unusual here. It is not uncommon for WSIB Auditors to make a determination as to the employment status of an individual under contract with a particular firm. In fact, the WSIB has developed industry-specific questionnaires to assist in its investigation. In this instance however, while **Company No. 4** was able to have questionnaires completed for contractors *currently* under contract, it could not complete questionnaires for contractors no longer under contract, as those individuals were no longer reachable. For those individuals for whom questionnaires were completed, the WSIB Auditor ruled that they were "independent operators", and thus were not subject to compulsory coverage. No premiums were payable for them. However, the Auditor informed **Company No. 4** that *as a matter of departmental practice*, in every instance where a questionnaire is not submitted, *even if the company no longer has an ongoing business relationship with that individual*, the Board will "deem" the individual to be a "worker". This is so even if the company is able to attest that those contractors enjoyed precisely the same contractual circumstances as those contractors for whom questionnaires have been obtained (and which the Board held to be independent operators). After retaining counsel, no less than three (3) meetings with WSIB Audit were needed. The Board eventually capitulated and reversed its original findings. This was a small company that could ill-afford legal services, the scope of which were required were out of pace with the depth and nature of the problem. ***Yet without legal counsel pressing issues of fairness, the result would have been quite different and the capacity for this business to compete diminished.

Audit Fairness Issue No. 6: **Company No. 5** is an Ontario small business which also underwent a routine audit facilitated by the Board, in which the WSIB Auditor also reviewed the status of "independent contractors". This audit was conduced in a most unsatisfactory manner. As with **Company No. 4**, **Company No. 5** was able to have questionnaires completed for contractors *currently* under contract, but it could not complete questionnaires for contractors no longer under contract, as those individuals were no longer reachable. **Company No. 5** though tried -- diligently. The Board held that contractors for whom questionnaires were completed were "independent operators" not subject to compulsory coverage, but in every instance where a questionnaire was not able to be submitted (because the company could not locate the contractor), the Board "deemed" those individuals to be "workers". **The Board Auditor issued a payment demand (due immediately) of $80,000, *which would have bankrupted this Ontario small business***. Legal counsel was retained and acted immediately. Over a tense period (for **Company No. 5)** of some months, a different Audit Manager was assigned to the case, the original audit ruling was reversed and the $80,000 payment demand revoked. Absent the aggressive actions of legal counsel, the story would have been quite different. One less firm would be operating in Ontario, and many people would be unemployed. Yet, the systemic problems which gave rise to this unconscionable treatment of this small Ontario business persist.

Summary of observations

(from these and other Audit cases)

***Observation No. 1*:** The WSIB Audit and Collections Departments do not aspire to the principles set out in the **Fairness Pledge** of the WSIB Employer Audit Services Department. The chasm between reality and intent is deep and wide.

***Observation No. 2*:** WSIB Audit as a matter of course and department policy will make an improper adverse inference with respect to the non-submission of questionnaires and *de facto* deem worker status even when the WSIB has other contextual facts available to it to rule otherwise.

***Observation No. 3*:** WSIB Audit decisions are often immediately implemented regardless of the scope of the decision or the nature of the circumstances giving rise to the Audit decision. Payment demands are usually immediate and often determinative to the viability of the business enterprise.

***Observation No. 4*:** WSIB officials often do not display initiative to resolve systemic fairness considerations when brought to their attention.

***Observation No. 5*:** Even when an objection to an Audit decision has been filed and the material, additional facts or arguments presented in that objection give rise to additional investigation by WSIB Audit, the WSIB Audit decision usually remains in force and the debt immediately due even when though the Board itself is reconsidering the matter.

***Observation No. 6*:** When WSIB Audit officials change or adjust an audit ruling, the original decision is often not officially vacated nor is it replaced by a renewed decision presenting the new institutional position.

***Observation No. 7*:** WSIB Audit has made some decisions on "secret information" which was not immediately made available to an appellant employer, a tactic fundamentally unfair at its core.

***Observation No. 8*:** Very aggressive WSIB collection activities have continued in spite of ongoing review by WSIB Audit.

***Observation No. 9*:** WSIB Collections over-ride Audit decisions "turning the case on its ear". Employers have been held hostage to departmental turf war and unfair exercise of WSIB authority.

***Observation No. 10*:** Audit dispute resolution timetables often conflict with Collections deadlines, impeding the capacity of the company to carry on business in Ontario.

***Observation No. 11*:** Legal efforts to obtain full file disclosure have been thwarted as WSIB Audit personnel do not include complete documentation in the WSIB "Firm File".

***Observation No. 12*:** WSIB Audit officials were not open and forthright with company officials and then acted in a manner contrary to original advice.

***Observation No. 13*:** WSIB Auditors, as a matter of WSIB Audit departmental policy, practice and procedure, view the non-submission of an Independent Operator questionnaire as determinative of worker status, even in instances where a company has no ongoing commercial relationship with the subject Contractors. The WSIB routinely fetters its obligations to investigate in such circumstances.

***Observation No. 14*:** WSIB Audit officials conducted themselves needlessly forcefully in aggressive in face-to-face meetings with an Ontario employer.

***Observation No. 15*:** WSIB Audit officials while in writing presented an illusion of assistance, participation and helpfulness, in reality presented a summary decision of significant economic consequences to a small Ontario employer.

***Observation No. 16*:** Efforts by counsel to bring systemic problems to the attention of senior WSIB Audit management were ignored.

***Observation No. 17*:** Allegations of bias of WSIB Auditor brought to the attention of senior WSIB officials were ignored.

***Observation No. 18*:** WSIB Audit improperly refused to present retained counsel with copies of Audit decisions

For these reasons, a large scale, high level review by the WSIB Board of Directors and Office of the Chair is urgently required. ***As things stand, employers, especially smaller employers, are treated unfairly.***