The Liversidge *e*-Letter

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

March 12, 2007 **An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.** **9 pages**

Standing Committee on Government Agencies
What the critics said about the WSIB
A mix of knocks & praise

Comments are constructive – but – a "love-in" it is not

In the February 28, 2007 issue of **The Liversidge *e*-Letter** ["***L.A. Liversidge appearance before the Standing Committee on Government Agencies; WSIB Under Review***"], I (very briefly) set out some reform ideas for the WSIB's audit and collections departments, along with a suggestion for ongoing reform of the Ontario workplace safety and insurance ["WSI"] system. As subsequent issues of **The Liversidge *e*-Letter** will record, I think I got my points across – ***the Board will be making some immediate changes to its audit and collection functions***. I will be providing a full account of these changes over the next few weeks in future issues of **The Liversidge *e*-Letter**.

The Board appeared before the ***Standing Committee on Government Agencies*** of the Ontario Legislature February 27, 2007. Six (6) presenters (including L.A. Liversidge) also were invited to present comment on "*the services and mandate*" of the WSIB "*to aid in (the Committee's) evaluation of the operation and performance*" of the WSIB. In this issue of **The Liversidge *e*-Letter**, I will summarize some key points made by the Board on February 27th, along with those of some of the presenters, and elements of the Board's response of March 1st, some of which may surprise readers on a few fronts.

***On the one hand*, the Board expressed appreciation** for several of the presenters' comments and critiques, and in fact, on-the-spot, announced several changes to its practices and processes, particularly in response to several suggestions I made to the Committee.

***On the other hand*, the Board was quite forceful** in some of its retort on March 1st. Readers should draw their own conclusions. Take a look at **Hansard**, for a verbatim account – **go to the (revamped) Ontario Legislature website:** http://www.ontla.on.ca/ ; "Committees"; "Transcripts (Hansard); "Committee Transcripts"; "Standing Committee on Government Agencies"; Transcripts February 27 & March 1.

(*continued page 2)*

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The Board's comments to the *Standing Committee*

Attending on behalf of the Board were The Hon. Steve Mahoney, Chair; Ms. Jill Hutcheon, President; Mr. John Slinger, Chief Operations Officer; Ms. Malen Ng, Chief Financial Officer.

WSIB insists that the WSIB is a good deal

Mr. Mahoney advised the Committee that it is the Board's ultimate desire for ". . . ***employers to realize that WSIB is, in fact, a good deal. We offer no-fault, reliable benefits to their employees and a number of important services, including prevention initiatives and promotion, monitoring the quality of health care and return-to-work support and research***".

The WSIB considers that "*premiums are actually an investment in health and safety and an increase in the quality of life for a business's most valuable asset, its people*" and that the "*WSIB belongs on the asset side of the ledger sheet*".

LAL Comments: Overall, WSIB premiums are likely "a good deal" for many employers. *I quite agree*. In fact, I often advise clients who have the opportunity to voluntarily opt in (i.e., those that are not subject to compulsory coverage), *to do just that – opt in*. That, of course, is presumptive on a fair and reasonable insurance premium (sometimes the premium is just too high, even taking into account ancillary benefits such as limited immunity from civil litigation).

Clearly, the Board's long-term objective seems to be this – if Ontario businesses had a choice to go *either* WSIB *or* private insurance, because the Board is such a good deal, they would *choose* the Board.

Mr. Mahoney advanced this very point when he told the Committee: "***I've been saying, as I travel around the province, that one of my goals is to have the employer community, if they had a choice of buying coverage of this nature from five or six different companies, which of course they don't -- but if they did, they would choose the WSIB"***.

That is a great goal. *In fact, it is not at all a new idea*. As I noted almost five (5) years ago in the June 26, 2002 issue of **The Liversidge *e*-Letter, "*Coverage Under the WSIA*: WSIB Releases Coverage Discussion Paper**", the WSIB's January 21, 2002 coverage discussion paper suggests that the Board's program should be "*seen as cost competitive in the current market place*" (at p.10). **At that time, I noted though that "*competitive qualities can only be measured in a competitive environment*"**, but agreed that, theoretically, *if the Board is run efficiently*, and sets the performance standard, industries would flock to the Board "*for price and efficiency considerations*".

The litmus test to assess the Board's insurance efficiency exists already

Interestingly, we already have the opportunity to test the Board thesis – the question of WSIB coverage for independent operators ["IO"]. Presently, IOs are not subject to compulsory coverage under the *Workplace Safety and Insurance Act* ["WSIA"]. For that class of individual, coverage is optional. Yet, many have been advocating mandatory WSIB coverage for IOs, even if they have alternate insurance (as most, of course, likely do – and 24/7 coverage at that, which they cannot get from the Board). Before implementing irreversible mandatory WSIB coverage, other options are *at least* worthy of consideration.

[*As an aside, I have gone on the record on this point before.* **I completely support the idea of mandatory *insurance coverage* for IOs**. ***However, I do not support needless insurance duplication****, or inadequate coverage. Most IOs require 24/7 coverage, which of course, they just cannot get from the WSIB (which covers only work related activities). And, most IOs already have private insurance coverage, which would still have to continue even if they were ordered to insure themselves as well under the WSIB. Double insurance is wasteful*. ***There are several options available.*** *One is to focus on the coverage question and not the insurance carrier question. Instead of requiring IOs to "double insure", why not instead mandate insurance coverage for IOs (WSIB or private), along with minimum benefit levels. That way, there is a choice. If the WSIB is a better deal, IOs will go there for business reasons, not because they are forced. Another approach is to have a separate insurance pool for IOs – with a reduced, attractive premium. Again, if the Board is a better deal, IOs will go to the Board. Consider these ideas when assessing the points which immediately follow*].

It seems that the logical extension of the Board's objective is this – ***since IOs currently have the lawful ability to choose WSIB coverage or not, if the WSIB is in fact the paradigm of insurance efficiency and effectiveness, then they should voluntarily jump at the chance of insuring with the Board***. In other words, the *litmus test* for the efficiencies of the Board already exists – WSIB coverage for independent business operators.

The Board should test itself – can it in fact compete in a real competitive environment?

I suggest this – that the Board test its own standard and expectations and develop a promotional campaign to attract more IOs to *voluntarily* opt for WSIB coverage. To measure the penetration of the Board's campaign, the Board should announce the number of IOs currently covered, proceed with the campaign, then assess how effective it is.

***Letting the market decide, where it can*, not only serves as a perpetual test of the efficacy of the Ontario WSIB, but just might force the Board to ensure that *its practices are out in front of its rhetoric* – that it in fact, is the most cost-effective and efficient insurance company around**. If it is, coverage is increased and the Board gets the business. If it isn't, well the IOs will go to private insurance carriers.

WSIB more open and transparent than ever

According to Mr. Mahoney, the Board is "***more open and transparent than ever before***". Interesting, in spite of these comments, one major trade association presenter suggested otherwise, declaring, "*Communication problems continue to plague us, both as an association and our members specifically. . . Lack of communication continues to exist for some of our members*". In fact, the pointed criticism went

further noting that, "***As an association, we are also disappointed with the lack of communication as to policy initiatives, program changes, pilot projects undertaken, or other board-initiated reviews either under way, being considered or already approved for implementation*** . . ." With respect to transparency, the same association advised "***Transparency in the financial details is also vital, but it too is absent from the discussions***".

On March 1st, the Board hit these comments quite hard, and head-on. Mr. Mahoney vigorously rejected the idea that the Board does not consult, noting, "***Frankly, for anyone to suggest that the WSIB does not consult with the employees, employers and associations in the province simply shows either a lack of understanding or a lack of awareness***".

LAL Comments: *Actually, I think both are wrong*. I strongly disagree that the Board does not consult. It does. In fact, its formal consultation mechanisms are pretty well oiled and pretty effective – perhaps not quite what they were in past eras, but pretty sound overall. Its approaches to early and safe return to work ["ESRTW"] consultation [see past issues of **The Liversidge *e*-Letter** for an in-depth discussion of those], is evidence enough. In that case, the Board released proposed policies, asked for comments, received them, dramatically altered its approach, released a new set of policies, sent that out for consultation, revamped its implementation plans, set up a pilot project review process, and asked for more stakeholder input. **If that is not an archetypical approach to sound public policy consultation, *I don't know what is***.

So, with respect to suggestions that the Board does not consult. . . . *well, I think they are a little beyond the pale*.

But the Board is very much overstating the case when it suggests it is "*more open and transparent than ever before*". This is simply not the case. I am not suggesting that the Board is shrouded in a cloak of secrecy, *but it is far from being the most open it has been*. Let me look at just a few examples that immediately come to mind.

The openness and accessibility of the Board of Directors: One does not have to go back too far in history to find a Board that was *far more open* than the current Board. Not that many years ago, members of the Board of Directors ["BOD"], as a group, would meet directly and regularly (monthly) with interested stakeholders. These were not loose, random, *ad hoc* meetings, called to address some immediate issue, or to maintain cordial external relations. These were regularly scheduled monthly discussions, officially sanctioned by the Board, and used as the primary means for the Board members to seek out substantive external advice on the multitude of matters placed before the BOD. **Nothing like these meetings happen today**. While I am not suggesting the Board today is not accessible, *the Board was more accessible then than now*.

***The actual briefing material provided to members of the Board of Directors was shared for in-depth consultation*:** To ensure that the regular meetings with the members of the Board of Directors were as fruitful as possible, with the permission of the Board of Directors, *and at the insistence of many of the Directors*, as a feature of standard operating protocol, *the actual briefing material prepared by Board officials and provided to the Board members was openly shared before Board meetings* (of course, confidential information such as human resource matters, was omitted). **I attended these meetings, and saw first hand the singular importance of this**. Very meaningful input was provided. Moreover, this process moved stakeholders from critics to partners, with many of the requisite (and constraining) responsibilities of "system ownership". **Absolutely nothing like this happens today**. The BOD material is simply not disclosed to stakeholders. In fact, it is often necessary to advance *Freedom of Information and Protection of Privacy Act* ["FIPPA"] requests after the fact to get a glimpse of the material that was considered by the Board. Today, the most the Board voluntarily gives out is the agenda of the BOD meeting. While I am not suggesting the Board today is not open, *the Board was more open then than now*.

One final example: The Board used to publicly disclose (un-audited) quarterly financial statements. Involved stakeholders found the release of current financial information of tremendous value, not only in assessing the performance of the Board, but as well, in understanding the fiscal pressures facing the Board. Absent these Quarterly Statements, which were extremely informative, stakeholders can only rely on the financial information set out in the Board's Annual Report, which was, and is, *always out of date* by the time it is released (the Annual Reports are usually not released until the summer of the following year, at the earliest). While I am not suggesting that the Board does not provide useful, current information, *the Board used to provide more information, and more current at that*.

So, overall, I am afraid that I would have to disagree with the comment that the Board is "*more open and transparent **than ever before***". I am not suggesting the Board is not "open". It is. I have never been refused an audience with a senior Board official when circumstances required such a meeting, no matter the topic. Never. Not a single time. [But, then again, I have never asked for a meeting unless it was essential to address whatever issue was pressing at the time. Everyone's time is simply too valuable, and always in such short supply]. ***In fact, I have always been extremely impressed with the efforts and eagerness of Board officials, particularly those in the senior slots, to directly reach out when their involvement is necessary***. Admittedly, some missteps occur, but there is no profit in focusing on those.

Without question, Mr. Mahoney's style is very open. And, the Board it is more open since he arrived. Just review the November 3, 2006 issue of **The Liversidge *e*-Letter**, "***Mahoney Hits a Home Run*"**, for a very strong endorsement of Mr. Mahoney's personal style and his clear and forthright commitment to openness. **It is genuine and it is having effect**.

But, the simple fact is this - overall, the Board has been more open in past eras. Who knows, in a few years, the Board's statement may very well be proved true. It may well be the case that the Board will become "*more open than ever before*". ***It's just not quite there yet.*** There is a lot more that it can do (just the three ideas set out earlier would do a lot). I am sure that as time moves forward, the Board will continue to make advances in its openness. Certainly now there is more of a public spotlight on the question, especially since public criticism seems to have hit a nerve.

There is no magic in 2014 – the date set to pay off the Unfunded Liability

Readers will recall the discussion which unfolded in past issues of **The Liversidge *e*-Letter** when the Board was getting set to hike up employer premium rates. For example, in the **June 23, 2005** issue of **The Liversidge *e*-Letter, "*2006 Premium Rates: There is a Responsible Alternative to Premium Rate Hikes*"**, I wrote:

> **There is an alternative to higher premiums**
> **Employer groups unanimously call for no rate hikes**
> In a WSIB "wrap up meeting" held June 23rd, to a participant, while thanking Board officials for their time and openness, that Board was advised that there is a responsible alternative to increasing premium rates. *In fact, this advice was based on the Board's own analysis*. The viewpoint was unanimous – the WSIB must not increase premiums for 2006 (and beyond), and instead, simply extend the amortization of the UFL out a couple of years, and focus energies on understanding and dealing with cost drivers.
> **"*The system is not in crisis – it is very manageable*" [WSIB Chief Actuary, WSIB Funding Session, March 24, 2005].**
> Noting that the Board's Chief Actuary unequivocally declared that the "*system is not in crisis*" and is "*very manageable*", employers pressed upon Board officials that there is a responsible alternative to increasing premium rates. During the 2005 consultations, at the outset, employers had requested that the Board analyze the system implications if there are no rate hikes, and the average premium is held at $2.19.
> **If rates remain stable, the "sky does not fall" – the UFL is still reduced to zero – it will just take 2 to 4 more years**
> If rates remain at current levels, just as was discovered in July 2003, not only does the system not implode, but after rising slightly in 2006, the UFL begins a downward slope and declines to zero just a few years after the planned target of 2014.
> **The bottom line** – a "zero percent increase" responsibly respects the essence of the long-term funding strategy, without resorting needlessly to premium rate hikes.

I further noted:

> **The tail should not be wagging the dog**
> . . . declining premiums was just as significant a building block to WSIB funding as was retiring the UFL by 2014. While it is clear that employers would prefer to see the system fully funded by 2014, it would be imprudent and inconsistent with the principles of the long-term funding strategy to achieve that objective at any cost. 2014 was selected as a reasonable terminal date more than twenty years ago. It was not an unreasonable target – but it was simply that – a target. ***The tail should not be wagging the dog*** – the 2014 date should not determine funding policy – funding policy should determine the termination date.

The Board did not heed that plea then, and in the Fall of 2005 announced that 2006 premiums would rise, on average, approximately 3%. One of the reasons proffered by the Board was this – premiums had to rise or else the Board would be unable to "pay off" the unfunded liability ["UFL"] by 2014 (*the tail wagging the dog*).

Mr. Mahoney addressed the issue of the UFL and 2014 straight-on. What he advised the Committee follows. **This is, in my view, the single most important and defining statement presented at the *Standing Committee* – one that reflects strong leadership, and which will set the stage for the financial governance of the Ontario WSIB for the next many years**: This is what he said:

> "When I arrived in the job, I was aware of a dispute going on in the business community with the date 2014, and I tried to find out what was magic about that date. The only thing that I could find was that it was the 100th birthday of the founding of the compensation system. There didn't appear to be anything else ***and there didn't appear to be any financial justification for it***. I do want to say that in my position ***I don't want to see the tail wagging the dog*** *(ed:, It's ok – he can steal my line – he has put it to good use)*. If in fact there are some things we need to do to make the system sustainable, to improve the system, to make it work for the benefit of all the stake-holders involved, and it means that we have to move the magic date of 2014 by six months or eight months or 12 months, I don't have a hang-up about that. As long as the goal is there, it's still a good goal. I believe it's achievable".

***Hip, hip, hooray*!!!** That is a forceful and dynamic statement that reflects pure leadership. Employers could not ask for anything more with respect to the 2014 question. He said more:

> **So I would like this to be on the record as well, if I might: that *we're committed to 2014, but it's not at any cost*. We have to go on an annual, year-by-year basis as a board to make sure that we're fiscally prudent, financially responsible and able to deliver the services that we need to injured workers.**

Exactly. That one statement captures the essence of the Board's long-term funding plan first rolled out over 23 years ago (commencing in 1984), and mirrors precisely what employers had been asking for just a couple of years back.

While some groups have been calling on the Board to reopen the Board's official *Funding Framework* plan, in light of these statements, advanced before a legislative committee, such a move is, in my view, not at all needed.

This is not to say that there will not be any future premium hikes facing employers. There just may well be. *But, there will not be any hikes for the reasons proffered in 2005 – that because of 2014, the Board must raise rates*. ***In short, the tail will no longer be wagging the dog*** – and that is as sound a Board policy as one could hope for.

Interestingly, Ms. Malen Ng, the Board's CFO, advised the Committee that, "*At this point in time, as the chair has said, 2014 remains quite achievable. I think very much depends on how much focus, collectively, all health system partners put on actually working on improving return to work and prevention*". **LAL Comments:** It should be noted, for the record, that 2014 is still achievable *without* any rate hikes for 2007 and likely none for 2008.

The Unfunded Liability has dropped a whopping 10% in one year!

With respect to the UFL, Mr. Mahoney announced that when the 2006 figures are finalized, in view of the very strong performance of the Board's investment fund (about a 16% return), **the UFL should drop almost three-quarters of a billion dollars** and come out at about $6 billion (from about $6.7 billion). (*Do I hear rumblings of a demand for a decrease in employer premiums*?)

Experience rating gets maligned

One of the presenters went after experience rating ["ER"] – with a vengeance, accusing ER of being nothing less than a scam. Here is what was said:

> Let me deal first of all with this experience rating scam. What you have here, just so everybody understands, is a system that basically encourages bad practices. ***You have a system that encourages employers to lie and cheat so they can get money back on their WCB claims, in many cases literally millions of dollars***. You're going to hear people talk about, "*This has decreased and so many injuries over here have decreased*." Let me tell you, in the real world what's going on is that employers are not reporting incidents because they know that if they don't, they can get money back from the workers' compensation system. ***If the system was really and truly interested in preventing injuries and ensuring that people have a safe workplace, they would not be paying liars and cheaters***. What they would have is a system that provides money for investment in prevention and return to work. That's what you would see. Unfortunately, that's not the case right now.

I couldn't let those comments go untouched and **Mr. Gerry Martiniuk, Progressive Conservative MPP for Cambridge**, asked me to "*discuss it (experience rating) philosophically, because, as I understand it, there has been a considerable decline in accident claims over the last 10 years. Is there any correlation between that decline and the various incentives that were in place and that may be changing?*" This is how I responded:

> That's an excellent question. I think that from an anecdotal standpoint, I could say yes, but what value is that? An opinion on my part, even based upon years of direct observation and experience, is really of little help and of little value***. But actually, there is a study on this that was recently released by the Institute of Work and Health. It was provided to the Workplace Safety and Insurance Board a year or two ago. It resulted in several conclusions, one of which was that experience rating does drive both positive accident prevention activities on the part of Ontario business and positive early and safe return to work initiatives on the part of Ontario business. That question, I think, has been settled.***

In fact, so outrageous were the smears against ER, that I wrote to the Committee the very next day and provided the members of the Committee with excerpts of that report. This is what I wrote:

> Several times during yesterday's proceedings, questions were posed with respect to the effectiveness of the Workplace Safety & Insurance Board's experience rating ["ER"] programs. Some presenters suggested that there was an absence of evidence of the effectiveness of ER. More significantly, others suggested that ER encourages untoward conduct on the part of employers. **Neither allegation is supported**. There has in fact been a study on the effects of the Ontario WSIB's ER program entitled, "***Assessing the Effect of Experience Rating in Ontario: Case Studies in Three Economic Centers***", (**June 2005, Institute for Work and Health, IBM Business Consulting Services**). The Executive Summary (a copy of which is attached) notes:
>
> > ***Our research indicates that NEER functions well, encourages prevention and contributes to positive workplace health and safety practices.*** Nearly three-quarters of all managers across all three sectors state that NEER is influencing them to develop safer workplaces. The ***large majority of employees state that they are being encouraged to report accidents and incidents and are being offered suitable modified and early return to work if injured.***
>
> In my comments to the Committee, I noted that in the area of injury prevention, experience rating is but one tool in a larger arsenal of tools. I suggested that "*You can't do it absent a regulatory framework; you can't do it absent a prosecutorial model; you can't do it absent certain expectations and guidelines*".
>
> With respect to the worry "*about experience rating that when you start to hold employers to account for their actual performance, are they going to fudge the numbers*", I went on the record to repeat the analysis I first set out more that a year ago on the January 23, 2006 issue of **The Liversidge *e*-Letter**.
>
> I argued that first of all, there are strong safeguards through fines up to $100,000 to prevent that type of behaviour. But, also, I argued that "*the informed rational employer*" (the very audience of ER), simply would not behave in that fashion. ***Contrary to unsubstantiated rhetoric that employers are hiding claims, I said this*:**
>
> > *Who would do that*? Who's the individual who would engage in that type of behaviour? The experience rating model is designed to focus in on the rational, informed business person who's going to respond in a self-interested manner to look after their self-interest. **That's supposed to translate into positive employer behaviour. The study I made reference to earlier says it does just that**. That means you're going to avoid an injury and you know there's going to be a reduction in premiums as a result. We all understand experience rating. If you are driving an automobile and you're accident-free, your premiums go down; if you have an accident, your premiums go up. It's the same principle. The arithmetic is a little bit more complicated, but the principle is identical.
> >
> > If the self-interested business person says, "*I'm going to skirt the system. I'm going to pay the worker under the table not to come into work and I'm not going to report that claim to the Workplace Safety Insurance Board, and somehow I'm making money*," he's not. "***He's not only breaking the law and open for the prosecution that I've outlined earlier, but there's no financial gain in it at all. If you go through the numbers, there's absolutely proof that you aren't better off skirting your insurance program by directly self-insuring. It's absurd. It doesn't happen. I've shown these numbers in the past"***.

I noted though that *"I don't dismiss the fact that a few outlier companies may be performing in this way*", but, I attributed this to employers that have "*an inadequate understanding of this program*". In other words, while they may be acting in a "rational" (*albeit* untoward manner), they are not informed. I pointed the finger back at the WSIB for not explaining ER well enough [more on this in upcoming issues of **The Liversidge *e*-Letter,** when I will again address the need for a simple, easy to understand NEER Calculator to be placed on the Board's website].

On March 1st, Mr. Mahoney came out with one of the most definitive and strongest statements of support for ER I have heard from the Board in recent years. In direct response to criticism that ER is nothing more than a "scam", this is what he said:

> **I'm a strong supporter of incentives** for the business community to provide better-quality health and safety and ***I categorically reject the comments that the people who are employers in this province are liars and cheaters***. I don't believe that.

Hooray (again). For far too long now, the Board has been too quiet when faced with unsubstantiated and outrageous attacks against ER. The study I referred to earlier ("***Assessing the Effect of Experience Rating in Ontario: Case Studies in Three Economic Centers***", (**June 2005, Institute for Work and Health**), which really settles the question, and absolutely supports Mr. Mahoney's comments, has not been widely circulated by the Board. *It should be*. If its on the Board's website, I certainly could not find it. Nor could I locate it on the Institute's website as late as this morning (an earlier literature review is on the website). ***It is time to accept that ER works, and put that question away***. **Energies should be focused on how to make it work better**. And, to that end, I have a number of suggestions which I will lay out at a future date.

Several LAL suggestions get support from WSIB Chair – and are to be implemented

As I noted in the February 28, 2007 issue of **The Liversidge *e*-Letter**, ***L.A. Liversidge Appearance before Standing Committee on Government Agencies***, I advanced several recommendations to the *Standing Committee*:

> ***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".
>
> ***Three*:** The Board should immediately restore the ***Voluntary Registration Program***.
>
> ***Four*:** The Board should follow the Canada Revenue Agency ["CRA"] lead and suspend collection activity while an assessment is being actively appealed.

With respect to the request for a review of WSIB Audit, on March 1st Mr. Mahoney announced:

> We are constantly reviewing the way we do business to make sure that the WSIB continues to provide the kind of service excellence that employers and workers expect and deserve. One such example -- *and this was referred to by one of the presenters* -- is with respect to the employer audit. **We have already commenced a review of our practices, and that review will help to inform us of any process improvements which need to be made. Similarly, in the area of collections, which was *also referred to by one of the deputants*, we are currently looking for service improvements**. We will take the suggestions to heart and we will examine them to see how we can do things better.

And, I can assure readers of **The Liversidge *e*-Letter** that the Board is *seriously* addressing these issues. It has taken me some time to get their attention, and while I would have preferred a senior review by the Board of Directors itself, as I will document in future issues of **The Liversidge *e*-Letter**, the Board is taking this seriously and is responding in a thorough and responsible manner. *Kudos to the Board*!

***With respect to the Voluntary Registration Program* [VRP]**, on March 1st Mr. Mahoney announced:

> As was suggested on Tuesday by one of the deputants, ***we will be reinstating the voluntary registration program*** to give employers who continue to avoid the system the opportunity to come forward before we identify them through other means.

This is an important announcement which restores much needed fairness to the employer registration process. I will be devoting a special future issue of **The Liversidge *e*-Letter** to the VRP. This has been a long, arduous struggle of mine, spanning more than three years. It has taken a long time to convince the Board of the wisdom in re-introducing the VRP ***and for that, I credit Mr. Mahoney's leadership and empathy for the special challenges facing Ontario's smaller businesses***.

On the suspension of collection activity while an assessment is being actively appealed, no comments were made at the March 1st appearance. However, I was informed afterwards that the Board is of the view that the WSIA prohibits the Board from implementing this recommendation ***even if it wanted to***. It hasn't been confirmed that the Board wants to, but I suspect that some inroads are being made there. Actually, I think it is very much to the Board's benefit to adopt this approach.

I disagree that the Board *can't* do it now. But, more on that another time. ***Needless to say, I am not dropping this suggestion and I will continue to champion this idea***. It is critically important. ***This one change would make the WSIB's audit functions much fairer***. It is my opinion that the *Act* does not prohibit it, and it is well within the discretionary authority of the Board of Directors and the WSIB administration to accept my recommendation. If I am wrong and the *Act* has to be changed, *then change it*!

On the leadership and importance of the Chair

On February 27th, I opened with this about Mr. Mahoney:

> **But first I want to take a moment and comment on WSIB leadership. I listened very carefully to Mr. Mahoney this**

morning, and I've seen him active on this file in many years past. I continue to be very 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: <u>The board is responding</u>. 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.

I should note that on March 1st, Mr. Mahoney took some exception that I suggested Mr. Glen Wright was his "*immediate predecessor*", noting that it was the current WSIB President who served in a dual capacity as <u>Interim Chair *and* President</u> for the two year period after Mr. Wright and before Mr. Mahoney arrived. **Of course, he is technically correct**. But, it is obvious that I was distinguishing between the position of *Interim Chair* and *Permanent Chair* (a distinction acknowledged by Mr. Mahoney when his nomination was being reviewed by the same *Standing Committee* in May, 2006).

I actually think that doing the job of WSIB Chair on an interim basis <u>is a lot tougher</u> in many respects than doing it as a permanent Chair. The reasons are obvious. ***More to the point, doing both jobs is almost impossible***. <u>There is a reason why there are two positions</u>. In fact, being a permanent Chair and taking on the role of Acting President is likely a little easier than the reverse. As permanent Chair, particularly if the incumbent has held the office for some time, the policy direction is well set and the external and internal relationships are well established. But, the transition the other way, especially if relatively new to the WSIB world overall, and brand new to the two top slots, *well, that is <u>one tough assignment</u>*.

When he was appearing before the Standing Committee on Government Agencies on May 17, 2006 with respect to his appointment, Mr. Mahoney had this to say:

> **Jill Hutcheon has worn both hats for the last two years, as president and chair. It was an enormous job for her to undertake and, by all accounts, she did a great job in both positions**

<u>If anything, that is an understatement</u>. From my observations, Ms. Hutcheon took on what was unquestionably one of the toughest Ontario public service assignments imaginable. At a time of significant leadership transition, when a new government's directions on the file were in the development stages, the Board under Ms. Hutcheon's leadership continued to balance well entrenched expectations, with new emerging ones of a new government. ***No small feat at all***. Concurrently, the Board was addressing budding financial and other policy pressures. ***<u>So, overall, Mr. Mahoney's praise of Ms. Hutcheon last year was significantly understated</u>***.

One (Liberal) MPP asked that I follow up on "***some of the positive comments that about our chair, Mr. Mahoney***". I cautioned the member that "***You might run out of time here. I've got a lot of positive comments***", which while I admit was a good line on a long-afternoon (and one of the few chuckles of the day), was nonetheless, sincere.

Notwithstanding my high personal regard for Mr. Mahoney, and while I think he is, and will continue to be, an outstanding Chair of the Ontario WSIB, I responded by looking at the overall Office of the Chair. I said this:

> The office of the chair of the Ontario Workplace Safety and Insurance Board is determinately important. **<u>I have equal and high regard for his immediate predecessor, Mr. Glen Wright, who I thought also did an outstanding job</u>**.
>
> If you go back through the lines, there's not a single chairperson of the Ontario Workplace Safety and Insurance Board who has not come into that office dedicated to make things better for the injured workers of Ontario -- not one; not a single one.

I noted that "***Everyone has come in rolling up their sleeves. They want to leave their mark. And I would say without exception that that has happened***".

If anything, my praise for Mr. Wright was subdued, as I wanted to focus on the current administration. However, just as I have high regard for Mr. Mahoney and Ms. Hutcheon, the system transition and reformation experienced during Mr. Wright's tenure was unprecedented, with the leadership exercised being nothing less than exemplary. On June 1, 2006, long after he had left the WSIB Chair, Mr. Peter Kormos, NDP MPP had this to say about Mr. Wright: "*I have a lot of regard for the guy. He had experience, he was talented, he was creative*".

But, I noted that when that the position of the Chair is not filled by a permanent incumbent, "*without any negative commentary on the senior officials who are left to run it absent the position of the chair*" the organization just doesn't run as well. "*So it needs that leadership, that type of unique leadership that fortunately the (WSIB) seems to have been always able to attract, with a sense of personal commitment to a certain vision*."

I remarked that: **"*<u>Even with, however, a person of the high stature and quality you have in Mr. Mahoney, my respectful view is that that's not enough; the system is not necessarily going to move forward and advance as far as it can</u>*"**. "*This* (type of dialogue before the Standing Committee) *has been pretty much absent in Ontario for a long time*". "*What happens typically is ... <u>notwithstanding</u> the excellent people at the WSIB, <u>and they are</u>; notwithstanding the excellent leadership that the board has been able to attract over the years, <u>and it does</u>,* (the system) *from time to time cracks up on the rocks. <u>**And it's not until it cracks up on the rocks that the spotlight comes down, you have a crisis, and the system then responds to the crisis**</u>*".

The "*Wright era*" [1997 – 2004] benefited not only from the outstanding leadership and managerial qualities of the incumbent Chair, and the outstanding people he was able to attract (many of whom are still working hard at the WSIB), ***but by the boost provided by an extensive and high level policy review at the ministerial level, undertaken by a***

dedicated Minister for Workers' Compensation Reform – an Ontario first.

In supporting my suggestion for a periodic comprehensive review (more on that in future issues of **The Liversidge *e*-Letter)**, I observed that the dearth of regular and periodic forums is , "*the weakness of this system, and that's the weakness of this system for over 30 years*". "*I think that there is an opportunity to do things a little differently, a little more intelligently, so that you don't wait for the thing to blow up before you get engaged in it and you do it incrementally and you allow this conversation to. . . really never to stop. . .*"

The issue of Occupational Disease was front and centre

Many comments and questions were elicited with respect to compensation for occupational disease. One presenter, with *passion and conviction*, set out his take on disease compensation. I will reproduce significant portions of the Hansard record:

> In response to the asbestos crisis of the 1970s and 1980s, an independent panel was established in this province to review scientific evidence and make policy recommendations about occupational disease. *That was the result of inaction over the course of decades by the board that boiled up into a crisis that led to a royal commission, a review of the occupational disease issue by Professor Weiler and its own demonstrations*. The Industrial Disease Standards Panel and later the Occupational Disease Panel that resulted, over the decade it existed, issued over 20 reports on various diseases -- all but two, I think, on a consensus basis, a consensus of worker, employer and scientific members -- that were forwarded to the board for action. Only a handful were acted on. ***They fell into a black hole once they reached the board***.
>
> In 1997, the Occupational Disease Panel was abolished over the objections not only of the worker community but of the scientific community around the world. The reasoning given was that this would end the policy-making deadlock and it would also reduce inefficiencies that came about from having two different bodies looking at occupational diseases.
>
> The result, over the last 10 years, has been that, between 1997 and 1999, apparently, people were waiting for (specific workers) and other survivors from Sarnia to come and occupy the offices of the Ministry of Labour. This led, two years after that, to the creation of an occupational disease advisory panel at the board, which, two years later, broke down just as it was about to complete its report. Two years after that, a chair's report done without the full panel was approved by the WSIB's board of directors. Now, two years after that, we're waiting to have the draft policies that should result from that process distributed to us for comment.
>
> ***It's hard, really, to know where to place the blame for all that***. We're still left with outstanding reports from the Occupational Disease Panel, which was abolished 10 years ago, to be reviewed and acted upon by the board, because they've been waiting for their own process to come up with that. ***But it's clear that the board can't handle this all on its own; the problem that was there in the first place is still there***.
>
> I don't want to just throw mud at the board on this, because I think in fact that the attitude there has never been better than it is right now. **What that tells me is that there's a systemic problem with the way that this is set up, and we need the establishment of an independent -- in fact, a stronger oversight body on this issue**.

On March 1st, the Board responded:

> ***Occupational disease continues to be our biggest challenge*** on the Road to Zero. We are very sensitive to the fact that every claim is more than a piece of paper. We understand that there's a human being with a family within the pages of every claim file. **While we continue to implement a plan for the present, we all need to work together to make occupational disease a thing of the past**. *We are focusing on expedited decision-making, strengthening support for adjudication and quality service, improving our communications with affected workers and, in some cases, their survivors, and enhancing information and technology to support the difficult decisions that have to be made*.
>
> ***With respect, we have not sat on our hands or on reports***. ***For the past two years, our internal focus has been to ensure that the appropriate building blocks are in place***. This includes developing extensive adjudicative advice support materials to help guide the training of 70 occupational disease staff and aligning our policy priorities with our research advisory council's mandate. Rather than waiting for the ODAP policies to be put in place, we have implemented an adjudication protocol based on the principles of Brock Smith's final report on occupational disease.

LAL's Comments: I carefully addressed this essential discussion in two prior issues of **The Liversidge *e*-Letter** devoted to occupational disease ["OD"] [June 29, 2006 issue of **The Liversidge *e*-Letter, "Occupational Disease Advisory Panel Report: An Executive Overview"** and the September 28, 2004 issue of **The Liversidge *e*-Letter, "ODAP Report: A Recommended Course of Action: *Occupational Disease Requires Legislative Reform*"**.

I argued then and I argue now – **a new way is needed**. I cannot replicate the detailed arguments I advanced in this short summary, but what follows is a snap-shot of my appearance before the **Board's Occupational Disease Advisory Panel** ["ODAP"] (the Brock Smith investigation) in September, 2004 as recorded in **The Liversidge *e*-Letter**.

> **Fairness – to workers and to employers – can only be achieved if the law itself is reformed.**
>
> Compensating occupational disease is not a debate about *creating costs*. Make no mistake about it - the costs already exist. *The debate is about who absorbs those costs –employers, workers directly, or society at large*.
>
> Today, I appeared before Mr. Brock Smith, Chair of the Occupational Disease Advisory Panel ["ODAP"] strongly recommending that the WSIB Board of Directors refer this issue ***where the only hope of a sustainable and fair solution lies - to the Ontario legislature***.
>
> The ODAP is not the first attempt to resolve the occupational disease ["OD"] dilemma. There have been several inquiries and reports addressing the very issue, and I introduce four of those: Paul C. Weiler: *Reshaping Workers' Compensation for Ontario: November 1980* ["Weiler I"]; Paul C. Weiler: *Protecting the Worker from Disability: Challenges for the*

Eighties: April, 1983 ["Weiler II"]; Terence G. Ison: *Compensation for Industrial Disease Under the Workers' Compensation Act of Ontario: September, 1989* ["the 1989 Ison Report"]; and, Minister of Labour: *Report of the Occupational Disease Task Force: March, 1993* ["the 1993 Task Force Report".

To repeat my opening comment – the debate is not about creating a new cost for OD compensation. ***Disabling diseases already cost***. ***The debate is about who bears the cost***. OD tests the limits of the Ontario WSI scheme. *It is not an easy issue. There is no easy solution*. However, so long as employers and workers continue to agree on the basic tenets that underlie the WSI system, worker and employer interests must, and will, intersect on issues of fairness and principle. ***Once it is admitted that the OD question is not resolvable under the current system, the next step becomes clearer – a new way must emerge***. **The *status quo* is a "no go"**. A process beyond Weiler was needed in 1980 and in 1983. A process beyond the Task Force was needed in 1993. And, a process beyond ODAP is needed in 2004. **The question of compensation for OD requires the leadership and stewardship that is only possible from the Government, and ultimately, from the legislature.**

Unless a new way emerges, this file will not progress

Until that happens, when the Board appears before a *Standing Committee* of the Ontario legislature next year, two years from now, five or ten years from now, the discussions will be identical to what was said February 27, 2007, which was similar to what was said four years ago, a decade before that, and a decade before that.

The collective foot is on the gas pedal, but the tires are spinning in the sand. ***The system is not moving forward nearly enough***. Not through want of effort. Not through want of passion and commitment. Not through lack of study. Not through neglect. Not through a lack of applied talent. ***The problem is that the system is not moving forward because it simply can't – right now is as good as it gets***. And where we are right now, is not good enough.

So, either accept what we have, or change it. ***I vote for the latter***. **Change**. **Big change**. A full revamping of the heart and soul of the social contract as it is applied to disease compensation.

What is a new, workable model*?** Since that question has not been sufficiently addressed, of course, no one can really say. *But, I have an idea where to at least start*. How about this?: A bipartite (worker and employer) funded insurance scheme that automatically pays compensation to workers who succumb to disease, and then figures out what fund – the worker fund or the employer fund – pays, fully or partially – at a later time. ***Pay claims first, figure out attribution later.

These cases are never complicated by the question as to whether or not a worker has a disabling disease – ***they are complicated by the question of where was the exposure that gave rise to the disease; is it occupationally induced or not*?** *Employers do not get off the hook* – business is still held to account for OD. But, ill and dying workers do not wait and wait, and fight and fight, while the Board decides if there is an occupational link. **The first question is – is the worker incapacitated due to disease?** If yes, a claim is established and entitlements *immediately commence*. If the evidence establishes an employment link, then the cost is allocated to the employer. Not a simple solution. Not likely an inexpensive one either. But, unless this idea, or some hybrid of it, replaces the present system, 10, 20, and 30 years from now, we will be having the same discussions as we are today, just as we did 10, 20 and 30 years ago.

In the September 28, 2004 issue of **The Liversidge *e*-Letter**, I commented on the recommendations of both Prof. Weiler (of 1980 and 1983) and Prof. Ison (of 1989). This is what I said:

Weiler's report was remarkable in both its thoroughness and its simplicity. Complex issues which had plagued the system literally for decades, and which appeared to be without resolution, were distilled into workable policy concepts, capable of swift implementation. **He addressed every leading issue facing the system, including the then (and now) perpetual dilemma – compensation for occupational disease**.

Weiler readily recognized why an OD policy solution eluded the system. He observed that the Ontario workers' compensation system was essentially established for compensation for injury arising from traumatic accident, where the requirement to establish an employment causal connection was consistent with the funding arrangements. . . . A system 100% funded by employers for injuries arising from the employment made sense, was internally consistent and workable.

In the case of OD however, where the cause of disease was, in most instances at best uncertain, the system no longer maintained the same internal consistency. **The need to establish an employment causal link, essential in a 100% employer funded scheme, was recognized to be an impossible task**, in light of the potential non-occupational links to disease, or more precisely, in the absence of evidence showing a clear occupational connection.

Weiler concluded that the only way all OD will be compensated is if all disease is compensated. And, the only way to compensate all disease is to change the funding formula.

On the recommendation of Prof. Weiler (in Weiler I), an "Industrial Disease Standards Panel" ["IDSP"] was created in 1985 (later named the "Occupational Disease Standards Panel" and later still, disbanded). In 1989, the IDSP requested that Prof. Terence Ison discuss the very issues that were canvassed by the ODAP [1989 Ison Report, p. 3]. Prof. Ison concluded his analysis in a paragraph aptly entitled "**The Eternal Dilemma**" [at p. 38]: "*A major difficulty in the context in which the Panel (the IDSP) must work is that workers' compensation rests, and always has rested, on a false assumption. In relation to disease, the system assumes the feasibility of determining the etiology of disease, not just in general, but case by case.*" "***No system of compensation will ever work with efficiency, justice and consistency if the eligibility for benefits depends on establishing the etiology of each disablement***". Like Weiler, Ison concluded that the system itself must be changed

That is what I am proposing – *it is necessary to continue a dialogue that has stalled for 27 years now* – **to find a new, better way**.