

# The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

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

2 pages

## Workplace Safety & Insurance Appeals Tribunal

*Appeal caseload getting closer to target level*

### **Appeals Tribunal long-term methodical efforts paying off**

#### **WSIAT keeping sights on the long-term target**

In the recent issue of its newsletter "*In Focus*" the Workplace Safety & Insurance Appeals Tribunal ["WSIAT" or "Appeals Tribunal"] announced "*at the end of the first quarter of 2008, the active inventory (of the Appeals Tribunal) was 4,536, a significant reduction from the recent high of 5,493 active appeals at the end of the third quarter of 2006*".

#### **Most will respond with a "ho-hum"**

For most, I am sure that the response will be a shoulder-shrug (if that). But, behind that simple statement lies a very significant story, and one that warrants some telling. It is actually a remarkable achievement. The most remarkable element of this narrative however is not that the caseload is down (the target is an active appeal caseload of 4,000). Getting the caseload to within reasonable and workable levels, one way or another, was inevitable. The noteworthy aspect of this story is in the clear-headed and focused decision of the Appeals Tribunal to take its time to achieve this, and to realize this absent any serious external push. And for this, the Chair of the WSIAT, Mr. Ian Strachan, deserves unsought kudos.

#### **A generation ago, the "political story" was fair access to fair decision-making**

Players in the contemporary workplace safety and insurance ["WSI"] storyline would be hard-pressed to realize the depth and extent that the simple matter of fair access to fair decision-making was such a pivotal and determinative issue just a generation ago.

#### **Twenty-five years ago access to WSI justice was a driving political force - today it is taken for granted**

Only those who are veterans of the turmoil of the late 1970s and early 1980s will appreciate the political might of access to justice issues that are now simply taken for granted. But, the creation of the Appeals Tribunal in 1985,

which for the ensuing 23 years delivered *the* archetypical standard of administrative justice in Ontario if not Canada, was a leading edge and novel concept not that many years ago, that shook the Ontario workers' compensation regime to its roots.

#### **The Appeals Tribunal established a new level of system integrity**

Under the competent and deliberate stewardship of two outstanding Chairs, first Ron Ellis and then the current incumbent Chair Ian Strachan, the Appeals Tribunal established a level of overall *system* integrity previously impossible. This is not simply a story about a successful tribunal. This is about a legacy dividend of stakeholder confidence.

#### **The Appeals Tribunal allowed the Board to function effectively**

The Appeals Tribunal did more than introduce the rule of law to the Ontario WSI scheme (which it did). It shored up system confidence that allowed the Workplace Safety & Insurance Board ["WSIB" or "Board"] to maintain its mandate. Absent the WSIAT, now and 20 years ago, the WSIB simply would not be able to function. It would have remained bogged down in endless and otherwise irresolvable systemic disputes, that would have engulfed the Board's capacity to effectively carry on, let alone respond to a realigned prevention focus 12 years later. That the Board has the capacity today to earnestly focus on prevention is, in large measure, a dividend from the Appeals Tribunal.

#### **The success of the Appeals Tribunal did not flow from its design**

The nucleus of this achievement was not the Appeals Tribunal's architecture *per se*, which itself wasn't particularly remarkable or unique, even 23 years ago. There is no particular genius to suggest an independent decision-making body staffed with competent decision-makers, expected to make swift and fair decisions. That's the easy part. As trite as it sounds, the success of the Appeals Tribunal, was and is, in its people and in its leadership.

**And, that brings us back to the Tribunal caseload**

The challenges of caseload has always been, and always will be, a leading issue. No matter the calibre of the eventual outcome of a dispute resolution scheme, it is effectively useless if it is inaccessible. The old saw “*justice delayed is justice denied*” is as applicable to the Ontario WSI scheme as anywhere, if not more so. Injured workers seeking “their day in court” will hardly be appreciative if they had to wait four years to realize that seven weeks of WSI benefits they considered themselves due. And, if they wait that length of time just to be turned down again, well, that dissatisfaction will spill over into anger and indignation, and rightly so.

**Right out of the gate the Appeals Tribunal set a new standard for decision-making**

Of course, it goes without saying that unravelling the facts and law in the very complicated cases that end up at the WSIAT takes time. Right out of the gate in 1985 the Appeals Tribunal set a new standard for WSI decision-making. Without question, agree or disagree, have your appeal allowed or turned down, not a single participant in this process, worker or employer, could ever quarrel that they were not heard, that their arguments were not given very due and respectful consideration, and that at the end of the day the final product was just.

I have been appearing before the Appeals Tribunal since its inception and have won and lost appeals there, have both agreed and disagreed with panels but always have been secure that my client’s interests were of paramount concern to the decision-makers. It is quite a remarkable process for WSI disputes.

**Don’t misinterpret me – the Appeals Tribunal is not infallible**

By no means should this be interpreted as at all suggesting the Appeals Tribunal is infallible. That is hardly the case. The WSIAT has, does and will make mistakes. But, one of the remarkable qualities of the Appeals Tribunal is that, for the most part, when these mistakes are made, the very process that gave rise to an error - be it an interpretive misjudgement or simply an early pronouncement in an emerging or developing issue – it also is the process that usually corrects the mistake over time.

**The quality standard guaranteed that caseload management would be an ever-present challenge**

Once that quality threshold was crossed, the challenges of caseload were guaranteed to be omnipresent for evermore. There was no way around it. The simple fact is that these are complicated cases and they take time to *fairly* adjudicate. And, the Appeals Tribunal has to contend with a punishing level of incoming cases (over 4,000 cases per year!).

The WSIAT has set a target of 4,000 “active cases” as being optimum. While that target was reached a few years back, commencing in early 2003, for a range of reasons, the numbers started creeping upwards, and hit a peak of 5,493 by September 2006, 37% above target.

**Delays will always be a trigger for public criticism**

If the WSIAT is ever to come under significant public criticism, it likely will be one issue that will drive it – delays. The WSIAT therefore has an institutional interest in keeping delays to a minimum and the caseload numbers down. One response could be to greatly increase the Tribunal’s resources. Fortunately or not, the Appeals Tribunal does not control its own purse-strings. The other would be to ratchet down the quality a few notches – to “manage the numbers” so to speak and issue perhaps less complete decisions faster.

When the numbers started creeping upwards, very much to its credit, the only course of action considered by the Appeals Tribunal was “none of the above.” The WSIAT was committed to deal with the caseload question but not at the expense of quality. In the **WSIAT 2006 Annual Report**, Chair Strachan described the challenge this way:

**The Quest for Quality**

With limited financial resources, it is often difficult to strike a reasonable balance between the quality of the adjudicative service and the volume of production. *While the Appeals Tribunal has constantly worked to maximize production, it has always attempted to do so while maintaining a high standard of decision-making.* That approach has generally been well-received in the injured worker, employer and legal communities; however, *it is a delicate balance to maintain.* It helps to receive occasional reminders that the quest for quality should not be eroded by a large caseload or limited resources.

Fortunately for the Appeals Tribunal, most members of the injured worker and employer communities have been understanding . . . obviously place a high value on well-reasoned decisions by competent adjudicators and, while they undoubtedly found the volume of appeals and timelines frustrating, they recognized that there was no effective “quick fix.” *If quality adjudication is to be maintained, the solution must start with the testing, appointment and training of qualified adjudicators and the gradual integration of those new appointees into the hearing schedule.*

It should be noted that the Appeals Tribunal did not wait until the caseload hit its peak to act, but when it started its upward curve. From the outset, it played the long-game, no doubt ever cognizant that a brushfire of public criticism could have been ignited at any moment (as we have seen recently, WSI remains newsworthy, and in the past, there was no more newsworthy story than appeal processing).

**The real legacy though is stakeholder confidence**

But, that the Appeals Tribunal leadership embarked on that sensible plan is only part of the story. The most telling and significant aspect of all of this, in my assessment is this, notwithstanding that there have been longer line ups getting into the system for several years now, there has been no public angst aired. The Appeals Tribunal has not been a target for public criticism. Workers, employers, and their representatives have, in their silence, expressed confidence in the stewardship of the Ontario Workplace Safety & Insurance Appeals Tribunal.

*And that is a significant and compelling legacy that places the last 23 years in perspective.*