The Liverside *e*-Letter

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

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WSIB experience rating review

WSIB releases terms of reference

This may create opportunity to "turn the page"

WSIB releases terms of "Request for Proposal"
This watershed action may deflate the volatility of the debate and ensure an objective analysis

"Request for Proposal" released

In the last issue of **The Liversidge *e*-Letter** I recommended that the Workplace Safety & Insurance Board ["WSIB" or "Board"] quickly release the terms of reference of its experience rating ["ER"] review. *It has now done just that*. The Board is soliciting proposals under a **Request for Proposal** ("***RFP#: 2008-19-AF***"). Although it was sent out the last week in April, the RFP does not appear on the WSIB website, and it seems will not be posted. *This is a mistake*. The Board should reconsider. This entire process must be, pardon the pun, above board, in reality and appearance.

WSIB outsourcing ER review project

I remain of the view that outsourcing the project was not essential and the Board is entirely capable of facilitating the review "in house" while appropriately engaging stakeholders. However, sending this out to a competent external team of consultants is not necessarily a bad move (providing the consultant team chosen is considered suitable to stakeholders). Outsourcing gives the Board the luxury of assessing a variety of approaches with no ownership links to any of them. At the end of the day, it is the Board itself that must "*sign on the dotted line*". Whatever comes out in the end will be the Board's policy, not the consultant's.

Releasing the terms of reference redefines the debate

Before I get into the specifics of the RFP, which is far from perfect and introduces other concerns, this is nonetheless a breaking point in the ER "debate". ***The release of the RFP is a defining moment.***

This now establishes the ER policy review as what it should have been from the outset - *just that* - a policy review. The RFP brings forward some much needed discipline to the Board's management of this matter, which as readers know, has in my opinion been less than adeptly handled. But, the RFP allows everyone to "*turn the page*" on this chronicle and start a new chapter.

Employers should acquire some comfort with this step

Even allowing for some disagreement in the eventual outcome, and even acknowledging that at the end of the day, employers may not be entirely satisfied with the final product (although they may), employers should realize some comfort in this step.

First, and foremost, it is now highly improbable that ER as an Ontario workplace safety and insurance ["WSI"] concept and program is on its deathbed. Over the last few weeks its vital signs were dropping. This adds a new lifeline. **No matter its eventual form, I predict that ER is here to stay.** The focus of the review now is about *improving*, *not killing* ER. **This is consistent with WSIB Chair Mahoney's long-standing and I believe very sincere support of ER as a viable program.**

Second, at the end of day, regardless of the eventual design, ER will likely be emboldened as a viable program. It is my view that just when they were driving the agenda, the ER critics made a strategic misstep by demanding the resignation of the WSIB Board of Directors. If the bottom-line demand remains nothing less that the total elimination of ER in Ontario, ER critics have weakened their voice as the focus turns to program improvement.

Third, the review will inevitably return the debate to what it always should have been - an insurance analysis not a political analysis.

Fourth, whatever finally comes out will be the baby of this WSIB Administration. The accountability lines will be firmly inked in. No more "bobs and weaves" on the accountability question.

But, there are a few snares in this process

First, the project time line is far too short. This may be fuelled less by the magnitude of the project and more by the politics of it. The RFP was released in late April and interested consultants were asked to file proposals by May 6. **The final report is to be submitted by August 28**. This is simply too fast and may impact quality, no matter the calibre of expertise engaged. The Board is well advised to put in place a more realistic time-line.

50 Acadia Ave., Suite 101, Markham, ON L3R 0B3 Tel: 905-477-2039 Fax: 905-477-4659 E-mail: lal@laliversidge.com **ISSN 1710-5757**

Second, there is no room for any public consultation built into this (so far). In fact, there is no indication that the Board plans to consult at all (which if true will be a fatal misstep very much at the Board's peril). The WSIB Board of Directors ["BOD"] is to receive a draft proposal from the Administration by early September, 2008.

Third, the terms of reference themselves contain a few pointed conclusions (one about SIEF) which may be interpreted as being too firm a "guiding hand" towards an expected outcome. This may undermine the integrity of the project and ultimately weaken stakeholder "buy-in".

Overall though, that the review is now underway is a plus. So long as the Board retains an open mind (a big worry), sweeps aside the political elements of the controversy (a larger worry), and designs a credible ER program that has the unqualified support of Ontario's employers (the ultimate worry), then the exercise may succeed. ***My odds of a better program?*** **Right now - 50/50** (which is a significant improvement over the last weeks).

<u>Broad based employer consultation though is essential</u>

The Board has uttered but the vaguest of commitments that employers will be consulted. This is a serious mistake. Employer input and "buy in" is a critical ingredient. Without it, the Board may as well not even start. I encourage the Board to set out, in detail, what it plans to do to engage Ontario employers.

<u>ER consultation - the Board at its best (and worst)</u>

As I have written before, in years past WSIB ER programs represented the archetypical example of the Board at its consultative best. Also, I am afraid to suggest, sometimes at its worst. In the beginning, during the early to mid-1980s, the Board not only involved employers, together they formed an effective partnership. This characteristic was as important, if not more so, than the technical particulars of ER. Without unqualified employer "buy-in" ER will not achieve its promise. Ever.

<u>WSIB should review its experiences from the 1980s – they are relevant today</u>

The Board is well advised to "dust off" its ER file from the 1980s. The current Administration will learn something. What to do right and what to avoid. The Board must understand that ER change will take time – *a lot more* than they currently have allotted.

<u>The first ER programs took 12 years to implement</u>

From ER's first serious endorsement from Prof. Paul C. Weiler (in his 1980 report to the Minister of Labour, *Reshaping Workers' Compensation for Ontario*), to its initial experimental designs in the construction (CAD-7) and forestry sectors (NEER) in 1983-1984, to its first major but limited *voluntary <u>and democratic</u> introduction* into six industrial sectors in 1986, to its full blown deployment in 1992, took twelve years. *Twelve*.

<u>When ER consultation "works" employers are partners</u>

All along the way, employers were consulted and very much had their "*fingers in the pie*". In many respects the Board has as large a task in front of it today. A fast track process will thwart the most essential objective – getting it right. If the "new ER" lands without unqualified employer support it will hit with a deafening thud. A paternalistic "top-down" style of policy design won't cut it. If dispossessed from program design, it may well not be just labour calling for its demise – employers may join the chorus. As I said last week, the stakes are high.

<u>The ER review again proves my reform theory – only a crisis will motivate the system to change</u>

One of the most glaring weaknesses in contemporary WSI administration is the fact that until a crisis of confidence of one sort or another confronts the Board it simply isn't too eager to respond (no matter what the issue). I don't wish to point fingers only at the current administration. With a few exceptions (late 1990s) this is a time honoured reality. This has been true decade after decade. I have raised this point before. I introduced this idea in the April 2, 2006 issue of **The Liversidge *e*-Letter**, "***The WSIB is a Government in Miniature***" and expanded upon the idea in my appearance last year before the **Standing Committee on Government Agencies**. On February 28, 2007 I noted:

> **If three decades of WSI reform history has established two constant truths they are these**. ***<u>First</u>, the loss of confidence of a core constituency will spark a petition for reform. <u>Second</u>, 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***.

<u>The recent ER controversy affirms that the Board does not move until it is pushed</u>

This is the real lesson so far in the ER debate – system reform. Or more precisely, how to trigger it. The trigger for reform is now, as always, a crisis. It does not have to be this way. *It should not be this way*. I will be returning to this theme in future issues of **The Liversidge *e*-Letter**.

<u>The terms of the ER RFP</u>

Recall that the ER controversy was sparked by criticisms that employers receive ER rebates while at the same time facing occupational safety prosecutions. Yet, the scope of the ER review goes way past this point and gets into the nuts & bolts of ER design. This may be too ambitious. Worse, the real focus may be lost (and thus the criticisms will not be quelled). The Board has set the objectives of the review as:

> a. ***Align the Experience Rating programs to the WSIB's new five year plan - the Road to Zero***, the Prevention Strategy and return-to-work initiatives, to ensure that the Experience Rating programs deliver real improvements in the workplace;
>
> b. ***Determine if any gaps exist within the current Experience Rating Programs***, such as employer compliance features of the program with health and safety and reporting obligations of the Workplace Safety & Insurance Act;
>
> c. ***Design a program that is world class and ensures that it incents*** real improvements in workplace activities and improve prevention and return to work outcomes.

The RFP sets out the Board's expectations of the consultant:

> The successful Experience Rating Consultant will be asked to provide the following services:
>
> (i) To review the NEER and CAD-7 programs and assist WSIB in recommending possible refinements;
>
> (ii) To provide financial cost and administrative implications to WSIB as well as impacts to employers on the proposed refinements; and
>
> (iii) To scope the work required to research best practice incentive programs in Canada and internationally in countries such as Australia, Ireland, and United States, that have prevention and return to work mandates comparable to the WSIB.

The Board would have been wise to stop there. Instead, the terms of the RFP go a further step and actually tender some conclusions:

> The design features (relating to (i) and (ii) above) should include considering:
>
> **a. The appropriate threshold of NEER and CAD-7 Experience Rating programs:**
>
> The current minimum annual premium for inclusion in the NEER & CAD-7 programs is $25,000. ***This threshold should be reviewed*** to reflect the implications for small business and the impact on MAP.
>
> **b. The Review Windows:**
>
> The NEER window of 3 years is intended to capture all costs during that period for a given injury year. In addition, projected future costs and overhead are added to take into account potential benefit payouts beyond the window. Under CAD-7 the current design evaluates two award years for claims going back five accident years within each.
>
> **c. Second Injury and Enhancement Fund (SIEF)**
>
> The SIEF program relieves employers of the cost of injuries to pre-existing medical conditions, thereby excluding these costs from the experience rating calculations. ***A significant growth in SIEF in recent years has had the effect of eroding the effectiveness of experience rating*** – SIEF currently represents about 30% of expected claims costs.
>
> **d. Size of the Financial Incentive**
>
> The financial incentive should be sufficient in size to influence the desired improvement in employers' health and safety and return-to-work behaviours.

The Board has shown some of its hand

By commenting specifically on the threshold of the cut-off between MAPP, CAD-7 and NEER (presently at the $25,000 premium level) the Board may have telegraphed some preferred outcomes. (I say this notwithstanding that a review of the $25,000 threshold is called for – but this should be left to the findings of the consultants. In fact, as I will set out in future issues of **The Liversidge *e*-Letter**, it is my view that the cut-off should be raised considerably to include within MAPP all employers presently within the 40% NEER rating factor level, the lowest band with the NEER ER program.) It would have been preferred for the Board to await the independent analysis of the consultants before hinting at any preferences.

WSIB includes SIEF in the review

For a few months the Board has been hinting of a reworking of Second Injury and Enhancement Fund ["SIEF"] policy. The ER RFP provides a tip-off as to where the Board is headed. Even though no element of the SIEF is remotely connected to the recent ER controversy, not only did the Board slip this in, it telegraphed a design preference. This could mark a fatal retrenchment on the founding principles of collective liability. More in upcoming issues.

Do not blindly accept WSIB focus on "incentives"

Readers of **The Liversidge *e*-Letter** are well aware that when it comes to "incentives" the Board often speaks in code. As I observed in the May 16, 2005 issue commenting on the last time the Board adjusted ER:

> In the Fall of 2003, as an "interim" reform measure, the WSIB introduced several refinements to ER, suggesting that these adjustments were designed to increase the power of ER, and will result in "increased incentives". "Increased incentives" has always been interpreted by employers as increasing rebates **[see The Liversidge *e*-Letter, September 12, 2003]**. Yet, as it turns out, changes the Board introduced effective for "Accident Year 2004" have *decreased* rebates while *increasing* surcharges.

The last time the Board heralded "incentives" it reduced rebates and increased surcharges. In the context of WSIB ER policy "incentives" has become a complicated code word. It sells well. It sounds good. *And, best of all, it can mean anything the Board wants*. I therefore caution readers not to be mollified by the term "incentives".

The real risk – "revenue neutrality"

As readers are well aware, as I set out in my series on the ***Budget Reforms*** last fall, the Board is likely facing perilous times. Even before the ***Budget Reforms*** and worries of economic decline, with the exception of its investment income, the Board's numbers were going south. Injury frequencies were declining but claim durations and costs were (are) increasing. The *Budget Reforms* enhanced the pressures. ***The unfunded liability is on the upswing and predicted to crest at over $9 billion*****.** Long-term funding plans 25 years in the works may well be toast. Yet, increasing employer premiums is a tough sell and always politically charged.

I am not at all suggesting that this crisis focused ER review is part of a larger *Machiavellian* scheme to manipulate a *de facto* employer premium hike. Not only do I impute no such motivation, I contend the opposite.

Core principles should be set before a technical review

But, the Board is proceeding with this review even before it has nailed down core principles and with that flow some risks. *ER should be redistributive*. If it works as an incentive, it actually should serve to *lower* average employer premiums. But never should ER deliver more in surcharges than it pays out in rebates.

In future issues of **The Liversidge *e*-Letter**, I will be offering some suggestions on core design principles, but one essential design feature is this – *ER policy should not in any way unseat WSIB premium policy*.

Core to any ER design must be this golden rule – *experience rating must not increase aggregate employer premiums* at the system level or at the rate group level.