The Liversidge Letter

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

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The Liversidge Letter returns

There are many pressing WSIB issues that warrant public discussion

An introduction

The **Liversidge Letter**, published as **The Liversidge *FaxLine*** 1993 to 1998 and **The Liversidge *e*-Letter** 2002 to 2014, is a lively commentary on the WSIB system. Since 2002 we have published over 200 opinion pieces all of which can be found on our website.

We commenced this publication 30 years ago, participating in a rigorous public dialogue with a slightly different perspective. The Ontario workers' compensation system has undergone remarkable reform over those 30 years, with the genesis of the modern system tracking back 50 years ago to the 1973 **Aird Task Force** (of which Michael Star was a member and who later became WCB Chairman), followed by the two Weiler reports (more on those in later issues), the remarkable reforms of 1985, which gave rise to the external Appeals Tribunal and the 1990 reformed benefit structure, which while adjusted somewhat over the years, remains conceptually intact. The website, "Injured Workers Online," presents an excellent and well produced capsule summary of the history of the Ontario workers' compensation system from even before its modern beginnings. While nuanced from the perspective of the injured worker movement, which was powerfully influential in framing the current system especially through the 1970s, 1980s and 1990s (and for which I have had great respect even if not always in agreement), it highlights, in my view, all of the key milestones. Readers should take a look.

Beginning in the mid-2000s many of my writings focused on the developing financial crisis facing the Ontario WSIB. The release of the 2009 Auditor General Report was the catalyst for the next decade's focus and from that time, I directed my commentary more towards the senior management of the Board and less publicly. The remarkable serial leadership of the Hon. Steve Mahoney (WSIB Chair 2006 – 2011), David Marshall (WSIB CEO 2010 – 2016), Elizabeth Witmer (WSIB Chair 2012 – 2022) and Tom Teahen (WSIB CEO 2016 – 2021) put the Board in the position we see it today – fully funded with a funding surplus. That time was not without controversy and I plan on addressing that in future issues. For a variety of reasons, the public workers' compensation dialogue is becoming reinvigorated, in the political sphere and the public square. Returning to this public dialogue is, I believe, timely.

The themes that will be addressed in future issues of The Liversidge Letter (in no particular order)

There are a host of emerging issues, some quite technical, some more conceptual, some divisive, all of which warrant a full, robust public discussion. It is my aim to engage in that discussion in an open fair-minded manner. What unfolds in these pages will be my views and my perspectives.

WSIB quarterly financial reports

In 2022 the Board abruptly stopped the publication and public release of quarterly financial and sufficiency statements on its website. The last WSIB quarterly statement publicly released was for the period ending December 31, 2021. It was replaced by a vastly abridged report, providing what can be described as very cursory information. Only two financial metrics are now being reported, the sufficiency ratio and net assets, with no supporting background. Frankly, the reason behind this move escaped me then and escapes me now. Interestingly, quarterly reports are still available upon individual request. In future issues of **The Liversidge Letter**, I will explore the long history behind the *public release* of quarterly reports, dating back to my direct request to WSIB Chair Mahoney encouraging the Board to start this practice. See the February 27, 2009 issue of **The Liversidge Letter**. To Steve Mahoney's credit, the Board started issuing quarterly reports pretty much right after that with the public release of the **2008 Fourth Quarter Report to Stakeholders** (no longer available on the Board's website). I will be explaining why this information is so important and promotes WSIB public accountability.

WSIB Annual Meetings

In 2022, the Board ceased the public **WSIB Annual General Meeting** (AGM). In my view, this was a mistake and should be reconsidered. The AGMs, interrupted by COVID, started in 2016, and were an important annual

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event. The Board's **2016 Annual Report** (at page 10) advised that the AGMs would be a continuing annual event:

> In 2016, we held the first WSIB Annual General Meeting in our modern era. This well-attended event was an opportunity to discuss our progress and challenges with a wide range of stakeholders, representing both workers and employers. ***Based on this experience we have committed to making this an annual event*** (emphasis added).

This annual "state of the union" type of event was a forum where labour, injured worker and employer stakeholders came together to hear the Board's projections for moving forward. It was an opportunity for stakeholders to *publicly* ask important policy and procedural questions. In a future issue of **The Liversidge Letter** I will expand on the history of these types of meetings and outline my views on why the AGM, as a public forum, should be reinstated.

A return to Harry Arthurs' Funding Fairness – much of that advice is still pertinent today

The November **2009 Auditor General Report** triggered the installation of new WSIB leadership (WSIB President & CEO David Marshall), led to the creation of the **Harry Arthurs' Funding Review**, and the resulting and extraordinarily influential 2012 report, **Funding Fairness**, the promulgation of *O. Reg. 141/12* (link is to regulation as at time of initial decree – it has since been amended), and a new mindset governing the funding of the Ontario workplace safety and insurance system. I will be exploring that remarkable time through conversations with many of those engaged at the time along with my own recollections as a participant. In a future issue of **The Liversidge Letter**, I will return to **Funding Fairness** in some detail. Almost 12 years later, there is still much that **Funding Fairness** can offer. Dr. Arthurs' comments on consultation, the role of the Board's Chief Actuary, and the obligations of the Board in setting employer premium rates remain relevant and instructive. Some of that advice is being followed by the Board. Some isn't. Most of it should be.

WSIB $42 million retro inflation adjustments

I am sure that many readers of **The Liversidge Letter** read the September 13, 2023 Toronto Star article under the headline, "'***We screwed up:' WSIB to pay out $42M after coding error shortchanged 100,000 injured workers — for 20 years***." Here are some key excerpts:

> In an exclusive interview with the Star, WSIB president and CEO Jeff Lang apologized for the mistake, which affected two per cent of WSIB claims between 1998 and 2018.
>
> "We screwed up," said Lang, adding that he understands any anger the shortchanged workers are feeling. "They have a right to be frustrated."
>
> The glitch began in 1998 after legislative changes to the way cost-of-living adjustments were calculated on loss-of-earnings benefits. (COLA, as they're known, are given if a worker's claim extends past the end of a calendar year. They are meant to help benefits keep up with inflation).
>
> "It was human error," said Lang. "It was a coding error."

At first, I thought, "*OK, mistakes happen – at least they are correcting it*." Then, I started digging a little deeper. Not too deep yet; I have just really scratched away the surface. I read the Appeals Tribunal decision that started all of this, **WSIAT *Decision 3899/17R*** (May 31, 2019). I quickly realized this isn't just a simple computer mistake. This is a complex, complicated statutory and policy interpretation case, with a long litigation history. The Appeals Tribunal commented on the complexity (at para. 24), ". . . *it is understandable why these three different formulas have led to confusion*." This case attracted comment in the **WSIAT 2019 Annual Report, at page 8**, re "***Highlights of the 2019 Cases***" where this was written:

> Since 2017, the WSIA has been amended to reflect a full adjustment for inflation, based on the Consumer Price Index (CPI). **Decision No. 3899/17R**, 2019 ONWSIAT 1300, **considered the *complicated question* of how recalculations of LOE benefits should be indexed under the earlier version of the WSIA**. In 2006, when the recalculation on appeal took place, there were three formulas to recognize the effects of inflation: the alternate indexing formula, which is directly based on the CPI; the general indexing factor, commonly referred to as the Friedland formula, which provides for an inflation-related adjustment that is less than a full recognition of the initial CPI; and a more complex hybrid formula set out in section 43(5), which incorporates both the general indexing factor and the alternate indexing factor into different aspects of the formula. *Decision No. 3899/17R* considered background policy material and principles of statutory interpretation in concluding that the hybrid formula in section 43(5) applied.

This raises many questions. Contrary to the impression left by the Toronto Star article, this was a complex matter. The WSIAT expressly said so. Moreover, it is important to point out that ***Decision No. 3899/17R*** was a reconsideration, meaning that an earlier panel had a different view that appears to have supported the Board's Appeals Resolution Officer (ARO) decision (the ARO is the final decision-making level at the WSIB). The panel in ***Decision No. 3899/17R*** was a single person panel with no countering argument presented. The Board did not participate as an *amicus curiae*, which sometimes occurs in complex policy cases (see **WSIAT *Decision No. 1170/20I*** for a solid analysis on when the Board should/could participate in this way). The employer did not participate. It is clear to me that this was a complex statutory interpretation issue.

At this point, I have no opinion on whether the Board was clearly wrong and the WSIAT clearly right as the article suggests. If this is the case, *why did it take four years to remedy?* I presume there is much behind the scenes on this one. I find it puzzling that there was no external outreach process engaged before the Board's announcement. Why has the Board not *publicly* posted an extensive legal and policy analysis? The circumstances seem to call for one. I have many questions but am not in a position to present any answers at the moment. The Board's current position may well be reasonable. The Board's previous position may well

have been reasonable. The four-year gap is telling. I have initiated a series of Freedom of Information requests and hopefully will be in a more informed position soon. There will be more in future issues of **The Liversidge Letter**.

Rate Framework – some recent developments

Long time readers of **The Liversidge Letter** will know that I was never a fan of the WSIB "Rate Framework" (RF) project, a revamp of the premium rate pricing regime. RF transformed the Board from a retrospective (CAD-7 & NEER) experience rating scheme to a prospective approach, with an employer's current rates based on recent historic performance. While RF finds its official genesis in 2012's **Funding Fairness** (Chapter 6, p. 77) and more directly in 2014's **Pricing Fairness**, its actual beginnings track back to the experience rating controversies of a few years earlier. As a result of those, WSIB Chair Steve Mahoney recommended a prospective scheme in his February 2010 "**Report on Stakeholder Consultations**" (at p. 10).

RF underwent one of the most extensive and rigorous consultation exercises, facilitated over a period of years, with the Board promising a "simpler" and "fairer" premium setting model. I was an early critic. I argued that RF was anything but simple and predicted that RF would be much more complicated than the schemes it replaced. I was on the record as doubting the claims for increased fairness. While RF has technically been in place since 2020, full implementation was delayed in the first two years with both accelerators and constraints on premium rate movement, with impacts masked to a degree by declining premium rates since 2018. Constraints have been removed starting in 2024. So, we find ourselves at an interesting spot. For employers, RF is, for all practical purposes, a "new" scheme. For the Board it is old-hat with most of the core policies being "in-the-can" for about 5-6 years at least.

Interestingly, even before full implementation, the Board has already started revamping what once, we were told, were rock-solid policy innovations, developed over years, such as the premium rate policy for **Temporary Employment Agencies (TEA)**. This is an interesting and complicated issue. I responded to last year's consultation. In a future issue of **The Liversidge Letter**, I will explore the foundations of RF and the original design reasons for the TEA treatment and what the change means to the Board's commitment to the original conceptual design of RF.

I have also recently discovered a disconnect between the core promise of RF, its "heart and soul" if you will, and actual premium setting practices. The RF foundation was built on the promise that better performing employers would have premium rates lower than poorer performing employers. Simple enough. This was the primary reason, we were told, for this massive policy adjustment. I discovered that for 2023 (and it would seem 2022 but I have no data on 2022) the Board implemented a "transition modifier," a company specific adjustment, that clawed back earned premium rate reductions for the improving employer (*not* applied to companies with increases). The terminology is not important. The impacts are. I explain. By the way, the Board dropped the company specific transition modifier for 2024. The 2024 sector rates have now been posted.

I have discovered that the following absurd result *can* occur. I don't know how often it did occur. It may be rare. Take two companies, "**Company A**" and "**Company B**," both within the same sector. **A** has a better record than **B**. **A** is improving 2022 to 2023. **A** had a lower premium rate than **B** for 2022 (as it should). **B** has a higher 2022 premium rate than **A** for 2022 (as it should). **A** got better. **B** got worse. Clear enough. So, one would expect that **A**'s 2023 premium rate would be substantially lower than **B**'s. After all, **A** had a lower rate and improved. **B** had a higher rate and got worse. Such a result was the archetypical promise of RF. *Not so fast*. The impact of the "transition modifier" may result in the 2023 premium rate being the same for **A** and **B**! In a future issue of **The Liversidge Letter** I will provide the arithmetic behind these examples. I consider this contrary to the RF promise. I will be suggesting an extraordinary policy innovation to correct this approach for all employers subjected to the "transition modifier." It will be an equitable remedy, easy for the Board to implement.

Appeals value-for-money audit

The WSIB dispute resolution and appeals value-for-money audit consultation, in response to the November 30, 2022 KPMG Value for Money Audit – Dispute Resolution and Appeals Process, was posted on the WSIB website June 6, 2023 for external consultation. Consultation closed July 21, 2023. I filed a comprehensive response on July 20, 2023, "**Comment with respect to the WSIB Dispute resolution and appeals value-for-money audit consultation**." I was critical of several of the recommendations, as were many stakeholders. In a July 26, 2023 update, the Board advised it will "*publish the consolidated submissions along with our analysis and response, in the fall of 2023*" and on October 30, 2023 did just that. The Board published its responses and presented copies of the extensive submissions received (600+ pages, from 81 respondents). It seems that the Board listened to much of the criticism and is changing its approach on several of the original recommendations. The Board commits to ". . . *continue to proactively consult with our stakeholders as we create proposed changes for implementation*." In a future issue, I will present my views on the Board's response and comment on interesting stakeholder replies. **More soon**.

WSIB Appeals revamping Practices and Procedures

Around the same time as the Appeals VFMA consultation, the WSIB Appeals Services Division initiated a "limited consultation" revamping its Practices and Procedures (ASD P&P). The current ASD P&P is dated July 9, 2020. I filed an opinion and response on June 21, 2023. My main quarrel is with new terminology creeping into official WSIB documents. This truncated summary is from my June 21, 2023 response:

Problem: Vocabulary and terms

The proposed document utilizes the term "**injured/ill person**" throughout. This is similar but not identical to terminology deployed in the concurrently released "Dispute resolution and appeals process value-for-money audit consultation," which uses the term "**person with an injury**." Both documents are contextually referring to the same "person." I explained why neither term should be used. I suggested more appropriate terminology. In a legal context, the term "injured person" has specific meanings, especially with matters considered under the ***Workplace Safety and Insurance Act*** ("WSIA"). "Injury" sustained in employment is a predicate condition for entitlement. In the context of a document which is setting out the practices and procedures for an appeal under the WSIA quite often the very matter under consideration is whether or not the individual is in fact an "injured/ill person" or a "person with an injury." The entire proceeding will not be about whether or not the individual is a "person" of course, but may very well be, *and quite often is*, about whether or not there is an illness or an injury (WSIA, ss. 13 and 15).

One need not be an established "injured/ill person" or a "person with an injury" to submit a claim to the WSIB, or pursue an appeal within the WSIB, as that is a finding of fact to be determined by the Board itself. The very nature of the proceeding may well be whether or not the individual is in fact an "injured or ill person" or a "person with an injury." The determination of the Board could well be that the person is not, in fact, an "injured/ill person" or a "person with an injury." The Draft P&P use of these terms actually permits the construction of this absurd sentence, "*The injured/ill person who submitted the appeal was found after due consideration of all of the evidence not to be an injured/ill person*." This playfully constructed sentence illustrates the absurdity. Neither term "injured/ill person" or "person with an injury" appears within the WSIA. However, the WSIA does set out and define relevant and legally important terms that actually describe the same "person" attempted by the Draft P&P (and the Appeals Consultation Document).

The WSIA defines the terms worker, dependant, employer, guardian, learner, spouse, student, all of whom may possess claim and appeal rights, with some ironically excluded by the term "injured/ill person" or "person with an injury." For the intended purposes of the Draft P&P (and the Dispute Resolution Consultation Document), the Board should limit itself to the terms "appellant" and "respondent" or "party" or collectively "parties." I encouraged the Board to seek guidance from the WSIAT webpage "Terms We Use" which defines the terms as follows:

Appellant: An appellant is the person who makes the appeal to the WSIAT.

Party: A party is worker or employer who has decided to become involved in an appeal. Usually, only people who may be affected by how the appeal is decided can become involved. No one has to take part in an appeal if they do not want to, but the WSIAT can still decide the appeal.

Respondent: A person who starts an appeal at the WSIAT is called the appellant. The other person or people involved in the appeal are called respondents. For example, when a worker starts an appeal, the employer is usually the respondent. When an employer starts an appeal, the worker is usually the respondent.

I will comment in a future issue of **The Liversidge Letter** once the Board releases the revised ASD P&P.

Other issues to be addressed in future issues of The Liversidge Letter

Chronic mental stress claims: One would think that the law should be quite settled by this time. I will present an historical analysis and show that stress claims remain a "long and winding road" of legal complexities. I will address in particular **WSIAT *Decisions No. 693/20 & 693/20R*** in the context of the Board's responsibilities with respect to the age-old question (since 1985), "*who has the final say?*"

Should the benefit wage replacement level be 90% or 85% of net (or some other amount?): In an April 20, 2022 pre-election News Release the government announced, "*Ontario Exploring Increase to Compensation for Injured Workers*." As reported in the media at the time, the government was asking the WSIB to "look into" "consider" and "explore options" to increase benefits from 85% to 90% of net. We haven't heard much since. I will explore this issue in depth, providing the history on wage replacement levels since the beginning, and set out my suggestion as to how the government should proceed so that the issue is treated as a serious policy consideration and not seen as a purely political question.

WSIB funding – what does the "sufficiency ratio" mean? I will explain what "sufficiency ratio" means, and provide the statutory history behind the term. I will contrast the "sufficiency ratio" (i.e., going concern evaluation) with the **International Financial Reporting Standards** (IFRS) approach (i.e., actual current assets and liabilities). There is a difference, heightened when the Board's performance exceeds or falls short of expectations. Currently, the Board reports a 118.1% sufficiency ratio.

Other upcoming issues will address the WSIB's grant to Runnymede Health "Center of Excellence"; the Board's Communicable Illness consultation (LAL response here); Occupational Disease; and the Board's head office move to London, and more.

The next issue of **The Liversidge Letter** will be quite special. I had the privilege to interview **Mr. David Marshall, WSIB President and CEO 2010 – 2016**. It was a fascinating discussion. We touch on David's remarkable career before arriving at the WSIB in 2010, the state of affairs upon his arrival, how he got up to speed, his decision to embark on the **Funding Review**, his relationship with the Auditor General, and how he so quickly delivered remarkable results. He was the right leader at the right time.