

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

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“Budget Reform” benefit indexing: A delicate policy balance

Budget Reforms added over \$2.3 billion to the WSIB unfunded liability
The policy was well intended but ill-timed and too broad

Full benefit indexing – not a simple issue

In its 2007 Annual Report, the Workplace Safety & Insurance Board [“WSIB” or the “Board”] affirms its support for indexing enhancements introduced in Bill 187, “which will help protect injured workers against the effects of inflation” [2007 WSIB Annual Report, p. 5].

Omnibus style Budget Reform process – a bad fit for WSI

Bill 187 (the “Budget Reforms”) introduced significant omnibus style reforms to the *Workplace Safety and Insurance Act* [“WSIA”] through the Ontario budget. As I made clear then, I oppose this method of reform (see September 10, 2007 issue of *The Liversidge e-Letter*, “*Why employers and workers alike were let down by the Budget Reform process*”). I argued that *all* prior significant workplace safety and insurance [“WSI”] reforms included stand-alone legislation and stand-alone process, involving public legislative committee hearings (this was true of the legislative reforms of 1985 [the Tories’ Bill 101], of 1990 [the Liberal’s Bill 162], of 1995 [the NDP’s Bill 165], of 1997 [the Tories’ Bill 99]).

Without an open and public reform process, sound, sustainable reform is not possible

I said then that without fair process, sound reforms are not possible, in the short or long term. *There were none of the customary WSI reform processes engaged in the Budget Reforms.* Without an accountable public process, WSI reforms too easily become about good politics and not about good policy. Accountability garners responsibility.

A year ago, I predicted future *substantive* fallout from the *Budget Reforms*, fallout that could have been prevented with a more public reform process that invited competing ideas from the stakeholder public. I stick to those comments today. In this issue of *The Liversidge e-Letter*, I will explain why the *Budget Reforms* were ill-timed and ultimately work against worker interests.

My position on indexing is clear – I support it

My position on benefit indexing is well documented and clear – *I am all for it.* Always have been. This is what I said in the September 12, 2007 issue of *The Liversidge e-Letter*:

Full indexing is very supportable

Full benefit indexing *is* a good idea. Worker benefits should not be eroded over time by inflation. **But, indexing must be responsible, and achieved in a way that does not risk pushing the Ontario WSI system back into yesterday’s malaise, where expedient political decisions to increase benefits without the requisite funding almost bankrupted the system. But, raising taxes carries its own prevailing risks.** There have been some that suggest opposition to the *Budget Reforms* is the same as being against benefit indexing, and against worker interests. *Nonsense.* This “*straw man*” argument deserves little comment, and ill-fits a serious and principled discussion on the *Budget Reforms*.

I remain of these views today. As I reminded readers on September 12, 2007, it was, after all, the NDP which introduced curtailments to full indexing. *The NDP!*

The NDP stopped full indexing in 1995

Never forget – *there was only one reason for less than full indexing of worker benefits – the existence of the UFL.* That it was an NDP government (*that’s right – the NDP*) that eliminated full indexing is a very telling point. I should add that in 1995 Liberal MPPs (some still prominent) did not oppose the NDP measures to introduce the Friedland formula (less than full indexing).

The WSIB now strongly supports full indexing

At the **Standing Committee on Government Agencies** on September 12, 2008, WSIB Chair Mahoney was strong in his unabashed support for the *Budget Reforms*. In commenting on contemporary investment realities (which have slid horrifically in the days since), Mr. Mahoney said:

At the same time, I supported and indeed even recommended to the government that we reintroduce indexation for injured workers, something that was taken out in the early 1990s and that was reduced again later in the 1990s: *the Friedland formula and the modified Friedland formula which, frankly, were a slap in the face to injured workers, in my view, and needed to be changed.* It was my opinion, and supported by my team—and the government shared the opinion—that it was time to put indexation back into the plan. It’s been put back in; *it’s a cost of \$2.3 billion* [Hansard, September 12, 2008, Standing Committee on Government Agencies].

But support for full indexing was not so robust in 1994

But, Mr. Mahoney was not always such a fervent opponent to the Friedland formula. In fact, in 1994 he and

the Liberals supported it. This is what he said in the hearings on the NDP workers' compensation Bill 165:

Mr Mahoney: *In fact, we recommend the Friedland formula*, but that it be used to pay down the unfunded liability, not that it be spent again [Hansard, August 30, 1994].

Mr. Mahoney passionately supports worker interests

As readers know, I remain a very strong supporter of WSIB Chair Mahoney. His passion and support for worker interests is not outpaced. While at first blush it may appear that he and I will disagree on the scope and full definition of worker interests, both his 2008 and 1994 comments suggest otherwise. *I know that we agree that worker interests are paramount.* I will show that Mahoney's 1994 and 2008 comments on benefit indexing are in fact internally consistent and can be reconciled, even if they appear at first reading to rest at opposite ends of the spectrum.

Worker interests are paramount

Let me set aside any misconception that the modern WSI system is an equal balance between employer and worker interests. *It is not.* While unquestionably elements of the historic contract, specifically the guarantee of benefits for workplace injury with a trade off for no negligence either way, presents mutual benefits for workers and employers, *workers* are the predominant beneficiaries.

Limited protection from civil liability is a helpful but not particularly powerful business benefit

Businesses today face a spectrum of significant legal liability and insurance exposures, along with a bombardment of regulatory exposures, not the least of which are those related to occupational health and safety. In the grand scheme the "no liability trade" is likely at best a neutral for employers. The same cannot be said for worker interests and the significant benefits correctly bestowed upon workers by WSI insurance. *Worker interests are paramount.*

The balance is between worker and worker interests

WSI reform is less a balancing act between worker and employer interests and more a balance between "worker and worker" interests. I addressed this general theme in the October 1, 2007 issue of **The Liversidge e-Letter**:

Even premium rate decisions are assessed not only from the vista of employer interests but also through the prism of worker equity.

The WSI system is linked to the broader economic system

In the June 23, 2005 issue of **The Liversidge e-Letter**, I commented on the roots of the 2014 funding plan, citing an excerpt from the Board's 1983 Annual Report:

In 1983 . . . it was hoped that, together, the Board and employers could determine the most appropriate methods of reducing the unfunded liability without, in any way, hampering the ability of Ontario's employers to carry on business. After all, the ultimate health of the workers' compensation system depends on the continued strength of the province's economy. [WCB 1983 Annual Report]

In 2005 the Auditor General linked premiums to employment

In the September 17, 2007 issue of **The Liversidge e-Letter**, I noted that in his 2005 Annual Report, the Auditor General explained the reluctance to increase premium rates:

A reluctance to increase premium rates . . . has also contributed to the rise in the unfunded liability. We understand that this reluctance was driven by the potential impact on employers

and employment, and by the fact that Ontario's premium rates are already among the highest in Canada, because of the unfunded liability component. (Auditor General 2005 Annual Report, pp. 362-363).

The regulator on premium levels is not profit erosion - it is employment erosion (although they are linked)

. . . the regulator on premium rates is not profit erosion. It is employment erosion. Righting a WSI inequity in a manner that contributes to job loss runs "against the grain".

Benefits should be as generous and fair as possible without jeopardizing other worker interests

Worker benefits including inflation indexing should be as generous as possible without jeopardizing or negatively impacting other more broadly defined worker interests, such as job creation, tempered always with a sense of justice.

The presence of the UFL is counter to worker interests

The UFL is not exclusively an employer problem. *Far from it.* More than four years ago, in the July 14, 2004 issue of **The Liversidge e-Letter**, I wrote :

The presence of the UFL remains a significant impediment to the development of a labour/management consensus on most issues. It is difficult, as but one example, to explore new means to pre-fund compensation for occupational disease so long as approximately one-third of all employer premiums goes towards the UFL. Employers, since they pay the bills, implicitly understand the power and constraining effect of the UFL. So long as there is an UFL, and so long as it continues to pose a serious financial drain on employer premiums, Ontario must temper change to fit within this fiscal reality. For the foreseeable future, change must be assessed through a financial prism clouded by the ubiquitous UFL.

Therefore, from a perspective of pure principle, labour should be as supportive of the efforts to wrestle the UFL to the ground as management. Moreover, simply raising premiums to fuel the decline of the UFL is counter-productive if premiums rise to the point of impacting business investment and job creation decisions, an always delicate balance.

UFL and benefit indexing policies are joined at the hip

In that thesis one finds the rationalization of WSIB Chair Mahoney's comments in 1994 (where he supports less than full indexing, i.e., the Friedland formula) and 2007/08 (where he outright rejected less than full indexing).

In 1994 the system was a sorry mess

Let us for a moment travel back to 1994. At the end of 1994, the WCB UFL stood at \$11.4 billion, with the funding ratio (assets to liabilities) in the 30 percentile range. A year earlier the UFL was a staggering \$11.5 billion. The Ontario WCB was not financially well at all.

By 2006, things had picked up rather well

In contrast, things started to pick up beginning in the late 1990s. By 2002, the UFL sat at \$5.65 billion. While it swung upwards and downwards over the next few years, by the end of 2006, the UFL was just shy of \$6 billion with the funding ratio sitting at a not great, but respectable, 73%. In other words, by 2006 the WSI system had progressed far from its anaemic state of 1994.

The Mahoney paradox – supporting Friedland in 1994 and rejecting it in 2007/08

Now let's return to the Mahoney paradox - supporting Friedland in 1994 and calling it a "slap in the face" of

injured workers in 2008. Let me remove the explosiveness of his choice of words in 2008 (“slap in the face”), and just say that he supported Friedland in 1994 and did not in 2006. *The question is this – is he flip-flopping or is there a principled reason for his change in view?*

Benefit enrichment must run a second to the UFL

I did not support the *Budget Reforms*. I remain of the solid view that benefit enrichment must be secondary to the UFL. Clearing the books of the UFL is as much in the long term interests of workers as it is in the interests of employers. A return to benefit indexing should have been deferred until the UFL battle had been won. The UFL need not have been zero but certainly the funding should have been into the 90 percentile range, with zero in sight, before attention was turned to benefit enrichment.

That said, the Mahoney change of heart is actually a principled and consistent position

Having said that, the Mahoney paradox actually can be viewed as a principled *and consistent* position. I think he was right in 1994. I held the same position. While I disagree with the position he took in 2007 (and affirmed in 2008), I understand it and do not think he tried to change horses midstream. The world had actually changed. For the better. His position followed suit.

In 1994, without Friedland, the UFL would have spiked

In 1994, without Friedland the UFL would have spiked along with employer premiums and with that, more job losses. Curtailing injured worker inflationary adjustments was actually a move consistent with worker interests.

By 2006, the WSI world was a better place (for a bit)

In 2006, buttressed by significant improvements in some indicators (principally investment returns), Mr. Mahoney no doubt was of the view that the Board could absorb higher benefit costs without destabilizing the whole apple cart. In other words, in 1994 Mahoney was acting with worker interests in mind, and he did the same in 2007/08. I disagreed, but I do not for a bit think that his principles at all fluctuated. His positions, although seemingly opposite to one another, are actually, at their core, internally consistent.

Unfortunately, most of the improvements were investment not performance based

As I reported in last year’s series in **The Liversidge e-Letter**, most of the Board’s improvements were not based on performance. Other than a sustained reduction in injury rates, most other performance indicators were not doing particularly well. The key indicator, increases in time on claim (or “claims persistency”), was less than stellar in spite of good economic times and high employment levels.

The point is this – the Chair’s 1994 position (supporting less than full indexing) and his 2007 position (opposing less than full indexing) are reconcilable and principled positions, both fuelled from the perspective of worker interests. *If the funding ratios were then the same as today’s, I am certain Mr. Mahoney would have deferred on his support for benefit indexing. If not, I retract this analysis.*

All that said, the Budget Reforms indexing policy was still flawed policy

The *Budget Reforms* directed the Board to increase benefits 2.5% on July 1, 2007, January 1, 2008 and January 1, 2009 [WSIA, ss. 52(1.2), (1.4)], for a total increase of 7.5%. In addition, after January 1, 2009, the Ontario Cabinet was provided with the power to order up whatever inflationary adjustments it chooses beyond the prescribed levels (modified Friedland) [WSIA, s. s. 52.1].

The adjustments already processed already cost the system about \$720 million. These increases apply to “*pre and post*” 1990 claims. *This is significant.*

Pre-1990, long-term disability was compensated by what was referred to as the (long-ago discredited) “meat chart” system. The full explanation as to what that means is too lengthy to provide here but the relevant point is this: Before 1990 the majority of workers were over-compensated (i.e., they had no or a minor wage loss and still received a WSIB pension greater than any loss in wages from the work injury). Conversely, at the same time, many workers were tragically under-compensated with the WCB pension falling far short of any actual wage loss. This structural problem was “fixed” in 1990 when benefits were linked to the amount of the wage loss.

Here is the issue. The *Budget Reforms* adjustments applied to *all* pre-1990 pensioners, even those not experiencing a wage loss (likely the majority of pensioners). And, these pensions are paid for life, not just to age 65.

A few reasonable questions arise from this. *How much of the \$720 million in indexed benefits applied to pre-1990 claims? How much of the \$720 million went to recipients who in fact were doing just as well or better financially than at the time of their injury?*

A better question: If the policy rationale for the *Budget Reforms* was purchasing power erosion, why did the government give increases to workers who were experiencing no loss of earnings as a result of the injury? **Should the Board “stay the course” or change direction?**

At the **Standing Committee** September 12, 2008, Chair Mahoney admitted the Board’s investments were not performing well, but declared the Board is prepared to “*stay the course*”. This was before the recent severe meltdown.

We have a massive investment fund, varying between \$15 billion and \$17 billion, depending on how that market is performing, and it’s not performing very well. How that impacts, however, on our plan on the unfunded liability is simply that we need to have some courage. We need to be prepared to stay the course.

In the next issue, I will look at WSIB finances. I will argue that while things aren’t great, they have been worse, and there is no need to panic. *A slight change in course though along with other significant steps is called for.* I will repeat my assertion that the current “course” (no rate hikes; increase benefits; no UFL by 2014) is simply not attainable. It was likely not possible *before* the market melt down. But, the Ontario WSI system will be OK if some hard choices are soon made. *Stay tuned.*