

The Liversidge Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

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An ongoing policy discussion for the clients of L.A. Liversidge, LL.B.

5 pages

WSIB Funding Surplus Distribution of \$2.0 Billion!

Part 2: A brief history of WSIB funding; the end of the unfunded liability; the development of funding surplus regulations

A recap

In the [December 11, 2024](#) issue of [The Liversidge Letter](#), I presented the announcements from the [WSIB](#) and the [government](#) declaring the approaching [February 2025](#) distribution of a \$2.0 billion funding surplus to Ontario employers, highlighting my opinion concerning the encroachment of WSIB independence by the government. In the [December 20, 2024](#) issue, I introduced my view that this really wasn't some great act of generosity on the part of the WSIB. I expressed the opinion that not only did the Board have no real choice, but much more should have been distributed to Ontario employers. In this issue, I will set out the backdrop for these opinions. In Part 3 I will present the finances behind the surplus distribution decision, and in Part 4 outline easy to implement steps to make future funding surplus distributions fairer and more predictable with a slight tweaking of the scope of WSIB discretion.

A brief history

But first, an ever so brief history of the WSIB funding journey and how the Board went from being possibly at risk of not being able to “meet its obligations” (see the [2009 Auditor General Report](#)) to being able to distribute billions of dollars in surplus funding to Ontario employers, not once but twice. It is quite a remarkable story (see the series of [The Liversidge Letter](#) detailing my interviews with WSIB CEOs [David Marshall](#) and [Tom Teahen](#), who along with Chairs Steve Mahoney

and Elizabeth Witmer were largely responsible for turning the page on the Board's financial trajectory).

The unfunded liability (UFL) status of the WSIB received its first attention in the [WCB 1983 Annual Report](#) (at pp. 13 – 14), when the Board declared the rising UFL and announced a massive consultation with Ontario employers to “develop a long-term strategy” to deal with the UFL. In 1984, the WCB funding ratio (assets/liabilities) dipped to 49%, with the UFL at \$2.71 B (\$7.18 B in 2024 \$). The funding “strategy” was announced in 1984 and came to be known as the “2014 funding plan” with the goal to retire the UFL no later than 2014. It failed. *Miserably*. I set out the reasons for this calamitous failure in the April 19, 2010 issue of [The Liversidge Letter](#), [The WSIB 2014 Funding Plan, Why It Failed](#). The UFL continued to hit extreme heights:

Year	(UFL)/Surplus \$ Billion	In 2024 \$	Average Premium Rate
1984	(2.7)	(7.2)	\$2.17
1989	(8.5)	(18.1)	\$3.12
1999	(6.4)	(11.1)	\$2.42
2009	(11.8)	(16.6)	\$2.26

The modern “gamechanger” was the [2009 Auditor General Report](#). It changed everything. A “three-prong” response commenced immediately. **Prong #1:** The government set out funding targets in [O. Reg. 141/12](#) (link is to the regulation as when initially promulgated) of 60% by 2017; 80% by 2022; and, 100% by 2027.

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The WSIB 2014 Funding Plan
Why it Failed

Background
The WSIB 2014 funding plan was announced in 2014. It was a response to the Auditor General's 2009 report, which found that the WSIB was not meeting its obligations to workers. The plan set out funding targets of 60% by 2017, 80% by 2022, and 100% by 2027. The plan also included measures to improve the WSIB's financial performance, such as reducing the WSIB's operating costs and increasing its revenue.

Chapter 3
Section 3.14 Unfunded Liability of the Workplace Safety and Insurance Board

Background
The WSIB 2014 funding plan was announced in 2014. It was a response to the Auditor General's 2009 report, which found that the WSIB was not meeting its obligations to workers. The plan set out funding targets of 60% by 2017, 80% by 2022, and 100% by 2027. The plan also included measures to improve the WSIB's financial performance, such as reducing the WSIB's operating costs and increasing its revenue.



Prong #2: In early 2010 David Marshall came on board as the new WSIB CEO.

Prong #3: In mid-2010 Professor Harry Arthurs was engaged to head up a massive funding review consultation concluding with his seminal 2012 report, [Funding Fairness](#).

The results were fast and impressive. By 2018 the WSIB

was fully funded and began accumulating a funding surplus. Premium rates declined – a lot!

Year	(UFL)/Surplus \$ Billion	In 2024 \$	Average Premium Rate
2014	(7.9)	(11.1)	\$2.48
2019	4.3	5.5	\$1.65
2024	7.4 (Q2)	7.4	\$1.30
2025			\$1.25

A unique policy problem: What to do with a funding surplus?

By 2022 an enviable “problem” emerged for the very first time in the history of the Ontario workers’ compensation scheme: *what to do with the emerging funding surplus?*

In March 2018 I started thinking about this developing problem and wrote a [paper](#): “**A comment of the future funding strategy and policy of the Workplace Safety & Insurance Board: An opportunity to fulfill a 35 year old promise to Ontario’s employers,**” with the core theme being inter-



generation employer equity. (The paper sets out a more detailed history of the WSIB UFL, at pp. 2 – 3).

On the question of inter-generation employer equity, in part, this is what I said:

Intergenerational equity – the essential bridge towards fairness

1. As set out in the **WSIB 2005 Annual Report** (at p. 17), the key funding principle is the retirement of the UFL. We are almost there. The next fundamental principle is “*equity among generations of employers.*” This principle is repeated in the **WSIB 2005 “Funding Framework”** (at p. 6).
2. This is a dynamic principle.
3. During a period burdened by an unfunded liability, this equity principle ensures that today’s employers must contribute sufficient premiums to fund the current and projected future cost of new injuries, as well as contributing a sizeable portion to the UFL (resulting from a period predating adherence to this principle).
4. **However, it also means that today’s employers should not fund tomorrow’s costs.** For the sake of equity, those costs must be borne by that generation of employers.
5. Understandably, as the primary funding focus of the Board over the past 35 years has been the UFL, this principle has been applied in a manner to restrain the impact of past years’ injuries to current and future generations.
6. However, this principle also speaks to the concept of funding today for tomorrow’s injuries. Such a practice is not equitable, for the same reasons. This principle is discussed at length in the earlier introduced WSIB June 2011 paper, “**Perspectives on the WSIB’s UFL,**” at page 9:

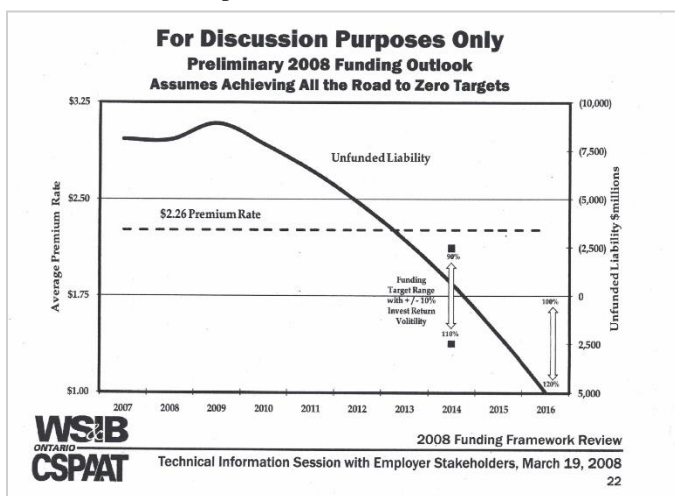
“... the laxness that enters the administration of the Insurance Scheme are a direct result of the absence of the check-and-balances provided by charging current employers the true cost of benefits. Cumulatively, these factors, if unchecked over time, inevitably deliver a poorly run Insurance Scheme”

7. Just as the paper advances the thesis that “*it is poor public policy to provide a subsidy to current employers at the expense of future employers*” (at p. 12), the inverse is also true, “*it is poor public policy to provide a subsidy to future employers at the expense of current employers.*”
8. Such subsidies undermine the accountability levers both within the Board and the employer community. Lax administration will result if administrative actions are immunized from the funding implications of current decisions. Similarly, future employers will lose accountability over their current costs if a sizeable portion of those costs have been pre-funded by yesterday’s employers.
9. Therefore, any desire to establish a target level in excess of 100% offends the carefully designed equilibrium built into the WSI system. Once the UFL has been reduced to zero, the only reasonable funding mechanism is that which has been sought and promised since 1984 – a funding goal of 100%, nothing more, nothing less, and premium rates that reflect the funding realities of the day.

I addressed the relationship of intergenerational employer equity and premium rate stability:

An adjunct to the funding policy – rate stabilization versus intergenerational equity

1. While the only reasonable funding target consistent with the underpinning motivational and accountability elements of the WSI funding scheme and consistent with the principle of inter-generational equity is a 100% target, rate stabilization is a secondary but important consideration.
2. However, rate stabilization does not supplant equity.
3. The current generation of employers must adequately fund the current generation of insurance costs. More simply, the new claim cost component must reflect the actual cost regardless of the impact to absorb those costs.
4. In the past, the lack of will or perceived inability to adequately fund current claim costs resulted in the creation of the UFL – a dragging weight on the system for 40 years. Of course, a cornerstone of the current funding mindset ensures that contemporary costs are borne by the contemporary generation of Ontario’s employers.
5. Rate stability is not a relevant consideration in the context of performance based variations (beyond defining the length of the historic window through which to average past costs).
6. However, the fluctuation of the capitalized value of the Board’s investment fund along with periodic declines in investment returns is a powerful variable that directly impacts the UFL.
7. While 100% must be set as the funding target, a funding ratio slightly higher or lower resulting from market conditions should not drive premium rate adjustments.
8. This issue was canvassed in the **WSIB May 2008 “Funding Framework”** (at p. 6, which floated a 90% to 110% funding range).
9. The 90% - 110% funding range idea (while premature and optimistic at the time) was an element of the **2008 Funding Framework Review Technical Information Session with Employer Stakeholders, March 19, 2008**, when a **+/- 10% Funding Target Range** concept was first introduced.
10. The chart on the next page reflects the Board’s thinking at that time (*ed.*, below in this excerpt).
11. Since the system had “bigger fish to fry” at that time, and as the UFL itself was the primary funding focus, the idea did not garner serious debate in that 10 years ago meeting.
12. It is now a concept that warrants attention.



13. In the 2011 Eckler paper presented to the Funding Review by WSIB President Marshall, this concept is addressed and described as a “yellow or No Action Zone around the target funding level, within which no corrective action is taken, in order to avoid over-reacting to temporary fluctuations in the funding position” (**Eckler Paper, Section 8: Other Elements, at p. 26**).
14. Be it described as a “Funding Target Range” or a “No Action Zone” the concept is a vibrant one and should be an integral element to the WSIB post-UFL funding strategy.

A road-map for the future

1. The WSIB must affirm that a funding ratio of 100% is the only target being sought.
2. Once 100% funding is reached, the 35 year old promise to remove the UFL surcharge must be fulfilled.
3. Once that promise is fulfilled, a post-UFL funding strategy is to be developed, adopting a “no action zone” concept, be it 90-110% or 95-105%, or another range. While funding is within the “no action zone”, the average premium will neither increase or decrease.

In 2021 the government commenced developing the statutory and regulatory framework for funding surplus distributions

Not much work was done after the Board reached full funding in 2018, but in mid-2021 the government commenced discussions with business groups to seek guidance on the question of a surplus distribution. I was privileged to have an opportunity to participate in those discussions. The surplus was gathering steam but there was no legal mechanism to distribute a surplus to Ontario employers. Simply reducing premium rates as a transitional solution was not optimal for many of the reasons I canvassed in the “intergenerational employer equity” arguments. If premium rate reduction was the primary lever to distribute a surplus, rates would not only be volatile, they would not reflect the true insurance cost, a massive problem. A resolute workers’ compensation funding principle is that premiums must reflect the true insurance cost.

The **Construction Employers Coalition (CEC)**, a group with which I am associated, presented some core ideas on [August 6, 2021](#) in response to a draft regulation, much of which remains intact in the later amended [O. Reg. 141/12](#).

I would encourage readers to peruse the entire paper, but I will excerpt some key elements of the advice presented dealing with the question of WSIB discretion (the core subject I will address in



Part 4 of this series). While the CEC did not agree with a 115-125% funding corridor and instead suggested 90% - 110%, which, as noted earlier, was the Board's own preference in 2008 (and mine), CEC offered suggestions on the exercise of WSIB discretion with funding levels between 115-125%:

115-125% WSIB discretion

1. The WSIB acquires discretion to disgorge if funding is between 115-125%. *What does this mean?*
2. Absent a contextual analysis, it could mean any number of things, and presuming that the WSIB conducts itself prudently (as required by WSIA s. 163(2)), that the WSIB has complete unfettered discretion to do nothing, or to disgorge to any level of funding above 100%.
3. Our analysis suggests that neither would be permitted.
 - a. A reasonable expectation of prudent governance would likely support a decision to maintain funding at or slightly above 115%, notwithstanding a 100% funding target.
 - b. With that noted, while the Board would not have the direction to disgorge excess funding below 115%, it would maintain the discretion not to increase premium rates if funding sat within 100%-115%. The act of disgorgement and premium rate policy are related but distinct considerations.
 - c. So, in our view, the Board would not have the discretion to reduce funding through disgorgement to below 115% and any such move may be open to legal challenge by stakeholders (workers and/or employers) and/or the government directly. This point does not require additional comment but highlights the need for a reasonable lower threshold (hence our 110% parameter).
 - d. Nor would the WSIB have the luxury of doing nothing. It is our contextual reading of the codification of a threshold (115%) *as creating an obligation on the part of the Board to address the question as to whether or not disgorgement should occur once funding reaches 115%*.
4. The requirement of the Board to turn its mind to disgorgement once funding reaches 115%:
 - a. We suggest a *de facto* expectation of disgorgement if funding reaches and/or exceeds 115% unless there is a sound, evidence-based reason not to disgorge, and this expectation should be codified in the legislation/regulation.
 - b. The regulation must also require the WSIB to develop guidelines to be approved by the Minister for the exercise of this discretion, and for those guidelines to form part of the Memorandum of Understanding.
 - c. We propose that the regulation require that at 115% or higher that the Board is required by the WSIA to publicly release its decision to the Minister on disgorgement, with full reasons (either way).

- d. If the decision is to disgorge, the publicly released reasons will be accompanied by a publicly released plan for distribution.
- e. Section 96.1 which deals with a funding plan can serve as a guiding template. As in s. 96.1, the Minister will have the capacity to ask for a review of the WSIB's decision. This checks the Board's discretion without limiting that discretion in any manner.
- f. The bottom line is that there be a structural expectation of disgorgement unless there is a sound evidence-based reason not to. The default is to disgorge.

The WSIA, O. Reg. 141/12 and the WSIB Funding and Pricing Policy form the "three-legged-stool" for surplus distribution decisions

Effective 2022, the **WSIA** and **O. Reg. 141/12** were amended to permit a funding surplus distribution. The CEC's suggestions on the scope of WSIB discretion when funding is between 115% and 125% were not accepted. I will be returning to these ideas in **Part 4** of this series. For completeness, I have excerpted relevant sections of the [WSIA](#) and [O. Reg. 141/12](#), followed by the [WSIB Funding and Pricing Policy](#) (June 9, 2023) and have **highlighted** the key elements. Some sub-sections have been omitted.

Workplace Safety and Insurance Act, 1997

Distribution of surplus

97.1 (1) If the amount of the insurance fund meets a sufficiency ratio that is equal to or greater than 115 per cent and less than 125 per cent, the Board may distribute any amount in excess of the amount prescribed under clause 100 (c) that it considers appropriate among Schedule 1 employers having regard to such criteria as may be prescribed and such other factors as the Board considers appropriate.

Same

(2) Except in such circumstances as may be prescribed, if the amount of the insurance fund meets a sufficiency ratio that is equal to 125 per cent,

(a) the Board shall distribute the difference in the amount prescribed under clause 100 (f.1) and the amount in the insurance fund among Schedule 1 employers; or

(b) if no amount is prescribed under clause 100 (f.1), the Board shall distribute any amount in excess of the amount prescribed under clause 100 (c) that it considers appropriate among Schedule 1 employers having regard to such criteria as may be prescribed and such other factors as the Board considers appropriate.

Distribution of different amounts

(3) The Board may determine that Schedule 1 employers are to be distributed different amounts under this section having regard to such criteria as may be prescribed and such other factors as the Board considers appropriate, including an employer's compliance with this Act.

No distribution

(4) The Board may determine that a Schedule 1 employer is not to be distributed an amount under this section having regard to such criteria as may be prescribed and such other factors as the Board considers appropriate, including an employer's compliance with this Act.

Timing of disbursements

(5) Subject to such requirements as may be prescribed, the Board may determine the timing of disbursements made under this section and may distribute amounts to different Schedule 1 employers at different times.

Form of disbursements

(6) The Board may determine the form of disbursements made under this section.

Same

(7) The Board may distribute an amount to a Schedule 1 employer under this section in more than one disbursement.

Regulations

100 The Lieutenant Governor in Council may make regulations,

- (a) prescribing anything referred to in this Part as prescribed;
- (b) prescribing the date by which the insurance fund must become sufficient;
- (c) prescribing the amount of the insurance fund required to make the fund sufficient by the prescribed date or prescribing the method of determining that amount, including any formula, ratio or percentage to be used to calculate the amount;
- (d) REPEALED: 2021, c. 35, Sched. 6, s. 4 (1).
- (e) prescribing the requirements with which the Board shall comply for the purposes of section 96.2, including the time period within which the Board must comply with those requirements;
- (f) prescribing any terms, conditions, limitations or requirements on the use of reserve funds for the purposes of subsection 97 (2.1);
- (f.1) prescribing, for the purposes of subsection 97.1 (2), an amount, expressed as a ratio or percentage, that is greater than a sufficiency ratio of 115 per cent but less than a sufficiency ratio of 125 per cent;

ONTARIO REGULATION 141/12

Sufficiency of insurance fund

1. (1) For the purposes of Part VIII of the Act, the day section 1 of Ontario Regulation 864/21 comes into force is the date prescribed under clause 100 (b) of the Act.

(2) For the purposes of Part VIII of the Act, a sufficiency ratio of 100 per cent is the amount prescribed under clause 100 (c) of the Act.

(3) The sufficiency ratio of the insurance fund shall be calculated by dividing the value of the insurance fund assets by the value of the insurance fund liabilities and shall be expressed as a percentage.

(4) The values of the assets and liabilities shall be determined by the Board in actuarial valuations made using actuarial methods and assumptions that are consistent with accepted actuarial practice for going concern valuations.

Prescribed amount

2. For the purposes of clause 97.1 (2) (a) of the Act, 115.1 per cent is the amount prescribed under clause 100 (f.1) of the Act. O. Reg. 864/21, s. 1.

Prescribed criteria

3. For the purposes of subsection 97.1 (4) of the Act, the following criteria are prescribed:

1. Whether, during the preceding year, a Schedule 1 employer has been convicted of an offence under the Act . . .
2. Whether, during the preceding five years, a Schedule 1 employer has been convicted more than once of an offence under the Act . . .
3. Whether, during the preceding year, a Schedule 1 employer has been convicted of an offence under the Occupational Health and

Safety Act . . .

4. Whether, during the preceding five years, a Schedule 1 employer has been convicted more than once of an offence under the Occupational Health and Safety Act . . .

Timing of disbursements

4. For the purposes of subsection 97.1 (5) of the Act, the following requirements are prescribed:

1. Disbursements made under subsection 97.1 (1) of the Act shall be made within 90 days of the Board determining . . .
2. Disbursements made under subsection 97.1 (2) of the Act shall be made within 30 days of the Board determining . . .

WSIB Funding and Pricing Policy

The Board's [Funding and Pricing Policy](#) is the third leg of the stool.

Legislative framework

The WSIB will adhere to the WSIA requirement to maintain the Fund such that the amount of the Fund is sufficient for the WSIB to meet its obligations under the WSIA, i.e. a Sufficiency Ratio of at least 100 per cent, while allowing risk appetite to shift as the Sufficiency Ratio rises such that mitigating the risk that the Sufficiency Ratio reaches 125 per cent increases in importance when making Funding Decisions. The WSIA and its regulations prescribe the amount and timing of surplus distributions should the Sufficiency Ratio reach 125 per cent.

Stability of premiums

The premium rate in combination with any target funding contribution required from employers will be as stable as possible, taking account of the intention to maintain the Sufficiency Ratio within the Target Funding Range and to align with the WSIB's risk appetite statement for Insurance Funding Risk. The premium rate, excluding any target funding contributions, will continue to reflect the need to fund the benefits provided to injured workers and the costs of running the workers' compensation system for the injury year. Premium rate setting is a Pricing Decision, whereas determining target funding contributions is a Funding Decision.

1.1.2. Elements of the Legislative Framework

Should the Sufficiency Ratio be equal to or above 115 per cent and below 125 per cent, any Surplus distributions shall be distributed within 90 days of the WSIB determining that it will issue a Surplus distribution to eligible Schedule 1 employers, with the amount of the distribution within the discretion of the WSIB. The WSIB shall use the quarterly or annual Sufficiency Statements in making this assessment.

Should the Sufficiency Ratio be equal to or above 125 per cent, any Surplus distributions shall be distributed to eligible Schedule 1 employers within 30 days of the WSIB determining the Sufficiency Ratio is equal to or above 125 per cent, to return to a Sufficiency Ratio of 115.1 per cent. The WSIB shall use the annual audited Sufficiency Statement in making this assessment.

In **Part 3** of this series, I will outline the current state of funding that in my view compels the Board to issue a surplus distribution. In **Part 4**, I will assess the policy intent of the WSIA and regulations and offer a simple suggestion to make future surplus distributions more in line with the over-arching policy objectives of inter-generational employer equity. I will explain why the \$2 billion surplus distribution is in fact a low-ball figure. It should be more.