

FUNDING FAIRNESS

A REPORT
ON ONTARIO'S
WORKPLACE
SAFETY AND
INSURANCE
SYSTEM

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Dear Minister and Messrs. Mahoney and Marshall;

In September 2010 I was appointed to review a number of matters related to the funding of the Workplace Safety and Insurance Board. I have now completed my review and have the honour to present my report entitled "Funding Fairness". I have chosen that name because it links two ideas that are not always recognized as compatible, but which in my view are mutually dependent. The first is that the whole point of funding the WSIB properly is to ensure fairness to the injured workers who depend upon it. The second is that funding must rest on sound principles and be carefully administered, if it is to appear fair and reasonable to the employers who must pay the premiums. If fairness is not accorded to employers, workers cannot be treated fairly; and vice versa.

I wish to record my thanks to a number of individuals and organizations whose contributions to the review were crucial to whatever success it can claim to have had:

- to my staff, for their encyclopaedic knowledge of the WSIB, their high professionalism and their willingness to both educate and sustain me;

- to our research consultants for their responsiveness to our needs, and their careful analysis of the issues confronting the review;
- to my advisors for their sage advice;
- to the WSIB staff and management for their willing provision of information and analysis and their respect for the independence of the review process;
- and especially to the stakeholder representatives, individual workers and employers and other Ontarians who not only conveyed their criticisms of the WSIB but also engaged in constructive debate over how to improve it.

Needless to say, I am available to you or your staff to discuss my findings and recommendations.

Sincerely

A handwritten signature in black ink, appearing to read 'Harry Arthurs', with a stylized, flowing script.

Harry Arthurs
Chair
WSIB Funding Review

cc: Cynthia Morton
Deputy Minister
Ministry of Labour

TABLE OF CONTENTS

CHAPTER 1 — THE FUNDING REVIEW	9
1.1 Establishment and structure of the Funding Review	9
1.2 The mandate of the Funding Review	9
1.3 Outreach, public consultations and official briefings	10
1.4 The background, context and general approach of the Funding Review	12
1.5 The changing legislative and administrative context	14
1.6 The organization of this report	15
CHAPTER 2 — THE WSIB’S UNFUNDED LIABILITY: HISTORY AND SIGNIFICANCE	17
2.1 Introduction	17
2.2 What is the UFL and how big is it?	17
2.3 A short history of the UFL	18
2.4 The Auditor General’s 2009 report and Bill 135	21
2.5 The multiple meanings and symbolic significance of “under-funding”	24
2.6 Sufficient funding	26
2.7 Undue and unfair burdens: intergenerational and intersectoral equity as an obstacle to dealing with the UFL	26
CHAPTER 3 — A NEW FUNDING STRATEGY FOR THE WSIB	31
3.1 Introduction	31
3.2 What would a “good” funding policy look like?	31
3.2.1 The objectives of the WSIB’s funding policy	31
3.2.2 Degrees of sufficiency	32
3.2.3 The technical characteristics of a good funding policy	33
3.3 A new funding strategy for the WSIB: derived from realistic assumptions, driven by objectives and disciplined by a corridor approach	35
3.3.1 Assumptions	35
3.3.2 The corridor system	36
3.4 Should government share the WSIB’s burdens?	40
3.4.1 Government responsibility for the UFL	40
3.4.2 Reimbursement to OHIP for routine medical services	41
3.4.3 Costs associated with accident prevention and safety promotion organizations and with enforcement of occupational health and safety legislation	41
3.4.4 The cost of the Offices of the Employer Adviser and the Worker Adviser and the Workplace Safety and Insurance Appeals Tribunal	42
3.4.5 Reducing the WSIB’s legislated obligations	42

3.5	Should Schedule 2 employers contribute more to the funding of the WSIB?	43
3.6	Alternative funding strategies considered and rejected.....	43
3.6.1	The <i>status quo</i> plus greater control model.....	44
3.6.2	The CPP “steady-state” funding model	44
3.6.3	Ring-fencing, annuitization and bond financing	45
CHAPTER 4 — PREMIUM RATE SETTING: PRINCIPLES AND PROCESSES		49
4.1	Rate setting as the Achilles heel of the funding strategy.....	49
4.2	Key issues in the premium rate-setting process.....	49
4.2.1	Funding sufficiency	49
4.2.2	Sound technical analysis	49
4.2.3	Transparency and intelligibility	51
4.2.4	Stability.....	52
4.2.5	Affordability and fairness.....	52
4.3	Ensuring the integrity of the rate-setting process	54
CHAPTER 5 — WHO PAYS HOW MUCH? RATE GROUPS AND THE APPORTIONMENT OF FINANCIAL RESPONSIBILITY AMONG EMPLOYERS		59
5.1	Introduction.....	59
5.2.	Rate groups	59
5.2.1	The multiple levels at which costs are allocated among employers	59
5.2.2	Collective responsibility versus insurance equity	60
5.2.3	Heterogeneity, cross-subsidization and behavioural consequences.....	62
5.2.4	Integrating rate setting, accident prevention, safety and health promotion, and return-to-work initiatives.....	63
5.3	Reform of the existing rate group system	66
5.3.1	Shortcomings of the existing system of rate groups	66
5.3.2	Technical descriptors used to define coverage and rate groups.....	67
5.4	Implementation issues.....	69
5.5	Which employers should pay how much?	70
5.5.1	New claims costs	70
5.5.2	The unfunded liability.....	71
5.5.3	Legislated obligations	74
5.5.4	Occupational diseases.....	75
5.5.5	Administrative expenses	75
5.5.6	The cost of experience rating programs	75
CHAPTER 6 — EMPLOYER INCENTIVES AND EXPERIENCE RATING.....		77
6.1	Introduction.....	77
6.2	The impact of Bill 160	78

6.3 The debate over employer incentive programs.....	78
6.4 Making sure that experience rating programs are fit for purpose	82
6.5 Redesigning the WSIB's experience rating programs.....	86
6.5.1 Design flaws and promising options in the design of experience rating programs.....	87
6.5.2 The integration of rate setting and experience rating: the Nexus proposal	88
6.6 A controlled experiment in experience rating.....	89
6.6.1 The experiment.....	89
6.6.2 The control.....	90
CHAPTER 7 — FUNDING OCCUPATIONAL DISEASE CLAIMS	93
7.1 Introduction.....	93
7.2 A precautionary strategy	94
7.3 Allocating financial responsibility for occupational disease.....	95
CHAPTER 8 — BENEFIT INDEXATION FOR PARTIALLY DISABLED WORKERS	99
8.1 Background	99
8.2 The arguments for and against restoring full benefit indexation to partially disabled workers.....	100
8.3 Implementing full indexation	101
CHAPTER 9 — ISSUES NOT WITHIN THE MANDATE OF THE FUNDING REVIEW ..	105
9.1 The WSIB's reputation among employers and workers	105
9.2 Governance and regulation	105
9.3 Coverage.....	106
9.4 Significant modifications to the WSIB system: deductibles, “mutual groups,” co-pay, self-insurance and privatization.....	108
9.5 Benefits and related policies and practices	109
9.6 Investments.....	111
9.7 The “one size does not fit all” problem.....	111
9.8 Advocacy.....	112
9.9 The WSIB and Ontario's social and economic development	114
CHAPTER 10 — REFLECTIONS ON THE REVIEW	115
APPENDIX A — WSIB Funding Review Biographies	117
APPENDIX B — Public Hearings Advertisements, Dates and Locations	121
APPENDIX C — Participants in the Consultation Process	123
APPENDIX D — Models A and B with a Lower Discount Rate	127
APPENDIX E — Morneau Shepell: User's Guide to the Funding Corridor Strategy.....	129
TECHNICAL ANNEX	139

CHAPTER 1

THE FUNDING REVIEW

1.1 Establishment and structure of the Funding Review

In September 2010, at the request of the Ontario Workplace Safety and Insurance Board (WSIB), I was appointed to conduct an independent review of its funding and related matters, and to advise then-Minister of Labour, the Honourable Peter Fonseca, as to what would constitute “a fair level of indexation for partially disabled workers.” A panel of four distinguished Ontarians — Maureen Farrow, Buzz Hargrove, John O’Grady and John Tory — was appointed to advise and assist me; their biographies are provided in Appendix A. I have greatly appreciated their wise counsel. I have also been privileged to work with a small staff seconded to the Review by the WSIB. Their knowledge of workers’ compensation issues has been generously placed at my disposal, their hard work and good judgment have met the highest standards of public service, and their willingness and ability to approach the issues from an independent and objective perspective have been invaluable. Their names and biographies also appear in Appendix A.

I have also had considerable interaction with I. David Marshall and Steven W. Mahoney, President and Chair of the WSIB, respectively, and with other WSIB officials and technical staff. They made my task easier by ensuring that I had the resources required to conduct the Review, that information was made available to the Review as required and that, in the course of our discussions, my independence was always fully respected.

Finally, the credibility of the Review and its capacity to make sensible recommendations both depend heavily on the quality of the research that underpins its analysis. Given the small size of the Review staff, it was therefore necessary to seek research assistance externally. To my good fortune, following a public bidding process, I was able to engage a team comprising the Conference Board of Canada, one of Canada’s leading economic research agencies, and the actuarial firm of Morneau Shepell, which has extensive experience in advising workers’ compensation boards and other bodies. Both were extremely helpful in providing high-quality research on the issues under review and in responding to questions from my staff and me.

To the Advisory Panel, my staff, WSIB interlocutors and research consultants, I offer my profound thanks. I hardly need add that I absolve them of responsibility for any deficiencies in my findings and recommendations.

1.2 The mandate of the Funding Review

The Funding Review was asked to consider six specific issues:

- the WSIB’s unfunded liability (UFL);
- premium rate setting;
- rate groups;
- employer incentives;
- occupational diseases; and
- indexation of benefits for partially disabled workers.

However, it is fair to say that various stakeholders expected that the mandate of the Funding Review should and would extend to governance of the WSIB, its administration and adjudication practices, its treatment of workers and employers, the nature and quantum of benefit entitlements, coverage of the *Workplace Safety and Insurance Act* (WSIA), accident prevention, and other issues. All of these matters are no doubt appropriate for someone's review in the sense that they affect either the WSIB's funding status or the quality of its interaction with Ontario's employers and workers or both. It is also fair to say that announcements concerning my appointment and mandate were somewhat ambiguous, and that this ambiguity was compounded by the prior, simultaneous or subsequent appointment by the Ministry of Labour or the WSIB of review panels, consultants, committees and advisors whose work touched on one or more of the six topics listed above. On the other hand, it seemed obvious — at least to me — that a Funding Review had by definition a limited scope, that a “review” was not a Royal Commission, that the time frame specified in my mandate was too short to permit me to pursue a longer and more complicated agenda, and that inquiries or reviews like mine lack the power to write (or rewrite) their own terms of reference.

Nonetheless, whether justifiably or otherwise, stakeholders criticized the limited scope of my mandate; they made their views clear to me before, at and after the public hearings; and they conveyed them to the WSIB and the provincial government as well. In the event, the government and the WSIB confirmed my understanding of the mandate, as set out above. I sincerely regret that controversy over this issue consumed some of the Review's limited time, resources and good will. However, as matters turned out, stakeholders were seldom deterred by the scope of the mandate from expressing their views on issues they deemed important or from urging me to ignore issues they deemed inappropriate

for consideration. In response, I could only promise that if I received substantive submissions on out-of-scope issues, those submissions would be noted in my report, even if I was unable to make findings and recommendations with regard to them. Chapter 9 represents my efforts to make good on that promise.

1.3 Outreach, public consultations and official briefings

In October 2010, the Review established a website. It contains extensive information on the personnel, plans and activities of the Review, provides links to relevant documents and data sources, makes accessible the submissions from stakeholders and the public, and affords a convenient way for concerned parties to communicate with the Review.

In accordance with my mandate, I consulted widely with stakeholders and interested parties. In late 2010, I met informally with some 39 umbrella organizations representing employer groups, injured workers' advocates and unions to explain how I intended to proceed and to gain a preliminary sense of their views on the main issues I was asked to address. Following these informal consultations, I prepared, circulated and posted online a Green Paper that explained my mandate, indicated in a general way how the Review would proceed, and posed a series of questions to be addressed by stakeholders and others who wished to make submissions.

In January 2011, the Review convened a technical consultation attended by actuaries and other experts representing stakeholders, as well as four non-aligned experts. During the consultation, the WSIB made an extensive presentation of the data, assumptions and analysis that shaped its own understanding of its financial situation. The WSIB's presentation is available online through <http://www.wsibfundingreview.ca/resources.php> (under “Technical Consultation”). Participants

were invited to question the WSIB's presenters and to ask for further information if required; the WSIB subsequently provided considerable additional information that has been posted online as well.

In April and early May 2011, the Review conducted 12 days of public hearings in six Ontario cities. The six venues were selected to accommodate requests for participation received in response to advertisements in some 12 newspapers across the province, to direct invitations sent to all major stakeholder groups, and to notices mailed to individual employers and injured workers. The mailed notices were included in mailings already scheduled by the WSIB to advise employers of their premium rates or to provide workers with benefit cheques or tax slips. For technical reasons, notices reached employers before workers, some workers before others, and apparently, some workers not at all. This discrepancy in the timing of notices sent to employers and workers understandably provoked complaints by workers' advocates; however, the alternative would have required a direct, dedicated mailing to all employers and injured workers at a cost of many hundreds of thousands of dollars. I apologize for any prejudice to workers that may have resulted, but note that, in fact, unions and workers' advocacy organizations were given direct and timely notice of the hearings and participated extensively and effectively, as did many individual workers. A list of newspapers in which the hearings were advertised, and of the dates and locations of the hearings, can be found in Appendix B.

Altogether, some 75 representative organizations either submitted written briefs or made oral presentations or both, as did some 55 individuals and businesses, while a further 14 submitted written comments online or by letter, or provided their views orally for transcription by Review staff. Finally, subsequent to the hearings, WSIB management, in its capacity as an interested party or stakeholder, filed three

position papers that it either wrote or commissioned. These position papers were treated like any other submission. They were posted online; the closing date for additional submissions was extended to afford other stakeholders an opportunity to comment on them or to file supplementary briefs; and 23 did so by the new deadline of August 31. A full list of those who participated in some fashion in the consultation process is found in Appendix C (except for a few names that have been omitted on request). All submissions received during the course of the consultation process — other than those whose authors withheld permission to post them — are available online at www.wsibfundingreview.ca/submissions.php.

Whenever possible, I engaged presenters in a dialogue in order to obtain clarification of their position and/or to give them an opportunity to consider and respond to points of view that differed from their own. I learned a great deal from the briefs submitted, from the public hearings and especially from these dialogues; I hope that participants did as well.

In June 2011, I convened two meetings — one for workers' groups, one for employer groups — to present what I had heard about the issues during the public hearings and from other sources. And in November 2011, I brought together the same workers' and employer groups and invited them to provide feedback on my tentative findings and recommendations. A list of participants in these two meetings is also found in Appendix C.

Finally, given my commitment to close engagement with worker and employer stakeholders, I felt that I should also keep institutional, governmental and political stakeholders apprised of what I was doing. I therefore briefed the WSIB regularly on the progress of the Review and also met with the Ministry of Labour and with the workers' compensation critics from the opposition parties.

1.4 The background, context and general approach of the Funding Review

As is well known, Ontario adopted a workers' compensation scheme in 1914 — the first in Canada — based on the recommendations of a Royal Commission chaired by Chief Justice Sir William Meredith, a distinguished jurist and former leader of the Ontario Conservative Party. The original *Workmen's Compensation Act* (drafted by Meredith himself) had four core features:

- Workers have the right to compensation if they are injured in the course of their employment or contract a work-related disease. Entitlement to compensation does not depend on proving fault on the part of the employer. In exchange, workers surrender their right to sue their employers.
- Workers with a compensable illness or injury are to receive statutorily mandated benefits for as long as their injury or illness lasts.
- The workers' compensation scheme is to be funded by employer premiums rather than by workers' contributions or from the province's consolidated revenue fund. Employers are collectively responsible for the costs of running the scheme.
- The compensation system is to be administered by an independent, impartial and expert public agency operating in a non-adversarial manner and free from oversight or intervention by the courts.

Over the years, Meredith's "historic compromise" has been the subject of considerable controversy. It has been interfered with from time to time by governments acting either overtly or covertly. It has been amended piecemeal to incorporate new initiatives related to benefits, safety promotion and other matters. And it has undergone extensive, systemic changes as a result of several comprehensive arm's-length reviews, most recently that of Professor Paul

Weiler in the 1980s. But during all this time, the core features of the 1914 Act — especially those related to funding — have been neither challenged nor changed.

I emphasize funding, of course, because the present review was clearly triggered by the *2009 Annual Report* of the Auditor General of Ontario, which challenged the WSIB's funding policies and performance. Specifically, the Auditor General's report expressed concern about the long-term financial viability of the WSIB given its apparent inability to reduce or eliminate its unfunded liability (UFL). I will examine the history, conceptual significance and practical implications of the UFL in considerable detail in Chapter 2. For now, I offer four preliminary observations:

- The WSIA requires only that the WSIB maintain an insurance fund "sufficient" to meet its obligations, rather than a fund equal to the capitalized value of all claims. This requirement — unchanged since 1914 when it was recommended by Meredith and approved by the Ontario legislature — does not explicitly or by necessary implication require elimination of the UFL.
- Eliminating, reducing or increasing the UFL is likely to affect almost every aspect of the WSIB's policies and practices, from premium levels and investment strategies to benefit levels and claims administration.
- Significant changes in the WSIB's policies and practices are in turn likely to have an effect — positive or negative — on the UFL.
- The growth or shrinkage of the UFL will also be influenced by legislative developments, fluctuations in financial markets, the prosperity and configuration of Ontario's economy, the rising costs of health care for injured workers, developments in medical science, and many other factors beyond the control of the WSIB.

These observations, I believe, help to explain why debate over the UFL — an issue of some technical complexity — has evoked such intense, conflicting reactions from stakeholders. They may also explain why those reactions often seem to have resolved themselves into a polarized debate between self-styled defenders of the “Meredith principles” on the one hand and proponents of a “pure insurance model” of workers’ compensation on the other — perhaps to the prejudice of intermediate perspectives.

Conformity to “the Meredith principles,” I was told, requires that the WSIB be funded in accordance with its character as a unique public institution; its financial arrangements have never conformed, and need not conform, to those that govern insurance companies in the private sector. Although it is a fact that, as of 1998, the *Workers’ Compensation Act* was renamed the *Workplace Safety and Insurance Act*, this change in nomenclature was not reflected in the substantive provisions related to funding. Nonetheless, it seems to have given rise to the belief, expressed in submissions on both sides of the debate, that the WSIB today has in fact become a conventional insurance provider. Given this perception, defenders of the Meredith principles argued that the WSIB ought to be restored to its pre-1998 incarnation; in response, proponents of the insurance model contended that the WSIB should be purged of any features that might be described as “social programs” and made to conform to the best business and financial practices of private sector casualty companies. I am not wholly persuaded by either of these arguments.

It is true that the funding provisions of the Act were not fundamentally altered between 1914 and 2010. However, that does not mean that its “principles” have remained unchanged. For example, the text of the *British North America Act, 1867*, has not been amended for even longer, but its core principles — federalism, parliamentary democracy and the rule of law — have evolved in ways that would make them

unrecognizable to their authors, the fathers of Confederation. Workers’ compensation, as conceived by Meredith, was designed when actuarial science was in its infancy, instituted prior to public provision of health care, social welfare and old age pensions, and designed to displace private litigation arising out of workplace injuries in an age when negligence doctrine was in a formative stage, class actions unknown and contingent fees forbidden. Given all of these changes, invoking the original “Meredith principles” does not yield automatic and appropriate contemporary solutions to the problems confronting the workers’ compensation system he established a century ago. Nor is this either surprising or inappropriate, given that Ontario’s society and economy have been radically transformed in the interim.

On the other hand, while the legislature has every right to call the WSIB an “insurance system,” if it is to behave like an insurance company, the legislature must do more than change its title. It must reconfigure the statute so that the WSIB is structured, endowed with powers and regulated in ways appropriate to this new identity. This the legislature has not done: indeed, it has done the contrary. The WSIB is required to provide “compensation” rather than an “undertaking ... to indemnify” — the defining characteristic of “insurance” under Ontario legislation; it is mandated to promote workplace health and safety, and to facilitate the return to work and labour market re-entry of injured workers — activities not normally undertaken by insurance companies; and the WSIB is not subject to oversight by either provincial or federal insurance regulators. Finally, Ontario’s employers and workers expect to be — and are — consulted on the legislative framework for workers’ compensation, on the WSIB’s policies, and on premium rates and other matters; but few, if any, private insurers afford their clients or beneficiaries such an opportunity to influence the price or quality of their coverage or benefits.

Consequently, to insist that the WSIB as presently constituted is just a state-owned insurance company is to ignore the history, language and structure of its governing statute, the functions undertaken by the WSIB pursuant to that statute, and the individual, corporate and public expectations that have shaped and reshaped Ontario's workers' compensation system for almost a century. In short, the complicated questions that I have been asked to investigate cannot be answered simply by using evocative terms such as "Meredith principles" or "insurance system."

That said, the WSIB must always be sensitive to the social, economic and psychological plight of injured workers in accordance with the Meredith principles; and just as obviously, it must also be as alert to considerations of managerial efficiency and fiscal prudence as insurance companies are required to be. Thus, both terms — "Meredith principles" and "insurance system" — have something to contribute to an understanding of how the WSIB should arrange its financial affairs and discharge its statutory responsibilities. These dual perspectives require that issues confronting the WSIB be approached by way of careful analysis, informed by nuanced debate and often resolved through novel arrangements that take account of its unusual character.

In keeping with this approach, I early on developed a number of working hypotheses to guide me through the Review:

- The point of the Funding Review is to reinforce the WSIB's capacity to discharge the statutory mandate set out in section 1 of the WSIA, not to fundamentally revise that mandate.
- The WSIB cannot properly discharge its mandate as long as its financial stability and sustainability are in doubt.
- The persistence of the UFL is at best a crude measure of the WSIB's financial stability and sustainability.

- Whether the WSIB has achieved financial stability and sustainability is an empirical question that requires consideration of its unique characteristics and circumstances.
- No strategy to achieve the WSIB's financial stability and sustainability is appropriate if it impairs the WSIB's ability to perform its multifaceted statutory mandate.
- The issues assigned to the Funding Review should be resolved on their merits and not solely by reference to their impact on the WSIB's funding status or the UFL. However, their funding implications must be clearly understood and given full consideration.
- Some issues assigned to the Funding Review cannot be permanently resolved. They require further, often ongoing, analysis, consultation and in some cases experimentation.
- For these reasons, and to the extent necessary to support its substantive recommendations, the Funding Review had an obligation not only to investigate the *status quo* but also to consider alternative institutional arrangements.

I hope and believe that these working principles enabled me to consider all points of view with an open mind and to do them justice in formulating my findings and recommendations. Readers of this report will no doubt draw their own conclusions on that point.

1.5 The changing legislative and administrative context

Since the establishment of the Funding Review, the Government of Ontario has enacted two important statutes that touch on matters I have been charged with investigating. The first, Bill 135, deals with the WSIB's UFL and related oversight issues; much of this legislation has not yet been proclaimed in force. The second, Bill 160, shifts responsibility for accident prevention and health

and safety education from the WSIB to the new Chief Prevention Officer operating under the aegis of the Ministry of Labour; this legislation received Royal Assent in June 2011, but not all of its administrative and financial consequences have been resolved at the time of writing. In addition, since I began my work in October 2010, the WSIB has adopted a number of new policies and introduced a number of administrative changes; it has conducted a value-for-money audit that may ultimately alter the way it deals with claims; as noted above, its management has written or commissioned policy papers that directly or indirectly address issues within my mandate; and statements by at least two Ministers of Labour have signalled their preferred approach to the question of benefit indexation for partially disabled workers. No doubt other WSIB and/or ministerial initiatives are contemplated or in process. As a result, the laws, policies, programs, practices and outcomes that I have been asked to review constitute something of a moving target.

I have therefore decided to describe both existing and proposed new arrangements as accurately as I can, but not to be deterred from making observations and recommendations about them simply because they are in flux or have recently been altered. In other words, I have evaluated new legislation, such as Bill 135 and Bill 160, much as I did the underlying WSIA, which has been in force since 1915. Do these statutes, and do administrative actions taken under their authority, contribute to or detract from the WSIB's financial viability? take account of workers' interests? respect the legitimate concerns of employers for affordable premium rates?

1.6 The organization of this report

As noted above, the Auditor General's 2009 *Annual Report* expressed concern about the failure of the WSIB to reduce or eliminate the UFL. Chapter 2 deals with this issue in the context of

a broader discussion of the history of the UFL, existing and proposed statutory provisions that govern the WSIB's approach to funding, proposals for new funding approaches by the WSIB and related matters. In Chapter 3, I propose a new funding strategy for the WSIB.

In large measure, the WSIB's success in aligning its assets and liabilities depends upon it having in place a proper method for setting and collecting premium rates, its primary source of income. Closely linked to this issue is the methodology used by the WSIB to ensure that the burden of funding the compensation scheme is spread fairly across the universe of premium-paying employers. At present, the WSIB apportions that burden among "rate groups" whose members participate in similar business activities and/or whose employees are exposed to similar risks of workplace accident or illness. These two subjects — rate setting and rate groups — are discussed in Chapters 4 and 5.

However, not all members of a given rate group pay identical premium rates. Those with better-than-average safety records are provided with a rebate; those with worse safety records are surcharged. Rebates are regarded in some quarters as "incentives" designed to encourage good safety performance, while surcharges are regarded as "negative incentives" to discourage bad performance. (In other quarters, rebates and surcharges are described as a form of "insurance equity" designed to ensure that each employer's premiums are proportionate to the benefit costs it generates.) Finally, incentives of a different kind are offered to employers that participate in accident prevention programs or in initiatives designed to facilitate the re-employment of injured workers. Incentives in general are discussed in Chapter 6.

Next, the resolution of two long-standing policy debates may have important consequences for the WSIB's financial situation. The first has to do

with the funding of occupational disease claims, the costs of which account for a significant and increasing proportion of the WSIB's liabilities. The second relates to the restoration of full indexation of benefits for partially disabled workers, which has not been provided since 1995. These two issues are dealt with in Chapters 7 and 8 respectively.

In Chapter 9, I record a number of important — but out-of-scope — issues raised by stakeholders and other presenters in the course of their written and oral submissions. By doing so, I hope not only to acknowledge that responsible and well-informed parties deemed these issues important, but also to bring them to the attention of the WSIB and the government for further investigation, if deemed appropriate. Chapter 10 offers some concluding observations about what the WSIB might learn from the experience of the Funding Review.

Finally, readers are invited to consult the Technical Annex to this report. It contains a glossary of technical terms, as well as references to statutory, statistical and other sources referred to or relied upon in the main body of the report.

CHAPTER 2

THE WSIB'S UNFUNDED LIABILITY: HISTORY AND SIGNIFICANCE

2.1 Introduction

In this chapter, I provide a description of the central issue confronting the Funding Review — the WSIB's unfunded liability (UFL). I then offer a brief history of its development, an account of recent reactions to its persistence and growth, and finally an analysis of its significance. In the next chapter, I propose a new funding model for the WSIB.

2.2 What is the UFL and how big is it?

The UFL may be defined as the extent to which the WSIB's estimated and projected liabilities (the cost of paying for awarded claims, administering the system and meeting other responsibilities mandated by the statute) exceed its estimated and projected assets (the cash, investments and other resources it has available to meet that cost).

I have deliberately used the terms “estimated” and “projected” to remind readers that we cannot know with certainty what costs or revenues will be years or decades into the future, when the WSIB will still be paying benefits to claimants, some of whom were injured years or decades into the past. Consequently, the actuarial valuations on which we must depend in assessing the size of the UFL are necessarily exposed to some risk of error. Nevertheless, actuarial estimates of liabilities and assets do have meaning. Significant asymmetry between actuarially estimated liabilities and the corresponding assets — as is the current situation

with the WSIB — represents an important warning signal. This report will offer an approach to interpreting that warning signal in a way that is neither alarmist nor reflective of wishful thinking, but that is grounded in the WSIB's capacity to fulfil its statutory mandate and that maintains confidence in the integrity and fairness of Ontario's workers' compensation system.

At the end of 2009 — according to the WSIB's own estimates and as confirmed by the Auditor General — the UFL was approximately \$11.7 billion. At the end of 2010, according to the President of the WSIB, it stood at about \$12.4 billion. At the end of 2011, it will no doubt be some other number. It is, of course, in the nature of estimates that they will change over time as underlying assumptions are tested against real events and revised in light of further and better analysis. In that sense, the UFL is always a work in progress and can never be measured with complete precision. Nonetheless, it is crucial that all concerned — the Funding Review, stakeholders, the WSIB, the government and the public — have as accurate an understanding of its magnitude as possible.

The Review therefore organized a technical consultation at which 12 experts, nominated by stakeholders, and 4 non-aligned experts, invited by the Funding Review, examined the WSIB's assumptions, data and calculations. Questions raised by the participating experts were (as far as possible) addressed by the WSIB either at the consultation or subsequently, and all data used by the WSIB to support its estimates

was posted online for scrutiny by interested parties. Finally, the Funding Review asked its independent consultants, Morneau Shepell, to construct a sophisticated financial model that would enable it to evaluate various approaches to the UFL used by the WSIB or advocated by stakeholders. At a minimum, the WSIB's financial situation is now more transparent than it ever has been, and issues arising out of that situation can now be addressed with greater confidence by interested parties.

Participants at the technical consultation arrived at a consensus (now joined by the WSIB itself) that its original 2010 estimate of the UFL was, if anything, too low because it assumed investment returns of 7% per annum going forward, and therefore used a “discount rate” of 7% to estimate the capitalized cost of its future obligations. The consensus in early 2011 was that a discount rate of 6% would be more realistic; at the time of writing in late 2011 that consensus appears to be moving towards an even lower figure, in the range of 5.5%. Participants also pointed out that the WSIB has for some years under-priced the cost of new claims and in several other respects maintained an overly optimistic view of its own ability to predict and control costs. It seems quite possible, then, that the WSIB has, if anything, also underestimated the rapidity and extent of future increases in the UFL. Indeed, the estimate prepared for the Funding Review by Morneau Shepell placed the present UFL at about \$14.5 billion, with the potential to rise further if the discount rate drifts lower or if nothing is done to improve the WSIB's ability to capture new claim costs.

How does the WSIB's funding compare with the funding of other provincial systems? By its own estimate, the WSIB's funding ratio — the ratio of its assets to liabilities — was 54% as of 2009 and only marginally higher as of 2010; Morneau Shepell's estimate suggests that 50% is likely closer to the mark. In contrast, most

other Canadian workers' compensation systems had no UFL; rather they were in surplus, fully funded or nearly so.

2.3 A short history of the UFL

Chief Justice Meredith considered two funding models for Ontario's new workers' compensation system — the full-funding insurance model and the pay-as-you-go model. He rejected both. Instead, he recommended that

... the act should not lay down any hard and fast rule as to the amount which shall be raised to provide a reserve fund and that it is better to leave that to be determined by the Board ... as experience and further investigations may dictate. I have therefore made provision in the draft bill to that end, by making it “the duty of the Board at all times to maintain the accident fund so that with the reserves it shall be sufficient to meet all the payments to be made out of the fund in respect of compensation as they become payable and so as not unduly or unfairly to burden the employers in any class in future years with payments which are to be made in those years in respect of accidents which have previously happened” ... and by authorizing the Lieutenant-Governor in Council if in his opinion the Board has not performed that duty to require the Board to make a supplementary assessment of such sum as in his opinion is necessary to be added to the fund

The scheme has in fact been funded in accordance with Chief Justice Meredith's recommendations down to the present. For most of that time, whether by design or default, the WSIB and its predecessors operated with less — often much less — than full funding. However, in 1984, the WSIB formally resolved for the first time to eliminate the UFL within 30 years. The WSIB made some halting progress towards that goal and, in

2007 — still some distance from its target — in a document ironically named *Road to Zero*, it reaffirmed its intention to eliminate the UFL. It did not, however, specify a new target date, although by that time it had become clear that 100% funding by 2014 was unattainable, as the WSIB subsequently acknowledged.

Why did the WSIB's 1984 plan fail and what lessons can be learned from its failure?

While workers' and employer groups disagree about the causes and significance of the growth of the UFL, both point to the determinative role played by successive governments in either reducing the WSIB's revenue or increasing its liabilities without addressing the consequences for its UFL. For example:

- In 1987, benefits paid to injured workers were indexed to ensure that their purchasing power was not eroded (indexation was subsequently reduced for partially disabled workers); no additional revenues were provided to the system to pay for indexation.
- From 1996 to 2001, the government first froze average premium rates and then oversaw their reduction by almost 30%; contemporaneous legislation reducing benefits achieved offsetting cost savings of only about 15%.
- In 2007, firefighters suffering from certain occupational diseases were deemed to have contracted them in the course of their employment, a presumption extended to volunteer firefighters who were deemed eligible for WSIA benefits in 2009; again, no additional revenues were provided to cover in-year costs, although of course the WSIB was in principle free to raise premium rates to cover these costs in future years.
- In 2007, 2008 and 2009 *ad hoc* increases of 2.5% per annum to adjust for inflation were provided for a large contingent of injured workers; no additional revenues were provided.

The WSIB could have reacted in three possible ways to these government initiatives: it could have raised premium rates to pay for additional benefit costs; it could have reduced access to benefits through administrative initiatives in order to align its expenditures more closely with its reduced revenues; or it could have allowed the UFL to grow. In fact, average premium rates remained more or less unchanged between 2000 and 2009 and have grown only modestly since; despite cost-restraint policies, benefit costs actually grew during this period; and of course the UFL grew from \$2 billion in 1983 to \$12.4 billion in 2010. (I will deal at greater length below with the way in which governments influence rate setting, benefit costs and the WSIB's financial well-being.)

By no means are governments solely responsible for the WSIB's failure to achieve its original 1984 plan or to traverse the "road to zero" after 2007. A considerable portion of the responsibility resides with the WSIB itself:

- The WSIB failed, over the past 10 years, to adequately price new claims costs. Its failure to take in each year as much as it paid out has produced a cumulative operating deficit of \$8.3 billion, some of which had to be recouped by selling off investments, thereby reducing its long-term potential for enhanced investment income.
- The cost and/or incidence of several kinds of claims appears to be rising rapidly; it is not yet clear why or what (if anything) the WSIB can or should do about this.
- The WSIB's employer incentive or experience rating programs yielded a cumulative "off-balance" — an excess of premium rebates over surcharges — of \$2.5 billion (see Chapter 6).

- As of early 2011, the WSIB estimated its UFL at \$12.4 billion based on an unrealistic discount rate of 7%; adoption of a discount rate of 6% would cause the UFL to rise to \$14.5 billion; and adoption of a still lower rate — under discussion at present — would cause the UFL to grow even further (see section 2.2 above).
- The WSIB is said to have adopted excessively generous, even improvident, policies for determining entitlements as well as loose claims management practices, which have exacerbated its financial plight (see Chapter 9).
- The WSIB's failure to ensure that employers register with it and properly report their payroll and pay their premiums has, it is alleged, resulted in considerable (but unquantified and possibly unquantifiable) revenue leakage.

To some extent, the WSIB seems to have accepted the need to rectify what it acknowledges to have been serious missteps. It has raised average premium rates from \$2.26 in 2009 to \$2.40 for 2012. It is taking steps to improve its actuarial capacity and the methodology it uses to price new claims. It significantly reduced the off-balance generated by employer incentive programs in 2010 and hopefully will not incur one in the future. It is actively considering revision of its discount rate in deference to an actuarial consensus that it has been too high. It has conducted a value-for-money audit of its claims management procedures. And, of course, it has appointed this Funding Review. Taken together, these steps signal a more focused approach to the administration of Ontario's workplace compensation system.

But, whatever the positive or negative contributions of the government and the WSIB to the present (and future) size of the UFL, to some considerable extent the WSIB's financial situation has been (and will be) driven by developments that are largely beyond the control of either of them:

- The financial crash of 2008 inflicted heavy losses on investors, including the WSIB; 2011 proved to be a difficult year as well; no doubt financial markets will continue to fluctuate in the future.
- The costs of medical care and drugs — both of which are provided by the WSIB to injured workers — have been rising steadily for some time; they will continue to rise.
- The increased longevity of injured workers and their survivors, and the increased incidence of known occupational diseases, have both added to the WSIB's benefit costs; this trend will likely continue.
- Changing actuarial and accounting standards have forced or will force the WSIB to restate its assets and liabilities in ways that will likely add to the UFL.
- Changes in labour markets — persisting high levels of unemployment, the rise in non-standard (short-term, part-time) employment, the shift in employment from mining and manufacturing to other sectors — may undercut the WSIB's efforts to get injured workers back to work and off benefits, and leave it with the challenge of paying down expensive legacy claims without access to the high levels of premium revenues generated under previous labour market conditions.

Of course, some of these developments may be transitory. For example, by 2010 the WSIB had already recouped most of its 2008 investment losses. With enhanced actuarial capacity and over the long term, the WSIB may be able to more accurately predict and more thoroughly prepare for rising costs associated with increasing longevity and more expensive occupational disease claims. And by determined action, the WSIB may be able to contain or even reduce medical and drug costs (though governments around the world have generally been unable

to do so). On the other hand, labour market changes are likely to continue at an accelerated rate. Consequently, although aggregate premium revenues will likely rise with population growth and inflation, the WSIB may find it difficult to continue to match legacy costs against new revenues on a sector-by-sector basis, at any lower level of disaggregation or perhaps at all. If this shortfall occurs, it will likely generate conflicts over how the burden of retiring the UFL should be shared among different groups of employers and may further complicate the WSIB's task of managing its finances in the future.

2.4 The Auditor General's 2009 report and Bill 135

This account of factors that contributed to the growth of the UFL, and may well lead to difficulties in eliminating it in the future, brings me to the event that triggered the appointment of this Funding Review — the *2009 Annual Report* of the Auditor General of Ontario. In that report, the Auditor General stated:

The WSIB may need to find a new approach to deal with [its unfunded liability]. Failure to do so could result in the WSIB ultimately being unable to meet its commitments to provide workers with the benefits to which they are entitled.

The Auditor General, it must be noted, was appropriately cautious in his phrasing: the UFL “could result ... ultimately” in the WSIB being unable to meet its commitments. However, he offered neither a comprehensive account of how the UFL has arisen (I offer my own account above) nor guidance as to the combination of circumstances under which the WSIB might be unable “to provide workers with the benefits to which they are entitled.” Nor, in charging the WSIB with “the need to find a new approach,” did he acknowledge that such an approach must necessarily involve the other actors who

contributed to the development of the UFL — especially the Government of Ontario in its legislative and executive capacities and in its various political incarnations.

The government's role in the creation of the UFL began with its acceptance of Chief Justice Meredith's recommendation, outlined above, to reject both the “pay-as-you-go” funding strategy and the “full funding” strategy evidently preferred by the Auditor General in his report. Instead, as Meredith proposed, the legislature conferred on the Board a duty

... to maintain the accident fund so that it ... shall be sufficient to meet all the payments ... as they become payable [s. 71].

This language effectively conferred on the WSIB a discretion as well as a “duty” insofar as it permitted the WSIB to depart from the conventional “insurance” approach of full funding. Additional language in the original statute made this amply clear:

[I]t shall not be obligatory upon the Board to provide and maintain a reserve fund which shall at all times be equal to the capitalized value of the payments of compensation which will become due in future years [s. 72(1)].

This language remained virtually unchanged throughout all the years the UFL was accumulating, although it is to be removed from the statute when recently enacted amendments come into force.

Successive governments adhered to the same approach to funding, not only in the formal sense that they left the statutory language unamended for almost a century, but also in the practical sense that for all that time they knowingly tolerated significant departures from “full funding.” Indeed, for virtually its entire history, Ontario's workers' compensation system has been funded at levels usually well below 100%, and sometimes far below the 2009 level of 54%

that prompted the Auditor General's comments. But the WSIB has never failed to "make the required payments under the insurance plan as they become due" [s. 96(2)]. Moreover, governments over the years apparently never felt there was a risk that it would do so. At least, they never exercised their power to require the WSIB to "increase employers' premiums to the extent ... necessary to ensure that the fund" met the "sufficiency" standard [former s. 96(4)].

Still, the past is not a sure guide to the future. It is possible that at some point the WSIB might find itself unable to meet its obligations, or approaching that point. The Auditor General himself suggests only that such a situation "could result ... ultimately." Nonetheless, the possibility of insolvency, however remote, raises an important question: if the WSIB were to fail to meet its obligations as they came due, might this trigger a claim on the province's general funds or compromise its credit rating? If so, that would certainly explain the Auditor General's concern. However, again history is instructive though not conclusive: in all these years, neither the WSIB nor its predecessor, the WCB, ever sought or received provincial funds by way of either grant or loan. The prospect of provincial support for the WSIB in the future is extremely remote, especially since in 2010 (likely in response to the Auditor General's report) the government repealed a long-standing but never-used provision of the statute that enabled it to extend loans to the WSIB [former s. 100].

Nor can one explain almost a hundred years of government inaction by saying that it had no need to intervene because the WSIB never defaulted on its obligations. Notwithstanding the provisions quoted above, the government could have put the WSIB on the path to full funding, if it considered anything less than full funding lawful but unwise. Since 1998, the WSIA has required the Minister of Labour and the WSIB to enter into a Memorandum of Understanding (MOU)

every five years "containing only such terms as may be directed by the Minister" [s. 166(1)]. The government could have directed a term in the MOU requiring the WSIB to reduce or retire the UFL; it never did so. The Act also accorded the Minister the power to give the WSIB "policy directions" [s. 167, now repealed] including, presumably, a direction to achieve full funding; this never happened. Finally, under the Act the WSIB's accounts are subject to annual review by the Auditor General [s. 169]. In 2005 — not for the first time — the Auditor General took special note of the persistence of the UFL, but the government again took no specific steps to require the WSIB to improve its funding position; in fact, during the ensuing period, the WSIB's funding ratio deteriorated further.

The government, in other words, has long had the means to make itself fully conversant with the WSIB's financial situation; to specify that it must take steps to improve its funding ratio to 100% or some other level; or to make full funding the subject of a policy direction by the Minister. But — as far as I have been able to discover — it has apparently never used its extensive powers to force the WSIB to raise premium rates in order to eliminate the UFL.

On the contrary, on numerous occasions governments have contributed to the growth of the UFL, not only by legislating new benefits as outlined above, but by overtly ordering or covertly persuading the WSIB to adopt average premium rates lower than those required to fund itself "sufficiently," let alone fully. Just how this was accomplished is difficult to document. The power to set rates is vested by statute in the WSIB itself [s. 81]. Government could have pre-empted the WSIB's rate-setting power in the three ways outlined above: by directing a premium rate increase "to the extent necessary" to achieve sufficiency of funding; by directing an appropriate term in an MOU; or by ministerial "policy directions." But, although governments

have apparently never taken such action formally, ministers have gone on record as claiming credit for preventing premium rate increases or reducing rates. A well-documented — but by no means unique — incident of this type occurred in 1995, when the government “directed” the WSIB to “freeze rates”; in 1996, it announced its intention to “deliver on our commitment to reduce average ... rates” by 5%; and in 2001, it claimed credit for the fact that “thousands of businesses reap the benefits of lower WSIB payroll taxes” as the result of an “incredible turnaround” that produced a reduction in average premium rates of 29% over the previous six years. More often, however, governments appear to have sought and obtained similar results by less public means. Certainly “political interference” with WSIB rate setting is widely believed by many stakeholders to be an important explanation for its current financial situation. And they should know whereof they speak: stakeholders have been the primary instigators of such interference as well as its beneficiaries (and victims).

I conclude, therefore, that governments have made a significant contribution to the UFL by enacting the standard of “sufficient” rather than full funding, by statutorily mandating the payment of benefits for which no funding was available, by failing to use instruments at their disposal to ensure that the WSIB adopted and achieved full funding, and by interfering with the rate-setting process to keep rates below the level needed to achieve full, and arguably even sufficient, funding. However, Bill 135 — enacted in 2010 but not yet fully in force — suggests that the government may be contemplating a somewhat different approach in response to the Auditor General’s report.

Bill 135 apparently seeks to ensure that the UFL is addressed or, more accurately, that the WSIB has “sufficient” funding to meet its obligations. It specifies that the insurance fund must cover “future benefits,” defined as “the present value of the cost of benefits that will become

due under the insurance plan in the future ... as determined by the Board’s actuary” [new s. 96(1)(2)(3)]. It introduces an explicit requirement that the WSIB must “develop and implement a plan to achieve sufficiency” [new s. 96.1] and authorizes the government to enact regulations prescribing what constitutes “sufficiency,” to fix the date by which sufficiency must be achieved and to specify the elements that must be included in the WSIB’s plan [new s. 100]. The Minister of Labour is also empowered to submit the WSIB’s plan for review by an auditor or actuary and, if it is deemed not to meet the required standard, to require the WSIB to produce and implement a new plan that will do so [new s. 96.1(6)–(10)]. In addition, Bill 135 will repeal the section that made it unnecessary for the WSIB to “maintain a reserve fund that at all times equals the capitalized value of the benefits that will become due in future years” and thus seemed to legitimize something less than full funding [s. 97(2)]. None of these provisions of Bill 135 has been proclaimed in force. I assume that this hiatus is intended to give the government and the WSIB an opportunity to consider the findings and recommendations of this Funding Review before launching a new approach to the WSIB’s funding.

Clearly, Bill 135 can put the WSIB on the road to full funding and long-term financial stability if the government uses its new powers to require that the WSIB interpret “sufficiency” as requiring a 100% funding ratio. However, this outcome is subject to three important caveats. First, the new requirements that the WSIB fund “future benefits” as actuarially determined [new s. 96(1)] and avoid “burdening” both current and future employers [new s. 96(5)] are neither inconsistent with the previous statutory language nor at variance with policies espoused by the WSIB for many years. But they are at variance with actual practice, since the WSIB has consistently burdened both current and future generations of employers and has sometimes failed to fund

future benefits in accordance with actuarial advice. Second, the former legislation already conferred on government much the same power to control WSIB funding as Bill 135, albeit in less detailed form. However, governments in the past chose not to exercise that power. Third, Bill 135 does not speak to the other ways in which governments have contributed to the UFL through their actions and inaction. These omissions must be read in light of the Auditor General's suggestion that someone must meet "the challenge of trying to satisfy both workers — who want higher benefits — and employers that want lower premiums" This is indeed a challenge, but it is not one that the WSIB can meet on its own, without both the cooperation of government and a commitment to self-restraint by the stakeholders who bring pressure to bear on government (and on the WSIB itself) to increase benefits or suppress rates. In Chapter 4, I recommend ways to safeguard the integrity of the WSIB's rate-setting functions while acknowledging government's legitimate interest in this and other issues related to the WSIB's financial viability.

These reflections on the Auditor General's concerns and on the government's response — Bill 135 — are not intended to downplay the risks of under-funding. On the contrary, they are meant to focus attention more closely on the precise nature of those risks and on the design of sensible measures to address them.

2.5 The multiple meanings and symbolic significance of "under-funding"

Whether the WSIB is under-funded can be seen both as a question of fact and as a question of law. Whether the WSIB is actually in imminent danger of being unable to meet its commitments depends on many factors: how large the gap is between its liabilities and its assets, how much time is available to reduce or close that gap, what premium rates the WSIB can realistically

expect to charge and collect, what other sources of revenue are available to it, and what control it has over its costs. These factual questions — some requiring actuarial analysis, some not — are dealt with in Chapter 3. However, the WSIB can also be said to be under-funded in a legal or technical sense if it is less well-funded than its governing statute requires, notwithstanding that it has been meeting its obligations and will be able to do so for some time to come. Conversely, even if funded to a level that is legally or technically in compliance with the statute, the WSIB could nonetheless confront unusual circumstances in which its costs and/or revenues fall so far out of line with predictions that it cannot pay workers the benefits to which they are entitled. The possibility of a disjuncture between factual and technical "under-funding" is heightened by the use of an ambiguous term — "sufficient" — in the WSIA. This explains, for example, why stakeholders proposing very dissimilar funding regimes and ratios were able to make plausible arguments that acceptance of their position would place the WSIB in a position where it met the statutory standard of sufficiency.

Employer representatives seemed generally to assume that, despite the relative open-endedness of the sufficiency standard, only one funding ratio was technically (if not legally) permissible: 100%. This view was evidently espoused by the WSIB itself, when in 1984 it committed to a 30-year plan to eliminate the UFL. One can therefore understand the disappointment (and worse) of employers upon being reminded by the Auditor General in 2009 that — despite collecting premiums ostensibly high enough to retire the UFL — the WSIB had not only failed to do so but was so far from succeeding that it had to acknowledge defeat, abandon its plan and begin again.

Many employer organizations, their advisors and presumably their members concluded from this experience that stern measures were needed to eliminate the UFL. As expressed in various

submissions, some of those measures related to the governance of the WSIB: the WSIB's Board of Directors and senior executives ought to be experts with a background in insurance and financial services; the WSIB should be made to adopt and execute a realistic plan for elimination of the UFL; policy oversight of the WSIB ought to shift from the Ministry of Labour to the Ministry of Finance; and rate-setting and/or financial forecasting by the WSIB ought to be subject to scrutiny by the Financial Services Commission of Ontario.

Other measures were proposed to reduce the WSIB's costs and/or increase its revenues: make the WSIB's administration more efficient; change the rules regarding benefit entitlement, apply those rules less generously and/or crack down on fraud by benefit claimants; price the WSIB's "insurance product" more realistically and transparently; improve administration of the WSIB's investments and forecast less optimistically the returns those investments were likely to yield; allow employers to pay injured workers directly and/or require workers to co-pay WSIB premiums; allow employers to opt out of Schedule 1 and/or Schedule 2; and subject the WSIB to other forms of market discipline. And perhaps the sternest measure of all: until full funding is achieved — by all estimates in not less than 15 or 20 years — the WSIB should launch no new program initiatives (such as revision of rate groups) and commit to no new expenditures (such as restoring full indexation of benefits to partially disabled workers). Clearly, for employers "underfunding" is a symbolic rallying cry, as well as a term of technical and legal significance.

Not surprisingly, in light of the position taken by many leading employer organizations, workers' representatives viewed full funding not as a well-meant strategy to ensure the long-term viability of the WSIB, but as a rallying cry, a symbol, used by those who wished to curtail access to benefits, to rewrite the Meredith compromise or even to privatize the WSIB. (In fact, privatization

appears to have occurred in states like West Virginia where the public compensation system had apparently collapsed, taking down with it both public confidence and political support.)

However, workers' representatives opposed to full funding also put forward important analytical and practical, as well as political, arguments. Full funding, they argued, is inappropriate in a public compensation system for three reasons: unlike private insurers who must offer low rates to remain competitive, the WSIB can set its rates at whatever level is necessary to keep the system solvent; unlike private insurers, the WSIB will "never" be wound up; and as long as the aggregate payroll base to which premium rates are applied continues to grow — as it will, they believe — the WSIB will be able to meet its obligations. In addition, they reiterated an argument espoused both by Justice Meredith and by Professor Weiler, who reviewed the legislation in the early 1980s: premiums that would accumulate in the WSIB's insurance fund under a full funding policy would likely be invested to better effect by employers themselves.

When asked what approach would be more appropriate than full funding, workers' representatives generally favoured the "steady-state" funding model used by the Canada Pension Plan (CPP) and approved for that purpose by the federal Superintendent of Financial Institutions. Steady-state funding has several distinguishing features: it employs the "open group" rather than the "closed group" method of accounting used by private insurers; instead of full funding, the CPP aims to maintain a 5.5:1 ratio of assets to expenditures and a 25% ratio of assets to liabilities; and it maintains funding discipline by ensuring an independent review of its solvency every three years. In support of their position, workers' representatives also cited the WSIB's long experience of carrying a UFL; its estimate that if the present funding ratio is maintained it would be able to operate for the next 25 years; and its claim that, even if its revenues ceased

tomorrow, its reserves would suffice to fund benefits for the next 2.75 years.

The case for the steady-state approach to funding is an interesting one, and deserves the close attention I have given it. However, for reasons set out in Chapter 3, I have concluded it would not be an appropriate approach to funding the WSIB. On the other hand, I am equally unable to accept the employer argument that “sufficient” funding is necessarily synonymous with full funding. Chief Justice Meredith, as author of the original statute, made clear in his final report to the legislature that this is not what he intended; nor would the legislature have acquiesced over almost a century in less-than-full funding if full funding was what the statute required. Furthermore, when it enacted Bill 135 in 2010, the legislature would not have failed to replace “sufficient” with “full” funding (the standard adopted in most other provinces as a matter of law or policy) if it had changed its views about the funding approach originally adopted in 1914.

2.6 Sufficient funding

“Sufficient,” then, is the standard. But what does sufficient mean? In the words of the Auditor General, it means that the WSIB must be able “to meet its commitments to provide workers with the benefits to which they are entitled.” I asked presenters at the public hearings if they could describe circumstances in which the WSIB might find itself unable to meet its commitments. Unfortunately, neither proponents nor opponents of full funding offered much assistance. I therefore reframed the question: how would one identify a “tipping point” — a crisis in which the WSIB could not within a reasonable time frame and by reasonable measures generate “sufficient” funds to pay workers’ benefits?

A plausible combination of developments that might bring about such a crisis include a sudden, significant loss of investment earnings, an

unforeseen sharp spike in occupational disease claims or in general or medical inflation, an unexpected need to pay significant new benefits mandated by legislation, a precipitous fall in premium revenues due to a deep recession or depression, or some combination of these or similar events. In such circumstances, radical measures might be needed to prevent the WSIB from “tipping” into what would amount to bankruptcy — a radical increase in premium rates, a radical decrease in benefit costs and/or a radical revision of Meredith’s historic compromise of 1914. But there is a strong likelihood that radical measures would engender radical stakeholder resistance, making it impossible to adopt the necessary measures quickly or in full. As I explain in Chapter 3, a tipping scenario is well within the realm of possibility, as long as the WSIB is funded at less than 60%, but above 60% the risk of tipping becomes increasingly improbable. I therefore conclude that the first test of whether the WSIB’s funding is “sufficient” is whether it has passed the tipping point.

But “sufficiency” is not a binary, either/or concept. There are degrees of sufficiency: 61% funding is sufficient, but clearly less sufficient than 81% or 101%. And as I also explain in Chapter 3, these degrees of sufficiency signal different degrees of opportunity for the WSIB to introduce new benefits and harm-reduction strategies; to invest in new initiatives to enhance efficiency, stop revenue leakage and improve service delivery; and to implement new approaches to funding that would permit it to reduce premium rates and rely more heavily on its investment income.

2.7 Undue and unfair burdens: inter-generational and intersectoral equity as an obstacle to dealing with the UFL

In addition to being “sufficient,” the WSIB’s insurance fund has historically been required to meet a second, quite different, standard:

The Board has a duty to maintain the Insurance Fund so as not to burden unduly or unfairly any class of Schedule 1 employers in future years with payments under the insurance plan in respect of accidents in previous years [s. 96(3)].

This requirement is apparently aimed at achieving intergenerational equity: tomorrow's employers should not be required to pay for accidents originating in today's workplaces, nor should today's employers have to pay for yesterday's accidents. However, for a number of reasons, achieving intergenerational equity as defined in the statute at present is not quite as easy as it seems.

The first reason is that the present generation of employers has in fact inherited from its predecessors a significant burden of responsibility for "payments in respect of accidents in previous years," as has every generation of employers from the inception of workers' compensation in Ontario. That responsibility goes by the name of the UFL. If the present statute is read literally, depending on how much they are asked to contribute to retire the UFL, all classes of Schedule 1 employers might have grounds to claim that the WSIB is imposing an undue or unfair burden on them. On the other hand, if today's employers are not asked to pay claims generated in the past, the UFL can never be retired.

Worse yet, in my view, the revised version of section 96(3) proposed in Bill 135 will require the WSIB to

... maintain the insurance fund so as not to burden unduly or unfairly any class of Schedule 1 employers with payments, (a) in any year in respect of current benefits; or (b) in future years in respect of future benefits [new s. 96(5)].

On one interpretation, the new subsection appears to direct the WSIB to avoid charging employers even the full cost of current claims —

the claims they themselves have generated — if doing so would be undue or unfair. Given that these same employers will also have to pay a considerable sum to retire the UFL, it is easy to imagine that many, if not all, classes of employers might characterize the total annual premium rate as undue or unfair. Much depends, therefore, on how one defines undue or unfair, a subject I explore below.

The second reason why section 96(3) — in both its original and revised versions — may complicate any attempt to reduce the UFL is that associating either present or future benefit costs with "classes of employers" is inherently problematic. Any "class of employers" to be spared the cost of paying for benefits "in respect of accidents in previous years" or "in respect of current ... or ... future benefits" is likely to contain a significant proportion of firms that did not exist during one period or the other. Indeed, some 20,000 firms are added to and 20,000 removed from the WSIB's register each year out of a total of 240,000 firms registered at any one time. Consequently, while some firms survive for decades, the actual membership of any "class" is ever-changing; at no point can one say with certainty whether the present cohort is inflicting or suffering the results of intergenerational inequity (or both).

Moreover, the "classes" themselves are redefined from time to time. Originally, the WSIA identified 44 industry classes; now there are 9. There are currently 154 "classes of employers" or rate groups, but that number has fluctuated greatly over the years. Each change in the configuration of a group makes it more difficult to determine whether intergenerational equity is being respected or violated. Finally, the size and affluence of particular "classes of industries" and "classes of employers" has changed dramatically over time. Employment in mining and manufacturing, for example, has shrunk significantly over the past 40 years in relative if not absolute terms. Thus, unless they can be shifted elsewhere, significant

benefit costs generated by “classes” that in their heyday contained many more workers must now be borne by those same classes (or some approximation of them) despite their much-reduced capacity to pay.

A third difficulty with section 96(3): to move past the tipping point and reach the first, critical stage of sufficiency described above, the WSIB must inevitably charge premium rates that generate revenues in excess of what is required to meet the cost of current claims — an inter-generational transfer of “burdens.” However, it must avoid any transfer that is undue or unfair. But how is the WSIB to know what qualifies as undue and what might be characterized as unfair? The words are vague and open-ended; the statute contains no definitions; section 96(3) has never been judicially interpreted; and the WSIB itself has adopted no benchmarks of “unfairness” or “undue-ness.” Nonetheless, they must mean something. I propose the following working definitions: “undue” seems to apply to the absolute level of the premium rate burden borne by any given class of employers, while “unfair” apparently requires that the burden assigned to any one class be measured against that borne by others or some other benchmark.

The Conference Board of Canada, at my request, provided an analysis of the factors that might generate an undue burden or (in their words) “a negative economic impact” on employers in a given rate group or industry class (available online at www.wsibfundingreview.ca/finalreport.php). These factors included: whether employers were voluntarily enrolled in the WSIB system or covered by compulsion of statute; whether they could easily leave Ontario for another jurisdiction; whether the WSIB’s premium rates for such firms were significantly higher than rates for similar firms in other jurisdictions; whether their revenues were derived from public or private sources; and whether WSIB premiums represented a significant proportion of their costs and profits. Applying these factors on a trial basis

to a number of large, high-premium rate groups and industry classes, the Conference Board found that, in general, the rates currently paid were not undue in the sense specified: they did not generate negative economic impacts.

However, the Conference Board also identified several existing rate groups whose premiums were arguably “undue” as the term was defined in its study. What to do about these rate groups poses a serious problem. Assuming that public policy has identified the right level of benefits to be provided to injured workers, that the WSIB is operating efficiently and in accordance with its statutory mandate, and that actuarial determination of rates for all rate groups is technically sound — assumptions that are likely to be challenged — the options for dealing with undue premium rates are limited:

- *Allow firms facing an undue premium burden to deal with the negative economic consequences as best they can.* This might involve improving their safety record; achieving offsetting cost reductions in their operations that will allow them to pay the rates assessed and maintain profitability; moving operations to another jurisdiction where workers’ compensation premiums are cheaper; or suspending operations altogether. This approach is most consistent with good business practice and sound market-based economic policies.
- *Require firms to pay the undue premium rates and resolve their problems outside the WSIB system.* Governments concerned that undue premium rates might cause firms to shut down or move, with consequent losses in jobs and tax revenues, might decide to subsidize the operations of such firms by providing infrastructure to lower their costs of doing business, some form of tax relief to facilitate their conversion to new technologies or entry into new markets, or a direct loan or subsidy from provincial taxpayers. These approaches would allow the WSIB system to function in

accordance with insurance principles and shift the task of balancing insurance principles against broader economic policy considerations from the WSIB to some other forum.

- *Cross-subsidize firms facing an undue premium burden by spreading some part of that burden over firms in other rate groups that can better afford to pay.* This approach is inconsistent with insurance principles, and raises the possibility of a moral hazard insofar as firms benefiting from cross-subsidization will be less inclined to take the necessary action to reduce accidents in order to reduce their premium rates. It would also mean that the WSIB would in effect be administering industrial policy as well as social policy, rather than adhering to the pure insurance model favoured by employers.

Of these three options, the third — cross-subsidization within the WSIB system — strikes me as most problematic from the perspective of maintaining the integrity of the rate-setting process and safeguarding the financial viability of the system. However, it is possible that, under a different definition of undue, other approaches might be developed that do not present policy makers with such stark choices.

Nonetheless, the Conference Board study demonstrates at least three things: first, determination of what is “undue” is (in the words of its authors) “open to interpretation” and “virtually impossible to calculate;” second, to replicate the Conference Board study at regular intervals and across all of Schedule 1 to identify rate groups paying “undue” premiums, the WSIB would have to deploy a considerable cadre of labour market economists; and third, unless it did so, claims of undue burdens are likely to be dealt with entirely on the “squeaky wheel” principle. It would be more sensible, in my view, to expunge the “undue” test from the statute.

Determining whether one class of employers is being asked to bear a burden that is unfair

relative to other classes — intersectoral rather than intergenerational equity — is equally problematic. The burden in question relates to “payments ... in respect of accidents in previous years” [s. 96(3)]. How should the WSIB quantify the burden so that fair comparisons can be made? Should it consider the relative size of the two groups when the accidents occurred or their present size? Should it take into account the fact that one class complaining of “unfairness” has improved its accident record relative to the comparator class or vice versa? Should it select as a comparator or benchmark “classes” of employers in other provinces? And, if so, how will it ensure that it is comparing like with like, fully accounting for differences in economic conditions, work products and practices, classification systems and board policies in those provinces? Like “undue,” “unfair” is such a vague standard in the present context and the difficulties involved in giving it some precision are so great that, in my view, it ought to be abandoned altogether.

Finally, apart from the difficulties involved in defining the terms undue and unfair, and other technical issues, the greatest obstacle to implementing section 96(3) or its proposed successor in Bill 135, is this: if any one class of employers can successfully object to paying a proposed premium rate on the grounds that it is either undue or unfair, how will the WSIB make up the resulting loss of revenue?

There are only three answers to this question: first, the revenue loss might be made good by the government, whose failure to enforce section 96(3) has resulted in the present difficulty (this is extremely unlikely); second, the loss might be — has in fact historically been — treated as part of the UFL and sustained indefinitely (this is unwise, for reasons canvassed above); or third, the loss might be shifted to all Schedule 1 employers (this strategy is implicit in any plan to retire the UFL but — for reasons that follow — is problematic under existing legislation).

At present, the WSIA provides:

If there is a deficiency in the amount of premiums in any class because of a failure of any of the employers in the class to pay an amount owing or by any other circumstance that, in the opinion of the Board, would unfairly burden the employers in that class, the deficiency shall be made up by a payment of additional premiums by the employers in all the classes [s. 99(1)].

In other words, the WSIB is given express power to shift costs from any one class to all Schedule 1 employers in only two situations: (1) if a “deficiency of ... premiums” arises from a “failure to pay” by employers in that class and (2) in “other circumstances” where, in the WSIB’s opinion, requiring payment from the class would be unfair. The first situation will be rare indeed. The second seems open-ended but, given the context, should likely be read to apply only in “circumstances” as rare as those contemplated in the failure-to-pay provision. If this interpretation is correct, section 99 presents the WSIB with a Catch-22. On the one hand, section 96(3) tries to safeguard classes of employers from undue or unfair costs associated with the retirement of the UFL; on the other, section 99(1)

makes overt cost-shifting virtually impossible. To phrase this point somewhat differently, section 96(3) seems to allow considerations of intersectoral equity to trump the need to provide sufficient funding, if necessary by redistributing “undue” or “unfair” burdens to all Schedule 1 employers in circumstances where that seems like an appropriate strategy. That said, it is almost inconceivable that the WSIB does not engage in intersectoral cost-shifting by various means other than invoking the language quoted above.

My broad conclusion is this: section 96(3) — in its present form, as amended by Bill 135 and as interpreted in conjunction with section 99 — is a potential obstacle to dealing with the UFL. In Chapter 4, where I propose a new approach to rate setting, I therefore make a series of recommendations: to repeal the “undue” and “unfair” limitations on the WSIB’s ability to set premium rates; to require that all new claims costs be fully funded so that cohorts of employers assume collective responsibility for the liabilities they generate; and to ensure that the WSIB has discretion to allocate the costs of the UFL as it deems appropriate. In Chapter 5, I suggest how that discretion should be exercised and how the costs of the UFL should be allocated.

CHAPTER 3

A NEW FUNDING STRATEGY FOR THE WSIB

3.1 Introduction

In this chapter, I propose a new funding strategy for the WSIB. This proposal was developed through an iterative process between the Funding Review staff and our research consultants who provided economic background data, modelled alternative funding strategies suggested by stakeholders or myself, and helped me to understand the funding experience of both the WSIB and its counterparts in other provinces.

In developing this proposal, my point of departure was that funding policies involve both ends (objectives) and means (technical arrangements). I discuss both in succeeding sections of this chapter, and then move to the specific details of a new funding strategy for the WSIB, whose adoption I recommend. I then review the possibilities of shifting certain costs now borne by Schedule 1 employers to government or to a broader employer population. The chapter concludes with an account of the alternative funding strategies that I considered but rejected.

3.2 What would a “good” funding policy look like?

3.2.1 The objectives of the WSIB’s funding policy

Funding policies should be driven by clear objectives. However, neither “avoiding the tipping point” nor “eliminating the UFL” is an objective in itself; each is a benchmark that can be used to measure the extent to which the

WSIB has the necessary resources to achieve certain objectives at a particular juncture in its development.

In my view, those objectives should be:

- to ensure that the WSIB can meet its obligations (a) to honour the entitlements of injured workers, to protect their health, safety and employability, and to so in a manner that is respectful of their rights and dignity; (b) to ensure that premium rates levied on employers are spent prudently and in accordance with sound administrative practice; and (c) to account to government and Ontarians for the faithful and financially responsible discharge of its statutory mandate;
- to eliminate any actual or perceived risk that the WSIB may become insolvent, and (a slight paraphrase of section 96) to ensure that the WSIB can meet its existing and future obligations to injured workers as they come due;
- to endow the WSIB with the necessary financial capacity to meet increased costs, whether attributable to legislation, to changes in its administration and programs, or to changed external circumstances;
- to provide the WSIB with the resources it needs to update its policies and operations, to manage transitions to new arrangements, and to take all necessary measures to ensure compliance with its statute, to stem revenue leakage and control costs, to operate more efficiently and to improve service delivery;

- to diminish the WSIB's reliance on premium rate revenue and increase its access to investment revenue;
- to reinstate the WSIB's reputation for sound financial management in order to dispel the present atmosphere of financial crisis, and to allay the strongly voiced concerns of the Auditor General, the leadership of the WSIB, many stakeholders and the authors of Bill 135.

However, it is not possible to rank-order these objectives according to their relative importance or their priority in time. On the contrary, they are all legitimate and must often be pursued simultaneously. By way of example, in restoring its reputation for sound financial management, the WSIB must not neglect its obligation to respect workers' rights and dignity. Or, to take another example, while deploying resources to fund necessary administrative and policy initiatives, the WSIB must not neglect its long-term obligation to enhance its investment income. By insisting that its funding policies be driven by its objectives, I mean to signal that the WSIB should always keep in mind that financial strategies are not an end in themselves but rather a means to an end.

3.2.2 Degrees of sufficiency

Achievement of any or all of its objectives depends on the WSIB having "sufficient" resources.

At its current level of funding — estimates vary from 50% to 55% — the WSIB clearly lacks "sufficient" resources. Indeed, it confronts a 5% risk of "tipping" as that term was defined in Chapter 2. In other words, in one year during the next 20, it may not be able to meet its obligations as they come due unless it takes radical and rapid steps to bring its revenues and expenses into line. This possibility cannot be shrugged off, especially since it assumes, not an unprecedented catastrophe, but simply the recurrence of one or more adverse events that the WSIB has actually

experienced during the past decade (see the Morneau Shepell study for further details).

However, as noted in Chapter 2, once the WSIB achieves a funding ratio in excess of 60%, the risk of tipping becomes minimal. But that does not mean it can simply abandon the project of improving its funding ratio over time. As long as moderate financial reverses might have the effect of reducing the WSIB's funding to or below 60%, each short-term fluctuation in its fortunes is likely to subject it to pressure to reduce expenditures or increase revenues. In response to such pressure, the Board may be tempted to adopt measures that would undermine stakeholders' confidence or impair its reputation for fairness. For example, it might decide to "tighten up" its policies, practices and procedures, adopt cheaper — but perhaps less effective or more coercive — programs to get workers back to work, ramp up premium rates, or take on riskier investments in the search for higher returns. These are the very consequences that, during the public hearings, workers' advocates associated with a full funding regime. By contrast, I associate them with funding policies that keep the WSIB within reach of the tipping point. In my view, having minimally "sufficient" funds is likely to tempt the WSIB to adopt policies and practices that are minimally acceptable to both workers and employers.

It is therefore important that the WSIB achieve a degree of funding sufficient to dispel the financial concerns that led to this review, and to restore stakeholder and public confidence in the WSIB system. Only then will the WSIB — and the government — feel free to adopt and execute fair and sensible policies. While it is neither necessary nor possible to define this "recovery zone" with precision, I will use the term to describe the distance between 60% and 80%.

Beyond 80% funding, the WSIB would enter a "comfort zone." The comfort zone is, in some ways, the functional equivalent of full funding.

If the WSIB encounters financial difficulties while funded at 80% or more, it will have a margin of time within which to correct the situation. If it wishes to initiate new policies, it will be able to fund the transition costs with relative ease. If government wishes to increase benefits or provide additional services to injured workers, it can do so without fear of pushing the WSIB back towards the tipping point — although of course it must always be mindful of the costs it is imposing on employers.

However, the comfort zone — a funding ratio in excess of 80% — differs from full funding in several critical respects. Full funding assumes that the WSIB has an asset pool sufficient to generate significant investment revenues. In 2010, for example, the WSIB's investment portfolio will likely have provided only about 12% of its projected revenues. By contrast, if the WSIB were fully funded, and if it achieved the same returns as other fully funded provincial systems, its investment income might well contribute as much as 30% or 35% of its annual revenues. Of course, increased reliance on investments involves an element of risk: returns in any given year may fall rather than rise — as they did in 2008 and again in 2011. But experience teaches that, over a period of years, investment gains are very likely to outpace losses — a conclusion shared by the CPP, workplace pension plans, union benefit plans, and other institutional and individual investors.

The pursuit of 100% funding as a longer-term goal thus has several potential advantages. It provides the WSIB with a sound rationale for continuing to charge higher average premium rates than most provinces until it reaches the level of 100% funding (or more) that they enjoy; it enables the WSIB to “reward” employers by reducing premium rates to levels comparable to those in other provinces once 100% funding is within reach; it insulates the WSIB system against a potential long-term decline in premium revenues resulting from the possible (though

unlikely) long-term shrinkage of the Schedule 1 workforce and/or payroll base; and — perhaps most importantly — it enables the WSIB to offer both decent benefits and useful services for workers, and affordable rates for employers. If it were able to achieve all of these objectives, and to do so in a manner that is perceived as efficient and purposeful, the WSIB would almost certainly enjoy a higher level of confidence from government and the Auditor General, and encounter less virulent criticism from the public and the stakeholder communities it serves — factors which, in my view, would conduce to worker-friendly policies rather than the contrary.

In section 3.3 below, I will propose a funding strategy designed to shift the WSIB from its present location in the tipping zone into the recovery zone in 5 to 7 years; about 7 years later, it would enter the comfort zone; and by the end of 20 years — if other aspects of the strategy are adhered to and barring a general economic catastrophe — it should be fully funded. However, as I have noted above, it is essential that progress towards full funding proceed hand-in-hand with the pursuit of other objectives, including protection of the legitimate interests of injured workers and employers, and support for the WSIB's capacity for institutional innovation.

3.2.3 The technical characteristics of a good funding policy

Funding policies must not only be driven by clear objectives, they should possess a number of technical characteristics, listed below. Attention to these technical characteristics will enhance the success of the funding policy, as I hope to demonstrate in section 3.3 below.

Realism, prudence and comprehensiveness

A funding policy should be constructed on a foundation of realism, not wishful thinking or best-case scenarios that expose the WSIB to a significant risk of not meeting its funding objectives. While it should not be unduly conservative,

it should certainly be comprehensive and take into account all factors that may affect either revenues or expenditures. The policy outlined in the next section proceeds on this basis.

Discipline and consistency

The WSIB should pursue a disciplined, consistent approach to any funding policy it adopts. To the greatest extent possible, the policy itself should contain self-corrective measures, so that if the assumptions underlying the policy turn out to be inaccurate, compensatory measures are in place, ready to be invoked. Such a system is proposed below. In addition, institutional safeguards should be established that will insulate the WSIB, as far as possible, from pressures by government and/or stakeholders to depart from its funding policy in order to achieve particular short-term objectives. These safeguards are discussed in Chapter 4.

Adaptability and innovation

Social and economic circumstances are likely to change over the span of any long-term funding policy; so too are legislative requirements regarding benefits and other services provided by the WSIB; so too are the technologies, administrative approaches and staff it will require to implement new policies and practices. The funding policy must therefore not only meet the WSIB's current and anticipated financial requirements, it must also ensure that a modest margin of resources is available to fund transitions and support innovations.

Affordability and fairness

The WSIB system should not be burdened with costs that in fairness should be met elsewhere, nor should it exact higher premium rates from employers than it needs to achieve financial sufficiency and sustainability. That said, industry classes, rate groups and individual firms will claim — sometimes with justification, sometimes not — that they are being asked to assume a

share of the system burden that is “undue,” “unfair” or “unaffordable.” Other than confirming that its rate-setting methodologies are appropriate, the WSIB should — for reasons set out in Chapter 2 — resist such claims. In particular, it should only redistribute the financial burdens of the system for good reasons, publicly announced, and according to principles and procedures that have been articulated in advance. This issue is also dealt with in Chapters 4 to 6.

Premium rate stability and predictability

Once a funding policy is adopted and an appropriate initial level of average premium rates is implemented, subsequent rate changes should be avoided if possible, moderate if necessary, triggered by the achievement of positive or negative results of a specified magnitude rather than in response to lobbying or political pressures, and undertaken only in accordance with principles that are set out in the policy itself. Rate setting is dealt with in greater detail in Chapter 4.

Transparency and accountability

To preserve its autonomy to devise and implement what it deems to be the “right” funding policy, the WSIB must gain the trust of stakeholders, the Auditor General and the government. Doing so will depend in part on the quality of the technical analysis and professional advice provided by the WSIB's Chief Actuary and its new Actuarial Advisory Committee. It will depend as well on the extent to which the WSIB is willing and able to give a credible account of its funding policy to all interested parties, and to regularly listen to and learn from any sensible criticisms it receives. And it will depend finally on the willingness and ability of the WSIB's management and Board of Directors to engage in self-scrutiny and to take corrective action when necessary. Suggestions for improving the technical quality of analysis and advice, and for achieving greater transparency and accountability, are found below and in Chapter 4.

3.3 A new funding strategy for the WSIB: derived from realistic assumptions, driven by objectives and disciplined by a corridor approach

In section 3.3.1, I propose a new funding strategy for the WSIB. It is based on realistic assumptions and has been extensively tested by our consultants, Morneau Shepell, whose methodology and results are set out in their research report (see www.wsibfundingreview.ca/finalreport.php). Its fundamental premise is that the WSIB must proceed at the right pace — with all deliberate speed — and in the right general direction — towards full funding. Rather than setting arbitrary goals to be achieved at artificial intervals, the proposed strategy offers an evidence-based prediction of what is likely to be possible; it assembles the components necessary to achieve the possible; it provides the WSIB with the means to detect emerging difficulties that may make the possible impossible; and it requires the WSIB to alter course in timely fashion to deal with such difficulties. As an added attractive feature, it also allows the WSIB to detect and respond to unexpectedly favourable circumstances that may allow the possible to be achieved sooner than anticipated. It is, in short, a highly disciplined strategy, rather than a rigid one, a methodology rather than a roadmap.

These are large claims. To assist readers in assessing them, I offer two working models — Models A and B — that illustrate what happens when the proposed methodology and disciplinary approach are applied to a given body of experience-based data in light of specified assumptions and defined practical decisions, such as what average premium rate should be used. It would also be possible to construct a Model C or D using, for example, different assumptions or a different average premium rate. As long as these models used a similar

methodology and imposed a similar discipline, they would sooner or later generate reliable and positive outcomes. As explained below, however, “sooner” has significant advantages over “later.”

3.3.1 Assumptions

Models A and B, depicted below, rest on assumptions that are, in certain respects, more conservative than those adopted by the WSIB.

- As of early 2011, the WSIB was using a discount rate of 7% to predict the current cost of its future liabilities. As explained in Chapter 2, participants in the technical consultation convened by the Funding Review agreed that this rate was excessively optimistic, a view that the WSIB apparently now shares. The discount rate used in both Model A and Model B has therefore been reduced to a more realistic 6%. (Recent developments suggest that an even lower discount rate may be more appropriate. Versions of Models A and B using a lower rate are found in Appendix D.)
- The WSIB is engaged in extensive efforts to improve its efficiency, and to adjust its policies and procedures, in order to reduce claims costs. I am in no position to evaluate these efforts. However, similar efforts in the past have not always yielded the predicted savings. I have therefore not assumed for modelling purposes that the anticipated savings will be achieved. On the other hand, if they are achieved, this will allow the WSIB to move into the recovery zone sooner than projected and, at higher levels of funding, will give it greater latitude to address its important objectives.
- The WSIB and its consultants currently price new claims costs at \$1.01 and \$1.20–\$1.25 respectively. In light of the fact that these costs have been consistently under-priced, our consultants have used a figure of \$1.28 (including \$.03 to reflect the future cost of full indexation for partially disabled workers).

- In Chapter 8, I recommend that the WSIA should be amended to provide for the full indexation of benefits for partially disabled workers at a cost of \$2.2 billion (including a partial adjustment of their base and full indexation going forward from 2013). Both Model A and Model B assume that these recommendations will be accepted and take their cost into account.

Given that I have adopted somewhat more conservative assumptions than those used by the WSIB, it is no surprise that my estimate of the UFL is considerably higher: \$16.7 billion (including indexation) or \$14.5 billion (excluding indexation), as opposed to the WSIB's \$12.4 billion. Conversely, my estimate of the WSIB's current funding ratio is lower: 47% (including indexation) or 50% (excluding indexation), as opposed to the WSIB's estimate of about 54%. Nonetheless, I believe that the funding strategy proposed below will produce gradual but relatively assured progress towards full funding of the WSIB over a period of 20 years, and that it will do so while leaving the WSIB the latitude it needs for innovation in both its administration and its programs.

However, I register three caveats. First, my proposal requires strict discipline in the execution of both the funding strategy and rate setting. If discipline is not maintained, the strategy is unlikely to succeed. Second, my proposal is based on the actuarial modelling of 1,000 very different scenarios per year over 20 years (see the Morneau Shepell report for details). However, if events occur outside that range — for example, if the payroll of Ontario's insured workforce shrinks rather than grows — the strategy will have to be revisited. And third, as noted, the proposal is based on realistic assumptions. If it can be shown as a matter of fact — not as a matter of wishful thinking — that things have turned out better than anticipated, the model can be revisited in light of actual events. This would have the effect of either moving the WSIB onto a sounder financial footing sooner than predicted (my preferred approach), allowing it to charge a somewhat

lower premium rate than proposed, or some combination of these two possibilities. Conversely, if the assumptions turn out to have been insufficiently conservative, it is conceivable — but unlikely — that average premium rates may have to be higher than proposed.

3.3.2 The corridor system

A technical “User's Guide to the Corridor System” has been prepared by Morneau Shepell, and is found in Appendix E. In this section, I illustrate its operation using two models.

Model A seeks to ensure that the WSIB's funding improves from its current level of about 50% to around 100% in year 20 passing through the zones or degrees of sufficiency outlined in section 3.2.2 above. This progress is represented by a line of boxes ascending through Model A.

However, these boxes are not simply points on an arbitrarily selected trajectory. Rather, they are the average results obtained through an extensive modelling process and identified as achievable goals, based on (a) realistic assumptions (outlined in section 3.3.1) and (b) the adoption by the WSIB of an average premium rate of \$2.52. The average premium rate in turn comprises two components:

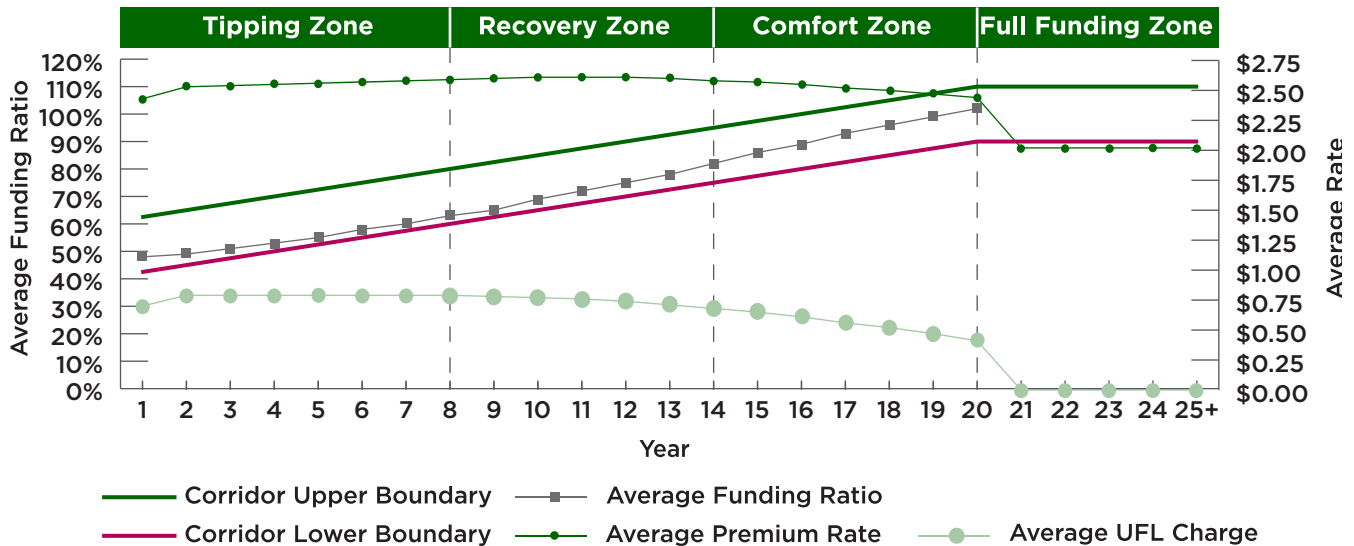
- a *base charge for current costs* — initially \$1.73 — to cover new claims, administration, legislated obligations and other expenses
- a *UFL charge* of \$.79.

While each of these two components may be adjusted in specified circumstances, it is the method of managing such adjustment that distinguishes the proposed new policy from many alternatives.

The *base charge for current costs* is designed to remain relatively stable during the 20-year life of the new funding policy, which will in turn contribute to the stability of the average premium rate. Because realistic assumptions have been used

Model A

Premium Rate: \$2.52 (includes improved indexation)



and because the significant additional cost of indexing the benefits of partially disabled workers has been accounted for, the careful projections of costs and revenues that underlie the decision to fix the base charge at \$1.73 should prove to be reliable. However, insurance costs what it costs. If the actual course of events turns out to be radically different from those foreseen in the testing process, the base charge will have to be adjusted and average premium rates will rise or fall accordingly. The success of this approach, of course, depends on the WSIB's commitment to properly price and fully fund new claims — a commitment (as noted in Chapter 2) that appears to have been lacking for an extended period prior to the commencement of this Review. In Chapter 4, I propose a new rate-setting mechanism that will help to ensure that the WSIB is able not only to make such a commitment but to live by it.

The proposed *UFL charge* proceeds from the same assumptions. The boxes marking the upward movement of the WSIB's funding ratio represent the midpoint results of a series of tests about how various revenue and expense scenarios might advance or retard the effort to pay down the UFL.

But, while these boxes represent a carefully considered best estimate based on actuarial analysis, in any given year results may deviate from those predicted. It is crucial to the success of the new funding policy that the WSIB neither over-react nor under-react to any such deviation by automatically adjusting the UFL charge upwards or downwards. Doing so might lead either to an artificial crisis of confidence in the plan, or to an unwarranted conclusion that its discipline needs to be tightened or relaxed. In order to avoid either eventuality, I am proposing that the WSIB adopt a 20% funding corridor (shown by parallel green and red lines in Models A and B). The corridor has been designed so that all results that fall within it will likely yield success for the funding strategy (albeit with varying degrees of probability). Accordingly, results that fall within the corridor will not trigger a change in the UFL charge.

However, if the funding ratio in any given year falls below the corridor, the WSIB would have to initiate a special study to determine its response in order to ensure that it remains on track to achieve something approximating full funding by year 20. Because the original UFL charge

will have been set initially at a level sufficiently high to absorb periodic fluctuations in revenues or expenses, no response may be needed. Or it may be necessary to postpone the reduction of the UFL charge — predicted in Model A to occur at about year 16 — until results are back within the corridor. Only in rare, virtually catastrophic, circumstances would the WSIB have to abandon its funding strategy and begin anew; and even then the corridor system would signal if and when matters had deteriorated to that point.

Conversely, if the funding ratio rises above the corridor in any given year, the WSIB might conceivably decide to decrease the UFL charge, depending on the level of funding it has then achieved. However, it should take such action only after carefully considering how far it has progressed towards its goal of increased funding. Thus, if funding is still in the recovery zone, there are strong reasons not to lower the UFL rate; if it is in the comfort zone, and especially if it is in the full funding zone, the case for decreasing the UFL charge obviously becomes stronger. The point of the corridor, then, is to ensure that the WSIB

makes informed, timely and tough — but nuanced — decisions about the UFL.

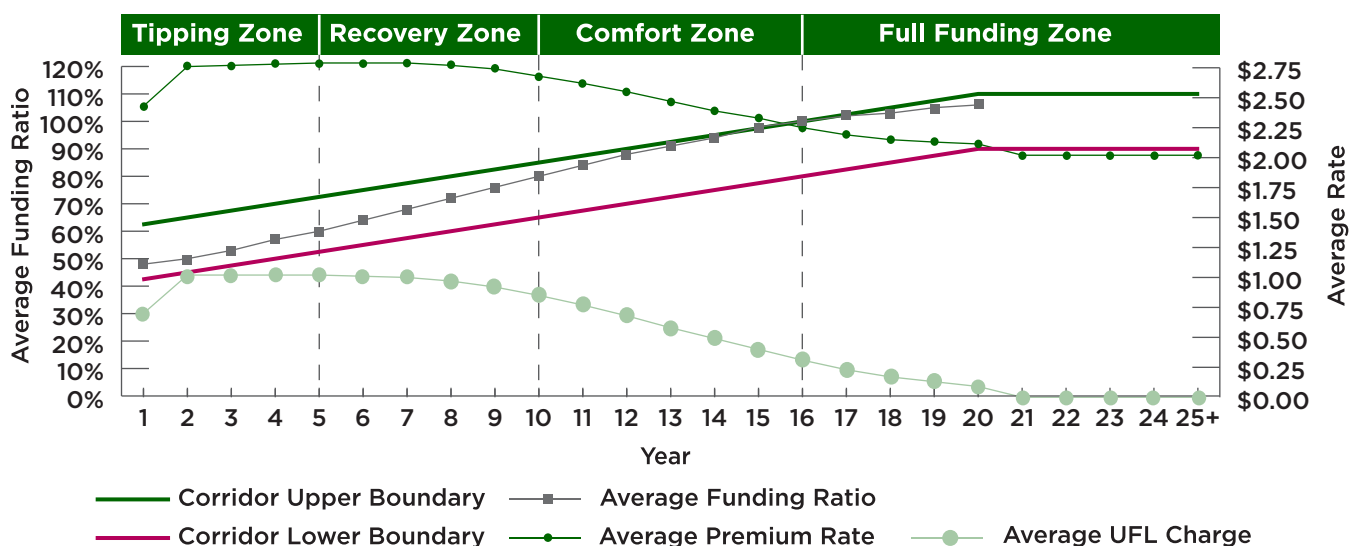
In Model A, the first example of how the new funding policy might operate, several important developments are displayed:

- The risk of tipping will become remote by year 7; the comfort zone should be reached by year 14; and the full funding zone is very likely to be reached in year 20.
- The average premium rate will rise in year 2 (the first year of the new system) to \$2.52, subject to adjustment if current costs turn out to be higher than anticipated; it will likely remain at that level until year 15; it should then begin to decline; and by year 20 — when the UFL is expected to be fully paid down — the premium rate will fall sharply to \$2.00 or less.
- The UFL component of the average premium rate should remain constant for about 14 years and then decline slowly, bringing the average premium rate down with it if circumstances warrant.

Model B, which uses an initial premium rate of \$2.76, is depicted next.

Model B

Premium Rate: \$2.76 (includes improved indexation)



Model B produces long-term results roughly comparable to those achieved using Model A, but because premium rates are initially higher, positive results are achieved sooner.

- The risk of tipping will have virtually disappeared by year 5; the comfort zone should be reached by year 10; and something approximating full funding should be achieved in year 16.
- The UFL component of the average premium rate — \$1.03 in this model — will remain constant for about 8 years; then, assuming the desired results have been achieved, the WSIB may decide to reduce it. This reduction would, in turn, trigger a commensurate decline in the average premium rate.

Each of these models has its attractions. Model A involves a relatively modest increase in the average premium rate that will likely remain stable over time and decline only towards the end of the 20-year period. However, Model A is somewhat riskier than Model B, as can be seen by the fact that the funding ratio hovers relatively close to the bottom of the corridor for about 15 years and is consequently more vulnerable to being forced below the corridor by unanticipated negative developments. If this were to happen, the corridor system would automatically trigger a new analysis and likely a course correction by the WSIB; however, in a worst-case scenario, the result could be a fairly sharp increase in premium rates or reduction in benefits. By contrast, Model B moves the WSIB past the tipping point to the recovery zone in 5 years rather than 7; it promptly shifts the funding ratio towards the top of the corridor rather than the bottom, thus reducing the likelihood that further rate increases will be needed; and it will likely deliver premium rate relief for employers at around the 8-year mark — twice as quickly as in Model A, where premium rates begin to decline at about year 16. The advantages of Model B are obvious, but its disadvantage is that it involves a higher initial premium rate than

Model A. Still, to put the Model B premium rate of \$2.76 in perspective, it is much lower than the \$3.00 rate applied by the WSIB less than 20 years ago.

In the recommendation that follows, I do not propose that the WSIB should adopt Model A or Model B or any other specific model. To reiterate, I have presented these models to show how the corridor system would work, not to prescribe a specific funding policy. I think they do show, however, that the strategy is robust and that, if rigorously adhered to, it can deliver results with a high degree of reliability.

Recommendation 3-1

The WSIB should adopt a new funding strategy incorporating the following key elements:

- The funding strategy should be based on realistic assumptions, including a discount rate based on the best available actuarial advice.
- It should aim to move the WSIB as quickly as feasible beyond the tipping point of 60% funding.
- It should put the WSIB on course to achieve 90% to 110% funding within 20 years.
- Premium rates should comprise (a) a variable “basic charge” that includes provision for new claims costs that are properly priced and fully funded on an annual basis and (b) a fixed “UFL component” that will change only in exceptional circumstances defined in the strategy.
- It should include a corridor system that will signal the need to re-price the UFL component in timely fashion.

- It should identify zones of sufficiency, so that the WSIB will be able to keep in focus not only its financial situation, but also its responsibility to achieve its statutory objectives.
- It should include provision for the funding of full indexation for partially disabled workers as proposed in Chapter 8.

3.4 Should government share the WSIB's burdens?

At present, the WSIB is solely responsible for meeting the cost of benefits, activities and programs mandated by legislation and/or under the Memorandum of Understanding it must execute every five years with the Minister of Labour. The WSIB then sets — or should set — average premium rates each year at a level high enough to meet those costs, after making due allowance for its other expenses (including administrative costs and provision for future liabilities) and revenues (essentially, returns on its investments). In this section, I consider the consequences of government action or inaction that has sometimes made it impossible for the WSIB to set premium rates at the appropriate level.

I also consider the fairness of government imposing obligations on the WSIB — and consequently on Schedule 1 employers — to pay for services and programs that arguably should be funded in some other way. In general, my concern is this: at any given level of premium rates, “legislated obligations” drain off revenues that otherwise would be available to retire the UFL and/or pay current and future benefits to injured workers.

The WSIB is not only wholly self-sustaining; it has never — since its earliest years — received assistance from the government by way of either

loan or grant and, as a result of Bill 135, will be foreclosed from securing any such assistance in the future. Thus there is a certain logic in curtailing or eliminating the flow of funds from the WSIB to the government.

3.4.1 Government responsibility for the UFL

Is it fair that the entire burden of retiring the UFL should fall on Schedule 1 employers? If indeed government action and/or inaction were ultimately responsible for the growth of the UFL in various ways described in Chapter 2, it might be fair for Ontario's taxpayers to bear some of the cost of retiring it. However, no government is likely to accept this argument, first because of the cost implications, and second because doing so might compromise the position of the WSIB as an arm's-length public trust.

That said, a stronger case can be made for a one-time, earmarked contribution to the WSIB by government whenever it adds to the UFL by introducing new benefits mid-year, after premium rates have already been set and too late for the WSIB to recoup the newly imposed costs by adjusting the rates for that year. Two examples have already been described: the increase of occupational disease coverage, first for professional and then for volunteer firefighters, and the three *ad hoc* improvements in the indexation of benefits provided to partially disabled workers. In the larger scheme of things, these sums are relatively trivial, and if the WSIB's insurance fund were in surplus rather than in deficit, mention of them might seem gratuitous. However, there is a point to be made: governments should not on the one hand demand fiscal rectitude from the WSIB and on the other require it to spend money it does not have.

At very least, the government should commit to not putting the WSIB in such a position in the future.

Recommendation 3-2

The WSIA should be amended to provide that new benefits or entitlements whose costs are to be met out of premium rates will take effect in the budget year in which the WSIB can account for those costs in its rate-setting process. If the government wishes to initiate the change without waiting for the next budget year, it should either provide the WSIB with a bridging grant to cover costs in the interim, or instruct the WSIB to add any resulting in-year deficit to its unfunded liability. In the alternative, the Memorandum of Understanding executed between the Ministry of Labour and the WSIB should include an undertaking by the Ministry to adhere to such arrangements.

3.4.2 Reimbursement to OHIP for routine medical services

At present, the WSIB is required to reimburse the Ontario Health Insurance Plan (OHIP) for routine services provided to ill or injured workers by their own physician, walk-in clinics or other publicly funded facilities (about \$110 million). While it seems appropriate for the WSIB to pay for services for which it has specially contracted, the case for reimbursement for routine services is less clear. Some 30% of Ontario's workforce is not covered by the WSIB system. If these excluded workers suffer workplace injuries or illnesses requiring medical assistance, the cost of providing such assistance is met by our universal public health care system — that is, by Ontario's taxpayers. Taxpayers also pay for routine medical care provided to self-employed individuals and to those who fall ill or sustain injuries in home or recreational settings. And, under our no-fault automobile insurance scheme, insurers are not required to reimburse OHIP for the cost of medical care provided to accident victims. It is unclear to me why the tax-supported

OHIP system should not provide similar services to workers who are employed by Schedule 1 employers and who experience work-related injuries or illnesses. The fact that employers have paid once for medical services for their workers by way of a health-care levy, or payroll tax, makes this second payment even more difficult to justify.

3.4.3 Costs associated with accident prevention and safety promotion organizations and with enforcement of occupational health and safety legislation

At present, some \$227 million is paid annually by the WSIB to support the activities of several large safety promotion organizations; certain safety-related activities of the Ministry of Labour (MOL) including enforcement of occupational health and safety legislation. To the extent that these matters are related to the WSIB's mandate to promote healthy and safe workplaces, there is perhaps some logic in these arrangements. However, that mandate is being redefined as a result of Bill 160, which shifts primary responsibility for these matters to the Chief Prevention Officer, which will perform some or all of the functions now nominally assigned to the WSIB. Given these changed circumstances, it would be odd if the WSIB (and Schedule 1 employers) were required to continue to bear this financial responsibility.

Moreover, the existing arrangements are anomalous in two additional senses. First, the MOL activities in question are conducted for the benefit of all workers in the province (at least those under provincial jurisdiction), of whom only 60% are employed by Schedule 1 employers. Schedule 1 employers are therefore effectively subsidizing other employers through their premium rates. Second, the MOL's other activities are funded entirely from the consolidated revenue fund. The costs of the Ontario Labour

Relations Board, for example, are not borne by unionized employers, nor are the costs of enforcing employment standards borne out of a special fund generated through payroll taxes.

3.4.4 The cost of the Offices of the Employer Adviser and the Worker Adviser and the Workplace Safety and Insurance Appeals Tribunal

The Workplace Safety and Insurance Appeals Tribunal (WSIAT) is an independent adjudicative body. It reports through the MOL. However, its expenses are paid for out of premium rates collected by the WSIB. This arrangement is appropriate, since it preserves the autonomy of the WSIAT while acknowledging its important role in ensuring fairness within the system established under the WSIA.

The WSIB also contributes a total of about \$15 million per annum to meet the operating costs of two independent agencies — the Offices of the Worker Adviser and the Employer Adviser — that provide advice and advocacy services respectively to unorganized workers and to small employers. This is an important contribution to the even-handed functioning of the WSIB system; no services are rendered to interests or organizations that fall outside its scope; and it is therefore appropriate that their costs should be borne by a levy on Schedule 1 employers.

However, during the public hearings of the review, I was struck by the limited capacity of these two offices to undertake policy research and therefore to make their full potential contribution to the policy debate that I had initiated. Although the matter is beyond the scope of the Review (and is mentioned under the “advocacy” section of Chapter 9), additional funding to enable these two organizations to expand their policy research and advocacy functions would, I believe, be money well spent.

3.4.5 Reducing the WSIB’s legislated obligations

I acknowledge that funding OHIP represents a major challenge for the Government of Ontario, and that eliminating the WSIB’s contribution to that funding will make that challenge somewhat more difficult. I appreciate also that the Ministry of Labour, like all ministries, is confronting budget constraints, and that it will be reluctant to abandon an earmarked revenue source that at present supports some of its important activities. And finally, I recognize that the earmarked funding provided by the WSIB under its legislated obligations makes it easier for governments to maintain the programs in question. This last consideration in particular makes me hesitate before recommending that any legislated obligations be repealed, notwithstanding their anomalous nature and despite the fact that doing so would improve the WSIB’s financial prospects. I have therefore made a less far-reaching recommendation.

Recommendation 3-3

The government should review its present requirement that the WSIB reimburse the Ontario Health Insurance Plan for providing routine medical services to injured workers and the Ministry of Labour for the cost of safety education, accident prevention and workplace compliance delivered or supported by the Ministry. The preferred outcome of this review would be an arrangement that ensures that costs now borne by Schedule 1 employers are spread among all employers whose employees enjoy access to similar services or are covered by the same programs. If it is not feasible to spread the costs to non-Schedule 1 employers, the government should give consideration to relieving the WSIB of these legislated obligations and instead providing the Ministry of Labour and other recipients with full replacement funding from the consolidated revenue fund.

3.5 Should Schedule 2 employers contribute more to the funding of the WSIB?

This last recommendation concerning the spreading of costs now paid for by Schedule 1 employers raises a more general question: to what extent, if any, should Schedule 2 employers bear some of the WSIB's funding burden?

Because Schedule 2 employers are self-insured, they do not pay premium rates. However, if their workers are injured and receive benefits from the WSIB, Schedule 2 employers must reimburse the WSIB for the cost of those benefits. In addition, they must pay an administrative fee to cover the WSIB's overheads including, presumably, its legislated obligations. However, while Schedule 2 employers contribute considerable aggregate sums each year to the WSIB, it is unclear whether they are at present paying an excessive, insufficient or fair share of the WSIB's non-benefit costs. It should be possible to answer that question by making comparisons between, for example, school boards registered under Schedule 1 and those registered under Schedule 2. If Schedule 2 boards pay less than comparable Schedule 1 boards (as has been claimed), is the difference attributable to variations in claims experience? or to under-charging by the WSIB? Unfortunately, while there are many possible explanations for this apparent discrepancy, not enough is known about either the composition of the Schedule 2 workforce or the compensation costs it generates to enable me to determine which might be the right one.

Quite apart from whether Schedule 2 employers are bearing their fair share of the WSIB's benefit and non-benefit costs (or more or less), there is the further question of whether those employers have spread the burden equitably among themselves. Since an employer's liability to pay the WSIB anything at all is triggered by a

compensable accident, an employer with few or no accidents in a given year pays little or nothing towards the WSIB's administration and legislated responsibilities. By contrast, a Schedule 2 employer with a larger number of compensable claims must contribute more towards these fixed costs, likely at a level sufficient to compensate for the fact that other Schedule 2 employers are paying nothing that year.

One way to resolve both issues would be for all Schedule 2 employers to pay a small annual fee to cover their fair share of all of the WSIB's non-benefit costs, as well as reimbursing the WSIB for specific benefit costs paid to their injured workers. However, in the absence of full information I hesitate to make a recommendation to that effect.

Recommendation 3-4

The WSIB should satisfy itself that Schedule 2 employers — in the aggregate and as among themselves — are making an appropriate contribution to its non-benefit costs.

3.6 Alternative funding strategies considered and rejected

Three alternative funding strategies were advanced for my consideration during the hearings or in submissions filed subsequently:

- the *status quo* model reinforced by greater government control;
- the Canada Pension Plan (CPP) “steady-state” model;
- the segregation or “ring-fencing” of the UFL and/or its financing by means of annuitization or a bond issue.

3.6.1 The *status quo* plus greater control model

A significant number of employer submissions proposed that the UFL should be paid down in regular instalments over a fixed period of years — the very approach adopted by the WCB in 1984. Proponents of the *status quo* model ascribed the WSIB's failure to see its plan through to successful completion to incompetence or indiscipline. Consequently, many of them emphasized the need to alter the WSIB's governance structure, to subject it to more intrusive control by the Ministry of Finance (MOF) and/or to make it more accountable, especially to the employer community.

For reasons outlined in Chapter 2, I regard this diagnosis as incomplete, especially insofar as it fails to take into account the government's own contribution to the growth of the UFL. I therefore regard the prescription of greater control by the MOF as inappropriate.

A radical increase in government control of the WSIB is likely to be counter-productive: government micro-management of rate setting risks its politicization and jeopardizes the WSIB's status as an independent, arm's-length trust agency. It is likely to be ineffective: based on past performance, it is improbable that greater government oversight will produce a more disciplined funding strategy than the corridor system proposed above. And it is also likely to be distracting: undue attention to retiring the UFL may well lead to neglect of the WSIB's many other programmatic and administrative objectives.

For all of these reasons, I was unable to accept the approach of "more of the same plus more intrusive government control."

3.6.2 The CPP "steady-state" funding model

Briefs submitted by unions and organizations representing injured workers almost unanimously

endorsed the "steady-state" funding model used by the CPP and described in detail in Chapter 2. This formula has won the approval of the federal Office of the Superintendent of Financial Institutions and the CPP is regarded by experts as being viable in the long term, or at least more so than its counterparts in most other countries. On the other hand, while attractive, this model departs significantly from the funding approach of workers' compensation systems across Canada and around the world. I therefore subjected it to close scrutiny. What I found ultimately persuaded me not to recommend it for use by the WSIB.

Assuming that the CPP is properly funded in accordance with its own requirements, it will by conventional standards have a funding ratio of only 25% — a ratio that, if applied to the WSIB, carries with it a very high probability of tipping (100% likely within the next 15 years). How is it that the CPP is apparently secure at this level, while the WSIB would be in considerable danger? The answer is that the CPP confronts fewer and less varied contingencies than the WSIB, and therefore requires a much smaller margin of financial security. Here are some of the principal differences between the two schemes:

- The CPP risk is spread across the whole working population; the WSIB risk is spread across 60% of Ontario's workforce.
- Under the CPP, virtually the only variables are the date when an individual is predicted to reach pensionable age and his or her life expectancy; under the WSIA, variables include the sector and duration of employment, changes in accident rates and benefit levels, and many others.
- Under the CPP, any new benefits must be fully funded; as recent experience has shown, there is no such constraint on the introduction of new benefits under the WSIA.

- The CPP is effectively protected from political or governmental interference in its funding policy by the requirement of provincial unanimity for changes; the WSIB is susceptible to (and has experienced) overt and covert interference with its funding strategy and premium rate setting.
- CPP contributions last through an individual's working life, while WSIB premiums may be paid for only very brief periods before a worker is disabled; CPP benefits last only from retirement to death, while WSIB benefits may last from early in an individual's working life until death.
- CPP contributions are paid by the same person who ultimately benefits from them; under the WSIA, employers pay premiums and workers receive benefits. This discrepancy highlights an element of political risk in the WSIB system that is largely absent from the CPP.

These differences demonstrate that types and levels of risk addressed in the two systems are very different and explain why what would be an acceptable level of funding for one is not so for the other. But even assuming that the steady-state funding model could be adapted for use by the WSIB, I am concerned that a funding model that operates on short time lines would keep the WSIB under constant pressure, divert it from its mission of providing decent benefits and services to injured workers, and deny it the resources it needs to bring about the much-needed administrative reforms recommended elsewhere in this report.

For all of these reasons, then, I am unable to recommend adoption of the steady-state funding model.

3.6.3 Ring-fencing, annuitization and bond financing

Several submissions proposed in one way or another to “ring-fence” the UFL — a term introduced in the Eckler Ltd. *Concept Design Paper*

for the Funding of the Workplace Safety and Insurance Board, commissioned by the President of the WSIB. If “ring-fencing” is intended only to provide a means of accounting more accurately for the UFL, planning more carefully for its reduction and keeping the UFL in focus as an important issue, it may well be a useful concept.

However, the Eckler paper speaks somewhat ambiguously about establishing “a separate legal entity” to deal with the UFL as it sits in 2011 and a “new financial reporting entity” to administer the WSIB's finances from 2011 onward. While the report stresses that no change is contemplated in workers' existing statutory entitlements, it is at least conceivable that the proposed splitting off of legacy claims from current and future claims might have such a result. Presumably, if two different entities are to deal with these two types of claims, each would have to be separately funded. This would require that the WSIB divide its investments and/or investment income between the two; that future premium revenues be calculated and collected separately by each entity; and that past and future funding deficiencies be dealt with differently. But suppose, for example, that revenues earmarked for one entity fell short of predictions, while the other exceeded them. Would the “ring-fence” have gateways through which cross-subsidies would be permitted — or required — to pass between the two entities? If so, this would represent little change from present arrangements. If not, there is at least a chance that the “new WSIB” (as it is called in the Eckler paper) might have to struggle to meet its obligations while the “old WSIB” benefited from the commitment implied by the creation of “a new legal entity.” Or, to pose a second difficult question: suppose that (contrary to my recommendations) the WSIB decided to charge average premium rates lower than required to meet the financial requirements of both the “new” and “old” entities? Would the shortfall be distributed equally between them, or would one be preferred over the other, and if

so which? Or a third: how would the “old” and “new” WSIBs deal with workers whose medical or labour market status changes? Would they remain subject to whichever regime they happen to be covered by at the time, or would they be transferred to the “other” WSIB, along with the assets held to cover their future benefits?

In short, converting “ring-fencing” from an accounting or policy-making concept to an operational reality is likely to involve complicated and possibly counter-productive arrangements that could ultimately impair the WSIB’s ability to discharge its responsibilities. That is also the possible result — though surely not the intent — of two other proposals, one for annuitization of the UFL, the other for a bond issue whose proceeds would be used to pay off the UFL thus relieving employers of the interest burden it now generates.

The annuitization proposal also effectively “ring-fences” the UFL insofar as it contemplates that the WSIB will purchase annuities to cover some or all of its obligations as of a given date (say 2011). The annuity provider would then pay the injured worker whatever benefits he or she was entitled to and, presumably, accept the risk or enjoy the profit if such payments turn out to be higher or lower than the WSIB’s own estimates. However, significant problems arise from the fact that the WSIB system is dynamic. Its policies on entitlement to benefits, indexation and other matters change, with retroactive or prospective consequences for injured workers; and the extent of workers’ entitlements also change as their individual circumstances change. It is difficult to see how the WSIB could take advantage of a system of annuities, which typically yield a fixed rate of return, without at the same time abandoning many of its long-standing worker-friendly policies.

Even more significant problems arise from the realities of the annuities market. On the one hand, the Canadian market for annuities is said to be quite small — a minor fraction, by some estimates, of what the WSIB would require in order to annuitize a significant portion of the legacy claims that comprise the UFL. It therefore seems quite likely that, even if the WSIB decided to embark on a program of annuitization, it would be unable to do so. On the other hand, the cost of annuitization is quite large. The WSIB calculated the present value of its liabilities, as of 2010, at about \$27.2 billion and estimated its assets at about \$14.8 billion. Where would the WSIB find the funds to purchase annuities to cover legacy claims of about \$12.4 billion — or even some lower amount? If it sold its assets to raise the funds, it would derive no future investment income from them and would become totally reliant on premium revenue. Such an outcome would undermine an argument often made in favour of full funding — that it would enable the WSIB to reduce premium rates and replace the lost income with a growing return on its investments. In the absence of further and better information, I cannot recommend annuitization as a way of dealing with the UFL.

A third proposal — for the WSIB to issue bonds — also “ring-fences” the UFL. At present, the WSIB characterizes the UFL as a collective “loan” from employers that have been allowed to retain profits in their businesses rather than pay the full or true cost of their workplace insurance. It therefore notionally charges them “interest” on the UFL at a rate equivalent to the profits it estimates it would have earned from the investments it was unable to make because employers were charged lower premium rates than they should have been. In recent years, the rate of “interest” charged by the WSIB was 7%, despite the fact that financial institutions would have charged their customers half that rate, or less, to borrow funds.

Against this background, the proposal to allow the WSIB to issue bonds has a certain logic. If it must pay bondholders, say, a 3.5% return, the WSIB can then reinvest the capital in equities markets or elsewhere, where they will presumably earn 7% — the rate it now charges employers. But arbitrage of this kind is a risky business. In current market conditions, for example, a return of 7% (or even 3.5%) is by no means guaranteed — quite the contrary: negative returns are commonplace. In addition, the WSIB would have in effect to commit itself to paying its bondholders as a first priority even if it were hard pressed to meet its commitments to injured workers. And finally, it is not clear that the WSIB has the power at present to issue bonds, or if it has, that the market would accept them unless they were backed by a government guarantee of some kind. It is highly unlikely that the government would provide such a guarantee because doing so might impair its own credit rating and could conceivably jeopardize the WSIB's status as an arm's-length trust agency.

These three related proposals — especially the Eckler paper — made an important contribution to my thinking about the UFL and a funding strategy for the WSIB. Even when close examination revealed them to be impractical or unwise, the reflection they provoked often helped to shift my thinking towards other approaches that, in my view, were more promising. However, in addition to the specific concerns I have recorded with regard to each of them, all of them suffer from one significant omission: they fail to indicate to what extent implementation would assist or inhibit the WSIB in the pursuit of its multiple objectives. To conclude this chapter on a note I sounded at the beginning, eliminating the UFL is not an end in itself.

CHAPTER 4

PREMIUM RATE SETTING: PRINCIPLES AND PROCESSES

4.1 Rate setting as the Achilles heel of the funding strategy

In Chapter 2, I asked why the WSIB had to abandon its 1984 plan to achieve full funding by 2014. While many explanations have been proffered, one important factor was its failure or inability to set premium rates in accordance with the logic of its funding policy. Rate setting, in other words, is the Achilles heel of any funding strategy. No strategy, however well considered, will succeed if rate setting is not driven by the achievement of strategic objectives, executed to the highest professional standards, perceived as transparent and intelligible by the employers that pay the premium rates, sufficiently stable to allow them (and the WSIB) to plan their affairs; and conducted with integrity and determination.

In this chapter, I first review key issues in the rate-setting process and then propose a new approach to rate setting that should ensure its high quality and integrity.

4.2 Key issues in the premium rate-setting process

4.2.1 Funding sufficiency

In Chapter 3, I recommended that the WSIB adopt a new funding strategy. Because the strategy has been built with features that promise a high likelihood of success, and because it has been tested extensively in various configurations, I have confidence that if rigorously applied it will in due course move the WSIB past the

tipping point, through successively higher levels of sufficiency, and ultimately to within close proximity of full funding. But the strategy depends crucially on the WSIB adopting an appropriate premium rate (two were modelled in Chapter 3) and — subject to one caveat — maintaining that rate until the strategy has run its course 20 years hence. The caveat is this: each of the two components of the average premium rate may change under specified conditions. The basic charge — of which new claims costs are a major component — may have to be adjusted if actual developments deviate from the assumptions that were used to construct the scenarios on which the strategy is based. However, the UFL charge is somewhat less sensitive to change: as long as it produces a funding ratio somewhere within the prescribed corridor in any given year, it should remain the same; only if the funding ratio falls outside the corridor should the UFL charge be increased or decreased.

To put the matter succinctly: as long as the funding strategy drives rate setting, the strategy is very likely to succeed, but if rate setting is influenced by other considerations, there is a serious risk that the funding strategy will fail.

4.2.2 Sound technical analysis

Some circumstantial evidence suggests that average premium rates have not always been set in accordance with a well-designed funding strategy, but rather in response to what is perceived to be acceptable to one or more relevant audiences — stakeholders (especially employers), government, political actors or others.

For example, unless the WSIB enjoyed a healthy surplus (which it does not) one might expect that its funding strategy would require premium rates to be set high enough to fully cover new claims costs each year as they arise. Unfortunately, the WSIB's experience over the past decade has not conformed to this expectation. New claims costs and other current costs were not accurately priced; they were therefore not fully recovered through the setting of an appropriate average premium rate. What is worse, this situation was allowed to continue over a protracted period without being corrected, and the cumulative effect was that \$8.3 billion was added to the WSIB's UFL. There are various explanations for this unfortunate development: either the WSIB's actuarial capacities were not what they should have been, or oversight by the Board of Directors was deficient, or non-actuarial considerations influenced the setting of premium rates, or some combination of these circumstances.

As to actuarial capacity: several participants in the technical consultations organized by the Funding Review in January 2011 suggested that, indeed, the WSIB needed to reinforce its actuarial staff and analytical processes. The WSIB seems to have reached the same conclusion and has taken corrective measures, including the appointment of a Chief Statistician and the creation of an Actuarial Advisory Committee. As to shortcomings in oversight by the WSIB's Board, the facts speak for themselves. However, they do not answer the all-important question: why did the then-leadership of the WSIB not intervene to put a stop to this fairly obvious failing in its approach to rate setting?

This brings me to the third possible explanation for the WSIB's failure to properly price new claims costs: perhaps it felt that if it did so, it would have to charge higher premium rates than the market could bear. The "market" in this case is, of course, not a conventional market in which most disgruntled buyers can exercise

their exit option by shopping for cheaper workplace insurance elsewhere. Rather, it is a small-p political market in which influential participants voice their displeasure by denouncing the WSIB, advocating drastic action to reform or dismantle it, and lobbying government to intervene to keep premium rates "affordable." The efforts of injured workers' groups to improve benefit levels and make claims processing more worker-friendly can likewise be seen as interventions in the political "market" for workplace insurance. Their interventions, however, are designed to persuade the WSIB (and ultimately the government) to improve benefits and, implicitly, to charge whatever level of premium rates is necessary to pay for them.

Somewhat similar questions are raised by the WSIB's inability to accurately predict the outcome of measures it adopted to reduce or eliminate the UFL. True, any prediction can be confounded by unforeseeable events, such as the stock market crash of 2008. And true, even reasonable predictions may turn out to be over-optimistic: for example, for much of 2011, the WSIB continued to use a discount rate of 7% despite an emerging actuarial consensus that a rate of 6% — or lower — was more appropriate. On the other hand, predictions concerning the UFL may have gone awry because they were based, not on sound technical analysis, not on good professional judgment, but rather on the desire to announce an average premium rate that "market" participants would find acceptable.

Whatever the true explanation for the WSIB's past difficulties with premium rate setting, what is important is that it does a better job going forward. Doing a better job involves three distinct changes. First, the WSIB should enhance its actuarial capacity, which it has already begun to do. Second, the WSIB must commit itself to setting rates in accordance with its funding policy and based on the best available technical analysis. And third, if the WSIB takes steps to enhance the independence and authority of the

Chief Actuary, this will signal its commitment to a more professional approach to rate setting. These measures will all help to insulate the WSIB from pressures or temptations to set rates on any other basis.

I am optimistic that the employer community will support such an approach. After all, most briefs I received from employer groups stressed that the WSIB must operate on sound business principles. As far as I am aware, such principles do not include wishful thinking about discount rates, persistent mis-pricing of new claims costs or fixing premium rates with a view to placating stakeholders rather than generating the necessary revenues. Nor can I see any reason why workers should object to employers paying premium rates that are calculated honestly and accurately on the basis of what is needed to ensure that the WSIB meets its obligations as they come due. And there should be public and political support for a more professional approach to rate setting at the WSIB. After all, the Canada Pension Plan — like the WSIB, a public agency with rate-setting functions — has been applauded for de-politicizing its decision-making processes.

Recommendation 4-1

- 4-1.1** The WSIB should further strengthen its actuarial capacity and its capacity to conduct relevant economic analysis.
- 4-1.2** The Chief Actuary should be appointed by the Board of Directors (BoD) from a list of nominees approved by the Actuarial Advisory Committee, and should report directly to the BoD.
- 4-1.3** The Chief Actuary should have a fixed (but renewable) tenure, subject to removal by resolution of the BoD only on grounds of misconduct or incompetence.

4.2.3 Transparency and intelligibility

For several reasons, it is important that the rate-setting process be both transparent and intelligible to informed observers. First, if the WSIB knows that rate setting will be subject to scrutiny, it will be more likely to set rates on the basis of full information, high-quality analysis and well-developed reasons. Second, if individual employers know that the rate-setting process has been subject to critical review by experts representing their interests, they may be less inclined to question those rates or to impugn the WSIB's competence or fairness. Third, if worker-nominated experts are better informed about the assumptions underlying rate setting and the financial affairs of the WSIB more generally, workers' organizations will be in a better position to criticize the spending priorities of the WSIB and propose constructive alternatives, but also they may be more inclined to accept outcomes that they might otherwise question. And finally, if government knows that the rate-setting exercise has been conducted expertly and transparently, it may hesitate before intervening to substitute its own view of what the average premium rate should be.

Recommendation 4-2

- 4-2.1** The WSIB should convene an annual technical briefing to which it invites actuarial and other experts nominated by stakeholders and by the WSIB itself to consider (a) the progress it has made in advancing its funding policy, including any amendments or exceptional measures that may be necessary, (b) how the proposed premium rates do or do not conform to that policy, and (c) the methodologies and assumptions it has used to set rates for the following year.

4-2.2 Materials should be circulated to participants in advance, preferably in a standard format that will enable time-sequence analysis; participants should be allowed to ask questions and offer comments; and the WSIB should disclose in timely fashion as much information and analysis as possible.

However, transparency has its limits. What might be intelligible to an actuary or other expert might make no sense to individual employers or workers. Technical disclosure will therefore not entirely dispel existing suspicions and resentments, especially among employers that will actually pay, not the average premium rate discussed at the consultation, but a rate adjusted to reflect group and/or individual experience. Moreover, while experts may understand how and why the WSIB has chosen to set the average premium rate at a particular level, they may remain sceptical about the validity of the assumptions that are being relied on. They may therefore legitimately want to see more detail than the WSIB has provided. On the other hand, the WSIB does not have unlimited capacity to respond to information requests from stakeholder experts. At some point, the cost of providing further information may exceed the benefit of doing so. If these and other potential problems are addressed in good faith — perhaps by a tripartite steering committee — I am convinced that the institution of an annual technical briefing, with special emphasis on rate setting, will be of great benefit to all concerned.

4.2.4 Stability

It is important for both the WSIB and employers that premium rates be relatively stable. For the former, stable rates set at an appropriate level will go some distance towards ensuring that the WSIB enjoys a predictable revenue flow, and that it can balance its liabilities and assets over the

long term. For the latter, stable rates will permit firms to enter into long-term contracts with reasonable assurance that their labour costs will not be driven unexpectedly upwards by changes in WSIB premium rates. And, since rate setting often generates tensions between employers and the WSIB, a process that conduces to stable rates may serve to mitigate tension.

That said, stable premium rates are not the same as rates chiselled in stone. It is unrealistic to expect that rates will never change from one year to the next. The funding strategy proposed in Chapter 3 includes a built-in stabilizing mechanism. It allows for “normal” fluctuations in the average premium rate in response to changing current costs (especially new claims costs) while holding constant the UFL charge, unless — an unlikely occurrence — the funding ratio rises above or falls below the corridor. Of course, the average premium rate set at the Schedule 1 level has ultimately to be translated into rates paid at the rate group level, where they may well be more volatile. In Chapter 5, I propose that the present 154 rate groups should be replaced by a much smaller number of much larger sectoral groups. Implementation of this recommendation should also contribute to rate stability, since shifting rate setting to a larger group will mute or modify the fluctuations triggered by changes in accident frequency, lost-time injuries, benefit costs or other metrics used to fix rates at the rate group level.

4.2.5 Affordability and fairness

Affordability was a recurring theme of submissions, especially from employer groups. Many urged that in setting premium rates, the WSIB should have regard to their impact on Ontario’s competitive position, the profitability of particular sectors and the risk of putting employers out of business — all factors said to deserve special attention in the context of the current economic situation. Several workers’ groups echoed this position, arguing that the WSIB should avoid

increasing rates to pay down the UFL so that employers could retain their funds and invest them in productive activities. I am unable to accept these arguments for several reasons.

First, and most importantly, the WSIB does not control benefit and other entitlements, which are fixed by the WSIA. True, the WSIB might “tighten the screws” somewhat in order to diminish pay-outs or deny benefits paid to individual workers. This would bring costs down somewhat, and therefore make premium rates a little more affordable; but the WSIB cannot and should not make premium rates affordable by subverting the intention of the legislature or denying injured workers their legal rights. Second, “affordability” arguments lead into a *cul de sac*: premium rates that are unaffordable for any employer or rate group are displaced onto other employers and rate groups; premium rates that are unaffordable for employers generally are displaced onto the UFL. Third, as I explained in Chapter 2, drawing on the insights of a study prepared by the Conference Board of Canada, the impact of premium rates on individual firms and classes of firms varies enormously, depending on the impact of labour costs on their overall cost of operation and of premium rates on labour costs, on their exposure to foreign competition and their capacity to relocate out of Ontario to jurisdictions where workplace insurance is cheaper, on their ability to pass premium costs on to their customers, and on many other factors — none of which the WSIB is either mandated or equipped to evaluate. And finally, many economists believe that the rising costs of WSIB coverage in the end lead employers to decrease real wages. If this is true, workers — not employers — are the ultimate victims of “unaffordable” premium rates.

In another version of the affordability argument, objections to the high cost of premium rates are sometimes couched in statutory language that forbids the WSIB to charge “any class of employers” premium rates that “unfairly” or “unduly”

burden them (s. 96). However, for reasons developed at length in Chapter 2, as well as those deployed above, the WSIB should not respond sympathetically to such objections.

Recommendation 4-3

- 4-3.1** The WSIA should be amended by deleting the present section 96(3), which requires the WSIB not to charge premium rates that “unduly” or “unfairly” burden “any class of employers.”
- 4-3.2** Language in Bill 135 to replace section 96(3) should not be proclaimed in force.
- 4-3.3** The WSIB should set premium rates on the basis of the actual costs of providing insurance coverage to employers, not on the basis of whether its rates are “affordable.”

The corollary of these recommendations is that criticism of the cost of workplace insurance should be directed to the legislature, not to the WSIB. Insurance costs what it costs. If employers do not want to pay what it costs, they should address their concerns not to the WSIB but to the Ontario legislature, the body that designed the insurance “product” they are required to buy. Since they can hardly argue that they are entitled to receive that “product” — coverage sufficient to pay the benefits provided under the WSIA — for less than it costs, they are likely to propose that the legislature should adopt a less expensive benefit package. Of course, if they do so, they will quite properly have to debate the point with workers’ groups that maintain with equal vigour that WSIB benefits should be higher, not lower. The political marketplace — to return to a metaphor I used earlier — should be conducted at Queen’s Park, not on Front Street.

Finally, despite my reservations about singling out individual industries or firms for special treatment, I do accept that in highly unusual circumstances, the government may legitimately respond to requests for relief against high premium rates. In the next and final section of this chapter, I propose a transparent and orderly approach to such exceptional government intervention in the rate-setting process.

4.3 Ensuring the integrity of the rate-setting process

It is widely acknowledged that, despite the WSIB's clear statutory authority to set premium rates, governments can and do intervene in the rate-setting process. In a few cases, they have publicly directed the WSIB to freeze or lower rates. This seems odd, given that the WSIA empowers government to direct that the WSIB raise rates to ensure the sufficiency of the insurance fund, not lower them to serve general financial and political objectives, but it has occasionally happened. More frequently — so it is widely believed — governments have used informal persuasion and clandestine pressures to hold rates down. If this is true, it puts in question the integrity of the WSIB's rate-setting process; if not, the WSIB and the government should take steps to clear the air by establishing a more transparent relationship, as I recommend below.

Government's interest in the level of premium rates is understandable. It may favour lower premium rates in order to provide symbolic and tangible encouragement to potential investors, or to make good on promises made to particular constituencies of business supporters. It may want to suppress rates in order to enlist the WSIB in an initiative to reduce expenditures across the broader public sector, or to force it to cut administrative costs and deliver its programs more efficiently. Or it may believe

that the province faces a serious fiscal or economic crisis to which the proper response is a one-off reduction of all forms of "taxation" — including premium rates. However, government seldom seeks premium rate reductions without being importuned to do so by influential stakeholders, who have also been known to make vigorous arguments in favour of lower rates directly to the WSIB.

More to the point, lower rates have downstream consequences. Premium rates account for some 80% of the WSIB's revenue. If the flow of rates — and therefore overall revenue — is reduced, the WSIB must respond in some way. It may decide to "tighten up" on compensation awards to injured workers or to reduce administrative costs, with the attendant risk of adverse consequences mentioned earlier. It may decide to maintain its current expenditures and run a deficit — in effect, to increase the UFL. Or it may decide to adjust its actuarial assumptions or display its financial results in such a fashion as to create the impression that it is collecting sufficient funds to meet its obligations when it is not. Even when it does not technically transgress the law or professional accounting or actuarial standards, such actions by the WSIB are inappropriate and, ultimately, counter-productive. They are, however, the fairly predictable consequence of government intervention and stakeholder pressure to suppress rates.

Clearly, then, it is important to restore the integrity of the rate-setting process. This must involve a change in behaviour by both the WSIB's Board of Directors (BoD) and the government. For its part, the BoD must signal its commitment to setting premium rates in response to its overall funding strategy and in accordance with the best available professional advice.

Recommendation 4-4

- 4-4.1** The WSIB's Board of Directors (BoD) should adopt and publish a formal funding policy outlining the key elements of its funding strategy and the principles that are to govern premium rate setting. It should also adopt and publish an annual supplement to its funding policy, with special emphasis on factors affecting rate setting for the coming year.
- 4-4.2** The BoD should issue standing instructions to the Chief Actuary to submit an annual recommendation for the average premium rate in accordance with its funding policy and the annual supplement. The recommendation should be accompanied by a signed statement that it is in accordance with the funding policy and annual supplement.
- 4-4.3** The BoD may (a) accept the recommendation of the Chief Actuary; (b) seek review of the Chief Actuary's opinion by the WSIB's Actuarial Advisory Committee (which should be appointed by and advisory to the BoD, rather than to the President, as at present); or (c) reject the rate recommended by the Chief Actuary.
- 4-4.4** If it decides to adopt an average premium rate different from that recommended by the Chief Actuary, the BoD must publish a statement setting out the reasons for its action.

The government must agree not to intervene clandestinely in the rate-setting process. If in fact I am misinformed, and no such intervention

occurs, this should cause no difficulty. If, however, some governments at some time have engaged in this practice, it is time they stopped doing so. The way to deter governments from bad behaviour is to construct an orderly process within which they can act legitimately, and then hold them politically accountable for failing to adhere to that process. In the present context, it is indeed conceivable that in highly unusual circumstances the government may feel that it must take action in order to serve some higher public interest than the WSIB's need for funds to meet its obligations. In such exceptional circumstances, government should be prepared to intervene overtly, to publicly justify its intervention by reference to those circumstances, and to accept responsibility for depriving the WSIB of the revenue it needs. As a corollary, it should commit itself to not intervening except in the manner and for the reasons specified.

The WSIA has long given the government extensive power to require the WSIB to operate on a sound financial basis, ultimately by ordering it to increase premium rates in order to achieve "sufficient" funding. Amendments enacted but not yet proclaimed in force will enable the government to achieve the same outcome through slightly different means [Bill 135, ss. 96.1, 96.2]. And if the government wishes to demonstrate its commitment to rational, responsible and transparent rate setting, it can do so by further amendments to the WSIA. However, while a statutory amendment is certainly the preferred option, it is not the only one. The present statute provides for the execution of a Memorandum of Understanding (MOU) between the WSIB's BoD and the Minister of Labour [s. 166]. Appropriate language in the MOU can achieve the same practical result as an amendment to the legislation, although there is always the risk that future ministers may choose to amend or ignore it.

Recommendation 4-5

- 4-5.1** The average premium rate should be set by the WSIB's Board of Directors (BoD) in accordance with its funding policy and with the procedure described in recommendation 4-4.
- 4-5.2** The Minister of Labour should not interfere in any fashion with rate setting by the BoD except in the exceptional circumstances set out in recommendations 4-5.3 and in accordance with the procedures set out in recommendation 4-5.4.
- 4-5.3** The Minister may reject the premium rate set by the BoD if in his or her opinion the province is (a) facing a serious economic crisis and (b) the increase in premium rates proposed by the BoD would have a significant adverse effect on the province's economy.
- 4-5.4** If the Minister elects to reject the average premium rate, he or she must forthwith issue a public statement (a) explaining his or her reasons for doing so, (b) setting an average premium rate, and (c) instructing the BoD what steps to take in the event that the rate set by the Minister provides insufficient revenue to enable the WSIB to meet its current and future statutory obligations and to implement its funding policy. The steps to be taken may include increasing the WSIB's unfunded liability, selling its investments or imposing a special premium rate surcharge in future years.
- 4-5.5** In the interest of transparency, the Minister should ensure that the WSIB's full annual report is published by June of the following year.

I am optimistic that both the WSIB and the government will support this initiative to restore integrity to the rate-setting process. After all, it insulates both the WSIB and the Minister from pressures to lower rates and, most importantly, goes a considerable distance to ensuring that the WSIB will be able to deal with the UFL and, more generally, to muster the resources it needs to meet its statutory obligations in a manner that is both fair and financially responsible.

I am also optimistic (though a little less so) that the employers that pay premium rates will see that their long-term interests are not well served by continuation of the present system. While they may have achieved marginal savings each year by lobbying the WSIB and/or the government to suppress premium rates, over time paying down the UFL has become a major financial burden for employers and the precipitating cause of what injured workers perceive as unfair treatment at the hands of the WSIB. During the public hearings, many employer representatives alleged, or at least acknowledged, that that government suppression of rates was largely responsible for the UFL. However, when asked whether they would promise not to lobby government or the WSIB for lower rates, they declined to do so. Perhaps the proposed new rate-setting process will allow them to discover the better angels of their nature. Perhaps, too, a change in the WSIB's rate-setting practices would assist them to do so.

At present, the WSIB releases an interim or preliminary average premium rate and allows a lengthy period of time to elapse before finalizing it. During that period, employers frequently seek government intervention of the very kind my recommendations are designed to preclude. This arrangement is counter-productive and can only subvert the integrity of rate setting that my recommendations are designed to ensure.

Recommendation 4-6

- 4-6.1** The WSIB should abandon its present practice of announcing a preliminary average premium rate and proceed directly to the setting of a final average premium rate.
- 4-6.2** As early in the year as possible, and no later than July, the WSIB should publicly announce the average premium rate for the following year.

This arrangement will enable employers to make their business arrangements with firm and early knowledge of what the average premium rate will be; and it will enable the WSIB to set that rate with some assurance that it will not have to change it as a result of employer and/or government pressure. Any disadvantages attributable to the loss of an extended period of discussion of premium rates following announcement of the interim rate will be offset by an increase in the integrity of the process, and by the full exposure of the WSIB's numbers and analysis to scrutiny at the annual technical briefing to be provided under recommendation 4-2.

CHAPTER 5

WHO PAYS HOW MUCH? RATE GROUPS AND THE APPORTIONMENT OF FINANCIAL RESPONSIBILITY AMONG EMPLOYERS

5.1 Introduction

In the previous chapter, I described the process by which the WSIB determines the average premium rate necessary to generate revenue that, along with investment income, will enable it to meet its obligations as they come due. But employers are not charged the average rate. Rather, they are charged a rate that reflects the current and historical costs attributable to a particular cohort of employers — “industry class” or “rate group” — to which they have been assigned. In the first four sections of this chapter, I review a number of issues related to the way in which these employer cohorts are constructed. In the final section, I explore the principles that might be used to determine how particular costs (new claims, administration, the UFL and others) should be apportioned among them. Resolution of these issues ultimately determines “who pays how much” of the WSIB’s annual and long-term costs.

Or perhaps penultimately: Whatever arrangements are adopted for clustering employers into cohorts for purposes of insurance rating, and however costs are allocated among those cohorts, there remains the possibility that individual employers will pay more or less than anticipated because of the effect of experience rating and other employer incentive programs. These programs in effect “reshuffle the deck” — reallocate costs among employers by providing

rebates or lower rates to some and surcharges or higher rates to others. The logic of these programs is contested: they are meant either to incent employers to modify their behaviour (as the statute seems to say) or to ensure that each employer pays premium rates commensurate with the costs it generates for the system (as some commentators contend). Chapter 5 must therefore be read in light of Chapter 6, which deals extensively with employer incentives.

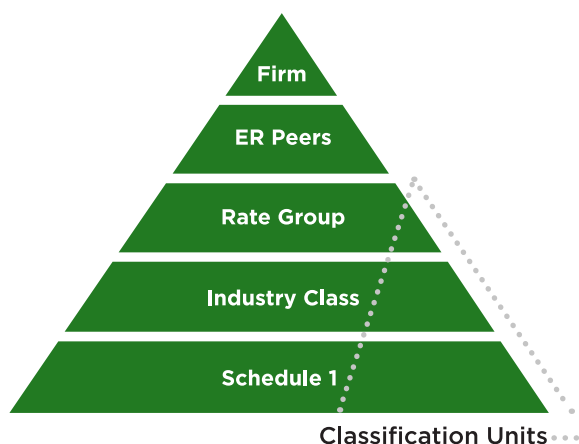
5.2. Rate groups

5.2.1 The multiple levels at which costs are allocated among employers

As noted above, few (if any) employers pay “average” premium rates. On the one hand, employers representing some 40% of Ontario’s workforce pay no premium rate at all: 10% are self-insured under Schedule 2 while 30% are not covered by the WSIA at all. On the other, employers covered under Schedule 1 — representing the remaining 60% of Ontario’s workforce — are charged a rate that reflects the risk profile and cost experience of the 9 “industry classes” and/or 154 rate groups (RGs) with which they are identified. Each RG comprises one or more “classification units” (CUs). And the matter is more complicated yet. By no means all employers in a given rate group actually pay that group’s premium rate. As mentioned previously,

many are “experience-rated” (ER) and consequently pay either more or less than the group rate depending on their own individual claims and/or accident record [s. 83]. And finally, the WSIB has the power to set rates for individual employers to reward or punish them for their compliance or non-compliance with legislative requirements, their initiative in instituting safe working conditions, and/or their accident frequency and costs [s. 82]. The multiplicity of levels at which costs are allocated and premium rates are set at present is depicted in Figure 1.

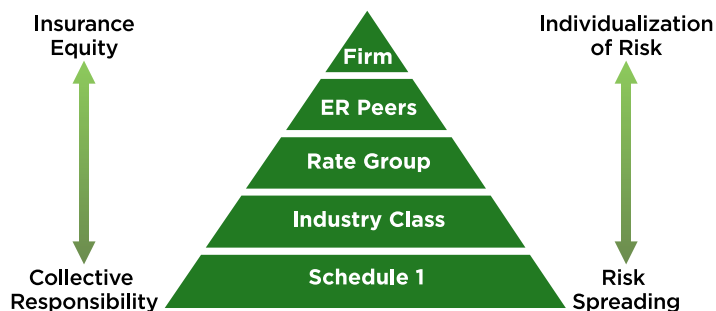
Figure 1
Levels at Which Costs Are Allocated and Premium Rates Set



5.2.2 Collective responsibility versus insurance equity

The selection of a particular level as the appropriate one at which to allocate various costs among employers involves a series of choices. The first is between competing principles advanced by workers’ and employer representatives at the public hearings: “collective responsibility” (supposedly a fundamental principle of the Meredith report) versus “insurance equity” (supposedly a fundamental principle of all insurance pricing). The tension between the two principles is depicted in Figure 2.

Figure 2
The Tension Between Collective Responsibility and Insurance Equity



I describe both principles as *supposedly* fundamental because, while they usefully describe tendencies towards the collectivization or individualization of risk, they do not prescribe which of those tendencies should prevail over the other. In fact, the WSIA as originally drafted, and as amended over the past 100 years or so, seems to acknowledge both to some extent.

If “collective liability” were “fundamental” — as worker representatives argue — all Schedule 1 employers (or perhaps all employers in an industry class) would share equally the costs of running the WSIB system and would therefore pay the same premium rate. However, from its inception, Ontario’s workers’ compensation system has operated on the premise that employers should pay premiums that are in some way related to the risks to which they expose their workers. That is why, under the original 1914 legislation, employers were assigned to one of 44 “industry classes,” each of which could be further subdivided and assessed at a different rate [ss. 74(1), 85(3), Schedule 1]. These 44 classes were eventually reduced to some 25 and, in 1993, to the present 9 classes [O. Reg. 746/92 Schedule 1].

From 1998 onward, the legislation also instructed the WSIB to “apportion the total amount of the premiums among the classes, subclasses and groups of employers” — now called “rate

groups” — based on “the extent to which each class, subclass or group is responsible for, or benefits from, the costs incurred under this Act” [s. 81(2)] and to “establish different premium rates” for each rate group, which “may vary for each individual industry or plant” [s. 81(4)]. However, while this language was new, it simply ratified and made more explicit the general policy adopted in the original statute, of setting different premium rates for different groups of employers.

Moreover, the 1914 statute specifically authorized the WSIB to impose punitive rates on individual employers with worse-than-average accident records who failed to take proper precautions to avoid accidents or operated unsafe workplaces [s. 74(4)]. While the scope and wording of this section have changed somewhat over the years, the principle remains intact. Under present legislation, the WSIB may

... increase or decrease ... premiums [for] a particular employer ... if ... the employer has not taken sufficient precautions, ... if the employer’s accident record has been consistently good, ... if the employer has complied with the regulations ... [or] if [the employer’s] frequency of work injuries ... is consistently higher than that of the average in the industry [s. 82].

This latter provision — whose antecedents, as noted, reach back to 1914 — constitutes a clear and continuing statutory acknowledgement that premium rates can be used, not only to distribute the costs of the system among participating employers, but also to reward or punish individual employers for their conduct after the fact. Seen in this light, a 1997 statutory amendment that authorized the WSIB to establish “experience and merit rating programs to encourage employers to reduce injuries and occupational diseases and to encourage workers’ return to work” [s. 83] converts the WSIB’s long-standing power to reward or punish individual employers

for their accident records into a system that operates to encourage positive or deter negative conduct in advance.

If “insurance equity” were a “fundamental” principle underlying the WSIB system — as employer representatives argue — employers that impose the least burdens on the system would be charged the lowest premiums. But that has never been the case. In part this is because, as I explained in Chapter 1, the WSIB is not simply an insurance company and should therefore not automatically adopt private sector insurance pricing practices. (Whether private sector insurance companies actually practice “insurance equity” or set their rates to attract or deter the customers whose business they seek or shun is debatable.) In part, however, “insurance equity” has never been regarded as a fundamental principle of the WSIA because it operates (if at all) only at the margins of a rate-setting system that assigns employers to cohorts — industry classes and rate groups — on the unverified assumption that, because they participate in similar business activities, they must generate similar risks.

Finally, if “insurance equity” were a “fundamental” principle of the WSIB system, it is odd that the WSIA dares neither speak its name nor invoke its spirit. Rather, it applies the “equity” principle in a practical way in just three quite specific contexts. First, section 81(2) authorizes the apportionment of premiums among employer groups based on “the costs incurred” by their members or the benefits received by their employees. This can fairly be described as a form of group-level “equity,” but it does not extend “equity” to individual employers. Second, section 81(4) permits the WSIB to establish different premium rates for different groups “in relation to the risk of the ... group,” but “[t]he rates may vary for each individual industry or plant.” The WSIB does not, as far as I know, assess the risk confronted by groups or individual employers, but in any event the “risk” metric is clearly different from the “claims costs”

metric usually associated with insurance equity. If it were not, there would be no need for section 81(4). Third, section 83(3) authorizes the WSIB to “increase or decrease an [individual] employer’s premiums based on the frequency of work injuries or the accident costs or both” It is a standard rule of legislative interpretation that, if particular action is allowed in specified circumstances, that action is not allowed in other circumstances. This leads me to conclude that the intent of the legislation is that experience rating programs should be permitted, to “encourage employers to reduce injuries ... and to encourage workers to return to work,” but for no other purpose. Indeed, the argument put to me, that section 83(3) confirms the universal applicability of the “insurance equity” principle, proves too much. If an equity component is implicit in every insurance scheme, as some employers contend, there would have been no need to add section 83(3) to the WSIA. I will return to this point in Chapter 6.

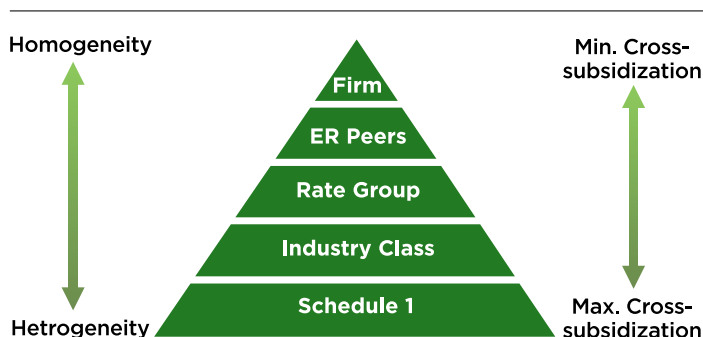
Clearly, then, neither of the two “fundamental” principles — “collective responsibility” and “insurance equity” — wholly trumps the other. They have existed in tension with each other for almost a century. The real issue is whether the present balance between them should be shifted in one direction or another. In order to address that issue, it is necessary to explore the implications of such a shift.

5.2.3 Heterogeneity, cross-subsidization and behavioural consequences

As Figure 3 indicates, to move along a spectrum from “insurance equity” to “collective responsibility” — from premium rate setting at the level of individual firms to rate setting at the rate group, industry class or Schedule 1 level — is to change the internal dynamic of the insurance scheme. As the group becomes larger, it becomes more heterogeneous in character. And as it becomes more heterogeneous, embracing employers whose employees encounter a

broader and broader spectrum of workplace risks, cross-subsidization within the group becomes more widespread. In effect, employers that present lower risks and generate lower costs are paying higher premiums than they would if they were in a smaller group containing firms with similar risk and cost profiles; those who present higher risks and costs experience the opposite outcome.

Figure 3
The Relationship Between Homogeneity and Cross-subsidization



Risk spreading and heterogeneity, and therefore cross-subsidization, are to some extent characteristic of all insurance schemes. However, cross-subsidization may give rise to a number of controversial consequences in the present context. Three warrant special mention. First, employers that pay more than they otherwise might may try to persuade the WSIB to transfer them to a group with greater homogeneity, less cross-subsidization of high-cost cohort members and consequently lower premium rates. Such “rate shopping” generates administrative costs for the WSIB and, to the extent that it succeeds, contributes to a loss of revenue in the short term. Second, employers that pay less than they should may be exposed to a “moral hazard”: they may become less assiduous in ensuring safe and healthy workplaces because they can slough off part of the benefit costs they generate onto group members that are providing

the cross-subsidy. And third, conflicts of interest within the group may make it difficult to organize collective activities such as safety education programs. The challenge, then, is to structure groups at the level of heterogeneity and cross-subsidization at which exposure to these potentially controversial consequences is minimized.

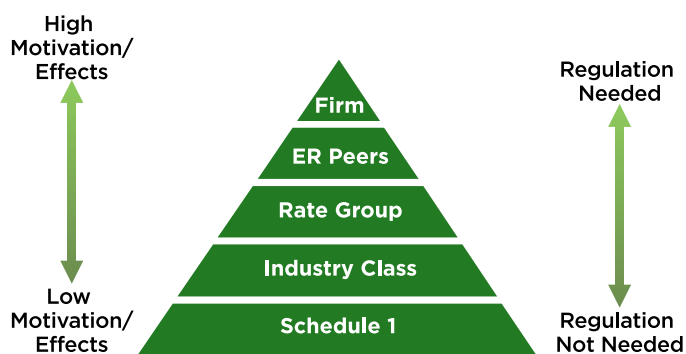
However, the level at which costs are distributed among employers also has behavioural consequences, as set out in Figure 4. The more directly an individual firm's premium rates are tied to its own particular accident record and benefit costs, the more the firm will be motivated and empowered to modify its behaviour in order to reduce its costs. This, of course, is the assumption that drives experience rating programs. But what kind of behaviour modification will enhanced motivation produce? It may, and clearly does, produce the positive behaviour contemplated by section 83(1) — improved attention to accident prevention and better strategies to enable workers to return to work. On the other hand, it may, and clearly does, also produce negative behaviour — hyper-aggressive claims management, misreporting or non-reporting of accidents, and pressure for workers to return to work prematurely or to “non-jobs” where they perform meaningless functions until it is advantageous for the employer to dismiss them.

In Chapter 6, I review the debate over the extent of abuse attributable to experience rating programs, and propose possible regulatory and design responses to such abuse. In essence I take my stand on the following proposition: if motivation for behavioural change is heightened, so too is the risk of abuse; and if the risk of abuse is heightened, so too must be the effectiveness of regulation to deter it, to punish it and to repair its negative consequences. Figure 4 illustrates this point.

That said, greatly enhanced regulation is not the only option. An alternative or complementary

Figure 4

Motivation, Abuse and the Need for Regulation



approach would be to ensure that employers respond to the opportunity to lower their premium rates by engaging in positive rather than negative behaviour. This approach is very much in keeping with the WSIB's statutory mandate:

... to promote health and safety in workplaces
... to facilitate return to work ... and labour market re-entry [and] ... to provide compensation and other benefits ... “ [s. 1].

A system of rate setting that misses an opportunity to promote all of these objectives at once, and focuses only on how to fund the provision of “compensation and other benefits,” is therefore sub-optimal.

5.2.4 Integrating rate setting, accident prevention, safety and health promotion, and return-to-work initiatives

A better approach would be to articulate or coordinate the WSIB's multiple functions by setting premium rates at the same level as accident prevention, safety, health and re-employment initiatives are organized. There are several arguments for doing so. First, grouping employers together for multiple purposes — harm reduction as well as cost allocation — will reinforce the connection between the two. Second, safety measures are expensive; if “good” firms invest in them while “bad” firms do not, the

former will find themselves at a competitive disadvantage. Peer pressure to persuade “bad actors” to mend their ways would be facilitated if they were all members of the same safety promotion organization as well as the same rate group. And third, while the situation will differ from one industry to another, harm-reduction initiatives often require collective action. An example: many individual firms lack the personnel or know-how to deliver training programs or design safer machinery and healthier work routines; groups can make up for this deficiency. Another example: groups of firms are likely to be able to offer better re-employment opportunities than individual firms.

The question then becomes: at what level should employers be brought together for cooperative and positive measures? Figure 5 identifies two important, but contradictory, factors to be considered in situating these efforts: *commitment* (which is highest in small groups and at the firm level) and *competence* (which requires a critical mass of firms but likely dissipates in very large, heterogeneous groups).

At present, all employers are nominally assigned to one of four Safe Workplace Associations (SWAs) — organizations funded by a charge

levied on all Schedule 1 employers as part of the premium rate they pay to the WSIB. However, for several reasons the existing SWAs may not provide a suitable template for employer groupings within which premium rates would be set and health and safety initiatives launched. First, as configured at present, they are so large and diverse that their members are unlikely to confront similar workplace risks, and may therefore be unable to find common approaches to education, risk reduction and other activities. Second, their members currently pay very different premium rates; those at the high end of the spectrum will welcome the movement to a common group rate, but those at the lower end will almost certainly resist. Third, as with rate groups, SWAs appear to be configured at present with a view to administrative and budget considerations, rather than their suitability as a vehicle for cooperative efforts to improve health, safety and return-to-work outcomes. And fourth, while they are still largely funded out of WSIB premium rates, SWAs will soon operate under the aegis of the Ministry of Labour’s Chief Prevention Officer — an issue to which I will return below and in Chapter 6.

Similar objections can be made to almost any heterogeneous grouping of employers that is meant to promote health, safety and return to work, or to serve as the vehicle for risk sharing for insurance purposes, or both. Heterogeneity is indeed a problem — but a problem that can and must be calibrated in degrees. If SWAs are not the appropriate level at which to achieve articulation between two important, closely related policy domains — as clearly they are not in their present configuration — some other level should be identified as more appropriate. Figure 6 suggests that mid-range groups of employers, larger in size than most of the present 154 rate groups and smaller than the present 9 industry classes, are likely to be suitable, both for cost spreading and for workplace safety and re-employment initiatives.

Figure 5
Commitment, Capacity and Cooperation in Improving Health, Safety and Return to Work

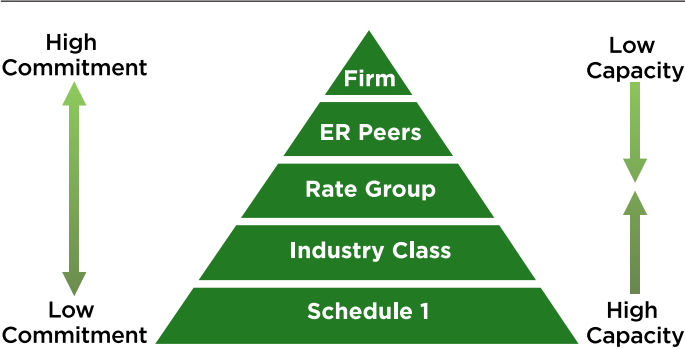


Figure 6

Locating the Optimal Employer Grouping for Rate Setting and Safety Promotion



Some existing rate groups likely fall within the mid-range identified in Figure 6 and could conceivably provide the foundation for the approach I am proposing. Indeed, a few rate groups and coalitions of rate groups are already functioning, both as the nucleus of safety organizations and as vehicles for the setting of premium rates. The potential synergy between these two functions is best illustrated by landscaping and group homes employers — RG 190 and RG 858 respectively — which have significantly reduced their premium rates over the years by extensive collective efforts to improve their safety and return-to-work records. A quick overview of existing rate groups suggest that new clusters could easily be formed that, on their face, offer the promise of similar success. An obvious example is the automotive sector, where four rate groups with identical premium rates are engaged in the same general line of work. And finally, the WSIB has for some time facilitated the formation of Safety Groups (SG) — voluntary organizations of firms, typically “sponsored” by pre-existing employer associations — by adjusting their members’ premium rates in recognition of efforts to make their workplaces safer.

Thus, approximations of the mid-range groupings that I propose already exist or could easily be formed. The intent of the recommendations that follow is (a) to make membership in such

groups mandatory and all-inclusive, (b) to make the links between their rate setting and safety promotion / harm-reduction functions more explicit, and (c) to distinguish them from existing rate groups and industry classes.

Recommendation 5-1

- 5-1.1** The existing system of rate groups and industry classes should be replaced by a new system of “sectoral groups.”
- 5-1.2** Sectoral groups should be used both to set premium rates and to organize accident prevention, safety education and return-to-work / labour market re-entry programs.
- 5-1.3** To facilitate the creation of sectoral groups, as far as possible they should comprise combinations of existing rate groups and be configured so that they build upon existing Safety Groups, employer associations and other organizations in which firms in a given sector are already committed to working together in their common interest.
- 5-1.4** To avoid the possibility of small firms being marginalized within sectoral groups, or having their rates effectively determined by costs attributable to dominant firms in their sector, the WSIB should also investigate the possibility of creating a separate small business sector, or alternatively of establishing a standard rate for small businesses within each sector.
- 5-1.5** The definition of sectoral groups should be undertaken jointly by the WSIB and the Chief Prevention Officer established under Bill 160.

There is no particular magic in any given number of rate groups. As recently as 1992, Ontario had 109 rate groups, then the number more or less doubled before shrinking again to the present 154; today, British Columbia, Manitoba, Saskatchewan and Nova Scotia have 50 to 60 each. Although I hope and expect that Ontario would have no more, and preferably less, than those provinces, the right number cannot be determined *a priori*. It should be the result of a conscious effort by the WSIB to cluster the existing rate groups into sectoral groups appropriate for both rate setting and health and safety promotion and accident prevention activities.

Finally, any significant reduction in the number of rate (or sectoral) groups, and consequent increase in their size, will trigger a debate about how variations in risk or cost experience will be reflected in the rates paid by individual firms within the group. One response is that they will all be treated the same; another is that firms within each group will be divided into bands on the basis of their accident record, claims costs or some other metric. These responses necessitate further examination of “insurance equity” and experience rating, issues extensively canvassed in Chapter 6. They also invite careful attention to proposals in a report by Nexus Actuarial Consultants, for an “employer-centric” model of rate setting in which experience rating — and presumably enhanced concern for safety — plays a significant part. I will discuss the Nexus proposals in Chapter 6 as well.

5.3 Reform of the existing rate group system

During the public hearings, a number of employer representatives took the position that the existing rate group system was working well enough and should not be changed.

In my view, the best that can be said for the present system of rate groups is that it is in

place and actually functions, albeit imperfectly, to apportion the costs of the WSIB system among Schedule 1 employers. However, it rests on a foundation of anachronisms and ambiguities, permits the impression and/or reality of serious abuses, encumbers the system with unnecessary transaction costs, sometimes produces results that seem indefensible, and — especially — fails to support the integration or articulation of premium rate setting and other activities related to the enhancement of safe working conditions and practices. I am therefore unable to accept the suggestion advanced by many employer representatives that I should not deal with the issues of rate groups and rate setting because they are too complicated or because they have little to do with the principal issue on my agenda — the UFL. On the contrary, I am firmly of the view that the WSIB must keep its conceptual toolkit up to date and its method of allocating costs fit for purpose.

My recommendation to replace rate groups (RG) with fewer and larger sectoral groups, and to link rate setting with harm reduction and related activities, has two aspects. The first, which underpins recommendation 5-1 above, rests on the conviction that a new approach to apportioning costs among employers will produce better outcomes. The second, set out in the next section of this report, proceeds from a critique of the present method of establishing RGs.

5.3.1 Shortcomings of the existing system of rate groups

At present, all Schedule 1 employers are assigned to one of 154 RGs, each of which is assigned its own average premium rate. The rationale, presumably, is that firms in each RG participate in similar business activities and/or expose their workers to roughly similar risks and/or generate roughly similar claims costs for the WSIB. However, this element of commonality is simply assumed and then ascribed to the firms in the group; it is not derived from an empirical assessment of what

they and their employees actually do. In fact, firms in many RGs often differ considerably from each other in each of the three respects mentioned. They may produce different products, operate in different market niches, use different technologies, hire employees with different skill sets or levels of experience, enjoy different economies of scale and specialization, encounter different pressures to contain costs, adopt different arrangements to ensure safe and healthy working conditions, and facilitate the return to work of injured workers with different degrees of enthusiasm and effectiveness. Yet, while these factors (and others) will clearly affect the incidence, type and cost of compensable injuries or illnesses, they are used neither to design RGs at their inception, nor to revise them subsequently.

Moreover, it appears that, on occasion, firms in related businesses but with quite different risk profiles may be intentionally included in the same RG in order to ensure that it is large enough to maintain “statistical credibility” — a particular problem for the WSIB in that employment in some sectors has shrunk considerably, while in others the number of compensable accidents has diminished to the point where more firms have to be added to lift the RG across the credibility threshold. Sometimes, too, high- and low-cost firms seem to be deliberately intermingled, with the apparent intention of producing a middling premium rate, in order to appease employers protesting against high rates or to accommodate a firm with a diverse workforce that can plausibly claim membership in more than one RG.

The overall result is that the present RG system contains many gaps and overlaps, lacks a clear internal organizing logic, cannot easily be explained or defended, and provides employers with ample opportunities for “rate shopping,” assisted by a new sub-profession of advisors and advocates — often paid (I was told) on a

contingency fee basis. As noted above, rate shopping generates needless transaction costs and results in revenue leakage for the WSIB.

Finally, the term “rate group” — although central to the methodology of premium rate setting and in use for decades — is found neither in the WSIA nor in the regulations enacted under it. For reasons presented earlier in this chapter, it is perhaps an unfortunate label to apply to aggregations of employers whose common interest should not be solely the premium rates they pay but the improvement of health and safety and return-to-work practices in their workplaces.

For all of these reasons, even if the WSIB declines to adopt the new system of sectoral groups recommended above, it should nonetheless take steps to improve the methodology it uses at present to create RGs and assign employers to them.

Recommendation 5-2

Whichever system the WSIB uses for grouping employers together for purposes of risk spreading and rate setting, it should adopt a clear set of principles governing the creation of rate groups and the assignment of employers to them, and should satisfy itself at regular intervals that those principles are up to date and are being complied with.

5.3.2 Technical descriptors used to define coverage and rate groups

The incoherence of the present system of RGs is in part attributable to the conceptual building blocks with which it is constructed.

The root of the problem is that Ontario — unlike other provinces where coverage is the default position — insures employers under the WSIA only if they are expressly mentioned in the Act

or regulations. It has therefore been necessary for the legislature, the Ministry and the WSIB to develop a lexicon of terms or descriptors that is sufficiently inclusive and precise that employers will know whether they are covered.

One component of that lexicon can be found in a regulation enacted under the WSIA [O. Reg 175/98]. It clusters “industries” (some of them, like “mimeographing” and “corset manufacturing,” anachronistic if not actually extinct) into the nine “industry classes” that comprise the segment of the workforce covered by Schedule 1 of the WSIA. Another group of industries, described in Schedule 2 (including the construction of “telegraph lines” but not of internet transmission towers) is also covered under the WSIA but is self-insured. A third group of employers is expressly excluded from either Schedule 1 or Schedule 2 coverage (including embalming, photography, barbering and “educational work — other than teaching”) under the same regulation [s. 3].

However, the descriptors used in the governing regulation do not correspond directly (or in some cases at all) to the 828 “classification units” (CUs) currently used by the WSIB to construct RGs. And to add to the confusion, the WSIB also decided for some reason to cluster CUs into 16 sectoral groupings rather than the 9 industry classes mentioned in Schedule 1 — but abandoned the practice in 2006. And the confusion compounds: the descriptors used to define CUs were originally drawn from an occupational taxonomy developed by Statistics Canada in 1980, but the WSIB apparently substitutes others whenever doing so suits its purpose. No matter: Statistics Canada itself has long since abandoned its 1980 taxonomy and now uses the North American Industrial Classification System (NAICS), which is updated every five years to include new and emerging occupations and businesses. In its present version, it identifies 23 primary categories of business, 102 sub-sectors and some

2,000 sub-sub-categories, which resemble CUs in the sense that they are the basic conceptual building blocks from which higher-level analytical aggregations are constructed. What does it matter? The answer is simple: Ontario may well fail to include some new areas of employment under Schedule 1 because they have been overlooked in the confusion of multiple systems of descriptors, rather than because a deliberate policy decision has been made to deny them coverage.

The NAICS, like the predecessor Statistics Canada system, was designed to track labour market trends, not to cluster together enterprises confronting similar workplace hazards or engaged in collective efforts to reduce them. Nonetheless, some workers’ compensation systems use NAICS descriptors to classify employers and assign them to RGs; others use an older system of Standard Industrial Classification (SIC) descriptors. But the WSIB uses neither. This has several consequences. First, it makes unreliable interprovincial comparisons of the premium rates charged to various types of businesses; second, it weakens the WSIB’s ability to use standard labour market analyses in order to forecast its own future revenue and expenses; and third, it requires the WSIB to devote resources to the maintenance of its own CU taxonomy. Ontario does not need five sets of descriptors: one in Schedules 1 and 2 to define coverage of the WSIA; a second in its unique system of CUs; and a third, fourth and fifth — the sectoral groupings, SICs and the NAICS — to enable the WSIB to find out what it needs to know about other workers’ compensation systems or general economic trends.

I believe that replacing both Schedule 1 and the current CU descriptors with the standard NAICS descriptors will improve the WSIB’s analytical and forecasting capacity, help to ensure that its coverage is up-to-date and, to a modest extent, save it money.

Finally, much of the problem flows from the fact that descriptors of “industries” in Schedule 1 are lodged in a governing regulation that can only be amended by an Order in Council. Many descriptors are anachronistic, and the remainder do not seem to flow from any principled consideration of either what constitutes appropriate coverage in today’s rapidly changing labour market or which industries should be clustered together for purposes of insurance rating. Nonetheless, as long as the regulation remains in force, it fixes in place the legal limits of WSIA coverage. That is why, presumably, the WSIB’s CUs — which functionally, if not legally, determine coverage and insurance rating — seem to operate in a parallel universe. Essentially, there are only two ways to remedy this situation. Either the province should commit to amending the regulation every five years, each time the NAICS is revised; or it should repeal the regulation altogether and, like other provinces, identify the industries it wishes to exclude by statute or regulation and then leave the WSIB to use NAICS descriptors in order to determine coverage and RG assignments. I favour the second option. My concern is not so much which employers should be covered and which not — a debate summarized in Chapter 9, but beyond the scope of this Review. Rather, it is that the present system is unprincipled, incomprehensible and inefficient.

Recommendation 5-3

- 5-3.1** The government should repeal the current regulation defining coverage and instead adopt a regulation under which all employers are covered unless specifically excluded. This new approach is intended to provide greater clarity and efficiency, not to alter the extent of coverage.
- 5-3.2** The descriptors used to determine coverage and to define rate groups should be replaced by the descriptors set out in the North American Industrial Classification System (NAICS), and should be automatically revised every five years, when the NAICS is revised.
- 5-3.3** The WSIB should abandon its present system of classification units.

5.4 Implementation issues

I earlier rejected the suggestion that I should not address rate groups and related issues because there was no need to do so. However, I do accept the point that the issue is too complex for me to do it full justice in this report. The design and implementation of a new and improved system of rate groups is a time-consuming process that requires extensive technical development, intensive consultation with stakeholders and the articulation of complex transitional arrangements, including the phasing-in of any new system. Moreover, as noted above in recommendation 5-1.5, the WSIB must cooperate with the Chief Prevention Officer if it decides to adopt a new system of sectoral groups that will serve the purposes of both organizations.

Recommendation 5-4

5-4.1 Implementation of the recommended changes in the present system of rate groups should be phased in over several years to permit coordination with the Chief Prevention Officer and consultation with employers.

5-4.2 Implementation should be facilitated by the adoption of transitional measures to avoid sudden increases in administrative costs or in the premium rates charged to employers.

5.5 Which employers should pay how much?

Regardless of whether it adopts my recommendation for the creation of sectoral groups or retains its present system of rate groups, the WSIB will still have to decide whether (and if so how) to allocate the burden of different kinds of costs among different cohorts of employers.

5.5.1 New claims costs

The first and most obvious principle of cost allocation, to my mind, is that new claims costs (NCCs) should be charged at the time they are incurred to the sectoral group (or rate group) responsible for generating them. As I have indicated elsewhere, I think it would be unwise to depart from this principle on grounds of intergenerational, intersectoral or insurance “equity.” However, the repeated failure of the WSIB to accurately predict, and reliably capture, NCCs has undermined this principle by deflecting some part of NCCs to the UFL. The “first principle” must therefore be restated and reaffirmed.

Recommendation 5-5

5-5.1 Each sectoral (or rate) group should pay the full current and future cost of the new claims its members generate.

5-5.2 The WSIB should take urgent steps to ensure that new claims costs are accurately priced.

NCCs are, by definition, always based on an estimate of what the following year’s experience is likely to be. For reasons explored in Chapters 3 and 4, that estimate has been frequently and significantly wrong. If my recommendations for improving the WSIB’s actuarial capacity, enhancing the integrity of its rate-setting process and imposing discipline on its funding policy are accepted, the frequency and magnitude of error should decrease considerably in the future. Nonetheless, some gains and losses are likely to occur in any system that involves estimates. How should they be allocated?

In principle, NCC gains and losses are at present assigned to the industry classes from which they originated. This, in effect, constitutes a retroactive correction of the mis-estimate that produced a discrepancy between projected and actual NCCs. However, as a practical matter, over the past decade NCC losses (gains are rare or nonexistent) have been treated as part of the UFL, rather than charged back to employers as contemplated by WSIB policy. My hope is that, if recommendation 5-5 is accepted, this practice will cease, and gains and losses will both be automatically charged back to employers as they are supposed to be. The question is: to which employers should they be charged and over what time horizon should they be amortized?

There is a certain logic to assigning NCC losses to rate groups. However, there are at least two reasons to assign them at a higher level. First,

under recommendation 5-1.1 the existing rate groups are to be replaced by sectoral groups, and second, assigning losses to groups larger than rate groups is likely to reduce premium rate volatility. For these reasons, it would seem preferable to assign them at the sectoral group level (if sectoral groups are introduced) or at the industry class level (as at present). However, even if recommendation 5-1.1 is rejected and the present system of rate groups is retained, rate stability considerations favour the assignment of NCC losses to the industry class rather than to the rate group. But this does not mean that rate groups with deteriorating accident records will escape unscathed. They will still be charged higher premium rates in succeeding years based on their actual experience, and will therefore have to pay an increasing share of the industry class premium rate.

How quickly to amortize NCC gains and losses is a more technical and difficult question. Simplicity argues for using the same lengthy amortization period as has been proposed for the UFL. So too does the need to avoid rate volatility: unless they can be amortized over a fairly lengthy period, even relatively minor gains and losses may trigger significant premium rate changes for small industry classes or sectoral groups. On the other hand, if gains and losses had to be amortized fairly quickly, this would create pressures for NCCs to be accurately predicted and properly priced. I can only suggest that the WSIB take this matter under advisement, consult as appropriate and decide what balance to strike among these contending considerations.

NCC gains present a somewhat different (and perhaps hypothetical) problem. If gains are to be distributed like losses, they should be assigned at the sectoral or industry class level. The question is whether they should be applied to reduce the next year's NCC and lower the current cost portion of the premium rate, or used to pay down the UFL and reduce the UFL charge

assigned to that industry class. In the interest of simplicity, and of maintaining the principle that insurance costs what it costs, NCC gains should be credited against the following year's NCC charges following the same amortization schedule as proposed for losses.

5-5.3 New claims costs losses and gains should be attributed to the industry classes (or sectoral groups) that generated them.

5-5.4 Losses should be amortized in accordance with a formula to be determined by the WSIB.

5-5.5 Gains should be used to reduce the current cost portion of the premium rate charged in any given year to the relevant industry class (or sectoral group).

5.5.2 The unfunded liability

The UFL comprises, in effect, a bundle of legacy costs — claims for which the WSIB failed to charge the full cost of providing benefits to injured workers. In Chapter 3, I proposed that these legacy costs should be — and can be — fully retired by requiring employers to pay a fixed annual UFL charge, which would be increased or decreased only under carefully controlled conditions and pursuant to a deliberate decision by the WSIB. In this section, I investigate how the cost of this annual UFL charge should be allocated among Schedule 1 employers. There are four options: at the level of rate groups (or the proposed sectoral groups), of industry classes, of all Schedule 1 employers, or some combination of these.

Rate groups are not the right level at which to assign responsibility for legacy costs. Many, if not most, of the rate groups that generated these costs will have been reconfigured; the firms that populate them will almost certainly have grown

or shrunk, as will the total rate group workforce and payroll base; over the years, rate groups will likely have altered working practices and conditions, adopted new technologies and experienced rising or falling profitability; and they will have improved their safety record and claims cost experience or allowed one or both of these to deteriorate. In short, it is impossible — and arguably inappropriate — to assign responsibility for legacy costs to the firms, or groups of firms, in whose workplaces those claims originated years or decades ago.

Industry classes have experienced similar changes save for one crucial difference: their boundaries have remained largely unchanged since 1993. This makes it possible to say at least that, over the past 20 years or so, some broad segment of Ontario’s economy — mining, say, or transportation or construction — has been associated with certain accident costs that must be borne by whichever employers today continue to engage in that same economic activity. (Data from prior to 1993 — the year in which the current industry classes were defined — apparently cannot be recaptured without great expense and difficulty.) The proposal to assign responsibility for the UFL

at the industry class level also makes sense in light of the WSIB’s current practice of assigning UFL gains and losses in similar fashion. And finally, it is consistent with my conclusion, earlier in this chapter, that the current system of rate groups is inappropriate and should be replaced.

However, as Figure 7 depicts, segments of the economy have grown or shrunk somewhat in the last two decades.

So, too, have the benefit costs associated with each of the industry classes (see Figure 8), so that some classes that generated significant legacy claims now have a much-diminished payroll base, much-diminished profitability and hence a much-diminished capacity to contribute to the UFL. Consequently, as a practical matter, it may not be realistic to expect such industry classes to pay for all of their own legacy claims. Indeed, in the words of the present legislation, asking them to do so may constitute the imposition of an “undue” burden.

It is also necessary to recognize that, over time, the contribution of different industry classes to the UFL will have fluctuated, reflecting the extent to which their premium rates met,

Figure 7
Schedule 1 Employment by Industry Class, 1993 and 2010

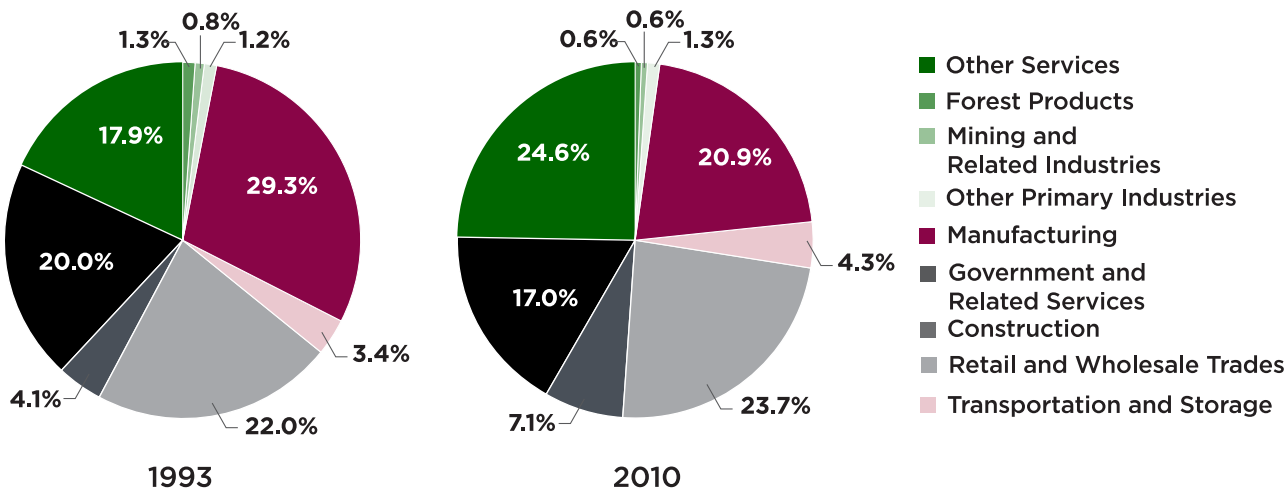
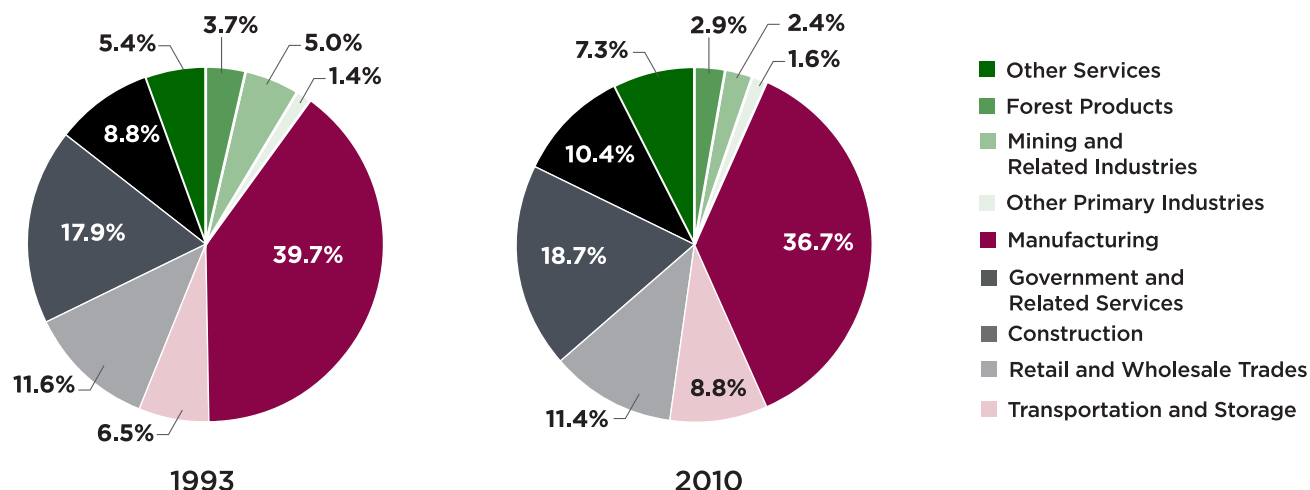


Figure 8

Schedule 1 Benefit Costs by Industry Class, 1993 and 2010



exceeded or fell short of covering the predicted cost of their new claims. Thus, an industry class that had a better claims record than anticipated in a given year would have generated a notional gain that, in principle at least, would have lowered the UFL. Contrariwise, an industry class that had a worse claims record than anticipated would not have paid its fair share of the costs of the system and thus would have added to the UFL. To the extent possible, the assignment of costs to industry classes should take account of these fluctuations. But history moves on. Industry classes that over the years managed to move from being net contributors to the UFL to being net contributors to its reduction deserve positive reinforcement; classes that moved in the opposite direction should be reminded of this fact.

In other words, responsibility for the UFL should be distributed, not only across the spatial dimension (among industry classes), but also across the temporal dimension (over time).

The third option is to ask all Schedule 1 employers to contribute equally to the UFL, regardless of their industry class, past record or current performance. There is a certain logic to this

approach. The UFL is an historical omelette that cannot be unscrambled. It reflects workforce deployments, accident and illness patterns, and WSIB policies that have changed radically over the decades. Over the years, industries have flourished and failed; firms have come and gone; rate groups have been established, consolidated, abolished and reconfigured; and the UFL has increased or decreased in irregular fashion in response to fluctuations in premium rates, investment returns, benefit costs and administrative vigilance. At some point, it becomes futile to ask who was responsible for what. At that point, the principle of collective responsibility comes to the fore: all participants in the WSIB system must be asked to share in solving the problem, even if they did not contribute to it. Finally, as I explained in Chapter 3, all employers will benefit if the WSIB is able to first reduce, then eliminate, the UFL. As the system moves past the tipping point, they will be spared the risk of either being left uninsured or (more likely) having to pay for a costly “bail-out” through a spike in their premium rates; at higher levels of funding, they will benefit from the WSIB’s enhanced capacity to innovate; and ultimately they will benefit from reduced premium rates.

Every employer — regardless of rate group or industry class — should therefore be asked to pay a small “collective responsibility charge” in addition to any other UFL-related costs assigned to their industry class. This collective responsibility charge should be small enough that it does not represent a significant burden for employers, but should be large enough to generate revenues over 20 years equivalent to about 5% of the total UFL.

The final option is to assign legacy costs in such a way that all of these considerations are taken into account. That is the option that I have decided to recommend.

Recommendation 5-6

5-6.1 5% of the annual cost of paying down the unfunded liability (UFL) should be distributed equally among all Schedule 1 employers in the form of a fixed collective responsibility charge. This would amount initially to about \$.03 per \$100 of payroll and would change only in accordance with the corridor system to be adopted as part of the WSIB’s funding policy.

5-6.2 Half of the remaining UFL should be allocated among industry classes on the basis of their responsibility for its growth over the past 20 years. That contribution should be measured by aggregating the benefit costs attributable to that industry class over the entire period, and should be recalculated annually on a rolling basis, reflecting improvements or deteriorations in its record during that period.

5-6.3 The other half of the remaining UFL should be allocated among industry classes on the basis of their current contribution to their estimated new claims costs, reflecting the extent to which they are facilitating or impeding the WSIB’s financial recovery.

This distribution of responsibility for the UFL — 5% to individual firms as a flat collective responsibility charge, 47.5% to industry classes on the basis of their historical contribution to legacy costs, 47.5% on the basis of their current claims record — leaves one issue unresolved. How should industry classes pass their share along to rate groups (or the new sectoral groups)?

I have already indicated that, for technical reasons, it is not feasible to try to trace the legacy costs attributable to individual rate groups. It is therefore not possible to replicate at the rate group level the temporal division of responsibility that I have recommended for allocation of the UFL among industry classes.

5-6.4 The share of the UFL allocated to any industry class should be divided among its constituent rate groups on the same basis as their estimated new claims costs.

5.5.3 Legislated obligations

In Chapter 3, I recommended that the government review the WSIB’s present legislated obligations to reimburse OHIP for routine (as opposed to specialized) medical services provided to injured workers, and to fund educational, accident prevention and workplace enforcement programs run by, or under the auspices of, the Ministry of Labour. I also recommended that the

government consider not funding prevention through a charge on Schedule 1 employers. To the extent that these recommendations are not accepted, the ongoing cost of these and other legislated obligations must be assigned to employers at some level.

Medical service costs are a component of new claims costs and can easily be assigned to rate groups or the new sectoral groups; and educational activities provided through Safe Workplace Associations can and should be assigned in the same way. However, if the government continues to require Schedule 1 employers to fund safety enforcement activities, the cost should be distributed *pro rata* among all Schedule 1 employers.

Recommendation 5-7

- 5-7.1** If the government declines to review the payments now made to it by the WSIB, their cost should be assigned as at present. The payments in question include reimbursement to the Ontario Health Insurance Plan for routine medical services provided to injured workers, and payments to the Ministry of Labour to cover the cost of enforcing health and safety legislation.
- 5-7.2** The government should investigate the possibility of requiring all employers, not just Schedule 1 employers, to contribute to the cost of running the new prevention function, funding Safe Workplace Associations, and enforcing occupational health and safety legislation. If responsibility for these costs continues to be borne by Schedule 1 employers alone, they should be charged to all employers as at present.

5-7.3 Funding provided by the WSIB for the support of the Workplace Safety and Insurance Appeals Tribunal and for the Offices of the Worker Adviser and the Employer Adviser should be charged to all employers as at present.

5.5.4 Occupational diseases

In Chapter 7, I explore the difficulty of establishing causal links between particular occupational diseases and the businesses or workplaces that contributed to or caused them. For reasons set out in that chapter, I have concluded that this difficulty warrants the allocation of different occupational disease costs to different groups of employers — the industry class or sectoral group in some cases, all Schedule 1 employers in others. The details are found in recommendation 7-3.

5.5.5 Administrative expenses

It is difficult, if not impossible, to assign most of the administrative costs necessarily incurred by the WSIB to any particular rate group or, under my proposal, to any particular sectoral group. The present practice of recovering half of administrative expenses as a percentage of new claims costs and half as a percentage of payroll seems sensible.

Recommendation 5-8

The WSIB should continue to apply its present formula for recovering its administrative expenses from Schedule 1 employers.

5.5.6 The cost of experience rating programs

The WSIB runs several programs designed to incent employers to reduce injuries and encourage workers' return to work. These programs,

described in greater detail in Chapter 6, offer positive and negative financial incentives in the form of premium rate rebates and surcharges. For present purposes, what is material is that, in the 15 years prior to 2010, rebates exceeded surcharges by a cumulative total of \$2.5 billion — a substantial contribution to the WSIB's UFL. Virtually everyone is agreed that these programs should not generate such an “off-balance,” and in 2010 the WSIB made considerable progress towards eliminating it.

Recommendation 5-9

The WSIB should take firm steps to eliminate any remaining off-balance associated with its experience rating programs and ensure that all such programs are revenue neutral on an annual basis.

CHAPTER 6

EMPLOYER INCENTIVES AND EXPERIENCE RATING

6.1 Introduction

Of all the issues addressed in briefs and at the hearings, none was more contentious than the system of incentives provided to employers under the experience rating system established by section 83 of the WSIA “to encourage employers to reduce injuries and occupational diseases and to encourage workers’ return to work.” Workers argued that experience rating violates the “collective liability” principle enshrined in Chief Justice Meredith’s original vision for Ontario’s system of workers’ compensation. Employers argued that experience rating is a form of “equity,” and a necessary and inevitable element of every insurance scheme, including that of the WSIB.

But this was not just a debate over concepts and terminology. It was very much a debate over practical outcomes. Workers maintained that, since employers are awarded rebates or surcharges based on their accident experience or the compensation costs they generate, some will be incented to engage in improper and illegal behaviour in order to keep their records clean, their premiums low and their workers deprived of the benefits to which they are entitled. Moreover, workers contend, these negative outcomes are not offset by positive ones: there is no evidence that performance- or experience-based incentives influence employer behaviour in positive ways, as they are supposed to do. Employer responses varied: some denied that incentives to wrongdoing exist or that employers ever yield to them; some acknowledged the existence

of employer abuses but claimed that they are infrequent and represent a smaller problem than fraudulent worker claims; some accepted that employer wrongdoing is a problem but maintained that it can be resolved by tweaking the present system; and some pointed out that accident rates have fallen significantly since experience rating was first introduced, which, they contended, provides ample justification for maintaining the present system. Nonetheless, despite these differences, virtually all employer submissions reached the same ultimate conclusion: premium rates must take into account both collective and individual firm’s claims costs and/or accident experience.

In Chapter 5, I noted that the two “fundamental” principles embraced by the proponents of insurance equity and collective responsibility have co-existed in some form or other since the inception of the WSIA in 1914, that they are in tension with each other, and that neither provides a quick or conclusive end to the debate over experience rating. I also accepted that — as both parties claimed — experience rating enhances the motivation of employers to lower their premium rates by modifying their behaviour. However, I concluded — as all workers insisted and some employers conceded — that some employers will likely modify their behaviour in ways contemplated by the WSIA and others in ways forbidden by it. In this chapter, I return to these issues, offer further reflections on the practical outcomes and propose a resolution to the debate over whether to continue experience rating or not.

6.2 The impact of Bill 160

The recommendations of the report of the Expert Advisory Panel on Occupational Health and Safety chaired by Tony Dean (the Dean report) were unanimously accepted in principle by the then-Minister of Labour. Some of those recommendations were translated into law by Bill 160, which will come fully into force by April 1, 2012. One important change accomplished by Bill 160 is to concentrate workplace accident prevention programs in the hands of a new Chief Prevention Officer (CPO), operating under the aegis of the Ministry of Labour. While this new agency will inherit certain functions from the WSIB, its position with regard to employer incentive programs is so far unclear.

In Chapter 5, I concluded that these programs are (and legally must be) designed “to encourage employers to reduce injuries and occupational diseases and to encourage workers’ return to work” [s. 83] rather than to provide “insurance equity” to employers. Arguably, encouraging the reduction of injuries through incentives is one means of preventing accidents, along with establishing codes of safe working practices, training workers and supervisors, inspecting workplaces, and punishing violations of safety standards. While Bill 160 on its face does not appear to transfer any responsibility for incentives to the new agency, the Dean report recommended that

... [t]he Workplace Safety and Insurance Board, in conjunction with the new prevention organization and stakeholders, should review and revise existing financial incentive programs, with a particular focus on reducing their emphasis on claims costs and frequency [recommendation 22].

Given that the government has endorsed all of the recommendations in the Dean report, I assume that at some point consultation between

the CPO and the WSIB will take place, with a view to carrying those recommendations forward. As I make clear later in this chapter, this particular recommendation also carries my endorsement.

To make a more general point, even though accident prevention has now been given a new institutional focus with the creation of the CPO, it does not follow that all other contributors to the promotion of workplace health and safety should abandon their efforts. On the contrary, because his mandate and resources are inevitably limited, the CPO will have to find ways to engage with, stimulate and coordinate initiatives undertaken by other actors in the field, including the WSIB. Working with the WSIB to align Safe Workplace Associations with rate or sectoral groups, as recommended in Chapter 5, is one example of such engagement; cooperating with it in the redesign of its employer incentive programs, as recommended in this chapter, is another.

6.3 The debate over employer incentive programs

The WSIB maintains several experience rating programs — New Experimental Experience Rating (NEER), Council Amended Draft #7 (CAD-7) and Merit Adjusted Premium (MAP) — that are designed to incent specific categories of employers (defined by size of firm and/or business sector) to make their workplaces healthier and safer, and to improve their arrangements for the re-employment of injured workers. These programs together cover over 120,000 employers — about half of the employers registered with the WSIB. Employers that fall within the specified categories are automatically enrolled in the relevant program; their performance is evaluated on the basis of their claims experience (one of the two metrics authorized by statute); and they are rewarded with cash rebates or rate reductions, or punished with rate surcharges or rate increases.

The WSIB and virtually all stakeholders agree that these programs should run (if at all) on a revenue-neutral basis so that, in any given year, total rebates or rate reductions do not exceed total surcharges or rate increases. I have made a recommendation to this effect in Chapter 5.

In addition, the WSIB has established several smaller programs that provide employers with financial incentives or disincentives. Employers with a high frequency of injuries must participate in the Workwell program. Participants are required to undertake specified remedial measures; they are audited for compliance; and they are heavily surcharged for non-compliance. Furthermore, the WSIB offers eligible employers the opportunity to join one of its two voluntary practice-based programs — the Safe Communities Incentives Program (SCIP) and the Safety Groups Program (SGP). Firms that choose to enrol must participate in various harm-reduction activities; participants are occasionally audited to confirm their participation; and rewards in the form of rate rebates or reduced rates are provided to participating employers based on their collective — not individual — cost experience. The final incentive program is the Second Injury and Enhancement Fund (SIEF), which is designed to encourage employers to hire previously injured workers by relieving them of financial responsibility for a subsequent injury that has been caused, contributed to or aggravated by a pre-existing disability. (The WSIB has also designed — but not yet implemented — a comprehensive program of accreditation for employers, under which firms that adopt good health and safety practices receive financial rewards. Under Bill 160, responsibility for accreditation programs will shift to the Chief Prevention Officer.)

Criticism of employer incentive programs during the hearings mainly focused on those that were performance- or experience-based — primarily NEER and to a lesser extent CAD-7 — and that used claims costs, accident frequency or similar metrics to trigger positive or negative financial

consequences. In good measure, this criticism was grounded in some 50 first- and second-hand accounts of workers victimized by employers intent on avoiding surcharges or claiming rebates. These workers testified that they had not been told of their right to seek compensation, had been offered inducements not to report their injury, ostracized or threatened with loss of their job for doing so; told to misrepresent their workplace accident as having occurred off the job; forced to return to work before they could safely resume their duties; offered no or insufficient accommodation in respect of their injury; called back to work to perform “non-jobs” (non-productive work), only to be fired or made to quit after their chance to “lock-in” their claim had passed; and/or confronted with hyper-aggressive employer opposition during the WSIB’s processing of their claims.

One case deserves special mention. Both an employer and the union representing its employees submitted evidence at separate hearings to the same effect: the employer, in the course of aggressively managing an employee’s workplace injury, made false representations to the WSIB; an arbitrator subsequently ruled in a grievance proceeding that it had done so; and, as a result, its rebate was rescinded and it was surcharged a considerable amount. This case was unique only in that the facts were confirmed, not only by worker representatives and by a neutral arbitrator, but, to its credit, by the employer as well. However, in other crucial respects it resembled the 50 or so cases reported to me (and many, many more, I was told): the employer violated workers’ rights in order to gain the benefit of the experience rating scheme — to preserve or secure a favourable premium rate or to avoid being surcharged — by keeping its record clean or holding down its claims costs.

While the evidence of abuse tendered by workers’ representatives during the hearings had the ring of truth, it was of course anecdotal, uncorroborated (except for the case mentioned above) and

not statistical. As employer representatives fairly pointed out, even if all the incidents reported to me (and additional incidents featured in a *Toronto Star* series in 2008) actually occurred, they would constitute an infinitesimal fraction of all accidents involving Ontario workers over the years. Consequently, there is no way of telling whether these incidents represent most or all cases of abuse (as employers contend) or merely the tip of the iceberg (as workers believe).

In an effort to determine whether the workers' or the employers' estimate of the extent of abuse was more accurate, I tried to discover how frequently employers had been found guilty of claims suppression. What I learned was not very helpful.

In 2009 and 2010, the WSIB investigated just 153 employers for allegedly suppressing or misreporting claims. It laid 174 charges and secured 96 convictions against 49 employers. These numbers might suggest that abuse is very infrequent. However, for many reasons, prosecutions and convictions are not a reliable measure of employer wrongdoing.

For one thing, while the WSIB maintains a "snitch line," workers who have been bribed or coerced to conspire or cooperate in illegal employer behaviour are unlikely to snitch, especially since the WSIA does not at present provide whistleblowers with protection against reprisals by their employer. For another, the WSIB neither proactively audits employers to seek out instances of claims suppression (as it does, for example, violations of its registration, classification and other payroll-related requirements), nor keeps systematic records of claims suppression detected by its personnel in the ordinary course of their duties, nor collects statistics on the nature of workers' complaints (unless those complaints lead to prosecution or other remedial action). For a third, the WSIB prosecutes employers only if the prospects of securing a conviction appear strong. Because successful prosecution of offences like claims

suppression requires proof of intent beyond a reasonable doubt, the WSIB normally seeks to demonstrate that the employer has engaged in a pattern of wrongful behaviour, rather than a single isolated instance. However, given the state of its records and other impediments, it is difficult to establish a pattern. For all of these reasons, prosecutions are quite rare and convictions even rarer.

However, prosecutions are not the only strategy for dealing with employer abuse. In 2010 alone, using its powers under Ontario Regulation 175/98, section 15, the WSIB imposed some 4,500 (admittedly trivial) administrative penalties for claims-related non-compliance by employers. (The term includes the non-reporting, late reporting or misreporting of claims, but does not connote deliberate or repeated claims suppression.) While this represented a considerable decline from 2008, when the WSIB imposed almost 11,000 penalties for such infractions, it suggests that the practice remains much more widespread than one might infer from prosecution statistics. And it may be more widespread yet: a 2002 study suggested that unreported workplace accidents may represent as much as 40% of the total. Of course, accidents may go unreported for many reasons, and I certainly do not suggest that employer pressure is responsible for all, or nearly all, of the non-reporting identified in this study. Nonetheless, the overall extent of non-reporting is so large that the WSIB must surely take prompt and proper steps to satisfy itself that, if injured workers are foregoing their benefits, the reason is something other than employer misconduct.

Of course, employers, for their part, also pointed to evidence — in particular, to evidence that claims arising from workplace injuries have declined sharply since the introduction of experience rating in 1984, especially in the last decade. This evidence, they argue, demonstrates that experience rating produces the desired results. Workers rejoined that the decline may

have been attributable to many factors, not least the under-reporting of injuries due to illicit employer pressure; no empirical study — they insisted — has ever verified that experience rating leads to harm reduction.

Several analyses of experience rating undertaken for the WSIB (most recently the Nexus study discussed later in this chapter) have suggested that the present system of financial incentives is likely to tempt employers to suppress claims. However, they offer no statistically reliable estimate of the extent of such behaviour. On the other hand, the same studies (and others) offer only modestly compelling evidence that experience rating produces the desired outcome of reducing workplace injuries or promoting workers' return to work.

Given the paucity of statistical evidence proffered by stakeholders concerning the positive or negative outcomes of the WSIB's experience rating system, I asked our research consultants, Morneau Shepell, to review the general literature on the subject. Their report can be briefly summarized as follows: a number of empirical studies during the past two decades provide modest — not overwhelming — support for the proposition that experience rating may indeed reduce accidents, but many of these same studies also conclude that experience rating probably creates incentives for abuse such as claims suppression.

These findings are hardly counterintuitive: they are consistent with the limited evidence placed on the record at the hearings, and I regard them as a sufficient basis for my findings and recommendations.

In my view, the WSIB is confronting something of a moral crisis. It maintains an experience rating system under which some employers have almost certainly been suppressing claims; it has been warned — not only by workers but by consultants and researchers — that abuses are likely occurring. But, despite these warnings, the WSIB

has failed to take adequate steps to forestall or punish illegal claims suppression practices. In order to rectify the situation, the WSIB must now commit itself to remedial measures that might otherwise require more compelling justification. Unless the WSIB is prepared to aggressively use its existing powers — and hopefully new ones as well — to prevent and punish claims suppression, and unless it is able to vouch for the integrity and efficacy of its experience rating programs, it should not continue to operate them.

I have therefore worded my next recommendation with considerable care:

Recommendation 6-1

The WSIB should continue to maintain experience rating programs under section 83 if, and only if, three conditions are met:

- it declares the purpose of such programs to be solely to encourage employers to reduce injuries and occupational diseases and to encourage workers' return to work, and it concludes that the programs are in fact accomplishing their purpose;
- it adopts a firm policy to protect the integrity of its programs and commits the necessary resources to proactively detect, prevent and, if necessary, punish any abuses committed by employers to gain the benefit of reduced premium rates; and
- it establishes a credible monitoring process to ensure that the first two conditions are met.

In the remaining three sections of this chapter, I explain and expand upon these crucially important conditions.

6.4 Making sure that experience rating programs are fit for purpose

The logic underlying the first condition in recommendation 6-1 is obvious. No public agency should act in violation of its own statute, and any well-run agency should confirm that its programs are achieving the goals laid out in that statute.

However, while the WSIB's experience rating (ER) programs do not on their face necessarily contravene the requirements of section 83, they have sometimes been presented in terms that suggest they do. Specifically, material produced by the WSIB for the technical consultation organized by the Funding Review states that one program — NEER — “is aimed strictly at insurance equity and is only cost based.” If that statement is true, either section 83 should be amended to permit such an equity-driven program or NEER should be discontinued forthwith. On the other hand, if this statement misrepresents the true nature and purpose of NEER, the WSIB should take more care to explain, reinforce and reiterate the remedial objectives of ER, rather than conveying the impression to employers that they are entitled to lower rates as a matter of simple “insurance equity.” Of equal importance, it should ensure that NEER and similar ER programs are accomplishing their statutory purpose: “encourag[ing] employers to reduce injuries and occupational diseases and to encourage workers' return to work.” This would require more robust evidence than the WSIB seems to have been able to muster to date.

The next condition in recommendation 6-1 amounts to a restatement of the first commandment in the physician's oath: do no harm. The WSIB must act much more vigorously and visibly to ensure that ER is not doing harm to injured workers.

Much can be accomplished through more aggressive use of the WSIB's existing powers to detect and punish abuses. For example, the WSIB might (and should):

- take aggressive steps to educate employers about their duty to report claims promptly and about the risks they face for failing to do so;
- develop algorithms to identify suspicious patterns of improvement in claims costs or accident experience;
- conduct random, proactive audits and examinations to both detect abuses and deter them;
- undertake training programs to sensitize its front-line claims staff to the possible suppression or misreporting of claims and other abuses;
- install systems that will record workers' complaints and staff findings that in turn may help to identify patterns of claims suppression;
- hold corporate officers and directors personally responsible for “permitting” or “acquiescing in” claims suppression;
- publicize more aggressively the steps it is taking against claims suppression, and
- expand the resources it makes available to its Validation Unit, which is now apparently preoccupied with other responsibilities.

However, if the integrity of ER programs is to be fully protected, the WSIB's repertoire of precautionary and punitive powers should be extended, and those additional powers must be used. I therefore recommend the following changes, some of which may require legislative amendments or changes to regulations made under the authority of the WSIA:

Recommendation 6-2

6-2.1 Employers should be required to take positive steps to ensure that workers know of and are able to exercise their rights under the WSIA:

- Every employer should be required to file with the WSIA the name of a designated Health, Safety and Insurance Officer (HSIO) whose acts or omissions will be conclusively deemed to be those of the employer. If the firm neglects to designate an HSIO, the President or Chief Executive Officer will be deemed to hold that office.
- The HSIO should be assigned responsibility for ensuring compliance with the WSIA and other occupational health and safety legislation, and for filing an annual statement on behalf of the employer recording all workplace accidents and certifying that the employer has complied with the legislation.
- The HSIO should also be held responsible for the acts or omissions of all agents, advisors or advocates representing the employer in relation to Workplace Safety and Insurance Board (WSIB) matters.
- The HSIO should ensure that each worker (a) receives annually a pamphlet briefly summarizing their rights under the WSIA (to be prepared by the WSIB in various languages) and (b) is advised in timely fashion of their right to file a claim in the event of a workplace accident or illness.

6-2.2 The WSIB should take steps to ensure that all participants in its proceedings act fairly and honestly.

- The WSIB should amend its Code of Conduct for Representatives to prohibit lay or professional advocates for any party from proffering, or procuring any person to proffer, false documents or evidence in any proceeding under the WSIA.
- The WSIB should provide courses, either directly or through some educational institution, for persons seeking to represent claimants or employers in WSIB proceedings. Such courses should provide participants with knowledge of the WSIA and of the WSIB Code of Conduct.
- All persons who successfully complete such courses should be eligible to appear in proceedings, and the WSIB should take steps to ensure that their right to do so is recognized by the Law Society of Upper Canada, the body that regulates paralegals.
- The WSIB should have the power to suspend or cancel the right of such representatives to participate in its proceedings if they violate its Code of Conduct.

6-2.3 The WSIB should devote additional resources, and be given additional powers, to detect and punish acts or omissions that interfere with the right of workers to claim compensation or to return to work under the WSIA.

- WSIB staff at all levels should be trained to detect, and required to report, claims suppression or other conduct that appears to violate the WSIA.
- The WSIB should establish or designate a special compliance unit, headed by a senior officer and provided with the necessary resources, to track all reports of abuse, to identify patterns of abusive conduct, to conduct proactive workplace audits to ensure compliance with the WSIA, and to refer cases for administrative disposition or prosecution as appropriate.
- Employers found to have violated the WSIA or other occupational health and safety legislation should be automatically ineligible for favourable premium adjustments or rate rebates, for at least one year and for any additional period up to five years, as determined by a claims adjudicator, tribunal or convicting court that makes a finding that such a violation has occurred.

- The WSIB should be given enhanced power to impose administrative penalties for violation of workers' rights to benefits or to return to work. Penalties should be levied up to a maximum of three times the employer's annual premium rates and graduated to reflect mitigating or aggravating factors.
- In addition to imposing administrative penalties, the WSIB should have the power to order employers (a) to reimburse it for all expenses it has incurred relating to the proceedings or in providing benefits to the aggrieved worker and (b) to reimburse workers for any loss incurred as a result of the employer's wrongful conduct, including lost wages and benefits, the costs of legal or paralegal representation, and travel, relocation and medical expenses.
- Administrative penalties imposed by the WSIB should be subject to appeal to the Workplace Safety and Insurance Appeals Tribunal.

In principle, the likelihood of being prosecuted for violation of the WSIA ought to function as a significant deterrent to abuse. However, for many reasons, this does not appear to be the case: the WSIB rarely lays charges; when it does, charges are heard by judicial officers (Justices of the Peace) who are unfamiliar with the Act; convictions are difficult to obtain because they require proof of intent and proof beyond a reasonable doubt; the fines now provided under the WSIA are derisory — \$25,000 maximum for individuals and \$100,000 for corporations [s. 158]; and courts are often reluctant to convict and punish reputable businesses and their officers for what are perceived to be “merely regulatory”

offences. However, if prosecution is to be used at all in order to deter wrongdoing, it must be used more aggressively than it is now, and convictions must involve more serious consequences for the offender than at present.

6-2.4 The WSIA should be amended to more effectively deter and punish illegal conduct.

- Whistleblowers who report violations of the WSIA should be protected from reprisals.
- An employer that has failed to report or has misreported a compensable accident or illness should be presumed to have done so deliberately unless it can show the contrary.
- Maximum fines for violations of the WSIA should be raised from \$25,000 to \$100,000 for individual offenders and from \$100,000 to \$500,000 for corporate offenders. For purposes of calculating the fine, each violation should be treated as a separate offence rather than as part of a pattern of conduct constituting a single offence.
- Upon conviction, the court should have the same power as the WSIB to make reimbursement orders, and in addition should have power to order the employer to pay the worker general damages for the intentional infliction of harm and to revoke any policy or cease any practice that has given rise to the violation.

I have recommended the adoption of significant measures to detect, deter and/or remedy illegal conduct by employers that amounts to an abuse of the ER system, that inflicts serious financial

and psychological harm on individual injured workers and deprives them of their rights, and that brings the WSIB into disrepute. Some will object that my recommendations represent an over-reaction to claims of abuse whose frequency has not been conclusively established, and some that they will require the WSIB to expend scarce resources on securing compliance with its statute that might better be devoted to increasing benefits or reducing the UFL.

There is perhaps some validity in both objections, although I reluctantly observe that no employer representative at the hearings or subsequently responded to my invitation to suggest an acceptable strategy for putting an end to the abuse that tarnishes ER programs. That said, employers that act responsibly and in conformity with the WSIA have nothing to fear from my recommendations, nor will their implementation add materially to compliance costs or premium rates. Indeed, most employers will ultimately benefit if the WSIB is able to ensure that all firms in their sector or industry observe the rules of the game, and none enjoys cost advantages gained through illegal behaviour. As for the diversion of WSIB resources to the proposed new arrangements, the amounts in question are small relative to the WSIB's overall budget, and if they lead to increased revenues for the WSIB and/or more reliable delivery of benefits to workers who are entitled to them, the money will have been well spent.

I must now put my recommendations in context. There are three arguments for treating these amendments to the WSIA as part of a larger project of law reform. The first is that claims suppression is by no means the only type of offence committed against the WSIA. To cite the most obvious example, workers as well as employers may engage in fraudulent conduct in connection with the reporting of claims. Second, the Dean panel recommended improved enforcement of occupational health and safety laws. These recommendations have not yet been implemented

although, given their endorsement in principle by the government, they may still be under consideration. And third, other regimes designed to regulate workplace relations — employment standards and human rights, for example — would also benefit from enhanced regulatory oversight and more vigorous and consequential enforcement strategies. Perhaps, then, the best way to deal with claims suppression incited by ER is to treat the regulatory, remedial and deterrence measures I have recommended as part of an integrated initiative to ensure more law-abiding workplaces.

6-2.5 If the Ministry of Labour prefers to pursue an integrated initiative to enhance compliance with all aspects of the WSIA, health and safety and/or other labour and employment legislation, it would be appropriate to include the measures set out in recommendations 6-2.1 – 6-2.4 in such an initiative.

Finally, I view the adoption of these measures to protect the rights of injured workers as a matter of highest priority. While appreciating that it will take time for the WSIB to develop specific strategies, to consult with stakeholders about them, to train and deploy personnel, and to budget for this new initiative, I am also aware that if it does not adopt and implement these much-needed reforms in the very near future, it likely never will. (Of course, the WSIB has no control over the legislative process. The government, rather than the WSIB, is responsible for securing amendments to the WSIA.) And if these reforms are not put in place, in my view, the risks associated with ER programs are too significant to allow them to continue.

6-2.6 The WSIB should commit itself to making the changes in its rules, structures and processes necessary to protect workers against claims suppression and other abuses that may occur in the context of experience rating programs. If it cannot or does not commit to making such changes within 12 months from the receipt of this report, and fails to initiate all necessary changes within its competence within 30 months, it should discontinue its experience rating programs.

6.5 Redesigning the WSIB's experience rating programs

Even if the WSIB were to adopt all of my recommendations concerning the protection of workers against claims suppression, it should also immediately begin considering the redesign of its existing ER programs and other employer incentive programs. The reason is simple, and is captured by recommendation 6-1 above: no one knows whether these programs are in fact achieving the purpose the statute requires them to achieve.

Indeed, this is an opportune moment for the redesign process to begin. First, recent reports have suggested that these programs exhibit some intrinsic design flaws. Such flaws ought to be corrected. Second, the 2011 Nexus report, *A Pricing System Conceptual Design for Moving Forward*, proposes that ER should become an integral part of the rate-setting process. This proposal deserves close consideration, which it can only receive in the context of a broader review of existing and/or new ER programs and of the very concept of experience rating. And third, under Bill 160, primary responsibility for accident prevention will move from the WSIB to the Chief Prevention Officer. What

connection, if any, the CPO will have with ER and other employer incentive programs remains to be seen, but it is important in any event to consider how these programs might be integrated into a comprehensive and reinvigorated prevention strategy.

6.5.1 Design flaws and promising options in the design of experience rating programs

Recent studies by Morneau Sobeco (2008) and the Dean panel (2010), as well as submissions made during the hearings, have identified a number of design flaws in the WSIB's existing programs, some of which are substantive, some technical. Among the flaws mentioned are the following:

- the excessive reliance on cost and experience metrics in ER programs, rather than on accident reduction and improved return to work;
- the under-utilization of practice-based incentives;
- the tendency of present ER plans to generate multiplier effects whereby relatively small changes in claims experience result in relatively large changes in premium rates;
- the non-alignment of the existing ER plans with each other;
- the misuse of SIEF;
- the lack of coordination between performance-based plans and practice-based plans;
- administrative complexity caused by the existence of a multiplicity of plans with different metrics, clienteles and consequences.

(The list is not exhaustive.)

I have not investigated these concerns in detail because I believe that a first priority is for the WSIB to take proper steps to ensure that ER programs generate positive results and not abuses.

If it is unwilling or unable to take those steps, then — as recommendation 6-2.6 proposes — its ER programs should be abolished rather than redesigned.

However, I am optimistic that the WSIB will promptly do what needs to be done, and accordingly offer the following as an agenda for a possible future WSIB initiative to redesign employer incentive programs, including those based on experience rating. The WSIB should:

- place greater emphasis on practice-based incentive programs and coordinate these programs more closely with other regulatory and educational initiatives to prevent accidents and promote return to work;
- make participation in practice-based programs a condition of eligibility for participation in experience-based programs, as is the case in Newfoundland and Labrador;
- introduce new metrics and/or program designs in order to mitigate rate volatility in ER programs and to shift their focus from cost reduction to accident prevention and return to work;
- consolidate the main ER programs (NEER and CAD-7) into one comprehensive program for large employers;
- replace existing retrospective programs for large employers (NEER and CAD-7) with a prospective ER program, as is the case in most other Canadian jurisdictions;
- extend the review window to 6 years to bring it in line with the legislated benefit review window;
- abolish SIEF or replace it with a program of wage subsidies for injured workers seeking to return to work with their original (or another) employer;

- implement the key recommendations in the Morneau Sobeco report to address design gaps within existing ER programs in the short term;
- consolidate and/or coordinate existing practice-based programs (SCIP, Safety Groups, Workwell and Accreditation); and
- establish incentive programs that are fair and practical for small businesses;

Some of these suggestions — those contained in the Dean report — have been approved in principle by the Minister of Labour, though not yet implemented. Some can be made within the existing legislative and administrative framework. And some may require amendments to the statutory scheme. But — as I suggest in the final section of this chapter — all changes should be viewed as a “controlled experiment” and monitored closely. Finally, my sense is that the WSIB would be well advised to approach the task of redesigning its incentive and ER programs as something more than a tweaking exercise. On the one hand, the existing programs carry too much baggage in terms of abuse and the fear of abuse, and provide too little by way of proven accomplishments; on the other, starting with an open mind and large ambitions is the best way to treat the exercise as a controlled experiment worthy of the time and effort that must be invested in it.

6.5.2 The integration of rate setting and experience rating: the Nexus proposal

WSIB management commissioned Nexus Actuarial Consultants to prepare a study on “pricing” or premium rate setting, which was submitted to the Funding Review in June 2011. It has occasioned considerable comment, much of it adverse. In essence, the Nexus model contemplates that firms will be assigned to a rate group, band or cohort whose members share a common claims experience rather than, as at

present, a common line of business. As firms improve their claims record, or allow it to deteriorate, they are automatically re-assigned to a new “risk category” and their premium rates are adjusted accordingly. In effect, then, the process of setting premium rates operates more or less formulaically and is driven by a process of continuous experience rating. In such a system the opportunity for “rate shopping” is minimal. Moreover, transition from one cohort to another is designed to be relatively gradual (whether it actually is requires further analysis), so that employers with poor claims records have an opportunity to mend their ways to avoid being re-assigned to a group with higher rates. And finally, it signals to employers in advance that, on the basis of their current experience, they are *en route* to higher rates, thus enabling them to modify their conduct.

At the conceptual level, this approach has much to recommend it. It is simple and transparent; it generates minimal transaction costs for the “insurer”; it enables employers to mend their ways; and (for those who favour “insurance equity”) it appears to ensure that firms pay premium rates in proportion to the costs they generate.

However, the devil in the Nexus model may reside in its details. First, it effectively individualizes risk at the firm level instead of spreading it across a rate group or industry class. This may “up the ante” for employers and encourage, rather than discourage, misreporting or non-reporting of claims and other abuses. I sought clarification on this point from the Manitoba Workers’ Compensation Board, which uses a version of the Nexus model, but none was forthcoming. Second, the Nexus model operates prospectively, rather than retrospectively (as Ontario’s NEER and CAD-7 programs do). Some commentators suggest that the prospective approach to experience rating may

mute its undesirable side-effects; others take the opposite view. However, the Nexus report fails to address this issue or to proffer empirical evidence from Manitoba that might confirm one view or the other. And third, by managing employers' collective liability on the basis of their claims experience rather than their business affinity, the Nexus approach seems likely to attenuate their motivation and capacity to work together to develop safe and healthy working practices, to promote safety education, to facilitate the return to work of injured workers, or to cooperate in other relevant ways. Given that accident rates and new claims costs in Manitoba are considerably higher than in Ontario, one might fairly ask whether its state-of-the-art "insurance" approach may prejudice, or at least fail to reinforce, education and prevention initiatives designed to improve workplace health and safety.

Thus, while I acknowledge the attractions of an integrated and straightforward rate-setting mechanism such as the one in force in Manitoba, the Nexus study leaves too many important questions unanswered. I therefore cannot recommend adoption of the Nexus/Manitoba model at this time. On the other hand, I am prepared to heed my own advice that one should not judge until all the evidence is in. If verifiable and acceptable answers are provided to the questions I have raised and — crucially — if the WSIB resolves to first put in place the safeguards that I have proposed, the Nexus proposal model may well deserve further consideration.

6.6 A controlled experiment in experience rating

Finally, whatever changes are to be made in ER programs, and by whom, they ought to be treated as a "controlled experiment." To explain my choice of terminology, I refer again to the vigorous debate around the issues at the hearings.

Workers' representatives pessimistically maintained that no prophylactic or punitive measures could possibly deter the abuses that, they said, are inherent in any system of experience rating. My response was, and still is, that the effectiveness of efforts to prevent abuse ought to be the subject of a controlled experiment. That experiment has not yet taken place. For their part, employer representatives optimistically claimed that all insurance schemes offer incentives and disincentives, and that those embedded in the WSIB's ER programs have in fact achieved their stated purpose of reducing accident frequency and improving the return to work of injured workers. This claim — I responded in similar fashion — has yet to be empirically tested. I therefore express the hope that both worker pessimists and employer optimists will agree to suspend judgment on the possibility of establishing a successful, abuse-free ER program until a new experimental program with adequate safeguards has been designed, allowed to operate for a finite period of time, and subjected to rigorous evaluation — in short, until all the evidence is in.

6.6.1 The experiment

It is in everyone's interest — workers', employers', the WSIB's and the government's — that people should not experience injury or illness in their workplaces. For that reason, I have already recommended that premium rates should be fixed at the level of sectoral groups, which in turn should be built upon the foundations of Safe Workplace Associations (SWAs) or other employer groups engaged in promoting safe working conditions and harm reduction for injured workers. This, I believe, will help both symbolically and in practical ways to drive home the connection between operating safer workplaces and achieving lower premium rates. Similarly, I believe that designating SWAs and similar bodies as the primary sites of ER programs will reinforce the statutory purpose of such programs — to encourage

employers to reduce accidents and facilitate workers' return to work following injury. What I now propose is an experiment to test my hypothesis.

While I hesitate to prescribe the technical details (which should in any event be worked out with the participants), the experiment should operate in the following general manner:

- The WSIB should designate two industry classes as initial participants. One should be designated to continue with present ER programs, and the other should be designated to adopt a new, experimental approach.
- The industry class selected to develop a new approach should be one with a strong existing SWA or equivalent body or bodies.
- The industry class should be divided into one or more sectoral groups, which would in turn comprise one or more existing rate groups. Rates should be established for each sectoral group within the industry class and adjusted in accordance with the new premium rate-setting approach proposed in recommendation 5-1.
- The SWA or equivalent should be asked to develop and deliver a menu of industry-specific, practice-based programs designed to persuade and assist employers to improve workplace safety; enhance the safety consciousness of workers, supervisors and managers; and encourage collaborative efforts to facilitate the return to work of injured workers.
- Only firms that agree to participate in these practice-based programs should be allowed to enrol in an ER program designed for the purpose or adapted from an existing program.
- The objectives of the new ER program should include harm reduction (lowering accident frequency), success in achieving the return to work of injured workers, and the reduction or elimination of claims suppression. Its metrics should be defined accordingly.

- The same metrics should be applied to both industry classes — the one designated to participate in the experiment and the one not so designated.
- The new ER program should operate prospectively — i.e. positive and negative incentives should take the form of an adjustment in rates for subsequent years, rather than of earmarked rebates delivered or surcharges imposed for the current year.
- Firms that do not agree to participate would pay the average premium rate for their rate group for the duration of the experiment and would not be eligible for experience rating.
- The experiment should last for three to five years and be subject to monitoring as described below.

Recommendation 6-3

6-3.1 The WSIB should initiate a time-limited, carefully monitored experiment in experience rating, involving one industry class, with the aim of reducing accidents, improving the return to work of injured workers and avoiding claims suppression by employers. If the experiment succeeds, the approach should be extended to other industry classes.

6.6.2 The control

The “control” element of the experiment has several dimensions. First, it requires that the objectives of the experiment be defined and that metrics be adopted that will measure the extent to which these objectives are achieved. Second, it permits comparisons among three different groups: employers in the designated industry or sector that choose to participate in

the experiment; those that choose not to; and those in the industry class not participating in the experiment. The latter two groups are not perfect control groups — the one because its members are self-selected, the other because it will be facing rather different conditions — but they are the best available. Third, the experiment will be monitored as it proceeds and rigorously evaluated upon conclusion. This latter point is important. One of the difficulties of previous studies of ER systems is that they tried to somehow capture data after the fact and fit them into a retroactively imposed analytical matrix. The proposed experiment avoids, or minimizes, this difficulty. Furthermore, the WSIB will not have to re-engineer rate setting and experience rating for all nine industry classes at the same time. Doing so would be difficult, especially in light of the transitional situation of the Chief Prevention Officer, who is potentially an important participant in this exercise given his stewardship of the SWAs. Moreover, experimenting with all 240,000 or so Schedule 1 employers at once would be costly and time-consuming, given that each industry class presents distinctive issues. And finally, like all experiments, this one may succeed or it may fail. If it succeeds, the lessons learned can be extended to other industry classes, as recommended above; if it fails, the WSIB can either continue with the current ER system (assuming that it includes much-enhanced regulatory arrangements to prevent and punish abuse) or design a new experiment.

In the end, however, the control aspect of the experiment stands or falls with the integrity of the process adopted to design and assess it. In recommendation 6-1 above, I proposed that, as a condition of continuing with ER programs, the WSIB should create a credible monitoring process to ensure that such programs were achieving their goals without at the same time incenting improper and illegal claims suppression. The following recommendation provides an outline of what that monitoring process might look like. Needless to say, all WSIB programs

should ideally be subject to a similar process of experimentation and evaluation. No program should be allowed to continue in its present form if it is not producing the desired results, or if in a revised version it could do better.

6-3.2 The WSIB should establish a unit (or contract with an outside consultant or the Chief Prevention Officer) to monitor its new experience rating system for the duration of the proposed experiment, with a view to determining whether it is achieving its purposes.

6-3.3 If, upon conclusion of the experiment and on the basis of empirical evidence and objective analysis, the experience rating system is found not to be effective in achieving its objectives, as defined in recommendation 6-3.1, it should be discontinued.

6-3.4 To ensure the integrity of the monitoring process, the WSIB should appoint an advisory committee comprising a neutral expert chair and equal numbers of nominees of employers on the one hand, and labour unions and injured workers on the other. The committee should:

- discuss directly with WSIB senior management the steps being taken by the WSIB to protect workers from claims suppression in accordance with recommendation 6-2;
- review and comment on the experience-rating methodology employed in the experiment and the measures adopted to prevent and punish abuses; and
- receive periodic detailed reports from the monitoring agency on both subjects.

Finally, stakeholders should not only monitor the proposed experiment in experience rating, they should contribute directly to the process in a meaningful way. That said, the experiment should not become an occasion for re-litigating issues that have been extensively canvassed by this review.

6-3.5 The redesign of experience rating and other incentive programs should be introduced following extensive consultation with stakeholders. Consultation should take place within a broad framework of principles laid down by the WSIB following consideration of the recommendations contained in this report.

CHAPTER 7

FUNDING OCCUPATIONAL DISEASE CLAIMS

7.1 Introduction

I have been asked to recommend an approach to the funding of occupational disease claims. On its face, this seems an odd assignment. Under the WSIA, a worker who contracts an occupational disease “is entitled to benefits under the insurance plan as if the disease were a personal injury by accident and as if the impairment were the happening of the accident” [s. 15(2)].

Funding to pay for benefits attributable to disease is in fact treated in the same manner as funding to pay for accident-related benefits, although the present statute directs that future employers not be burdened “unduly or unfairly ... in respect of *accidents* in previous years” (emphasis added) [s. 96(3)] but imposes no similar constraint with regard to diseases. (This anomaly, perhaps accidental, will be corrected when new language contained in Bill 135 is proclaimed in force.) As a practical matter, it would be extremely difficult for the WSIA to do otherwise: to account separately for the cost of illnesses and injuries; to levy separate premium rates or maintain segregated investment portfolios; in effect, to administer two distinct insurance systems.

Nonetheless, occupational diseases do have certain distinctive characteristics that have had to be accommodated by special provisions of the WSIA. The first relates to the difficulty of establishing causal links between workplace conditions and the symptoms presented by the worker. Workers vary in their genetic makeup, and some are doubtless more predisposed to

certain kinds of disease than others; they live in different environments, pursue different lifestyles and therefore experience different after-work conditions that may aggravate any health risks to which they are exposed in the workplace; and increasingly, they are likely not only to work for several employers in the same industry, but to work for many employers in different industries. Second, unlike accidents whose physical consequences usually become obvious almost immediately, many occupational diseases have long latency periods. Thus a worker may exhibit symptoms of a disease years or decades after working at the job that gave rise to that disease. Third, because of advances in medical science, workers may be diagnosed as suffering from a disease whose causes were not known or even suspected years earlier when she or he was employed in the workplace where the disease was contracted.

For all of these reasons, the WSIA treats issues of causation related to occupational diseases rather differently from issues of causation involving workplace accidents. Some diseases are dealt with by name in the statute: workers with these diseases will be entitled to benefits if they meet specified conditions, and disentitled if they do not. Others are dealt with in Schedules 3 and 4, which raise a presumption of causation if someone presenting with a particular disease has worked in a particular type of workplace. And others, not covered in the WSIA or in the two schedules, may be adjudicated on a case-by-case basis through the WSIB’s internal decision-making process. The first two

approaches have the advantage that they presumably rest on epidemiological evidence, although questions remain concerning the quality of such evidence, the extent to which it is or is not relied upon, and the institutional structures through which decisions are made to list diseases in the statute or one of the two schedules. The third approach is expensive and time-consuming, and potentially produces inconsistent and medically unreliable outcomes; ideally, it should be used only as a last resort. Of course, individuals whose diseases are arguably linked in some way to their work, but who are denied coverage under the WSIA, will have either to seek redress in the courts or (more likely) to rely on the same social safety net that supports ill and indigent individuals in the general population.

In addition to difficulties associated with proving causation, occupational disease claims differ from accident claims in other important respects. They tend to be far more expensive than claims originating in accidents — on some estimates, as much as 10 times more expensive on a per capita basis. They involve a far higher percentage of fatalities and therefore entail extensive survivor benefits, often in the range of \$400,000 to \$600,000. They represent a rapidly growing percentage of all claims costs — up from about 6% in 2000 to about 10% in 2010. And most importantly, there seems to be a general consensus that occupational disease claims and claims costs are likely to continue to rise for the foreseeable future, although no one can say by how much.

7.2 A precautionary strategy

One response to the anticipated rising incidence and cost of occupational disease claims might be to institute a precautionary strategy: to set aside funds today to meet anticipated but unquantifiable future benefit costs. Indeed, the WSIB has to some extent adopted this strategy.

It has allowed \$600 million for occupational disease claims in its estimate of future costs — a sum intended to provide for “future occupational disease claims that have not yet been incurred” (i.e., known diseases whose symptoms have not yet been manifested by claimants). However, it has made no provision for claims attributable to diseases so far unidentified by medical science. While this set-aside strategy is hardly a secret, all workers’ and most employer advocates resisted the notion that the WSIB should create a special fund for occupational diseases — the former because they feared that a fund would become a ceiling on the WSIB’s expenditure for occupational disease claims, the latter because they feared it would become a floor.

Early Ontario experience with special reserve funds for silicosis and for unspecified “disasters,” and contemporary experience in other provinces with earmarked occupational disease reserves, suggest that there is no basis for the concerns expressed by stakeholders. Nonetheless, in my view, the key issue is whether the WSIA has made sufficient provision for the future cost of occupational disease claims, not whether that provision should form part of its overall analysis of future funding requirements or be set aside in a special earmarked fund. This is a matter of particular concern at a time when the WSIB is significantly under-funded and may therefore be reluctant to set aside funds to cover risks that have yet to become manifest. However, advice proffered by my research consultants suggests that the WSIB’s present set-aside of \$600 million appears to fall within a reasonable mid-range estimate of possible future occupational disease costs. Parenthetically, new standards — promulgated by the Canadian Institute of Actuaries and expected to come into force in 2012 — will require that such a set-aside be made.

On the one hand, it seems likely that the WSIB will have to fund, not only the costs of occupational diseases it currently recognizes, but also those associated with “new” workplace-related

diseases that have not yet been reliably identified by medical science. If past experience is any guide, those new costs are likely to be significant and could conceivably be high enough to destabilize the WSIB's finances. On the other hand, there is some reason to hope that the overall cost of occupational disease claims can be contained. Employment in two of the sectors where such claims have historically originated — manufacturing and mining — is flat or declining; and advances in medical science are likely to identify, not only new compensable diseases, but prophylactic measures that will prevent their occurrence or diminish the cost of treating them.

While the WSIB can obviously control none of the factors that may drive occupational disease costs upwards, it must ensure that it has the necessary professional capacity and institutional arrangements to enable it to receive and process early-warning signals from medical science. This requirement points to the need to re-establish a medical / scientific panel that will enable it both to make informed decisions about whether particular diseases should be compensable and to better forecast the long-term financial implications of such decisions. Based on sound advice, it should also be prepared to increase its set-aside for “new” types of occupational disease claims as circumstances warrant.

Recommendation 7-1

7-1.1 The WSIB should re-establish a medical / scientific panel to enable it to identify occupational diseases that should be eligible for compensation under the WSIA, the conditions and/or presumptions which should govern eligibility for compensation, and advice that will enable the WSIB to forecast likely future costs attributable to those diseases.

7-1.2 The WSIB should closely monitor long-term trends in occupational disease costs and the emergence of “new” occupational diseases, and make prudent financial provision for future benefit costs.

7-1.3 The WSIB should not establish a special segregated fund to cover the future cost of occupational diseases.

7.3 Allocating financial responsibility for occupational disease

Of course, it is not possible to accurately forecast the financial burden of occupational diseases that the WSIB will have to carry without first deciding how much of that burden (if any) will be shifted from the WSIB to the province's health and welfare systems. The argument runs this way: if genetic predisposition, lifestyle and environmental factors are all scientifically acknowledged as factors that contribute to the incidence of certain diseases, then it is unfair to force employers to pay the full cost of such diseases, even though workplace conditions are also identified as a contributing factor. Rather, as do victims of non-occupational diseases, workers and their survivors who suffer economic losses and medical costs due to occupational diseases should look to public disability pensions and the Ontario Health Insurance Plan for some or all of the assistance they require.

There are, of course, several responses to this argument. The first is quite simple: workers with occupational diseases cannot at present secure the same range of benefits from other sources that they can from the WSIB. The second is that the argument for cost sharing proves too much. If some of the cost of occupational diseases is shifted from the WSIB system and made the responsibility of Ontario taxpayers, why not the whole cost? And, if some or all of the cost of

occupational diseases, why not the cost of workplace accidents? Parenthetically, similar logic led to attempts to establish all-inclusive public compensation systems in Australia and New Zealand, neither of which was ultimately implemented. The third response is that even partial relief for employers from the burden of occupational diseases might create a moral hazard: relieved of the financial consequences of occupational disease, they would have less reason to invest in ensuring healthy conditions in the workplace. For all of these reasons, I conclude that occupational diseases should remain covered under the WSIA in the same manner as at present.

Recommendation 7-2

The cost of occupational diseases should continue to be covered under the WSIA and not be shifted to the general welfare system or the Ontario Health Insurance Plan.

This leaves one remaining question: how should the WSIB allocate existing and anticipated future occupational disease costs among Schedule 1 and Schedule 2 employers?

There is much to be said for treating the cost of occupational disease claims like any other claims cost: they should be assigned to the rate group that generates them. This would make it more likely that firms in that rate group will do something to improve workplace conditions and practices that give rise to occupational diseases or, at a minimum, that they will pass the true cost of production — including health costs — along to their customers. However, for reasons outlined above, it is not always possible to determine where or when diseases originate. Indeed, in cases where the very existence of an occupational disease, or of conditions giving rise to it, are unknown or unsuspected, a key reason for assigning the burden to a rate group disappears.

And finally, even when working conditions or processes in a rate group can be said with some certainty to be associated with a given disease, it is not always practical to assign the cost of benefits to that group. I offer several examples:

- Workers in a given rate group may also work for, with or in close proximity to firms in another group whose activities also contribute to the incidence of the disease.
- The group's membership, business activities, working methods or safety record may have changed considerably over the years.
- Costs generated at a time when a rate group employed large numbers of workers may well have to be borne decades later by the same rate group whose payroll base has shrunk in the interim.

The result may be that, if a rate group has to bear the entire cost of the occupational diseases it has generated, its premium rates would have to be set at levels that could be characterized as “undue” or prohibitive, if not “unfair” or inequitable. As a result, under present WSIB practice, some part of that cost is displaced onto other rate groups. For reasons canvassed in Chapter 2, I have recommended that the WSIA be amended to remove the language that permits such displacement. However, as long as the language remains in the statute, the WSIB may be confronted with pressures to redistribute the cost from the rate group to the industry class or to all Schedule 1 employers. Indeed, in a manner of speaking, it does so already by assigning part of the capital cost of survivor benefits to the UFL, which in turn is ultimately paid for (in varying degrees) by all Schedule 1 employers.

On balance, the fair and sensible approach would be to frankly acknowledge the need to spread the cost of occupational diseases across groups significantly larger than the current rate groups. Under existing arrangements, such groups would be industry classes. Under the new arrangements

proposed in Chapter 5, they would be relatively large and well-differentiated “sectoral groups.” Either would be appropriate for the assignment of occupational disease costs.

However, costs attributable to “new” diseases — those that are newly recognized or newly associated with particular working conditions — pose a special problem. Because their very existence or their connection to particular types of workplaces was unknown, even unsuspected, employers could neither have acted to prevent or mitigate harm to their workers nor paid premium rates over the years to defray their long-term future costs. The choices are stark: the cost of new diseases will be borne entirely by the sector or industry that — on the basis of strong scientific evidence — is found retrospectively to have generated them; or it will be shared among all Schedule 1 employers; or it will be passed along to Ontario’s taxpayers. I have already rejected the last alternative. In the recommendation that follows, I acknowledge the difficulty of choosing between the other two.

Recommendation 7-3

7-3.1 The cost of benefits attributable to occupational diseases should normally be charged to the industry class or sectoral group where the claim originated.

7-3.2 When a decision is taken to compensate workers who have contracted a “new” occupational disease — a disease not previously recognized or connected with particular workplace conditions — the cost of compensation for workers who have already contracted the disease as of that date should be divided between the industry class or sectoral group and all Schedule 1 employers. The cost of benefits for workers who contract the disease after that date should be borne by the industry class or sectoral group alone.

7-3.3 In accordance with present policy, the costs of long-latency occupational diseases should not be used in connection with experience rating.

7-3.4 The cost of maintaining a reserve to cover anticipated future increases in occupational disease claims (\$600 million at present) should be distributed among all Schedule 1 employers on the basis of a formula to be determined by the WSIB.

CHAPTER 8

BENEFIT INDEXATION FOR PARTIALLY DISABLED WORKERS

8.1 Background

I have been asked to advise the Honourable Minister of Labour what form of indexation would be fair for partially disabled workers.

Until 1987, benefits paid to all disabled workers were adjusted *ad hoc* to compensate them fully or partially (or not at all) for increases in the cost of living. However, in that year — following a recommendation by Professor Paul Weiler — an amendment to the *Workmen's Compensation Act* provided 100% benefit indexation. This arrangement lasted until 1995, when another government, grappling with a financial crisis, accepted the recommendation of a labour-management advisory committee to reduce the cost of the workers' compensation system by curtailing the indexation of benefits received by partially — but not fully — disabled workers. These reductions were accomplished by invoking the so-called Friedland formula; and in 1998, indexation was further curtailed by the introduction of the so-called Modified Friedland formula. (In fact, the formula, as originally developed by Professor Martin Friedland in 1990, had nothing to do with workers' compensation; it was a modest proposal designed to secure some degree of inflation protection for members of workplace pension plans who previously had none.)

As a result of this significant reduction in indexation, the purchasing power of benefits paid to partially disabled workers has declined considerably over time. In order to ameliorate the effects

of this policy, the government over the years provided eligible workers with “supplements,” and recently — in each of 2007, 2008 and 2009 — with non-trivial 2.5% *ad hoc* inflation adjustments to their benefits. Nonetheless, workers and their representatives claimed at the Review's public hearings that, despite these corrective measures, partially disabled workers continue to lead lives of privation and despair. Clearly many do so, to some extent because their benefits have been eroded by inflation, but for other reasons as well. (One such reason, suggested by a workers' advocate, is the WSIB's policy of “deeming” some partially disabled workers to be capable of finding a job and earning wages; if they do not actually earn a wage, they may be “deemed” to be paid at the level of the provincial minimum wage, and their benefits are reduced accordingly.)

Moreover, if recent measures have provided some relief — which they have — they were delivered by way of *ad hoc* adjustments. The *ad hoc* approach is not optimal: it leaves disabled workers at the mercy of too many economic and political contingencies; it forces the WSIB to readjust its financial predictions, often after the fact; it imposes costs on employers that they could neither predict nor budget for; and it puts the government in the invidious position of choosing each year between praise from workers and protest from employers, or vice versa. Clearly, a permanent formula would be preferable for all concerned.

8.2 The arguments for and against restoring full benefit indexation to partially disabled workers

As noted above, benefits paid to fully disabled workers (and their survivors) are fully indexed, and have been since the mid-1980s. An onus therefore rests on those who favour differential treatment for partially disabled workers to provide a rationale for such treatment. In the absence of a persuasive rationale, continuing the differential treatment of the two groups is *prima facie* not fair.

One possible rationale is that — unlike fully disabled workers — partially disabled workers do not need indexation because they are more likely to be able to find work to supplement their benefits and replace their lost income. This is not a rationale that appeals to other provinces; none of them distinguish between the two classes of injured workers (although not all provide full indexation). Nor is it a rationale that is grounded in hard evidence. During the hearings, I was referred to two surveys, one of which suggested that many partially disabled workers cannot find work and the other that those who do find work are seldom able to earn very much. These studies were impressionistic or preliminary, and lacked scientific credibility. They are also difficult to square with a more careful study by the Institute of Work and Health (IWH) that suggests that injured workers on average are able to replace over 90% of their pre-injury earnings through a combination of WSIB benefits and wages. Unfortunately, the IWH survey does not distinguish between fully and partially disabled workers, nor does it explicitly deal with the differential effect of indexation on the average earnings of each group. More and better research would be helpful in documenting the actual economic plight and labour market prospects of partially disabled workers generally and perhaps in distinguishing those suffering great privation from those who are doing reasonably

well. But even having this information would not provide a reason for indexing benefits received by fully and partially disabled workers on a different basis.

Essentially, the issue comes to this: if the government were to adopt a policy that tied the quantum of benefits to an injured worker's actual annual income, rather than the extent of his or her impairment, partial indexation for partially disabled workers would be an inappropriate device to implement such a policy. It would allow inflation to erode the benefits of low-earning as well as high-earning partially disabled workers; and it would leave high-earning fully disabled workers unaffected while reducing the value of the benefits paid to their partially disabled counterparts.

A second possible rationale for partial indexation is that the so-called Friedland formula, which reduced indexation for partially disabled workers, was introduced in 1995 on the recommendation of a joint labour-management committee that advised the government on cost savings and other issues. To go back on that joint recommendation, some suggest, is to invite re-examination of the whole “deal” by which other benefits provided under the WSIA were left untouched. This suggestion is based on a misinterpretation of the events of 1995 and subsequent years. In the first place, there was no “deal”: the government of the day decided to act on advice it received. Moreover, if there was a “deal,” injured workers were not a party to it. And finally, a subsequent government repudiated the so-called “deal” by introducing further reductions in both indexation and other entitlements.

The third rationale does not claim to be grounded in any “fairness” principle. It is simply this: the system cannot afford the additional cost of full indexation, at least until the UFL has been retired, many years hence. This argument raises some important questions. Is it true that the WSIB cannot afford to do what is almost

universally (if not always explicitly) conceded to be fair in principle? Or, in a second version of the same question: is it fair that a shortfall in the WSIB's funding should result in the long-term erosion of benefits for some injured workers and not for others? Or, in a third version: is it fair to ask employers to pay additional premium rates to support full indexation at a time when they are also being asked to shoulder the burden of eliminating the UFL?

Some facts may be helpful in responding to these three questions. Full inflation protection for partially disabled workers on a going-forward basis could lead to an increase in the WSIB's long-term liabilities of about \$1.7 billion, thus necessitating an increase in average premium rates of about \$.10 per \$100 of payroll. A further premium rate increase of about \$.06 would be needed to fully offset the additional \$1.3 billion cost of restoring the base on which future indexation would be calculated to what it would have been had full inflation protection been maintained from 1995 onward. However, for reasons explained below, I am recommending only a partial restoration of the benefit base at a cost of \$.5 billion, to be funded by an average rate increase of \$.02 — still a significant increase. On the other hand, Morneau Shepell's analysis of the UFL (available online at www.fundingreview.ca/finalreport.php) indicates that, if average premium rates are increased in accordance with recommendation 3-1, the additional cost of fully indexing injured workers' benefits, and of adjusting their base benefits as proposed, can be met without jeopardizing the WSIB's progress to — and past — the tipping point within five to seven years (depending on the average premium rate selected). To fully understand the implications of indexation on the WSIB's overall funding, I also asked Morneau Shepell to determine how quickly the tipping point would be reached if no adjustment were made in the present indexation formula. Their analysis shows that, in such a scenario, the WSIB would likely exit the tipping

zone one to two years sooner (depending on the average premium rate selected). At least from the perspective of the WSIB — if not that of employers — this short delay seems to me not to be too high a price to pay for fairness.

Of course, the real effect of full indexation is not that it jeopardizes the WSIB's progress towards financial recovery and ultimately towards full funding. It is that it makes that progress more expensive for employers. This is a legitimate concern for governments, especially at a moment when the economy is in difficulty; but it is not a concern that speaks to “fairness” — the standard I was asked to apply in proposing a new indexation formula. Fairness, for reasons indicated, clearly involves restoration of full indexation and abandonment of the present *ad hoc* system of annual adjustments by regulation.

Recommendation 8-1

- 8-1.1** The benefits of fully and partially disabled workers should be indexed on the same basis. The WSIA should therefore be amended to restore full indexation of the benefits of partially disabled workers on a going-forward basis.
- 8-1.2** The present statutory language, allowing for *ad hoc* indexation, should be repealed.

8.3 Implementing full indexation

Implementation of this recommendation leaves a number of practical issues to be resolved. The first involves the date as of which full implementation should begin. In earlier chapters, I noted that retroactive imposition of costs on the WSIB system has contributed significantly to the emergence of the UFL. If, indeed, premium rates for 2012 have already been set when this

report appears, the most responsible course is to postpone implementation of full indexation until the following year. However, various submissions have urged that implementation be postponed even longer — for 5 to 7 years, until the tipping point is passed, or for 20 years, until something like full funding is achieved. I believe there are good reasons for not waiting as long as 7 years, and even better reasons for not waiting 20. The longer the delay in restoring full indexation, the greater the loss in benefits that will be suffered by partially disabled workers, the more extreme their distress (especially the distress of those injured prior to 2000) and the larger the ultimate cost of restoring their benefit base.

A second issue involves measurement of annual increments in inflation. While other benchmarks are possible, the Consumer Price Index is widely used and understood, and should continue to be applied in this context.

The third issue stems from the fact that going-forward indexation will operate on a benefit base that has been eroded by inflation in prior years. Should the benefit base be restored to what it would have been if full indexation had been applied from 1995 to the present? There are two arguments against this position.

The first is that precise adjustment of each worker's benefit base is technically infeasible. Partially disabled workers are not a homogeneous group, even within cohorts of workers injured during a given year. The extent to which an individual worker's benefits have been eroded by inflation depends on many factors: the length of time they have been receiving benefits, fluctuations in annual inflation rates during that period, the number and size of supplements they have received, the effect on their situation of recent *ad hoc* increases, the extent to which

their disability has increased or decreased since they first began receiving benefits, and whether they have reached pensionable age. The second is that to fully adjust the benefit base adds significant cost to the project of protecting workers against inflation. While I have already indicated that the issue of additional cost should not be dispositive, it certainly cannot be ignored.

Keeping these difficulties in mind, the most practical solution is to adjust the benefit base in a way that will acknowledge the justice of the claims of partially disabled workers, but will neither generate an unacceptable financial burden for the system nor launch the WSIB on the costly, lengthy and futile exercise of trying to determine individual entitlements.

Such a solution involves three steps. First, all supplements provided to these workers over the years should be treated as part of their ongoing entitlement and used as the new base to which future indexation will be applied. Second, a fixed but reasonable sum should be added to the overall benefits paid to partially disabled workers. The sum I have in mind is \$.5 billion. And third, the base benefits of each affected worker should be augmented by a fixed percentage, depending on which of three cohorts a worker belongs to: those whose benefits have been eroded most severely and are most in need; those who have suffered somewhat, but less so than the first group; and those who were disabled recently but were protected from inflation as a result of recent *ad hoc* indexation adjustments.

If a special fund of \$.5 billion were established and distributed in the manner indicated, it would produce the following results:

Year of injury	Total annual cost of proposed adjustment to benefit base	Average % of benefit erosion as a result of partial indexation	Approx. % of benefit erosion to be restored
All years to 1999	\$475 million	21.3%	45%
2000 to 2005	\$25 million	5.4%	40%
2006 to present	nil	nil	100% (no loss)

Unfortunately, I am not able to recommend lump-sum retroactive payments to compensate for the effects of inflation on benefits from 1995 onward. Not only would this impose an insupportable burden on the WSIB's finances, it would create an even more daunting challenge for the WSIB in calculating entitlements and in locating those who have returned to work and are no longer receiving benefits, as well as the survivors and heirs of those who have died in the meantime.

Recommendation 8-2

8-2.1 Beginning in the budget year following release of this report, the benefits of both partially and fully disabled workers should be increased annually by 100% of the annual increase in the Consumer Price Index.

8-2.2 The following adjustments should be made to the benefit base of partially disabled workers:

- for the cohort injured up to and including 1999, an aggregate adjustment of \$475 million to restore 45% of the erosion of that base caused by inflation;
- for the cohort injured from 2000 up to and including 2005, an aggregate adjustment of \$25 million to restore 40% of the erosion of that base caused by inflation; and
- for the cohort injured in or after 2006, no adjustment should be made since they have suffered no erosion of their benefit base.

8-2.3 The aggregate adjustment to base for each cohort should be distributed *pro rata* among its members as a percentage of their benefits.

I frankly acknowledge that my recommendations do not represent a perfect — or even a perfectly fair — response to this difficult issue. At best, they provide partially disabled workers with a measure of rough justice. However, rough justice is certainly better than no justice at all. My recommendations constitute, I believe, a reasonably just and practical approach to rectifying an unfortunate situation that has persisted for far too long. Not least, they send a message to all concerned that efforts to eliminate the UFL need not — and should not — pre-empt other initiatives to design and implement fair and sensible policies for the WSIB.

CHAPTER 9

ISSUES NOT WITHIN THE MANDATE OF THE FUNDING REVIEW

In Chapter 1, I referred to the controversy surrounding my mandate. I also noted that some participants in the public hearings chose to comment at length, and often in depth, on various issues not assigned to the Funding Review. In this chapter, as promised, I provide for the record a summary of the views expressed on those issues.

9.1 The WSIB's reputation among employers and workers

Many individuals and organizations expressed frustration (and worse) with the WSIB. Some workers, shocked by life-altering accidents, were deeply aggrieved by what they perceived to be the failure of the WSIB to understand or alleviate their situation. Others were outraged by what they characterized as “bureaucratic” or “callous” responses by the WSIB’s front-line personnel or managers to what they deemed to be obvious cases of injustice, such as an “illogical” premium rate increase or a “false” accident report. And still others — including experienced, well-informed advocates representing both workers and employers — were deeply critical of the apparent inability of the WSIB to adopt or execute policies that were “clearly” required by the Meredith principles, the governing statute, good business practice, common humanity or the WSIB’s own publicly professed intentions.

I had neither the means nor the mandate to investigate these complaints. I was not able to determine whether the frustration I heard

was typical or atypical of the views of WSIB stakeholders or “clients” (a term many dislike). And it was sometimes not clear to me whether the wrongdoings alleged were committed by the WSIB as presently constituted, in an earlier incarnation or not at all. Nonetheless, in deference to those who expressed their grievances with such intensity, I note them here to ensure that the WSIB is aware that it has a serious reputational problem with at least some workers and employers and the organizations that represent them. In fairness, I should also add that one vigorous critic also made the point — with equal vigour — that, despite its many shortcomings, the WSIB is a valuable public institution that in most cases actually performs the important public functions it was established to perform. Several others also expressed optimism about current developments in the WSIB’s policy and/or practice. And most, I suspect, would express more balanced opinions than they did in their submissions, if pressed to do so.

9.2 Governance and regulation

Because the Funding Review was charged with investigating systemic problems, such as the UFL, many of the submissions I received understandably proposed remedies for what were identified as structural flaws in the governance of the WSIB. While I have commented on some specific proposals in previous chapters, I will summarize them here in order to identify recurring themes.

First, I heard that the WSIB's financial plight is attributable to lack of appropriate oversight. The Ministry of Labour — at present charged with oversight responsibilities — is not as well equipped to discharge those responsibilities (I was told) as is the Ministry of Finance. The Ministry of Finance should therefore be given extensive powers to ensure that the finances of the WSIB are in order and (in some versions) are subject to the regulatory scrutiny of the Financial Services Commission of Ontario, which is responsible for ensuring the solvency of private sector insurance companies and pension plans.

Paradoxically, I was also told (sometimes by the same presenters) that the WSIB suffered, not from too little oversight, but from too much or the wrong kind. I received numerous submissions to the effect that the WSIB should be “de-politicized,” that it should be insulated from government interference, from political pressure and from stakeholder lobbying.

Second, deficiencies in the WSIB's internal governance structures were blamed for its poorly conceived and poorly executed policies, and for maladministration. Putting aside a few extreme allegations of egregious incompetence and corruption, the point of this complaint was to make the case that the WSIB's Board of Directors should be composed of individuals with experience in insurance or financial services, who would be capable of formulating appropriate funding policies for the WSIB and ensuring that they are carried out by management. Management, in turn, should have relevant private sector experience and expertise, and should adhere to private sector management practices. Finally, some of the WSIB's perceived financial difficulties were attributed to its lack of adequate actuarial and statistical capacity. (The WSIB appears to agree with this last criticism: it has recently taken steps to appoint a Chief Statistician and an Actuarial Advisory Committee.)

Not surprisingly, I heard opposing views: The WSIB should not be run like an insurance company; private sector attitudes and practices should not be smuggled in in the briefcases of its directors and senior executives; it should not rely unduly on actuarial expertise gained through experience with other kinds of institutions and informed by the attitudes that prevail in those institutions. Rather, the government should appoint Board members from various backgrounds, as at present, or should once again make it a Board explicitly representing stakeholders, as it was until 1998; it should appoint executives with a background in public sector management, especially in workers' compensation; and it should temper the professionalism of its actuaries, economists and accountants with a healthy infusion of humanitarianism. (The terminology is mine; the sentiments are those of workers' advocates.)

9.3 Coverage

As noted earlier, the WSIA operates on the principle that employers must participate in the workplace insurance system only if their industry is explicitly named in Schedule 1 or Schedule 2. (Non-covered employers may enrol voluntarily; some 14,000 do so at present). As a result, about 30% of all Ontario workers are not covered at all by the WSIA. Of the 70% that are covered, about 10% are employed by so-called Schedule 2 employers, which are self-insured but whose workers are entitled to WSIB benefits and services; the balance work for Schedule 1 employers, which are required to insure themselves with the WSIB. Coverage under Schedule 1 therefore amounts to just over 60% of Ontario's workforce, far lower than comparable coverage in other provinces, in many of which it exceeds 90%.

The boundaries between Schedule 1, Schedule 2 and the non-covered sectors of the workforce to some extent run along the fault lines that

delineate the different sectors of Ontario's economy. While further work needs to be done to establish the facts, a preliminary study prepared for the Review by the Conference Board of Canada indicates that, between 1985 and 2009, WSIB coverage declined by about 8.4% to its present level; the same study suggests that WSIB coverage will likely stabilize at about that level for the next 20 years. However, during this period, the composition of each segment of the workforce is likely to change. The non-covered segment includes banks and other financial sector firms, many professional, technical and other consulting firms, and providers of information technology and related services — in other words, much of Ontario's growing "new economy." The Schedule 2 segment comprises large municipal governments and an array of federally regulated transportation and other industries. Growth in this segment could conceivably occur if employers with an existing statutory right to transfer from Schedule 1 did so, if that right were extended to other groups of Schedule 1 employers, or if employers not covered at present volunteered to enrol under Schedule 2. While the Schedule 1 segment is expected to remain relatively stable overall during the next 20 years, it has been (and will continue to be) fundamentally reconfigured by the long-term decline of manufacturing employment, and by increased employment in construction, health care and "other" services.

These past and anticipated future changes in coverage give rise to a series of concerns related to the WSIB's financial situation, which have been canvassed in Chapters 2, 3 and 5. However, quite apart from these concerns, there remains the central issue of whether full or partial exclusion of 30% of Ontario's workers from the workplace insurance system constitutes good social policy.

First, large numbers of workers must seek redress directly from their employer if they suffer an injury or contract an illness in the

course of their employment. While most of these workers are employed in large and responsible businesses, many are not. The former may experience difficulty in proving their claim, obtaining full compensation or securing assistance in reclaiming their former job, or in re-entering the workforce; the latter may find that their employer is not adequately insured and cannot or will not pay. If they receive no benefits, are without access to rehabilitation programs, and do not benefit from the WSIB's return-to-work and labour market re-entry programs, they are more likely to become a charge on the public welfare and health-care systems, and thus on the taxpayers of Ontario.

Second, Schedule 1 employers are automatically charged for all compensation-related services provided by the WSIB, for its administration and the UFL, and also for various programs provided by or under the supervision of the Ministry of Labour — notably, enforcement of occupational health and safety laws. However, while Schedule 2 employers benefit from these latter programs, they make no contribution to the cost of providing them, unless one of their employees happens to suffer a compensable injury, in which case they reimburse the WSIB for the resulting compensation costs and pay a surcharge to cover the WSIB's administrative and other financial obligations. Consequently, Schedule 2 employers with few or no compensable injuries are in effect "free riders" on enforcement and other programs that are funded by premium rates and/or surcharges. So, too, are all employers covered by neither schedule.

Third, the exclusion of 40% of the Ontario workforce from WSIA Schedule 1 standard coverage may impair the efficacy of the whole workplace insurance scheme. Basic insurance principles favour the spreading of risk over the largest possible population; this is not possible under current arrangements. Moreover, because the insured segment of the workforce is shrinking (or at best stable) relative to the uninsured

segment, Ontario's workplace insurance scheme runs the long-term risk of not being able to meet the obligations it acquired when the economy was differently configured. This risk appears to be minimal during the next two decades, according to the Conference Board study; but, in the longer term, it may grow. And finally, the exclusion from WSIA coverage of many low-risk workplaces such as banks and information technology providers means that average premium rates in Ontario appear higher (and are higher) than in other provinces because they are based on a less diverse mix of businesses with a higher-risk profile. This complicates interprovincial comparisons and, in some instances, may possibly result in business activities being shifted elsewhere to gain the benefit of what is perceived, however wrongly, as a lower payroll "tax."

On the other hand, opponents of universal coverage under Schedule 1 make the case that extending coverage will impose financial burdens on employers now covered under Schedule 2 or not at all — none of whom contributed to the UFL. Such burdens, they argue, will place Ontario employers at a competitive disadvantage and ultimately lead to job losses. Their position is challenged by a recent study of the possible extension of coverage, which suggests that such concerns are either mistaken or exaggerated, that relatively few job losses will occur, and that these losses will soon be recouped. This latter study is entitled to respectful attention, given that virtually all workers in other provinces are covered by a Schedule 1-style scheme, with no apparent damage to their economies.

Finally, while I have no mandate to offer views on the merits of extending coverage — and offer none — I am convinced that the issue is so critical for the future of Ontario's workplace insurance system that it deserves early and extensive study. In fact, the WSIB commissioned such a study in 2003 but, for whatever reason, never released it. Perhaps a review of that study

would be the place to begin, along with careful consideration of the views expressed to me by stakeholders during the current exercise.

9.4 Significant modifications to the WSIB system: deductibles, "mutual groups," co-pay, self-insurance and privatization

In this section, I briefly review various proposed modifications to the WSIB system as we have known it since its inception. These modifications were either explicitly proposed or obliquely mentioned in submissions, in conversations or in readings I was referred to; some have also been raised previously with the WSIB by stakeholders or others. In the absence of details, their "devils" will remain hard to detect; and in the absence of reliable cost estimates, perhaps their proponents ought to be careful about getting what they wish for. Nonetheless, as conceptual alternatives to the present system advanced by participants in the consultative process, they certainly deserve mention.

One proposal involved the introduction of a two-week "deductible" period during which the employer — not the WSIB — would pay all costs arising out of a compensable injury or illness. To avoid abuse and to protect the worker in the event that compensation or WSIB services are required beyond the initial two-week period, the injury would have to be reported to the WSIB accurately and promptly. However, benefits paid directly by the employer during the initial period would not be included in the calculation of the employer's claims costs for purposes of experience rating.

At least on its face, a proposal for the establishment of "mutual groups" also represents a tweaking of the existing public no-fault scheme, rather than a fundamental repudiation of it. This device — already in operation in Québec — leaves unimpaired both the employer's statutory

obligation to pay premiums and the worker's statutory right to receive benefits. However, it allows a self-constituted group of employers to ask the Board to set a collective premium rate covering the group, gives its members the right to allocate the burdens and benefits of that group rate among themselves, and delegates to the group responsibility for improving the health and safety performance of its members. The mutual group scheme bears some relationship to Ontario's Safety Groups (described in Chapter 6).

A proposal for co-pay is more far reaching. While leaving the no-fault, compulsory character of the compensation scheme unimpaired, it contemplates that workers will pay a share of its cost, presumably through contributions collected at source, somewhat like Canada Pension Plan or Ontario Health Insurance Plan premiums. This, of course, would represent a major after-the-fact revision of the original Meredith "bargain," under which employers undertook to pay the full cost of the compensation system in exchange for employees surrendering their right to sue.

Self-insurance would also represent a major deviation from the Meredith principles of collective liability, despite the fact that it has been permitted for certain types of Schedule 2 employers from 1914 onwards. Current proposals would, in effect, allow new groups of employers to transfer from Schedule 1 to Schedule 2. In some versions, this privilege would be extended to all employers; in others, it would be available only to public sector employers or to very large enterprises; in still others, employers would have to provide a bond or other form of security to ensure payment of their past and current WSIB liabilities and/or buy private workplace insurance in accordance with specified standards. But, in all versions, employers that claimed the privilege of self-insurance would cease to pay premium rates to the WSIB.

Finally, while seldom advocated by employer groups, the option of privatization of the workers' compensation system seems to be favoured in certain quarters, at least as a strategy of last resort — an inference I draw from submissions that urged that the WSIB should operate as if it were a private sector insurance company but at the same time despaired of its ever being able to do so. Privatization, I note further, has been the motif of recent attempts to "reform" workers' compensation in American states and elsewhere, and is a subject of interest to Canadian companies involved in insurance, re-insurance, risk management and similar matters.

As noted in Chapter 2, privatization is seen by workers' representatives as the real "endgame" of current attempts to ensure full funding of the WSIB, even though the issue was mentioned relatively rarely by their employer counterparts. Whether workers' concerns are justified or not, I therefore have to record that the spectre of privatization lurked in the background of the consultation process.

9.5 Benefits and related policies and practices

An assessment of an organization's financial situation logically involves consideration of both its revenues and its expenditures. In the case of the WSIB, benefits comprise over 80% of its annual expenditures. However, I was not mandated to examine benefit-related issues, other than the indexation of benefits received by partially disabled workers (discussed in Chapter 8). Nonetheless, I received some submissions that sought more generous treatment for injured workers, and others that argued that specific statutory entitlements should be reduced or subject to termination in specified circumstances. For example, some workers' representatives focused on WSIB policies that "deem" a worker to have received

employment income regardless of whether he or she has been able to find employment, and deprive workers of benefits if they decline to return to non-productive employment provided by their employers or if they cannot find work in the designated field. To the extent that reversal of these policies is likely to increase the aggregate cost of benefits, such action will ultimately affect the WSIB's financial situation.

That said, most of the submissions that addressed the issue of expenditures proposed changes, not in the statutory scheme of benefits, but rather in how that scheme is administered by the WSIB. Indeed, some employer representatives claimed that the WSIB's difficult financial situation is the direct result of its profligate policies and lax administrative and business practices. These claims may be interpreted in several different ways.

First, they may simply suggest that the WSIB's administrative costs are higher than they should be. Figures proffered by the WSIB suggest, to the contrary, that its administrative costs compare favourably with those of other Canadian workers' compensation systems. Whether or not this is the case, administrative costs represent such a small percentage of its budget that even fairly egregious inefficiency could hardly explain why the WSIB's funding ratio hovers around 50%.

Second, some submissions suggested that the WSIB has adopted policies that are too generous to workers, or at least too costly, given the revenues it can reasonably expect employers to provide. Of course, the basic entitlements to compensation are set out in the governing statute, which the WSIB must apply; but these entitlements are delivered within a framework of operating policies and administrative practices established by the WSIB itself. If the WSIB has adopted policies and practices or provided benefits not contemplated in the WSIA, that is a matter for legitimate concern and should be fairly easy to determine from a reading of the statute and the WSIB's published policies. No such

discrepancies were identified by presenters at the hearings. On the other hand, while its policies may be beyond legal challenge, in the eyes of some of its critics the WSIB has improvidently defined the bright-line tests that trigger entitlements or determine their duration. And of course, injured workers have precisely the opposite view of these same policies: they feel that the WSIB has deprived them of their rightful due.

Third, even when WSIB policies themselves are appropriate, front-line staff may be applying those policies with excessive generosity, insufficient care or in the absence of appropriate cost controls. I take this to be the essence of the concern expressed by most of those who raised the issue of benefits. The WSIB has commissioned (and just recently received) an external value-for-money audit of its adjudication practices, and has apparently also initiated various cost-control measures. It is worth observing, however, that one stakeholder's "cost controls" are likely to be another's "heartless denial of benefits." In any event, a review of the WSIB's administrative or business practices designed to address this issue would necessarily be granular in nature, and would require interviews with employers, workers and WSIB staff, scrutiny of WSIB files, and an analysis of aggregated claims outcomes over the short, medium and long term. It would also require an assessment of whether WSIB management has taken appropriate steps to ensure that its staff are trained and supervised so as to ensure that the WSIB's operations are efficient, and that the overall outcomes achieved are appropriate and affordable. And finally, it would require someone to determine whether the Board of Directors performs due diligence in ensuring that management is taking appropriate action to contain benefit costs.

To conclude: many legitimate questions were raised about the WSIB's expenditures. Some of those questions relate to their impact on the WSIB's financial position, some to their impact

on injured workers, and some to the quality of administration and governance at the WSIB. But not all questions were equally legitimate: some were complaints about the legislation rather than WSIB policies or practices, and some were no more than unwarranted generalizations provoked by unhappy encounters with the WSIB. And none, as noted earlier, fell within my mandate.

9.6 Investments

A number of those who participated in consultations or presented at the public hearings raised questions about the WSIB's investments.

Workers' representatives on several occasions pointed to the heavy losses sustained by the WSIB in 2008 that — as the Auditor General noted — contributed significantly to the UFL. If the WSIB were fully funded, they argued, it would be even more reliant on revenues derived from its investments, would therefore have suffered even greater losses in 2008 and would consequently be in even more dire straits than it now finds itself. Others made the point that an agency with investments currently valued at \$15 billion could hardly be said to be in financial difficulty. And of course, as noted in Chapter 2, workers' representatives in general feared that premium revenues used to expand the WSIB's investments would be unavailable to pay for benefits workers were entitled to — a fear I did not share.

Employer representatives proffered responses to these concerns: the WSIB soon recovered most of its 2008 losses; the value of investment assets can and will fluctuate considerably from year to year, but in the long run will provide a reasonably predictable rate of return; and, far from enjoying a comfortable investment reserve, the WSIB in recent years has in fact liquidated some of its assets and used the proceeds to meet its annual costs of operation.

On the other hand, employer representatives raised different issues related to the WSIB's investments and investment-related policies: the discount rate used by the WSIB to value the present cost of future liabilities has been excessively optimistic (it is now being reviewed); net investment returns achieved by the WSIB have been less than they might and should have been; and — as noted in Chapter 2 — the WSIB has been sustaining itself on a current basis by devouring its own financial flesh. However, the concern expressed most frequently by employer representatives about investments is simply that the WSIB does not have enough of them.

9.7 The “one size does not fit all” problem

The WSIA covers a great variety of industries. Consequently, otherwise appropriate rules adopted by the WSIB may sometimes impose what are perceived as inappropriate, if unintentional, hardships on particular groups of employers. Construction firms, for example, may commit themselves to long-term, fixed-price contracts on major projects. If they experience a major increase in premium rates during the contract, they have no way to pass on the additional costs to their clients. Some institutions in the broader public sector operate on a fiscal year that requires them to submit budget requests before they know what their premium rates will be for the following year. Recommendation 4-6.2, for release of the average premium rate in July each year, would enable such employers to factor increased premium rates into their costing estimates and budgets.

Or to take another example: since the size of a construction company's workforce may fluctuate greatly over relatively short periods, rules related to the reporting of payroll may present difficulties that would not exist in a manufacturing or transportation company. Or another: the failure

of the WSIB to move to a system of “registered beneficiaries” means that it may find itself having to provide benefits to workers, even though their employer has failed to remit premiums in respect of their payroll earnings. In industries where there is a high turnover of both workers and employers, the result is that firms that have remitted premiums in accordance with the law are having to pay for benefits provided to employees of firms that have not.

The problems of small and medium-sized enterprises likewise claimed special attention. These firms seldom have access to specialist assistance in understanding and complying with the WSIB’s filing, remittance, reporting and re-employment requirements; their overworked, multi-tasking proprietors may have difficulty in finding the time to participate in information sessions or the resources to re-engineer their workplaces. And, as mentioned in Chapter 5, setting premium rates for small and medium-sized firms poses special actuarial challenges.

Of course, some who seek recognition of the “one size does not fit all” principle are engaged in special pleading designed solely to lower their premiums and/or other compliance costs. Nonetheless, it is highly likely that many anomalies are created by attempts to apply general legislation in a myriad of unique or unusual circumstances. The WSIB apparently does attempt to address such anomalies, for example by developing a special experience rating scheme for firms with modest payrolls and premium rate accounts, by providing plain-language information pamphlets for non-specialist readers, and by other accommodative measures. Further attempts are necessary, not merely to pacify complainants, but to achieve greater fairness for particular groups of employers and their workers.

9.8 Advocacy

Chief Justice Meredith hoped that the compensation system he designed would operate in a non-adversarial fashion. Perhaps it did, in some far-off golden age, or perhaps not. In any event, at several points in my review I encountered specific concerns related to representation and advocacy in areas within my mandate. The first of these related to the difficulty of finding expert workers’ representatives to participate in the annual technical briefings on funding that I propose in recommendation 4-2.1. The second related to recommendations 6-2.1 and 6-2.2, which seek to reduce illicit claims suppression by regulating the activities of advocates who appear in WSIB proceedings. In this section, I will revisit those issues and place them in a more general context.

Apparently a new sub-profession of advocates and consultants specializing in workplace insurance issues has appeared in recent years. Some of its members work on staff for large employers, some in independent consultancies and law practices. Rightly or wrongly, workers perceive that these skilled employer representatives are responsible for illicitly suppressing and aggressively contesting claims, for instigating frivolous rate-group classification appeals, and for persuading otherwise reasonable and responsible employers and their organizations to adopt anti-worker human resources practices and to lobby in the corridors of power and in open policy forums for harsh, anti-worker positions. In some areas, such as experience rating, I was told, specific WSIB policies help to stimulate such conduct by generating windfall payments to employers, out of which consultants are paid. In other areas, consultants gain advantages for their clients, not only because they are experts at what they do, but because they are “repeat

players” who develop close working relations with WSIB staff and officials, and are therefore able to influence their thinking.

Few, if any, of these allegations were supported other than by anecdotal evidence and conjecture; and to some extent, they were challenged by employers, including some who clearly sympathize with injured workers, support the system that sustains them, and participate in various initiatives that seek to reduce the incidence and consequences of workplace illness and injury. However, one cannot dismiss these concerns out of hand. Advocacy that touches and occasionally transgresses the outer bounds of acceptable behaviour is not unknown in other contexts, especially where professional standards are sketchily defined or poorly enforced. Instances of “regulatory capture” — the phenomenon of regulators coming to share the factual assumptions and policy perspectives of those whose affairs they are overseeing — are well-documented in the literature. And policy debates in other domains of political economy seem to have become similarly polarized in recent years. For all of these reasons, and without making a finding of impropriety against any individual or class of consultants and advocates, it seems to me that the WSIB might wish to examine its deliberative and adjudicative processes to ensure that proper rules are in place and in force concerning lobbying and advocacy.

The WSIB might especially wish to explore the implications of the clear imbalance of resources that has developed as between employers and workers in the context of claims processing and adjudication on the one hand, and policy debates on the other.

As for claims processing and adjudication, workers are dependent on a small number of under-resourced legal aid clinics that specialize in workers’ compensation issues, on the Office of the Worker Adviser, on trade union officials and

on an array of lay volunteers. The latter represent a particular problem. Under regulations adopted by the Law Society of Upper Canada, and reinforced by the WSIB’s policy and practice, paralegals or lay advocates are not allowed to appear on a regular basis in legal proceedings (such as claims adjudication) unless they are either individually licensed or employed by a legal clinic, a trade union or an injured workers’ organization funded by the WSIB. These regulations in effect prevent members of unfunded injured workers’ organizations from acting as volunteer advocates (except for a few cases each year, on behalf of their “friends”). They therefore deprive many workers of the benefit of the representation of their choice.

As for participation in policy debates, injured workers’ groups, legal clinics and trade unions made a very considerable and highly credible effort to engage with the complex issues before the Review. However, it was striking that some of these groups had essentially no staff resources of any kind, most had little or no access to in-house professional advisors such as actuaries or economists, and all had extremely limited means to engage such professionals to advise or represent them in the technical consultations and public hearings that I organized. This not only puts them at a disadvantage in making or responding to technical arguments, it seems to have engendered widespread suspicion of professional expertise *per se* — an understandable reaction, given that actuaries and economists so frequently represent employers in debates over the architecture, funding and governance of the workers’ compensation / workplace insurance system.

Once again, the WSIB might wish to consider this problem. If, indeed, adversarial attitudes are becoming entrenched in the processing of individual claims and in the formulation of funding and other policies, it is in the interests of the WSIB itself that both adversaries should

be adequately represented. Anything less will not only undermine the WSIB's reputation for fairness, it will deprive WSIB decision makers of good arguments.

9.9 The WSIB and Ontario's social and economic development

I conclude this "for-the-record" list of non-mandate issues by reporting that employers, workers and other participants often pointed to the connections between the WSIB's performance and Ontario's social and economic development.

Employers' representatives stressed that a workers' compensation system that is under-funded, or one that requires employers to pay premium rates significantly above the national average, might influence business decisions to invest in Ontario. Oddly, some workers' groups arrived at a roughly similar conclusion. For the WSIB to impose high premiums on employers in order to pay down the UFL, they maintained, would be to divert money to the workplace insurance system that otherwise would be invested in job-creation by businesses. However, it is important to test these seemingly common-sense predictions. I am in no position to do so, but the WSIB itself ought to be.

Workers' representatives, for their part, pointed to the links between the workplace insurance scheme, labour market developments and social policy outcomes. Some examples: Increasing numbers of workers are dispatched by temporary agencies to work sites operated by a third-party employer; these temporary workers are likely to be unfamiliar with working conditions and safety hazards on those work sites, which increases their risk of suffering workplace

injuries. Policies designed to promote the interests of disabled people in general should open up jobs for injured workers, many of whom are unable to find work at present. Inadequate WSIB benefit awards force impoverished injured workers onto the welfare rolls. These hypotheses and conclusions may well be true: but they would gain credibility if they were validated by large-scale surveys and longitudinal studies. Unfortunately, such studies are in short supply.

I have no doubt that the WSIB does the best in-house economic and social research it can, within the limits of its capacity. However, I have the impression that its research capacity is not what it might be and should be. If this impression is correct, the WSIB should rectify the situation (and, I gather, may be in the process of doing so). Without good research, the WSIB cannot critically evaluate its own policies and practices, nor can it plan intelligently for the future. I address this issue at greater length in Chapter 10.

CHAPTER 10

REFLECTIONS ON THE REVIEW

In due course, I do not doubt, the WSIB will adopt a new approach to funding and resolve one way or another the issues that I have been appointed to review. But its problems will not end there. In the future, it will have to deal with issues that have not yet appeared on its agenda, with criticisms from stakeholders and others that it has not yet had to respond to, and with challenges to existing concepts, processes and structures that will often require fundamental changes in the way it thinks about things. In this final chapter of my report, I briefly reflect on what the WSIB might learn from the experience of the Funding Review that might better prepare it to deal with issues of comparable importance in the future.

The first point has to do with information. While the WSIB made a genuine effort to provide the Review with any information it asked for, much of what I had assumed would be available “off the shelf” had to be produced specially for my purposes, or could not be provided without an unreasonable expenditure of time and money — or at all. Moreover, when data was available, it was often accompanied by detailed explanations to the effect that changes in WSIB policy or practice precluded comparisons over time or across current analytical categories. And finally, when I tried to use existing analyses of issues relevant to the work of the Review, I often found that they were done some time ago, were produced by external agencies, or were not designed to throw light on the particular question I was trying to investigate.

If the only consequence of these deficiencies was to make my own task a little more difficult

than it might have been, there would be no great cause for concern. However, I have come to suspect that the inability of the WSIB to answer my questions means that it has not been asking similar questions of itself. And if it has not been asking such questions, it has not been giving adequate attention to important issues that all institutions ought to be concerned about: are our policies producing the intended results? are those policies based on sound assumptions? are those assumptions likely to change? can the same results be achieved more humanely or efficiently by different means? If, indeed, it has not been regularly asking and answering such questions, the WSIB would not be unique. Many public agencies — especially those with heavy caseloads — find themselves in a similar position. In part this is because, if resources are chronically inadequate (as they are), spending money on research seems self-indulgent. In part it is because such organizations have a natural tendency to fixate on the mechanics of service delivery rather than on renewing their systemic architecture. But in part it is because consequential decisions at the WSIB often appear to be taken (or not taken) in response to external criticism and internal crises, real or imagined, rather than in response to well-informed, long-term analysis.

This brings me to a second point. Virtually all of the submissions made by stakeholder organizations and by individual workers and employers were critical of the WSIB in some respect or other. To a certain extent, criticism is inevitable: the stakes are high for everyone who pays premium rates or has to seek compensation;

the workplace insurance system is large, expensive, complex and perceived to be a legitimate subject of political controversy; and, as a century-old system, the WSIB is an easy rhetorical target for “reform” proposals that include its transformation or even abolition. If the WSIB cannot give a good account of itself, if it cannot show that it is serving the needs of stakeholders, performing a valuable public service and keeping up to date, the criticism will only intensify. That is why the WSIB must undertake the kind of institutional research mentioned above on an ongoing basis and not just episodically, as it did by establishing the Funding Review in response to the Auditor General’s report. The WSIB must be, and must be seen to be, proactive rather than reactive.

A third point: much of the criticism expressed in stakeholder briefs and presentations was couched in extreme language. In some cases, this was a genuine expression of distress or frustration resulting from prolonged, unsatisfactory encounters with the WSIB. In others, no doubt, it was a deliberate strategy designed to “up the ante” so that the presenter’s point of view would take priority in my mind over positions expressed in more moderate language. But, whatever the explanation for extreme language “on the record,” what struck me was how frequently I heard much more moderate language “off the record.” In my direct encounters with stakeholder organizations, in the technical consultation attended by their nominated experts, in their exchanges in small groups, and in their private conversations with me before or after the hearings, I often heard sensible and nuanced statements that contrasted with the extreme positions expressed in public forums days, hours and minutes earlier — often by the same people. This suggests to me that the WSIB has to find new ways to engage with stakeholders that will encourage a more balanced appreciation of the issues and more constructive contributions to the necessary task of redesigning the system.

During the course of the Review, I twice broke an apparent taboo against having employer and workers’ representatives in the same room at the same time, talking to each other as well as to me. On both occasions, I found the ensuing conversations to be very informative, and more importantly, I believe that the stakeholders did likewise. This is not to say that genuine differences of interest or ideology will be overcome by such interactions, or even that the expression of those differences will always be made more moderate. But having to listen to the other side of an argument and having to defend your own position to someone who does not share your views or values leads ultimately, not just to more temperate forms of expression, but to better analysis and more sensible outcomes.

To sum up, I hope that the experience of the Funding Review will persuade the WSIB to develop its own capacity for systemic research in aid of an ongoing program of renewal; that it will proactively share the results of that research with stakeholders and the wider political and academic community; and that it will find ways, not only to consult with stakeholders, but to ensure that they engage with each other.

APPENDIX A

WSIB FUNDING REVIEW BIOGRAPHIES

Chair, Harry W. Arthurs

University Professor Emeritus, former Dean of Osgoode Hall Law School (1972-77) and former President of York University (1985-92), Harry Arthurs previously served as Commissioner to review federal labour standards legislation (2004-06) and as Commissioner reviewing Ontario's pension legislation (2006-08).

Professor Arthurs is a former member of the Economic Council of Canada, a former Bencher of the Law Society of Upper Canada, a former President of the Canadian Civil Liberties Association and a former Associate of the Canadian Institute for Advanced Research. He is a Fellow of the Royal Society of Canada, a Corresponding Fellow of the British Academy, Canada Council Killam Laureate in Social Sciences (2002), and winner of the Bora Laskin Award for Contributions to Labour Law (2002) and of the International Labour Organization Decent Work Research Prize (2008). He is a member of the Order of Canada and the Order of Ontario, and holds numerous honorary degrees.

His publications range widely over the areas of labour and administrative law, legal education and the legal profession, globalization and constitutionalism. He has been an arbitrator and mediator in labour disputes, has conducted inquiries and reviews at Canadian, British and American universities, and has provided advice to governments on a number of issues ranging from higher education policy to the Constitution to labour and employment law.

Advisory Committee

Maureen Farrow

Maureen Farrow is President of Economap Inc., a firm specializing in interpreting the impact of global economic trends on financial markets to assist portfolio managers with asset allocation decisions.

During her career, Ms. Farrow has specialized in applied economics, forecasting and policy development. She is widely recognized for her frequent public speaking engagements on global economic trends, international trade issues, Canadian and regional economics, demographics, competitiveness and the environment.

She currently serves as a Director of the Equitable Life Insurance Company of Canada and a member of the Investment Committees of WorkSafeBC and the Workplace Safety and Insurance Board (WSIB) — the workers' compensation boards for British Columbia and Ontario respectively. She is a member of the British North American Committee. Ms. Farrow has also served as a Public Governor of the Toronto Stock Exchange (1993-94), Director of the Canadian Chamber of Commerce (1990-96) and as a Board member of the Social Sciences and Humanities Research Council of Canada (1985-91). She served as President of the Canadian Association of Business Economics (1983-85) and President of the Toronto Association of Business Economists (1979-80). In 1991, Ms. Farrow was made a Fellow of the Institute of Management Consultants in honour of her contribution as an economist to the business community. In 1996, she received the Commemorative Medal marking the 125th Anniversary of Confederation.

Ms. Farrow holds a Bachelor of Science (Honours) degree in Economics from Hull University, England (1966) and has undertaken postgraduate work at York University, Ontario.

Buzz Hargrove

Basil Eldon “Buzz” Hargrove is the former National President of the Canadian Auto Workers (CAW) trade union. He is currently serving as a Distinguished Visiting Professor at Ryerson University’s Ted Rogers School of Management and is the External Executive Director of the newly created Centre for Labour Management Relations at the School.

Mr. Hargrove first became involved in the automotive sector as a line worker for the Chrysler assembly plant in Windsor, Ontario. He served as President of the CAW from 1992 to 2008.

Mr. Hargrove co-authored the book *Labour of Love: The Fight to Create a More Humane Canada* with Wayne Skene (1998) and is the author of a second book entitled *Laying It on the Line* (2009).

In 1998, Brock University honoured Mr. Hargrove with a Doctorate of Laws degree. He has also received honorary doctorates from the University of Windsor (2003), Wilfrid Laurier University (2004) and Queen’s University (2009), in addition to honorary doctorates from the University of New Brunswick, Ryerson University and McMaster University. He is an Officer of the Order of Canada (1998).

From February 2009 to November 2009, Buzz Hargrove was the interim Ombudsman for the National Hockey League Players’ Association.

John O’Grady

John O’Grady is a consulting economist specializing in the analysis of labour markets and is a founding partner of Prism Economics and Analysis. Mr. O’Grady’s consulting focuses primarily on the construction industry, information technology occupations and regulated professions. He

also assists trade unions in their bargaining and arbitration activities, as well as in their representations to governments on policy issues.

In 1992, Mr. O’Grady was Visiting Senior Researcher at the Economic Council of Canada. He has also taught on a sessional basis at York University and Ryerson University. He was previously Research Director and Legislative Director at the Ontario Federation of Labour. Prior to joining the Ontario Federation of Labour, he was the representative in Asia for the Canadian Labour Congress and the Brussels-based International Confederation of Free Trade Unions.

Mr. O’Grady is currently Chair of the Institute for Work and Health. He was formerly President of the Toronto Business Development Centre. He holds a Master’s degree in Economics from the University of Toronto.

John Tory

John Tory is a lawyer, corporate director, broadcaster and community activist. He is the volunteer chair of the Greater Toronto Civic Action Alliance (formerly Toronto City Summit Alliance) and is active in many charitable organizations.

Mr. Tory practised law for 12 years as a management partner of one of Canada’s biggest law firms and was subsequently President and Chief Executive Officer of both Rogers Media Inc. and Rogers Cable.

Mr. Tory served as a Member of Provincial Parliament in Ontario and as Leader of the Official Opposition.

Today, he is on the Boards of Directors of Rogers Communications Inc., Metro Inc. and a number of other companies. He is the host of a daily radio talk show on Newstalk 1010 and co-host of Focus Ontario on Global Television.

Staff

Elizabeth Amaro

Elizabeth Amaro joined the WSIB in 1988 as Secretary for Ethnic Services in the Communications Division. In her 20-plus years of service, Ms. Amaro has worked in many areas at the Board, including the Office of the Secretary and the Office of the Chair.

She holds a Bachelor of Arts degree from the University of Toronto.

Joe Morsillo

After graduating from the University of Toronto with a specialist degree in Economics and Political Science (1982), Joe Morsillo worked with a transportation trade association for one year as an economics analyst.

Mr. Morsillo has worked at the WSIB for over 25 years and has held various positions. Soon after joining the WSIB as an initial adjudicator in 1984, he was promoted to senior adjudicator and subsequently moved to the Finance division, where he acquired extensive experience on funding and rate-setting issues in the Actuarial Services Branch.

Mr. Morsillo also worked as a junior and senior policy analyst in the former Revenue Policy Branch, where he was promoted to manager, a position he held until 2003.

Other positions he held include Executive Assistant to the Vice President of Policy and Research, Acting Executive Director of Policy and Research, and Project Director for the Stakeholder Funding Information Sessions that took place between 2004 and 2005.

He was appointed Director of Benefits and Revenue Policy Branch (November 2005 to October 2008).

In addition to being seconded as a staff Senior Advisor to the Funding Review, Mr. Morsillo has held other senior positions in the past three years, including Executive Director of the Revenue Division, Executive Director of Service Delivery, and Vice President of Policy Services and Appeals Division.

In November 2011, after completing his one-year secondment to the Funding Review, Mr. Morsillo was appointed to the position of Vice President, Service Delivery Division — Short Term.

Serge Recchi

Serge Recchi graduated from the University of Western Ontario with a Bachelor of Laws degree and became a lawyer in 1991. He also has a degree in Administrative Studies from York University.

Mr. Recchi articulated at a Toronto law firm that specializes in labour law, human rights, occupational health and safety, and workers' compensation.

He joined the then-Workers' Compensation Board in 1991 as Legal Counsel and was promoted to Senior Legal Counsel in 1997. While in Legal Services, he worked on a wide variety of legal, policy and quasi-legal matters for the Board of Directors, senior management and other staff. In later years, Mr. Recchi acquired extensive legal knowledge and experience on collection, revenue and employer-related matters. He has participated in both internal and external committees.

In 2007, Mr. Recchi joined Regulatory Services as a Senior Prosecutor, where he focuses on prosecuting various regulatory offences under the *Workplace Safety and Insurance Act*.

Tim Reed

Tim Reed graduated from the University of Western Ontario with a Bachelor of Science degree in mathematics (1981) and began his actuarial career doing pension valuations and other work for large life insurance companies in both Montreal and Toronto. He was hired by the Actuarial Services department at the then-Workers' Compensation Board in 1986 and is currently an actuarial associate.

Over the years, he has participated in many interesting projects on both the benefits and revenue sides of WSIB, and in the area of corporate initiatives. Mr. Reed has estimated the cost of legislative benefit enhancements and prepared net average earnings tables and benefit indexing factors used for determining injured workers' benefit levels. In 1992, he initiated work with the Conference Board of Canada economists to have them provide tailored economic forecasts for the newly introduced industry classes. He has helped train newly hired front-line staff on actuarial/financial matters and has represented Actuarial Services on many committees, including those established to develop corporate outcomes and measures, to design the WSIB's large data Enterprise Information Warehouse, and to undertake interjurisdictional workers' compensation studies and various injury-related studies.

Mr. Reed has been involved in consultations with stakeholders since the 1980s, especially on the subjects of experience rating plans, premium rates and industry classification issues, of which he has extensive knowledge.

Diane Weber

Diane Weber joined the WSIB in 2004 as Business Lead of Special Projects for the Chief of Corporate Services. Shortly after her arrival, she was asked to assume the responsibilities of the Director, Corporate Executive. As the President and CEO's designate, Ms. Weber was the government liaison on all matters, including policy, issues management, finance and administration. Working with the Chair's office and the Corporate Secretary's office, Ms. Weber oversaw the requirements of the Board of Directors.

Prior to joining the WSIB, Ms. Weber was with the Ontario public service. In her 20-plus years of service with the Ontario government, she held a number of positions with the Ministry of Labour, including Executive Assistant to the Deputy Minister, Manager of Policy and Issues Coordination, and a variety of management positions in finance and administration.

Ms. Weber is a business graduate of Ryerson University.

APPENDIX B

PUBLIC HEARINGS ADVERTISEMENTS, DATES AND LOCATIONS

In early February 2011, advertisements for the WSIB Funding Review's public hearings appeared in the following newspapers:

The Globe and Mail

The Hamilton Spectator

The Kingston Whig-Standard

The Record (Kitchener-Waterloo)

The London Free Press

Metro (Toronto)

Ottawa Citizen

Le Droit (Ottawa)

The Sault Star (Sault Ste. Marie)

The Sudbury Star

The Chronicle-Journal (Thunder Bay)

The Windsor Star

Hearing Dates and Locations, 2011

Hamilton April 18

London April 21

Sudbury April 12

Thunder Bay April 13

Toronto April 5, 6, 7, 26, 27, 28

May 3

Windsor April 20

APPENDIX C

PARTICIPANTS IN THE CONSULTATION PROCESS

Italia Altobelli	Council of Ontario Construction Associations
Florips Bajuco	Rose Courtney
Ed Betterley	Barrie Dale
Gilles Binet	Dryden and District Injured Workers' Support Group
Basil Boolis	Eckler Ltd.
Bright Lights Injured Workers' Group	Electrical Contractors Association of Ontario
Greg Brown	Elementary Teachers' Federation of Ontario
Business Council on Occupational Health and Safety	Employers' Advocacy Council
Betty Campbell	Employers' Council of Ontario
Canadian Auto Workers	Linda Barkhouse, Encompass Health Systems Inc.
Canadian Auto Workers Local 636	Paul Eves
Canadian Auto Workers Locals 707 and 112	Experience Rating Working Group
Canadian Federation of Independent Business	Mark Halberstadt, President/Owner of Faster Linen Service Ltd.
Canadian Institute of Actuaries	Robin Faye
Canadian Manufacturers & Exporters	Financial Executives International Canada
Canadian Restaurant and Foodservices Association	Sharon Folks
Canadian Union of Public Employees Ontario	Allan Francoz
Canadian Vehicle Manufacturers' Association	Penny Garito
Cement Finishing Labour Relations Association	General Business Advisory Committee
Denis Chartrand	Greater Sudbury Chamber of Commerce
Chinese Injured Workers' Group	Greater Toronto Hotel Association
Jim Clark	Michael S. Green
Laura Russell, Owner of CompClaim Legal Services Professional Corporation	Hamilton Community Legal Clinic
Construction Employers Advisory Committee	Hamilton & District Injured Workers' Group Incorporated
Construction Industry WSIB Task Force	

Hamilton Health Sciences
 Stephen Harris
 John Have, Have Associates
 Jo-Anne Hearn
 Bonnie Heath
 Kim Hoover
 Jennie Houle
 Doug Hyatt
 Industrial Accident Victims' Group of Ontario
 Community Legal Clinic
 Industrial Manufacturers Advisory Committee
 Injured Workers' Consultants Community
 Legal Clinic
 Injured Worker Outreach Services
 Institute of Injured Workers
 Terrence Ison
 Kevin Jones
 Joy Juckes
 Ranjit Kahlon
 Alison Kay
 Maria Keglevic
 Robert Larocque
 Richard Larouche
 Labour Issues Coordinating Committee
 Mark Leacock
 Eugene Lefrancois
 Les Liversidge
 London Chamber of Commerce
 London & District Construction Association
 London & Middlesex Injured Workers and
 Repetitive Strain Injury Group
 Kate Lushington
 Lisa Granger, MAHLE Filter Systems Canada
 Antonio Mauro
 Michelle McSweeney

Donna McParland
 Mechanical Contractors Association of Ontario
 Mechanical Contractors Association of
 Windsor and Windsor Electrical
 Contractors Association
 Bill Mersereau
 Mushrooms Canada
 Nexus Actuarial Consultants Ltd.
 Frances Nicholson
 Office of the Worker Adviser
 Ontario Agencies Supporting Individuals with
 Special Needs
 Ontario Automobile Dealer Association
 Ontario Business Coalition
 Ontario Chamber of Commerce
 Ontario Compensation Employees
 Union (CUPE 1750)
 Ontario Federation of Community Mental Health
 and Addiction Programs
 Ontario Federation of Labour
 Ontario General Contractors' Association
 Ontario Home Builders' Association
 Ontario Hospital Association
 Ontario Legal Clinics' Workers'
 Compensation Network
 Ontario Long Term Care Association
 Ontario Masonry Contractors' Association
 Ontario Mining Association
 Ontario Network of Injured Workers Groups
 Ontario Nurses' Association
 Ontario Provincial Building and Construction
 Trades Council
 Ontario Secondary School Teachers' Federation
 Tracie Edward, Ontario Secondary School
 Teachers' Federation, Vice President District 9
 Ontario Trucking Association

Emma Osso
 Glenn Palmer
 Dimitrios Petropoulos
 Rene Pineda
 Muriel Poster
 Fatemeh Pourjamshidi
 Willard Ramsey
 Patricia Reilly
 Vittorio and Dario Rossit
 Patricia Sameluk
 Schedule 2 Employers' Group
 Melke Seiferaw
 Moses Sheppard
 William Shulman
 Vladimir Smorhaj
 Prof. Robert Storey
 Myra Strzalka-Bernat
 Sudbury Construction Association
 Sudbury and District Labour Council
 Halima Tato
 Lemlem Tesfamichael
 Andrea Szomor, President of The Health Shoppe
 The Salvation Army
 Thunder Bay & District Injured Workers'
 Support Group
 Thunder Bay and District Labour Council
 Sue Thyssen
 Eddie Tilley
 Toronto Automobile Dealers' Association
 Toronto Construction Association
 Toronto Workers' Health and Safety Legal Clinic
 Jules Tupker
 United Food and Commercial Workers Canada
 Local 1000A
 United Steelworkers – District 6

United Steelworkers Local 6500
 Patmanathan Veeragathipillai
 Ippokratis Velgakis
 Livio Vicol
 Windsor and Essex Chamber of Commerce
 Windsor Injured Workers Coalition
 Women of Inspiration
 Workplace Safety & Insurance
 Board Management
 Nancy Yake

June/November Briefings: Stakeholder Participants

Injured Workers'/Labour Associations

Canadian Auto Workers
 Canadian Union of Public Employees/Ontario
 Compensation Employees Union 1750
 Elementary Teachers' Federation of Ontario
 Hamilton Community Legal Clinic
 Industrial Accident Victims' Group of Ontario
 Community Legal Clinic
 Injured Workers' Consultants Community
 Legal Clinic
 Office of the Worker Adviser
 Ontario Federation of Labour
 Ontario Legal Clinics' Workers'
 Compensation Network
 Ontario Network of Injured Workers Groups
 Ontario Nurses' Association
 Ontario Provincial Building and Construction
 Trades Council
 Toronto Workers' Health and Safety Legal Clinic
 United Food and Commercial Workers
 United Steelworkers – District 6

Employer Associations

Business Council on Occupational Health
and Safety

Canadian Federation of Independent Business

Construction Industry WSIB Task Force

Council of Construction Associations of Ontario

Employers' Council of Ontario

Office of the Employer Adviser

Ontario Business Coalition

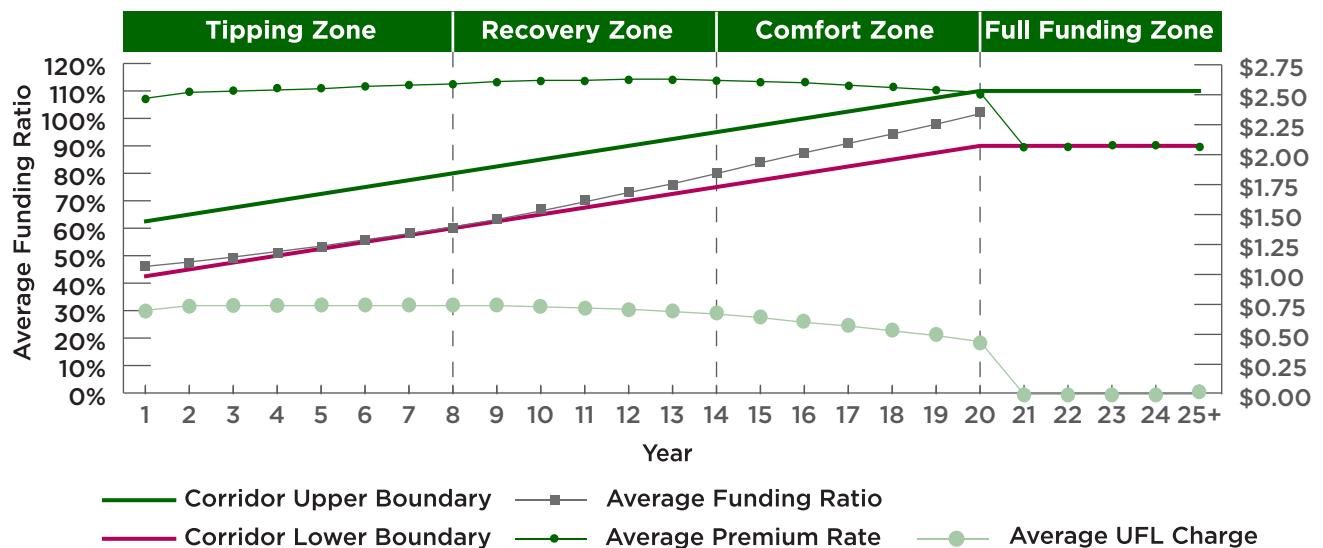
Ontario Chamber of Commerce

APPENDIX D

MODELS A AND B WITH A LOWER DISCOUNT RATE

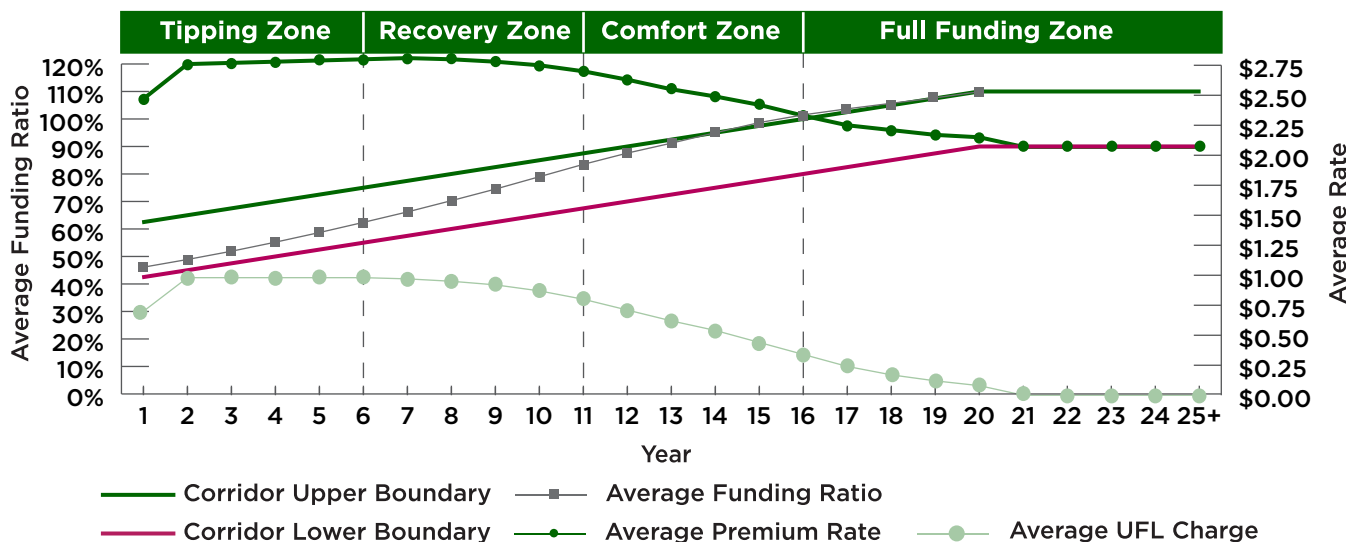
Model A with 5.5% discount rate

Premium Rate: \$2.52 (includes improved indexation)



Model B with 5.5% discount rate

Premium Rate: \$2.76 (includes improved indexation)



APPENDIX E

MORNEAU SHEPELL: USER'S GUIDE TO THE FUNDING CORRIDOR STRATEGY

User's Guide - Funding Corridor Strategy

Background

The Funding Corridor Strategy was developed as part of the independent Funding Review of the WSIB's finances. The corridor approach addresses the long-standing challenges in managing the Board's unfunded liability (UFL). This User Guide was developed to support the WSIB's implementation of this strategy.

The goals of the Funding Corridor Strategy are to provide:

1. A disciplined approach for addressing the UFL.
2. Relatively stable premium rates for employers, and
3. A sound plan for gradual improvement in the Board's financial situation, moving from a current funding ratio of approximately 50% to around 100% over a period of about 20 years.

The principles underlying the Funding Corridor Strategy are as follows:

- > Achieving sufficient funding is critical.
- > Premium rates must be set each year at a level that will allow the WSIB to fully recover the costs of new claims incurred during the year, and provide for administration costs, legislated obligations and other expenses.
- > In setting premium rates, best estimate assumptions should be used for predicting future experience. These assumptions should not include any anticipated improvements in experience that might occur.
- > Where changes to benefits are implemented, the full impact of these improvements should be incorporated into the premium rates, including a component intended to fund any one-time cost of the changes over a period not greater than 20 years.
- > Premiums are to include an unfunded liability charge (UFL Charge) that allows the funding position of the WSIB to gradually improve over time.
- > Corrective and timely action is required when the funding ratio falls below the corridor.
- > Building towards full funding by passing through a recovery zone and a comfort zone is desirable to allow the system to innovate and remain relevant at an affordable cost.
- > Results cannot be guaranteed. Achieving full funding by a specific target date is an unrealistic objective.

Premium Calculation Process

The premium rate setting process is designed so that new claims costs are estimated as best as possible each year and charged to current employers. Anticipated improvements in frequency, return to work or other initiatives are only to be accounted for after the improvements have been observed. To the extent that future improvements in claims experience do occur, the funding performance will be improved. If claims experience is worse than estimated, the NCC estimate **should be adjusted immediately** in the next rate setting period to avoid perpetuating experience losses. Any experience losses would become part of the cumulative UFL. It is critical that sound estimates of the NCC be considered each year to reduce the risk of persistent losses.

UFL Charge Procedure

The UFL Charge is a separate component of the premium rate setting process and is anchored by two primary fundamentals:

- > It is critical to continuously drive towards a sustainable funding ratio until full funding is reached; and
- > The UFL Charge should be as stable as is reasonably possible.

When the premium rates are set each year under the corridor approach, the WSIB will compare its funding position at the end of the previous year to a pre-defined corridor of funded positions that varies by year. The pre-defined corridor ranges from 40% to 60% at the outset and increases by 2.5% each year until it reaches 90% to 110% in year 20 (see Model A, page 7). The corridor ranges increase each year to ensure there is progress towards sufficient funding and ultimately, full funding.

In order to adhere to these two fundamentals and as a result of MS's modelling, it was found that the initial UFL Charge could be set at a minimum of \$0.79 per \$100 of payroll. However, this charge could change because of other factors such as adverse claims experience or a decline in payrolls for Schedule 1 employers combined with average or poor investment performance on the Insurance Fund. It should also be noted that good investment performance could offset losses from other sources.

A gradually upward sloping corridor of 20% was developed to monitor the change in the funding ratio relative to target funding performance each year over the next 20 years. The corridor was set around the initial funding ratio of 47%; therefore, the starting range of the corridor is 40% to 60%, moving on a straight line basis to reach 90% to 110% in 20 years. This ultimate corridor range was selected because it leads to a virtually non-existent probability of falling below the tipping point of 60% in year 20. Only 1 out of the 1,000 simulations results in the funding ratio being below 60% (the resulting funding ratio is 57%). All others are above 60% and most are above 90% (840 out of 1,000).



Once the initial UFL Charge is set, the corridor approach requires that it never decrease over the 20 year period unless:

- > Full funding is reached (at that time, UFL Charge no longer needed),
- > The funding ratio is above the upper boundary of the corridor and the WSIB decides it can reduce it. Until the funding level is close to full funding, it may be prudent to avoid or at least minimize the effect of potential reductions in the UFL Charge.

Maintaining a discipline of not decreasing the initial UFL surcharge as discussed above produces:

- > A strong pull to get the funding ratio inside the corridor when it falls below, and
- > A steady progression to full funding if the funding ratio stays inside the corridor or above the upper boundary of the corridor.

A \$0.79 initial UFL Charge was found, during modelling, to generate about 10 percentage points of improvement in the funding ratio every 3 to 4 years. Testing also showed that as long as the funding ratio stays within 10% of the lower boundary of the corridor, it would be expected that the funding ratio would be back in the corridor within 3 or 4 years unless a prolonged period of low investment performance develops. As long as the discipline is maintained for funding NCC, experience losses should be managed effectively.

The table below highlights three scenarios the WSIB may face with respect to the UFL Charge. A more detailed description with an illustration follows after the table.

UFL Charge Scenario	Implications	Impact
Above corridor	Ahead of schedule on funding targets	UFL Charge recalculated based on 20 year open ended period. WSIB decision on whether to decrease UFL Charge or not.
Within corridor	On schedule on funding targets	No Change
Below corridor	Behind schedule on funding targets.	UFL Charge recalculated based on 20 year open ended period. Increase current UFL Charge if it needs to be increased but no decreases allowed.

Illustration of UFL Charge Procedures when using Corridor Approach

The UFL Charge, when it needs to be recalculated, is based on an open ended funding period of 20 years. For simplicity, the factor used to recalculate the UFL Charge in the tests conducted for the Funding Review is 15. A factor of 15 is close to the twenty year amortization factor calculated with a 6% annual discount rate.

To calculate the UFL Charge:

$$\text{\$ Amount of UFL Charge} = \text{\$ Amount of UFL at previous year end}/15$$

To calculate the Charge in the Premium Rate:

$$\text{UFL Charge in Premium Rate} = \text{\$ Amount of UFL Charge}/\text{Projected payroll for next year}$$

The open ended period of 20 years was selected because it is long enough to achieve a stable UFL Charge and to keep increases, when required, at a more modest level. Use of a shorter period, based on the MS model, was found to increase the variability in the UFL Charge. Sufficient funding is the goal, not necessarily full funding. However, it follows that, the discipline proposed, combined with a sufficiently high initial UFL Charge, results in a high likelihood that full funding will be achieved in about 20 years. A higher initial surcharge would improve the outlook.

Examples:

Using the year 5 premium rate as a base line, the following examples illustrate the UFL Charge calculation procedure (this procedure would be the similar for any year).

Premium rates for year 5 would be set in year 4 based on the funding ratio in year 3 and the NCC experience for year 3. Payrolls would also need to be projected to year 5 by industry and the potential shift in risk due to shifts in the economy should be considered in estimating the NCC for the following year. This is outside the scope of the Funding Review mandate but is mentioned here for completeness.

In year 3, the corridor range would be 47.5% to 67.5%. This would serve as the basis for determining how the UFL Charge is to be calculated for year 5. Four examples that could be considered reasonable based on the modelling done, are provided below. Note that the probability of the funding ratio being above the upper boundary of the corridor in the short term is virtually non existent unless there are significant gains from sources other than investments. All examples and all probabilities noted below are based on an initial UFL Charge of \$0.79 per \$100 of payroll used in the MS model.

Scenario 1 – Above the Corridor

- > Funding ratio of 70% at end of year 3.
- > Probability of being above the corridor is virtually non-existent.
- > A recalculation of the UFL Charge would be triggered. The charge may decrease if the recalculated charge is less than the charge currently in the premium rates.
- > The WSIB would decide whether or not to implement a reduction in the UFL Charge. Of course, not reducing the UFL Charge increases the likelihood that full funding will be reached by the end of twenty years.

Scenario 2 – Within the Corridor

- > Funding ratio of 55% (little progress) at the end of year 3.
- > Probability of the funding ratio being in the corridor is about 75%.
- > System is on track to be fully funded in about 20 years but the period required to reach full funding may be extended.
- > The UFL Charge remains unchanged.

Scenario 3 – Just Below the Corridor

- > Funding ratio of 45% (no progress) at the end of year 3.
- > Probability of the funding ratio being between 45% and 47.5% is about 20%.
- > UFL Charge recalculation would be triggered.
- > The recalculated UFL Charge would be lower than the initial UFL Charge because the funding ratio has not deteriorated much from the starting point and because of the use of a 20 year open ended period for stability.
- > The UFL Charge remains unchanged.

Scenario 4 – Well Below the Corridor

- > Funding ratio at 39% at the end of year 3 represents the worst scenario produced by the model (1 in 1,000 probability).
- > A UFL Charge recalculation would be triggered.
- > The UFL Charge will be increased if the calculated charge is greater than the charge currently in the premium rates.



For each of these scenarios, we estimated the period to full funding based on the adopted initial UFL Charge and that all future assumptions would be realized over the ensuing period (i.e., no net gains or losses in the future).

In the model other variables can change over time. To illustrate the potential annual impact on NCC, administration expenses and legislated obligations, the NCC are assumed to have increased by \$0.05 from the previous level and other expenses are assumed to have decreased by \$0.01. Decreases in NCC and increases in other expenses would also be reflected in future premium rates.

The results for each scenario are presented in the Table below.

Illustration of Average Premium Rate Calculation for Year 5					
Calculation in Year 4 based on Corridor Range at end of Year 3 is 47.5% to 67.5%					
Scenario	Year 4 Premium Rate	Scenario 1 Above	Scenario 2 Inside	Scenario 3 Below	Scenario 4 Well Below
Funding Ratio at end of Year 3	N/A	70%	55%	45%	39% (worst case)
Components of Premium Rate					
New Claims Costs	\$1.29	\$1.34	\$1.34	\$1.34	\$1.34
Administration, Expenses and Legislated Obligations	\$0.44	\$0.43	\$0.43	\$0.43	\$0.43
Sub-Total	\$1.73	\$1.77	\$1.77	\$1.77	1.77
UFL Charge Previous year	N/A	\$0.79	\$0.79	\$0.79	\$0.79
Recalculated UFL Charge	N/A	\$0.40	N/A	\$0.75	\$0.79
UFL Charge Applied	\$0.79	\$0.79	\$0.79	\$0.79	\$0.79
Premium Rate	\$2.52	\$2.56	\$2.56	\$2.56	\$2.56
Year 100% funding ratio reached measured from year 0 (if all assumptions met in future years)	N/A	15	20	23	25

For the UFL Charge under Scenario 1, it is assumed the WSIB would choose not to decrease the UFL Charge because it is so early in the process. Moreover, it is assumed in the modeling process that in all scenarios (which reflect the full range of expected result for year 3), the UFL Charge is kept at \$0.79. In addition, if all future assumptions are met (i.e., no net gains or losses in all future years) full funding is achieved within 15 to 25 years as measured from year 0.

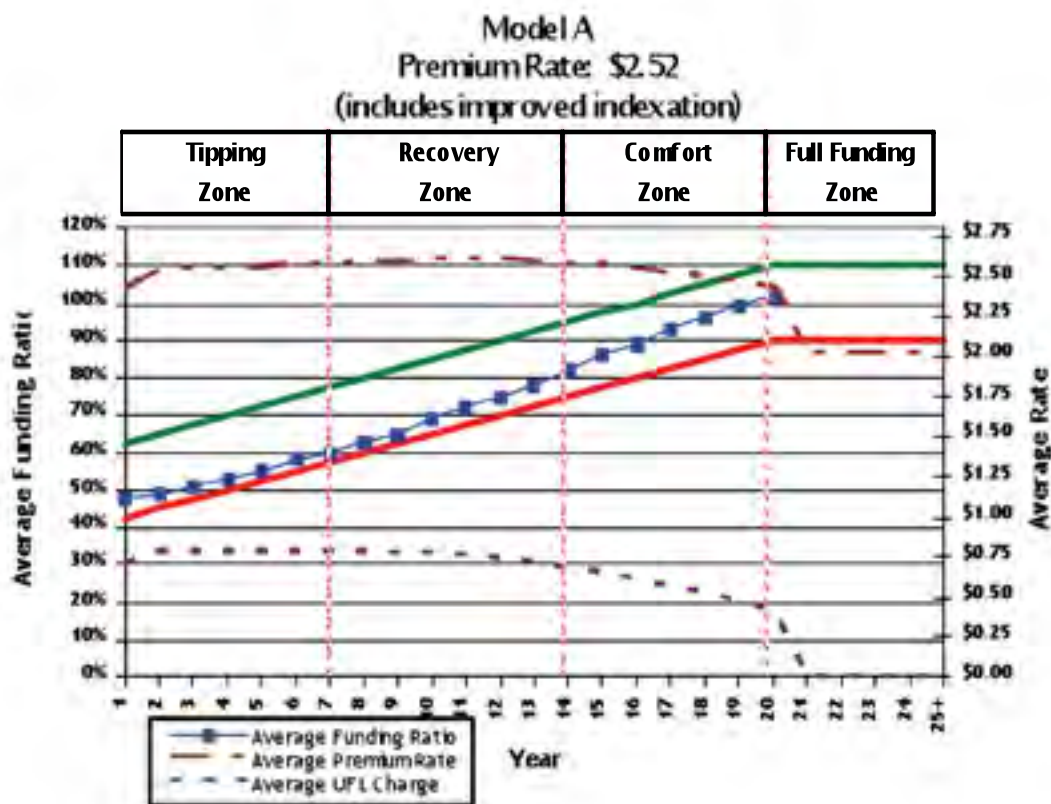
Scenarios 3 and 4 are intended to illustrate what would happen if actual experience is worse than expected in the first three years, resulting in a deterioration of the funding ratio from its current level of approximately 50%. In both scenarios, the funding ratio at the end of year 3 is below the lower boundary of the corridor range (47.5% to 67.5%). The intent is to show that in these particular situations, a review of the financial situation

could result in the period to full funding being extended beyond the original twenty year target.

Starting in year 5, the 20 year horizon is re-applied based on the funding ratio at the end of year 3 for Scenarios 3 and 4. Using a re-calculated UFL Charge, the time to reach full funding is extended to approximately 25 years from year 0. However, under Scenario 3, the recalculated UFL Charge (\$0.75) is slightly less than the current UFL Charge of \$0.79. By leaving the UFL Charge at \$0.79, this results in full funding being reached in 23 years due to the additional \$0.04 in revenue. Of course, in these examples we have assumed that all future assumptions are met in year 5 and beyond.

If other factors combined with investment performance led to a funding ratio below 39% in year 3, then and only then would the proposed approach result in an increase in the UFL Charge. Based on the assumptions underlying the projection model, the probability of falling below 39% after year 3 due to investment performance is virtually non-existent (2 trials out of 17,000 with the absolute worst result in year 4 at 37%).

The illustration below provides further explanation for the examples above (the full range of results is presented in the Morneau Shepell report and is not repeated here).





In the illustration above, the Average Funding Ratio, Average Premium Rate and Average UFL Charge reflect the averages for the 1,000 simulations made for each future year. They can be seen as a best estimate of what the funding ratio and premium rates are expected to be each year. In actual fact:

- > some scenarios have a funding ratio above the upper end of the corridor where a reduction of the UFL Charge is possible (above green line),
- > many are inside the corridor where the UFL Charge stays the same (between red line and blue line), and
- > some are below the low end of the corridor where the UFL Charge will be increased only if needed (below red line).

The UFL Charge (and also the Average Premium Rate) decreases around year 11. This is due to certain scenarios where the UFL Charge is removed because 100% funding has been reached. Since these simulations have a zero UFL Charge and many still have a \$0.79 UFL Charge, the average as shown on the graph decreases. As more and more simulations produce a 100% funding ratio, the average UFL Charge decreases even more.

The future performance of the WSIB cannot be predicted with accuracy. It would be misleading and potentially dangerous to commit to full funding by a specific date. The best that can be achieved is to model a wide range of economic scenarios over the next 20 years (in our analysis, 1,000 simulations made per year) and assess the robustness of the corridor approach by measuring the probability of a range of potential outcomes.

Additional Details - UFL Charge Procedures

- > A UFL Charge of \$0.79 produces an 84% probability of funding exceeding 90% in 20 years.
- > If the funded position is within the corridor, the UFL Charge is left unchanged. This effectively means the system is on track to be fully funded by about 2031. If the funded position is outside the corridor, the UFL Charge required to move the WSIB's funded position to 100% over a 20-year period will be calculated and the following procedures applied:
 - If the funded position is below the corridor,
 - The UFL Charge will be increased if the calculated charge is greater than the charge currently in the premium rates. This means the full funding date is being pushed beyond 2031 based on an open ended 20 year period.
 - No action will be taken if the re-calculated UFL Charge is less than the charge in the premium rates at the time this calculation is made. In most circumstances the initial surcharge (or later increased level) will be such that full funding will be reached in a period likely much shorter than an open ended 20 year period.



- If the funded position is above the corridor, the UFL Charge may be decreased if the calculated charge is less than the charge currently in the premium rates. If such positive scenarios develop and the WSIB does not reduce the surcharge, it increases the likelihood that full funding will be reached before 2031.

TECHNICAL ANNEX

TABLE OF CONTENTS

USER'S GUIDE TO THE TECHNICAL ANNEX.....	140
Purpose.....	140
Use	140
Internet Resources.....	140
QUICK REFERENCE FOR ABBREVIATED TERMS.....	142
Corporate Name Evolution.....	142
Legislation	142
Reports and Other.....	143
NOTES TO <i>FUNDING FAIRNESS</i>.....	145
Chapter One	
The Funding Review	145
Chapter Two	
The WSIB's Unfunded Liability: History and Significance.....	148
Chapter Three	
A New Funding Strategy for the WSIB.....	159
Chapter Four	
Premium Rate Setting: Principles and Processes	164
Chapter Five	
Who Pays How Much? Rate Groups and the Apportionment of Financial Responsibility Among Employers.....	166
Chapter Six	
Employer Incentives and Experience Rating.....	171
Chapter Seven	
Funding Occupational Disease Claims.....	176
Chapter Eight	
Benefit Indexation for Partially Disabled Workers	178
Chapter Nine	
Issues Not Within the Mandate of the Funding Review.....	181
GLOSSARY.....	185

USER'S GUIDE TO THE TECHNICAL ANNEX

Purpose

The final report of the WSIB Funding Review does not contain footnote references to the research studies, legislation or other sources consulted and relied on in the text. Instead, these references are included in this Annex. Specifically, where the report contains a quotation, or refers to or relies on a source for relevant data or commentary, this Annex enables the reader to identify and consult the source. This will provide the reader with the opportunity to explore issues in further detail, and to achieve a better understanding of the report. The Technical Annex also contains a glossary of key terms used in the report, as well as those used in the context of workers' compensation systems more generally.

Use

The Technical Annex is divided into parts corresponding to the chapters, sections, pages, columns and paragraphs of the report. The relevant reference for any given passage in the report is provided in the form of a citation to an identifiable publication, legal document or other source.

Frequently cited sources are abbreviated in the Technical Annex. For example, the *Workplace Safety and Insurance Act, 1997 S.O. 1997, Chapter 16, Schedule A as amended*

has been abridged to the "WSIA." To assist the reader, a Quick Reference for Abbreviated Terms has also been provided. Moreover, as the WSIB's legal name has changed several times since its inception in 1914, the Quick Reference guide also lists these changes.

Most of the historical records relating to the Workplace Safety and Insurance Board, such as old annual reports, repealed legislation, the Meredith reports, etc., are available to the public at the WSIB's Reference Library, 17th floor, 200 Front Street West, Toronto Ontario. Information about the Library and its catalogue is available at www.wsib.on.ca/en/community/WSIB if you search for "library."

Internet Resources

Many of the documents cited or relied on in the report are accessible on the Internet. Where possible, a technical or renamed hyperlink has been cited, corresponding to the applicable reference entry in the Technical Annex. It should take the reader directly to the relevant portal, once activated in the electronic version of the report. For readers who do not have access to the electronic version, a summary of the websites frequently accessed for reference purposes is set out below. Once the reader accesses the applicable website portal, s/he can simply enter the relevant document or report name in the search bar to locate it. All website references and links supplied in this document are current and operational as of January 2012.

Source	Website
Association of Workers' Compensation Boards of Canada (AWCBC) [comparative statistics, links to other boards, etc.]	www.awcbc.org/en/index.asp
Auditor General of Ontario (AG) [annual reports, etc.]	www.auditor.on.ca
Canadian Institute of Actuaries (CIA) [actuarial standards, etc.]	www.actuaries.ca
e-Laws [current bills, statutes, regulations, etc.]	www.e-laws.gov.on.ca/ navigation?file=home&lang=en
Funding Review [Morneau Shepell report, submissions, etc.]	www.wsibfundingreview.ca
Institute for Work & Health (IWH) [research reports on benefits, etc.]	www.iwh.on.ca
Legislative Assembly of Ontario [Bills, <i>Hansard</i> , Committee reports, etc.]	www.ontla.on.ca
Ministry of Labour (MOL) [Dean report, Ministry communiqués, etc.]	www.labour.gov.on.ca
Statistics Canada (StatsCan) [SICs, statistics, NAICS, etc.]	www.statscan.gc.ca
Workplace Safety and Insurance Board (WSIB) [financial reports, KPMG value-for-money audit, policies, etc.]	www.wsib.on.ca

QUICK REFERENCE FOR ABBREVIATED TERMS

Corporate Name Evolution

On May 1, 1914 a “body corporate” named “The Workmen’s Compensation Board” was created via legislation even though the provisions of the *Workmen’s Compensation Act* concerning benefits were not effective until January 1, 1915. Sources: *The Workmen’s Compensation Act* (4 Geo. V., Chap. 25), preamble, s. 45; *The Workmen’s Compensation Board, Ontario: Report for 1915 including Report for 1914 Covering Organization*, p. 42.

On December 21, 1982 the Workmen’s Compensation Board of Ontario, and the underlying Act, were respectively renamed the *Workers’ Compensation Board* and *Workers’ Compensation Act* “to better reflect the Board’s service to both the working men and women of this province.” Sources: *Bill 136* (c. 61, S.O. 1982), An Act to amend the *Workmen’s Compensation Act*, Royal Assent and proclamation on December 21, 1982, ss. 1, 55(1); *Workers’ Compensation Board: Annual Report 1982*, p. 2.

Effective January 1, 1998 the corporate name was formally changed to the “Workplace Safety and Insurance Board.” Sources: *Bill 99*, Schedule A, ss. 159, 184(1); *Workplace Safety and Insurance Board: Annual Report 1997*, p. 18.

Legislation

Bills

Bill 81 (Chapter 17, Statutes of Ontario 1985), An Act to amend the *Workers’ Compensation Act*, Royal Assent received on December 20, 1985 (*Bill 81*).

Bill 99 (Chapter 16, Statutes of Ontario, 1997), An Act to secure the financial stability of the compensation system for injured workers, to promote the prevention of injury and disease in

Ontario workplaces and to revise the *Workers’ Compensation Act* and make related amendments to other Acts, Royal Assent received on October 10, 1997 (*Bill 99*).

Bill 135 (Chapter 26, Statutes of Ontario, 2010), An Act respecting financial and Budget measures and other matters, Schedule 21, Royal Assent received on December 8, 2010 (*Bill 135*).

Bill 160 (Chapter 11, Statutes of Ontario, 2011), Occupational Health and Safety Statute Law Amendment Act, 2011, Royal Assent received on June 1, 2011 (*Bill 160*).

Bill 165 (Chapter 24, Statutes of Ontario, 1994), An Act to amend the *Workers’ Compensation Act* and the *Occupational Health and Safety Act*, Royal Assent received on December 9, 1994 (*Bill 165*).

Bill 187 (Chapter 7, Statutes of Ontario, 2007), An Act respecting Budget measures, interim appropriations, Schedule 41, Royal Assent received on May 17, 2007 (*Bill 187*).

Bill 221 (Chapter 3, Statutes of Ontario, 2007), An Act to amend the *Workplace Safety and Insurance Act*, 1997 with respect to firefighters and certain related occupations, Royal Assent received on May 17, 2007 (*Bill 221*).

Statutes

The *Workmen’s Compensation Act* (4 Geo. V., Chapter 25), Assented to May 1, 1914 (*WCA, 1914*).

Workers’ Compensation Act, R.S.O. 1980, Chapter 539 as amended to April 1990 (*WCA, 1990*). Available at www.e-laws.gov.on.ca

Workplace Safety and Insurance Act, 1997 S.O. 1997, Chapter 16, Schedule A as amended (*WSIA*). Available at www.e-laws.gov.on.ca

Reports and Other

Auditor General

Auditor General of Ontario: *2009 Annual Report of the Auditor General of Ontario* (AG 2009 Annual Report). Available at www.auditor.on.ca/en/reports_en.htm
Available in French at www.auditor.on.ca/fr/rapports_fr.htm

Auditor General of Ontario: *2005 Annual Report of the Auditor General of Ontario* (AG 2005 Annual Report). Available at www.auditor.on.ca/en/reports_en.htm
Available in French at www.auditor.on.ca/fr/rapports_fr.htm

Canadian Institute of Actuaries

Canadian Institute of Actuaries: *Research Paper, Funding of Public Personal Injury Compensation Plans – Committee on Workers’ Compensation*, April 2011 (CIA Paper on Funding Workers’ Compensation Plans). Available at www.actuaries.ca/members/publications/2011/211038e.pdf

Conference Board of Canada

Conference Board of Canada: *Assessing What Constitutes an “Undue Burden” for Ontario’s Employers*, July 2011 (Conference Board Report on Undue Burden). Available at www.wsibfundingreview.ca/finalreport.php

Conference Board of Canada: *Ontario’s Long Term Employment Outlook*, July 2011 (Conference Board Report on Ontario Job Market). Available at www.wsibfundingreview.ca/finalreport.php

Tony Dean

Expert Advisory Panel on Occupational Health and Safety, chaired by Tony Dean: *Report and Recommendations to the Minister of Labour*, December 2010 (Tony Dean Report). Available at www.labour.gov.on.ca/english/hs/eap/report/index.php.

Available in French at www.labour.gov.on.ca/french/hs/eap/report/index.php

Eckler Actuarial Consultants

Eckler Consultants & Actuaries: *Concept Design Paper for Funding of the Workplace Safety and Insurance Board (WSIB)*, June 6, 2011 (Eckler Report). Available at www.wsibfundingreview.ca/submissions.php

Eckler Consultants & Actuaries: *Concept Design Paper for Funding of the Workplace Safety and Insurance Board (WSIB)*

KPMG

KPMG: *Executive Summary, WSIB Adjudication & Claims Administration (ACA) Program Value for Money Audit Report* (KPMG Executive Summary on Claims Administration). Available at www.wsib.on.ca/files/Content/VFMA2010VFMA/2010WSIBVFMAReportExecSummary.pdf

Meredith

The Hon. Sir William Ralph Meredith, C.J.O., Commissioner: *Final Report on Laws Relating to the Liability of Employers*, October 31, 1913 (Meredith Final Report). Available at www.archive.org/details/finalreportonlia00onta

Morneau Shepell (formerly Morneau Sobeco)

Morneau Sobeco: *Recommendations for Experience Rating*, October 28, 2008 (Morneau Experience Rating Report). Available at www.wsib.on.ca/files/Content/Downloadable%20FileExperienceRatingReport/MorneauSobecoReport.pdf

Morneau Shepell: *Background and Analysis Report for the WSIB Funding Review*, December 2011 (Morneau Funding Report). Available at www.wsibfundingreview.ca/finalreport.php

Nexus Actuarial Consultants

Nexus Actuarial Consultants Ltd.: *A Pricing System Conceptual Design for Moving Forward*, May 31, 2011 (Nexus Report). Available at www.wsibfundingreview.ca/submissions.php

Research Studies

Doug Hyatt, University of Toronto: *Workplace Safety and Insurance Act Coverage Study*, November 14, 2003 (Hyatt Coverage Study). (Link not available.)

Harry S. Shannon and Graham S. S. Lowe: "How Many Injured Workers Do Not File Claims for Workers' Compensation Benefits?" *American Journal of Industrial Medicine* 42: 467-73 (2002). (Link not available.)

Workplace Safety and Insurance Board

Workplace Safety and Insurance Board: Table titled "25-Year Historical Unfunded Liability with Revenues and Costs" (1983-2008). This chart was supplied by the WSIB to the Legislative Assembly of Ontario's Standing Committee on Public Accounts. It was reproduced in the Standing Committee on Public Accounts' October 2010 report, *Unfunded Liability of the Workplace Safety and Insurance Board* (p. 6), presented to the House Speaker during the 2nd Session, 39th Parliament.

The Standing Committee report is available in [English](#) and [French](#) via the Legislative Assembly's website at www.ontla.on.ca

Workplace Safety and Insurance Board: *Chronology and History of WSIB's Incentive Programs*, January 2011 (Incentive Programs Chronology). Available at www.wsib.on.ca/files/Content/FundingReviewFRChronologyHistory/ExperienceRatingChronologyHistory.pdf

Workplace Safety and Insurance Board: *Five Year Strategic Plan 2008-2012*, updated June 2009 (WSIB 2008 Strategic Plan). (Link not available.)

Workplace Safety and Insurance Board: *Funding Review Technical Consultation*, January 2011 (WSIB Technical Consultation Manual). Available at www.wsib.on.ca/en/community/WSIB/ArticleDetail?vgnextoid=93d81f55502fd210VgnVCM100000469c710aRCRD

Workplace Safety and Insurance Board: *Workplace Safety and Insurance Board 2010 Annual Report* (WSIB 2010 Annual Report). Available at www.wsibontario.ca/PDF/OnlineAR_E_2010.pdf. Available in French at www.wsibontario.ca/PDF/OnlineAR_F_2010.pdf

Workplace Safety and Insurance Board: *Perspectives on the WSIB's UFL*, June 2011 (WSIB UFL Perspectives Report). Available at www.wsibfundingreview.ca/submissions.php

NOTES TO **FUNDING FAIRNESS**

CHAPTER ONE – THE FUNDING REVIEW

Headers and References	Citation, Chart or Comment
Section 1.1, page 9, column 1, paragraph 1	
“In September 2010...to advise...what would constitute ‘a fair level of indexation for partially disabled workers.’ ”	Order-in-Council 1334/2010, September 20, 2010.
Section 1.4, page 12, column 2, first bullet	
“The WSIA requires...insurance fund ‘sufficient’... value of all claims.”	The WSIB at present has a legal duty to hold sufficient funds to make payments as they become due. This duty will continue under Bill 135. <i>WSIA</i> , s. 96(2); <i>Bill 135</i> , s. 96(3).
Section 1.4, page 13, column 1, paragraph 2	
“Although... <i>Workers’ Compensation Act</i> was renamed the <i>Workplace Safety and Insurance Act</i> ,...not reflected in the substantive provisions related to funding.”	The statute title change is effective January 1, 1998 and is traceable to Bill 99. <i>Bill 99</i> , ss. 184, 185. Former Minister of Labour Elizabeth Witmer announced, during first reading of Bill 99, that one reason for legislative reform was “to refocus the system as an insurance plan for workplace illness and injury...” <i>Hansard</i> , November 26, 1996, p. 5338. However, notwithstanding the Minister’s statement, Bill 99 diminished funding accountability by not re-enacting the long-standing statutory provisions mandating separate revenue and cost accounts for each class and the requirement that the WCB file an annual report on funding with the Superintendent of Insurance. <i>WCA</i> , 1990, ss. 85(3), 91(3).
Section 1.4, column 1, page 13, paragraph 3	

Headers and References	Citation, Chart or Comment
“It is true that the funding provisions...not fundamentally altered between 1914 and 2010.”	The only significant funding changes made after 1914 were amendments requiring the WSIB to file annual reports about the accident fund with the Superintendent of Insurance; and giving the Superintendent the power to independently audit/examine the “sufficiency of the accident fund” at the request of the Government or the WCB. <i>WCA, 1990</i> amended and consolidated to April 1990, ss. 85(3), (4). The Superintendent’s authority to audit the accident fund ceased on January 1, 1998 when the WSIA was proclaimed in force and the WCA was concurrently repealed. <i>Bill 99</i> , s. 18, para. 2.
Section 1.4, page 13, column 2, paragraph 2	
“The WSIB is required...provide ‘compensation’...‘insurance’ under Ontario legislation;...facilitate the return to work...not subject to oversight by either provincial or federal insurance regulators.”	<i>WSIA</i> , s. 1. See paragraphs 2 and 4 concerning “return to work” and “compensation and other benefits.” Under section 1 of the <i>Insurance Act</i> , R.S.O. 1990, c. I-8, “insurance” means “the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance.”
Section 1.5, page 14, column 2, paragraph 2	
“The first, Bill 135, deals with the WSIB’s UFL... not yet been proclaimed in force.”	Bill 135 repeals and replaces key funding provisions of the WSIA and assigns the Minister of Labour broad regulatory powers with respect to funding. Specifically, ss. 96(4)-(6), 100, 167 of the WSIA were repealed on December 8, 2010. <i>Bill 135</i> , Schedule 21, ss. 1, 3(1), 4.
Section 1.5, pages 14-15, columns 2-1, paragraphs 2-1	

Headers and References	Citation, Chart or Comment
“The second, Bill 160...but not all...time of writing.”	Some of Bill 160’s provisions are expected to come into effect no later than April 1, 2012. <i>Bill 160</i> , ss. 29(2)-(4).
Section 1.5, page 15, column 1, paragraph 1	
“In addition...WSIB...has conducted a value-for-money audit....”	A summary of the audit findings and recommendations on claims administration were publicly released in 2011. KPMG Executive Summary on Claims Administration.
Section 1.5, page 15, column 1, paragraph 1	
“In addition...two Ministers of Labour have signalled their preferred approach to the question of benefit indexation for partially disabled workers.”	The government posed the following question to the Funding Review — “How should the Modified Friedland formula be replaced to ensure a fair level of indexation for partially disabled workers?” Order-in-Council 1334/2010, <i>Terms of Reference</i> , p. 4. In January 2010, former Minister of Labour Peter Fonseca announced a 0.5% indexation increase for partial disability benefits and said the government was committed “to protect the purchasing power of injured workers’ benefits.” Notice, <i>New Regulation Provides Inflation Protection For Injured Workers On Partial Disability Benefits in 2010</i> , January 4, 2010 available at www.labour.gov.on.ca/english/resources/notices.php
Section 1.6, page 15, column 1, paragraph 3	
“As noted...expressed concern about the failure...eliminate the UFL.”	The Auditor General expressed his views about the WSIB’s designated status as a “trust” as well as his comprehensive findings on the UFL. AG 2009 Annual Report, pp. 34-40; pp. 314-35.

CHAPTER TWO – THE WSIB’S UNFUNDED LIABILITY: HISTORY AND SIGNIFICANCE

Headers and References	Citation, Chart or Comment
Section 2.2, page 17, column 2, paragraph 2	
“At the end of 2009...confirmed by the Auditor General — the UFL was approximately \$11.7 billion.”	WSIB 2010 Annual Report, p. 71.
Section 2.2, page 17, column 2, paragraph 2	
“At the end of 2010...it stood at about \$12.4 billion.”	WSIB 2010 Annual Report, pp. 68, 71.
Section 2.2, page 18, column 1, paragraph 2	
“Indeed, the estimate...present UFL at about \$14.5 billion...with the potential to rise further ... if nothing is done to improve the WSIB’s ability to capture new claim costs.”	Morneau Funding Report, pp. 92-93. The “Status Quo” UFL estimate of \$16.2 billion in Table 2.B.1 assumes and incorporates \$1.7 billion for full indexation of partial disability benefits.
Section 2.2, page 18, columns 1-2, paragraphs 3-1	
“In contrast,...had no UFL;...they were in surplus, fully funded or nearly so.”	Canadian Institute of Actuaries (CIA): Paper on Funding Workers’ Compensation Plans, p. 3. According to the CIA, eight Canadian boards had funding ratios in excess of 100% in 2009. The only workers’ compensation board with a funding ratio below 60% was Ontario.
Section 2.3, page 18, column 2, paragraphs 2-3	
“Instead, he recommended that...‘the act should not lay down any hard and fast rule... added to the fund....’ ”	Meredith Final Report, p. 7, paragraph 2.

Headers and References	Citation, Chart or Comment
Section 2.3, page 18, column 2, paragraph 4	
“However, in 1984...resolved...to eliminate the UFL within 30 years.”	Minute #6, July 17, 1984, p. 5061: <i>Report on the Ontario Workers’ Compensation Board’s 1985 Assessment Rates</i> , p. 15; WSIB: <i>A Consultation Report on Ontario Workplace Safety and Insurance Board’s Funding Policy</i> (February 1998), Executive Summary, pp. 1-2. The WCB board of directors approved a proposal, in the former document, to “amortize the unfunded...over thirty years.” In the latter document, the WSIB reported that the “primary objective” of its 1984 funding strategy was “the complete elimination of the unfunded liability by the year 2014.” Moreover, the Executive Summary recommended the WSIB retain the 2014 retirement date for the UFL.
Section 2.3, page 19, column 1, paragraph 1	
“It did not...specify a new target date,... 100% funding by 2014 was unattainable, ...acknowledged.”	WSIB: 2008 Strategic Plan , p. 26. Subsequent to the global financial crisis of 2008, the WSIB affirmed its commitment to financial sustainability but also essentially admitted the UFL would not be retired by 2014 due to “current economic conditions.”
Section 2.3, page 19, column 1, bullet 1	
“In 1987, benefits paid to injured workers were indexed...no additional revenues were provided...to pay for indexation.”	<i>Bill 81</i> , ss. 138-139; Workers’ Compensation Board, 1985 Annual Report. Pursuant to this 1985 law, benefits were automatically indexed, effective January 1, 1987, based on the annual percentage change in the Consumer Price Index for Canada. Bill 81 also contained an indexation adjustment of 1.7% for 1986.

Headers and References	Citation, Chart or Comment
Section 2.3, page 19, column 1, bullet 2	
“From 1996 to 2001...froze average premium rates...their reduction by almost 30%... legislation reducing benefits achieved off-setting cost savings of only about 15%.”	WSIB: Table titled “25-Year Historical Unfunded Liability with Revenues and Costs” (1983-2008); AG 2009 Annual Report, p. 321. The 1996 average premium rate of \$3.00 had declined to \$2.13 by 2001. Meanwhile, the benefit reductions implemented in 1998 as a result of Bill 99 (specifically reduction of wage loss benefits to 85% of net average earnings and substitution of the Friedland indexation formula by Modified Friedland) resulted in an estimated net reduction of \$1.8 billion in future benefit costs and expected benefit liabilities.
Section 2.3, page 19, column 1, bullet 3	
“In 2007...presumption extended to volunteer firefighters who were deemed eligible for WSIA benefits in 2009....”	<i>Bill 221</i> ; Regulations 253/07 and 423/09 under the <i>Workplace Safety and Insurance Act</i> . Bill 221 created rebuttable presumptions favouring full-time firefighters diagnosed with specified diseases after 1960. These presumptions were extended to volunteer and part-time firefighters in November 2009.
Section 2.3, page 19, column 1, bullet 4	
“In 2007, 2008 and 2009 <i>ad hoc</i> increases of 2.5% per annum...no additional revenues were provided.”	<i>Bill 187</i> , Schedule 41, ss. 6-8, 12. In addition to prescribing three consecutive annual adjustments of 2.5% effective July 1, 2007, the Bill authorized the Lieutenant Governor in Council to create “temporary indexing factors” via regulation [s. 52.1].

Headers and References	Citation, Chart or Comment
Section 2.3, page 19, column 2, paragraph 1	
“In fact, average premium rates ...unchanged between 2000 and 2009...benefit costs actually grew...UFL grew from \$2 billion in 1983 to \$12.4 billion in 2010.”	WSIB 2010 Annual Report, pp. 70-71; AG 2009 Annual Report, p. 325; WSIB: Table titled “25-Year Historical Unfunded Liability with Revenues and Costs” (1983-2008). The 2000 average premium rate of \$2.29 declined modestly to \$2.26 by 2009. During the same period, the UFL climbed from about \$5.7 billion (funding ratio of 67%) to \$11.7 billion (funding ratio of 54%). At the end of 2010, the UFL was \$12.355 billion but the funding ratio remained stable at 54.5%.
Section 2.3, page 19, column 2 bullet 1	
“Its failure...cumulative operating deficit of \$8.3 billion,...reducing its long-term potential for enhanced investment income.”	WSIB 2010 Annual Report, p. 24; WSIB 2005 Annual Report, p. 19. \$8.3 billion was the cumulative operating deficit from 2002 to 2010 inclusive. In contrast, the WSIB had a relatively small operating surplus of \$18 million in 2001.
Section 2.3, page 19, column 2, bullet 2	
“The cost...rising rapidly...what (if anything) the WSIB can or should do about this.”	WSIB Technical Consultation Manual, Rate Setting, pp. 33-35. In 2008 Ontario had the highest average permanent impairment level at 14.6% among all Canadian workers’ compensation boards along with the highest percentage of “high impact claims,” including Lost Time Injury (LTI) claims receiving benefits two years post-injury. 43% of these LTIs involved back, shoulder and fracture injuries.
Section 2.3, page 19, column 2, bullet 3	
“The WSIB’s...experience rating programs...cumulative ‘off-balance’...of \$2.5 billion (see Chapter 6).”	WSIB Technical Consultation Manual, Incentives, p. 21.
Section 2.3, page 20, column 1, bullet 1	
“As of early 2011...adoption of a discount rate of 6% would cause the UFL to rise to \$14.5 billion...still lower rate...cause the UFL to grow even further (see section 2.2 above).”	WSIB 2010 Annual Report, p. 67. The discount rate is the actuarial assumption most sensitive to change. A 1% reduction from 7% to 6% would cause a benefit liability increase of \$1.631 billion.

Headers and References	Citation, Chart or Comment
Section 2.3, page 20, column 2, bullet 1	
“The financial crash of 2008 inflicted heavy losses...2011...difficult year...financial markets will...fluctuate in the future.”	WSIB Technical Consultation Manual, Investment, p. 7. The WSIB experienced investment losses of about -1% in 2007 and -15.5% in 2008.
Section 2.3, page 20, column 2 bullet 2	
“The costs of medical care...been rising steadily for some time; they will continue to rise.”	AG 2009 Annual Report, p. 331. The Auditor General’s Office noted that health care costs doubled between 1998 and 2008 to \$619 million and now constitute about 16% of total benefit expenses.
Section 2.3, page 20, column 2, bullet 4	
“Changing actuarial and accounting standards...force the WSIB to restate its assets and liabilities...add to the UFL.”	Canadian Institute of Actuaries (CIA), Actuarial Standards Board, (public) Memorandum, February 4, 2011, regarding “Final Standards of Practice — Part 5000 Practice-Specific Standards for Public Personal Injury Compensation Plans”; WSIB 2010 Annual Report, p. 22. In February 2011, the CIA adopted a new standard requiring auditors of all “public personal injury compensation plans” (the WSIB and other Canadian workers’ compensation boards) to include an amount in their benefit liabilities for potential occupational disease claims with long latency periods, where such claims are expected to arise after the benefit calculation date as a result of exposures already incurred in the workplace before the calculation date. As a result of this new actuarial standard, the WSIB increased its estimate/provision for future occupational diseases claims by \$600 million.
Section 2.3, pages 20-21, columns 2-1, paragraphs 1-1	
“And...WSIB may be able to contain...medical and drug costs...have generally been unable to do so).”	WSIB 2010 Annual Report, p. 25. Health care expenses for injured workers declined by about \$17 million in 2010 from the previous year.

Headers and References	Citation, Chart or Comment
Section 2.3, page 21, column 1, paragraph 1	
“Consequently, although aggregate premium revenues will likely rise...or perhaps at all.”	Conference Board Report on Ontario Job Market, pp. 4-6, 16.
Section 2.4, page 21, column 1, paragraph 3	
“Failure...could result in the WSIB ultimately being unable...to provide workers with the benefits to which they are entitled.”	AG 2009 Annual Report, “Overview and Summaries of Value-for-Money Audits and Reviews,” Chapter 1, p. 7.
Section 2.4, page 21, column 2, paragraph 3	
“...to maintain the accident fund...sufficient to meet all the payments...as they become payable [s. 71].”	WCA, 1914. Virtually identical language is found in s. 96(2) of the <i>Workplace Safety and Insurance Act, 1997</i> .
Section 2.4, page 21, column 2, paragraph 6	
“This language remained virtually unchanged... it is to be removed from the statute when recently enacted amendments come into force.”	WSIA, s. 97(2): “The Board is not required to maintain a reserve fund that at all times equals the capitalized value of the benefits that will become due in future years unless the Board is of the opinion that it is necessary to do so in order to comply with subsections 96(2) and (3).” Subsection 97(2) will be amended upon proclamation of Bill 135 to explicitly require the WSIB to hold sufficient funds to meet current and future benefit payments as these become due. <i>Bill 135</i> , Schedule 21, ss. 1(2), 6(2).
Section 2.4, pages 21-22, columns 2-1, paragraphs 7-1	
“Indeed, for virtually its entire history,...has been funded at levels usually well below 100%... sometimes far below the 2009 level of 54%... the Auditor General’s comments.”	WSIB 2010 Annual Report, p. 70; WSIB, Table titled “25-Year Historical Unfunded Liability with Revenues and Costs” (1983-2008). The funding ratio at the end of 2009 was 54.2%. However, for the period from 1983 to 1996 inclusive, the funding ratio was always below 50%, sometimes as low as 30%.

Headers and References	Citation, Chart or Comment
Section 2.4, page 22, column 1, paragraph 1	
“At least, they never exercised their power...to ‘increase employers’ premiums to the extent ... necessary to ensure that the fund’...‘sufficiency’ standard [former s. 96(4)].”	WSIA, s. 96(4). This provision was repealed on December 8, 2010 along with subsections 96(5), (6) when Bill 135 received Royal Assent. <i>Bill 135</i> , Schedule 21, ss. 1(1), 6(1).
Section 2.4, page 22, column 1, paragraph 2	
“However, again history is instructive though not conclusive: in all these years, neither the WSIB nor its predecessor, the WCB, ever sought or received provincial funds by way of either grant or loan.”	The Workmen’s Compensation Board: <i>Report for 1915 of The Workmen’s Compensation Board, Ontario</i> , p. 14. Very early in its history, the WCB did receive minimal government assistance. As its 1915 report disclosed: “The Province provides office premises (including lighting and heating) and pays the salaries of the Commissioners, and has paid approximately all the cost to date of permanent equipment and the cost of preliminary preparations for putting the Act into effect. (Details of all disbursements for administration expenses appear, from year to year, in the Public Accounts of the Province.)”
Section 2.4, page 22, column 1, paragraph 2	
“The prospect of provincial support...is extremely remote...repealed a long-standing... that enabled it to extend loans to the WSIB [former s. 100].”	<i>Bill 135</i> , Schedule 21, s. 3(1), 6(1). Section 100, which existed in one form or another since the legislation’s inception, was repealed when Bill 135 received Royal Assent on December 8, 2010.
Section 2.4, page 22, columns 1-2, paragraphs 3-1	
“Since 1998...has required...to enter into a Memorandum of Understanding (MOU)... ‘containing only such terms as may be directed by the Minister’ [s. 166(1)].”	<i>Bill 99</i> , Schedule A, s. 166. In 1998, Bill 99 codified in legislation the practice of having memorandums of understanding between the Ministry of Labour and the WSIB.

Headers and References	Citation, Chart or Comment
Section 2.4, page 22, column 2, paragraph 1	
“The Act also...‘policy directions’ [s. 167, now repealed]...this never happened.”	<i>Bill 135</i> , Schedule 21, ss. 4, 6(1). The government’s power to issue binding directives to the WSIB was repealed when Bill 135 received Royal Assent on December 8, 2010.
Section 2.4, page 22, column 2, paragraph 1	
“In 2005 — not for the first time...took special note of the persistence of the UFL...funding ratio deteriorated further.”	AG 2005 Annual Report, p. 362. In his 2005 Annual Report, the Auditor General noted that his Office had previously commented on the UFL in both 1993 and 1998.
Section 2.4, page 23, column 1, paragraph 1	
“A well-documented...in 2001, it claimed credit for the fact...reduction in average premium rates of 29% over the previous six years.”	<i>Hansard</i> : Thursday, 10 May 2001, at 1004. In response to a question in the Legislative Assembly, former Minister of Labour Chris Stockwell replied that a “Conservative government” had, since 1995, reduced the average premium rate from \$3 to \$2.13, or about 29%, and further proclaimed “We’re on target to eliminate the unfunded liability completely, as promised, by 2014.”
Section 2.4, page 24, column 1, paragraph 1	
“These omissions... Auditor General’s...‘the challenge of trying to satisfy both workers — who want higher benefits — and employers that want lower premiums....’ ”	AG 2009 Annual Report, p. 314.
Section 2.5, page 25, columns 1-2, paragraphs 3-1	
“(In fact privatization appears...in states like West Virginia...taking down with it both public confidence and political support.)”	Leonard Gilroy: “West Virginia’s Privatized Workers Comp Insurance System Turns One,” July 20, 2009. According to this article/blog, West Virginia commenced privatization of its workers’ compensation board in 2005 and completed the change in 2008. According to Mr. Gilroy, “198 different workers’ compensation insurance companies” were registered at the time to provide coverage in West Virginia.

Headers and References	Citation, Chart or Comment
Section 2.5, page 25, column 2, paragraph 3	
<p>“Steady-state funding...features...employs the ‘open group’ rather than the ‘closed group’... maintains funding discipline by ensuring an independent review of its solvency every three years.”</p>	<p>Office of the Superintendent of Financial Institutions Canada, 25th <i>Actuarial Report on the Canadian Pension Plan as of 31 December 2009</i>, pp. 69-71. An “open group” is defined “as one which includes all current and future participants of a plan where the plan is considered to be ongoing into the future, that is, over an extended time horizon.” Under an open group approach, CPP had a UFL of about \$7 billion in 2009. In contrast, a “closed group” approach only considers current Plan participants as well as benefits earned on or before the valuation date. Under a closed group approach CPP had a UFL of \$748 billion in 2009. According to its 2008-09 Annual Report on the CPP, the federal government announced the results of the triennial review in May 2009. Government of Canada, <i>Annual Report of the Canada Pension Plan 2008-09</i>, pp. 12-15.</p>
Section 2.5, pages 25-26, columns 2-1, paragraphs 3-1	
<p>“In support of their position.... funding ratio is maintained...able to operate for the next 25 years; and...if its revenues ceased...reserves would suffice to fund benefits for the next 2.75 years.”</p>	<p>Legislative Assembly of Ontario, Committee Transcripts: Standing Committee on Public Accounts, February 24, 2010 regarding “2009 Annual Report, Auditor General: Workplace Safety and Insurance Board,” pp. 4, 27.</p> <p>The link for the transcript can be found at www.ontla.on.ca</p> <p>Based on the value of assets in the Insurance Fund in September 2011 and projected cash expenditures, the WSIB estimates that it has enough assets to cover 3.25 years of benefits. (For the purposes of the computation, the WSIB assumed that premium and investment returns would cease effective October 1, 2011.) By comparison, Morneau Shepell estimated that the WSIB had adequate reserves in 2010 to pay for about 2.75 years of annual expenditures. Data and calculations supplied by the WSIB and Morneau Shepell.</p>

Headers and References	Citation, Chart or Comment
Section 2.7, pages 26-27, columns 2-1, paragraphs 3-1	
“In addition...‘The Board has a duty...so as not to burden unduly or unfairly any class...in future years with payments...in respect of accidents in previous years [s. 96(3)].’ ”	<i>WSIA</i> , s. 96(3). This provision has existed in Ontario workers’ compensation legislation since its inception.
Section 2.7, page 27, column 1, paragraph 5	
“...maintain...not to burden unduly or unfairly any class...with payments, (a) in any year in respect of current benefits; or (b) in future years in respect of future benefits [new s. 96(5)].”	<i>Bill 135</i> , Schedule 21, ss. 1(2), 6(2). The new provision will come into effect upon proclamation. Until then, the WSIB will continue to be bound by s. 96(3) of the <i>Workplace Safety and Insurance Act, 1997</i> . The proclamation date for Bill 135 has not yet been announced.
Section 2.7, page 27, column 2, paragraph 3	
“Originally, the WSIA identified 44 industry classes; now there are 9.”	<i>WCA, 1914</i> , Schedule 1; WSIB Technical Consultation Manual, Rate Groups, p. 5. The 1914 Act identified 44 classes in Schedule 1. This number declined steadily throughout the years. In 1993, the remaining 27 classes were reduced to the present 9 classes.
Section 2.7, page 27, column 2, paragraph 3	
“There are...154 ‘classes of employers’ or rate groups,...fluctuated greatly over the years.”	WSIB Technical Consultation Manual, Rate Groups, p. 5. For example, in 1992 there were 109 rate groups. One year later the number virtually doubled to 219.
Section 2.7, page 28, column 1, paragraph 3	
“The Conference Board...provided an analysis of the factors that might generate an undue burden...on employers...(available online at www.wsibfundingreview.ca/finalreport.php).”	Conference Board Report on Undue Burden. This report examines the “no undue burden” requirement in s. 96(3) of the WSIA from an economic perspective.

Headers and References	Citation, Chart or Comment
Section 2.7, page 28, column 2, paragraph 2	
“However, the Conference Board...identified several existing rate groups...‘undue’ as the term was defined in its study.”	Conference Board Report on Undue Burden, p. 20. Based on the Conference Board’s criteria, seven classes and/or rate groups were identified as potentially at risk of facing an undue burden: forestry; motor vehicle assembly; ambulance services; demolition and form work; certain health services such as nursing; personal services; and temporary personnel agencies which supply non-clerical labourers.
Section 2.7, page 29, column 1, paragraph 3	
“Nonetheless, the Conference Board study demonstrates...determination of what is ‘undue’ is...‘virtually impossible to calculate;’...and...claims of undue burdens are likely to be dealt with entirely on the ‘squeaky wheel’ principle.”	Conference Board Report on Undue Burden, p. 3.
Section 2.7, page 29, column 2, paragraph 1	
“The burden in question relates to ‘payments...in respect of accidents in previous years [s. 96(3)].’ ”	WSIA, s. 96(3). Pursuant to Bill 135, this provision will be replaced with an equally ambiguous section [renumbered as 96(5)] that specifies: “The Board shall maintain the insurance fund so as not to burden unduly or unfairly any class of Schedule 1 employers with payments, (a) in any year in respect of current benefits; or (b) in future years in respect of future benefits.” The present subsection 96(3) of the WSIA will be repealed and the new provision will take effect upon proclamation of Bill 135. <i>Bill 135</i> , ss. 1(2), 6(2).

CHAPTER THREE – A NEW FUNDING STRATEGY FOR THE WSIB

Headers and References	Citation, Chart or Comment
Section 3.2.2, page 32, columns 1-2, paragraphs 3-1	
“This possibility...assumes, not an unprecedented catastrophe,...adverse events that the WSIB has actually experienced...(see the Morneau Shepell study for further details).”	Morneau Funding Report, pp. 94-99. Based on 20,000 modelling simulations, Morneau Shepell estimates that the risk of “tipping” with a funding ratio of less than 60% is about 5%.
Section 3.2.2, page 33, column 1, paragraph 2	
“In 2010...investment portfolio will likely have... about 12% of its projected revenues.”	WSIB 2010 Annual Report, p. 42. In 2010, the WSIB had investment income of \$521 million and total income of \$4.5 billion. Thus, the WSIB received roughly 12% of its total cash revenue from investments.
Section 3.2.2, page 33, column 1, paragraph 2	
“By contrast, if the WSIB were fully funded...its investment income might...as much as 30% or 35% of its annual revenues.”	<p>WorkSafeBC: <i>2010 WorkSafe BC Annual Report</i>, pp. 5, 52-54.</p> <p>For example, the British Columbia board derived \$1.055 billion of its total revenue from premiums and \$554 million from investments.</p>
Section 3.3.1, page 35, column 2, paragraph 2	
“Models A and B...rest on assumptions...more conservative than those adopted by the WSIB.”	Morneau Funding Report, p. 92. Table 2.B.1 contains a convenient side-by-side comparison of the key actuarial assumptions made by Morneau, as opposed to the WSIB, and the resulting impact on the UFL.
Section 3.3.1, page 35, column 2, bullet 3	
“The WSIB...currently price new claims costs at \$1.01 and \$1.20-\$1.25 respectively.”	Eckler Report, p. 7; WSIB UFL Perspectives Report, p. 11, Morneau Funding Report, p. 92. The WSIB’s new claims costs (NCC) estimate for 2011 is reportedly \$1.01, down from \$1.13-1.14 in 2010. Eckler (the WSIB’s actuarial consultant) estimated NCC for 2010 at between \$1.20 and \$1.25.

Headers and References	Citation, Chart or Comment
Section 3.3.1, page 35, column 2, bullet 3	
“In light...our consultants have used...\$1.28 (including \$.03...cost of full indexation for partially disabled workers).”	Morneau Funding Report, pp. 75, 92-93. In Table 2.B.1, Morneau estimates NCC for 2010 to be \$1.28, of which \$0.03 is attributable to full indexation for partially disabled workers.
Section 3.3.1, page 36, column 1, bullet 1	
“In Chapter 8...WSIA should be amended to provide for the full indexation...cost of \$2.2 billion (including full indexation going forward from 2013).”	Morneau Funding Report, p. 75. Table 5.3.1 summarizes the expected financial results for the three different indexation options considered by the Funding Review. “Scenario 2,” the Funding Review’s preferred option, will increase the UFL by \$2.2 billion and result in a total premium rate increase of \$0.12.
Section 3.3.1, page 36, column 1, paragraph 1	
“Given...conservative assumptions...my estimate of the UFL...: \$16.7 billion (including indexation) or \$14.5 billion (excluding indexation)...to the WSIB’s \$12.4 billion.”	Morneau Funding Report, pp. 75, 91-93. Morneau’s “Status Quo” estimate of \$16.2 billion (in Table 2.B.1) for the UFL assumes that partial disability benefits will be indexed at the same rate as total disability benefits (2.5% annually) effective in year 2 of the funding strategy. This will add an estimated \$1.7 billion, to the UFL.
Section 3.3.1, page 36, column 1, paragraph 1	
“Conversely, my estimate...funding ratio is lower: 47% (including indexation) or 50% (excluding indexation), as opposed...WSIB’s estimate of about 54%.”	Morneau Funding Report, p. 91; WSIB 2010 Annual Report, p. 70. Based on its revised key assumptions about new claims costs, the discount rate, etc., Morneau estimates the funding ratio was “about 50%” at the end of 2010 (excluding costs associated with full indexation for partially disabled workers). In contrast, the WSIB reported a funding ratio of 54.5% for the end of 2010.

Headers and References	Citation, Chart or Comment
Section 3.3.1, page 36, column 1, paragraph 2	
“Second...based on...1,000 very different scenarios per year over 20 years (see the Morneau Shepell report for details).”	Morneau Funding Report, pp. 13, 90. Explained in alternate terms, Morneau essentially “produced 1,000 potential financial statements and 1,000 potential [sic] required average premiums rates for each year in the 20-year projection period.”
Section 3.4, page 40, columns 1-2, paragraphs 3-1	
“The WSIB...has never — since its earliest years — received assistance...by way of either loan or grant...will be foreclosed from securing any such assistance in the future.”	<i>Bill 135</i> , ss. 3(1), 6(1), 6(2). Section 100 of the WSIA, which allowed the WSIB to borrow from the Consolidated Revenue Fund, was repealed on December 8, 2010 when Bill 135 received Royal Assent. The new section 100, which allows the government to make regulations concerning funding, has not yet been proclaimed in effect.
Section 3.4.2, page 41, column 1, paragraph 1	
“At present...reimburse...(OHIP)...routine services...(about \$110 million).”	Data and calculations supplied by the WSIB. The WSIB spent about \$560 million on health care in 2010, approximately \$110 million of which would have been covered under the provincial health insurance plan (OHIP). The remaining \$450 million — for drugs, special services, medical assessments, reports, etc. — would not have been covered under OHIP.
Section 3.4.2, page 41, column 1, paragraph 1	
“Some 30% of Ontario’s workforce is not covered by the WSIB system.”	Conference Board Report on Ontario Job Market, p. 4. Relying primarily on data supplied by Statistics Canada and the WSIB, the Conference Board estimates that in 2009 four million employees (about 61.5 % of Ontario’s labour force) were insured under Schedule 1 and about 658,000 employees (10% of the total provincial workforce) were insured under Schedule 2. Hence, in 2009 about 71.5% of Ontario’s workforce was insured under the WSIA.

Headers and References	Citation, Chart or Comment
Section 3.4.3, page 41, column 2, paragraph 2	
“At present, some \$227 million is paid annually...to support...large safety promotion organizations;...safety-related activities... (MOL) including...occupational health and safety legislation.”	WSIB 2010 Annual Report, p. 26. The WSIB reported that total legislative obligations of \$227 million constituted 4%-6% of the 2010 average premium rate of \$2.30.
Section 3.4.4, page 42, column 1, paragraph 3	
“The WSIB also contributes...\$15 million per annum to meet the operating costs...Offices of the Worker Adviser and the Employer Adviser...services...to unorganized workers and to small employers.”	Office of the Employer Adviser (OEA), 2008-09 Report; Office of the Worker Adviser (OWA), 2008-09 Report. According to their respective annual reports the OEA had a budget of almost \$4 million and the OWA a budget of \$11 million for the 2008-09 fiscal year.
Section 3.6.2, page 44, column 2, paragraph 2	
“The answer...CPP confronts fewer and less varied contingencies...therefore requires a much smaller margin of financial security.”	Morneau Funding Report, pp. 84-86. A full analysis of the differences between the CPP and Ontario’s workers’ compensation system appears in the Morneau report as well as its critique on transferability.
Section 3.6.3, page 45, column 2, paragraph 2	
“However, the Eckler paper speaks...about establishing ‘a separate legal entity’...and a ‘new financial reporting entity’ to administer the WSIB’s finances from 2011 onward.”	Eckler Report, pp. 1-2. Eckler describes the concept as “ring-fencing,” the purpose being to isolate past claims “from new claims incurred in 2012 or later years.” The end result, (according to Eckler) would be that, “with respect to the new claims, the WSIB would operate as if it were a fully funded workers’ compensation board.”

Headers and References	Citation, Chart or Comment
Section 3.6.3, page 46, column 2, paragraph 1	
“The WSIB calculated...its liabilities, as of 2010, at about \$27.2 billion and estimated its assets at about \$14.8 billion.”	Morneau Funding Report, p. 92; WSIB 2010 Annual Report, p. 70. For 2010, the WSIB reported total liabilities of \$27.163 billion and total assets of \$14.8 billion. Meanwhile, based on its revised assumptions, Morneau estimates total benefit liability at the end of 2010 to be about \$28.2 billion.
Section 3.6.3, page 46, column 2, paragraph 1	
“In the absence of further...cannot recommend annuitization as a way of dealing with the UFL.”	Morneau Funding Report, pp. 88-89. Morneau reviews the feasibility and risks associated with annuitization of old claims in light of the annuities market in Canada.
Section 3.6.3, page 47, column 1 paragraph 1	
“It is highly unlikely...would provide such a guarantee...could conceivably jeopardize the WSIB’s status as an arm’s-length trust agency.”	Morneau Funding Report, pp. 88-89. Morneau assesses the feasibility and risks associated with issuing bonds to pay legacy claims and increase investment returns.

CHAPTER FOUR – PREMIUM RATE SETTING: PRINCIPLES AND PROCESSES

Headers and References	Citation, Chart or Comment
Section 4.2.2, page 50, column 1, paragraph 1	
“What is worse, this situation was allowed...over a protracted period...cumulative effect was that \$8.3 billion was added to...UFL.”	WSIB 2010 Annual Report, pp. 42, 71. This cumulative operating deficit (i.e. excess of expenses over revenues) was about \$8.3 billion for 2001 to 2010. Operating deficits consist of net annual losses, which (according to the WSIB) all flow directly into the unfunded liability. For 2010, the WSIB had an operating deficit of \$675 million, down considerably from previous years.
Section 4.2.5, page 53, column 2, recommendation 4-3.2	
“Language in Bill 135 to replace section 96(3) should not be proclaimed in force.”	<i>Bill 135</i> , ss. 1(2), 6(2). The new s. 96(5), states that “The Board shall maintain the insurance fund so as not to burden unduly or unfairly any class of Schedule 1 employers with payments, (a) in any year in respect of current benefits; or (b) in future years in respect of future benefits.”
Section 4.3, page 54, column 2, paragraph 2	
“Premium rates account for some 80% of the WSIB’s revenue.”	WSIB 2010 Annual Report, p. 42. According to its <i>Consolidated Statement of Cash Flows</i> , in 2010 the WSIB derived about \$4 billion of its total cash flow, of almost \$4.5 billion, from premiums.

Headers and References	Citation, Chart or Comment
Section 4.3, page 55, column 2, paragraph 2	
<p>“The WSIA has long given the government extensive power...by ordering it to increase premium rates in order to achieve ‘sufficient’ funding.”</p>	<p><i>Bill 135</i>, ss. 1(2), 3(2), 6(2); <i>WSIA</i>, s. 96(4). Subsection 96(4) will be repealed upon proclamation of Bill 135 and replaced with provisions that authorize the Minister of Labour to order a review of the WSIB’s funding sufficiency and explicitly require the WSIB to modify its funding plan to address sufficiency problems [new s. 96.1(6)-(9)]. If this amendment is adopted, the WSIB will also be compelled to implement any commitment stipulated in the new funding regulation [new s. 100].</p>

CHAPTER FIVE – WHO PAYS HOW MUCH? RATE GROUPS AND THE APPPORTIONMENT OF FINANCIAL RESPONSIBILITY AMONG EMPLOYERS

Headers and References	Citation, Chart or Comment
Section 5.2.1, page 59, column 2, paragraph 2	
“On the one hand...30% are not covered by the WSIA at all.”	Conference Board Report on Ontario Job Market. The Conference Board estimates that in 2009 about 4.7 million people out of 6.5 million employees were insured under the WSIA for work-related accidents and diseases.
Section 5.2.1, page 60, column 1, paragraph 1	
“And finally, the WSIB has the power...to reward or punish them for...their initiative in instituting safe working conditions, and/or their accident frequency and costs [s. 82].”	WSIB Technical Consultation Manual, Incentives, p. 6. Pursuant to its powers under sections 82 and 83 of the <i>Workplace Safety and Insurance Act</i> , the WSIB currently operates four mandatory and two voluntary incentive programs. At present, any employer who pays less than \$1,000 per year in premiums is exempt from experience rating.
Section 5.2.2, page 60, column 2, paragraph 2	
“However, from its inception...system has operated on the premise...employers should pay premiums...related to the risks to which they expose their workers.”	Meredith Final Report, p. 17: “It is the purpose of my draft bill to empower the Board in determining the proportions of the contributions to be made to the accident fund by employers to have regard to the hazard of each industry, and to fix the proportions of the assessments to be borne by the employer accordingly, and not to require that the proportions for each class or sub-class should be uniform....”
Section 5.2.2, page 60, column 2, paragraph 2	
“These 44 classes...reduced to some 25...in 1993, to the present 9 classes [O. Reg. 746/92, Schedule 1].”	WCA, 1914, Schedule 1; O. Reg. 746/92 made under the <i>Workers’ Compensation Act, 1990</i> . Ontario Regulation 746/92 significantly reduced the number of classes in Schedule 1 from 27 to 9 effective January 1, 1993.

Headers and References	Citation, Chart or Comment
Section 5.2.2, pages 60-61, columns 2-1, paragraphs 3-1	
“From 1998 onward...‘may vary for each individual industry or plant’ [s. 81(4)].”	<i>WSIA</i> , s. 2(1). Under the current legislation, “industry” is inclusively defined as “an establishment, undertaking, trade, business or service and if domestics are employed, includes a household.”
Section 5.2.2, page 61, columns 1-2, paragraphs 4-1	
“Seen...1997 statutory amendment...to establish ‘experience and merit rating programs to encourage employers to reduce injuries and occupational diseases and to encourage workers’ return to work’ [s. 83]...to encourage positive or deter negative conduct in advance.”	<i>Bill 99</i> , s. 18, paragraph 2; <i>Bill 99</i> , Schedule A, s. 83. The experience/merit rating provision was last amended in January 1998 by Bill 99. Prior to 1998, the WSIB could take into consideration metrics other than claim costs and accident frequency for experience/merit rating purposes.
Section 5.2.3, page 63, column 1, paragraph 2	
“It may...produce...section 83(1) — improved attention to accident prevention and better strategies to enable workers to return to work.”	<i>WSIA</i> , s. 83(1): “The Board may establish experience rating and merit rating programs to encourage employers to reduce injuries and occupational diseases and to encourage workers’ return to work.”
Section 5.2.3, page 63, column 2, paragraphs 1-2	
“This approach...statutory mandate: ‘...to promote health and safety in workplaces... to provide compensation and other benefits...[s. 1].’ ”	While Bill 135 directly impacts most of the funding provisions in Part VII of the <i>WSIA</i> (sections 96 to 100), the present obligation to carry out the purposes of the <i>WSIA</i> “in a financially responsible and accountable manner” remains unaltered [<i>WSIA</i> , s. 1].
Section 5.2.4, page 64, columns 1-2, paragraphs 3-1	
“At present, all employers...assigned to one of four Safe Workplace Associations (SWAs)... funded by a charge levied on all Schedule 1 employers....”	WSIB 2010 Annual Report, p. 26. In 2010, 12 SWAs were consolidated into the current: Infrastructure Health and Safety Association (IHSA), Public Services Health and Safety Association (PSHSA), Workplace Safety North (WSN) and Workplace Safety and Prevention Services (WSPS).

Headers and References	Citation, Chart or Comment
Section 5.2.4, page 64, column 2, paragraph 1	
“And fourth...SWAs will soon operate under... Chief Prevention Officer — an issue to which I will return below and in Chapter 6.”	<i>Bill 160</i> , ss. 8(1), 19, 20, 29(3). By April 1, 2012 the WSIB’s oversight responsibilities for the SWAs under Part II of the WSIA (sections 3-10) will be repealed and legal responsibility will move to the Chief Prevention Officer within the Ministry of Labour. The WSIB’s mandate under paragraph 1, section 1 of the WSIA will also be amended to delete responsibility for the prevention and reduction of workplace injuries and occupational diseases. The latter appears inconsistent with the continuing requirement under s. 83(1) of the WSIA to administer experience rating programs that encourage the reduction of injuries and occupational diseases.
Section 5.3.2, page 68, column 1, paragraph 2	
“One component of that lexicon can be found... [O. Reg. 175/98].”	Ontario Regulation 175/98 was passed under the authority of section 183(1) of the WSIA. Schedule 1 was last amended effective July 1, 2010 by Ontario Regulation 80/10.
Section 5.3.2, page 68, column 1, paragraph 3	
“And...descriptors used to define CUs were originally drawn from...by Statistics Canada in 1980, but the WSIB...substitutes others whenever doing so suits its purpose.”	WSIB Technical Consultation Manual, Rate Groups, p. 5. The current classification scheme, introduced in 1993, is based on StatsCan’s standard industry classifications as these existed in 1980, modified in some instances to suit the WSIB’s purposes.
Section 5.3.2, page 68, column 1, paragraph 3	
“No matter: Statistics Canada...now uses... (NAICS)...updated every five years to include... emerging occupations and businesses.”	www.statscan.gc.ca . For more information about the North American Industrial Classification System (NAICS), please visit Statistics Canada’s website.

Headers and References	Citation, Chart or Comment
Section 5.5.2, page 72, columns 1-2, paragraphs 2-1	
“The proposal to assign responsibility for the UFL at the industry class level...in light of... practice of assigning UFL gains and losses in similar fashion.”	WSIB Technical Consultation Manual, Rate Setting, pp. 12, 15. In 2010, \$0.94 of the average rate premium (equal to 40% of the total premium) was nominally allocated for payment of the unfunded liability (UFL). In turn, each rate group (RG) is charged a proportion of the UFL based on its share of new claims costs (NCC).
Section 5.5.2, pages 72-73	
Figures 7 and 8.	These pie charts were prepared based on data and other information supplied by the WSIB including historical employment and claims cost data for each rate group (RG).
Section 5.5.3, page 74, column 2, paragraph 3	
“In Chapter 3...government review the WSIB’s present legislated obligations...to fund...programs run by...Ministry of Labour.”	WSIB Technical Consultation Manual, Rate Setting, p. 15; WSIB 2010 Annual Report, p. 26. About \$0.14 (6%) of the average premium rate is designated for legislative obligations including the four Safe Workplace Associations. In 2010, total legislative obligations amounted to \$227 million.
Section 5.5.5, page 75, column 2, paragraph 2	
“The present practice of recovering half of administrative expenses as a percentage of new claims costs and half as a percentage of payroll seems sensible.”	WSIB Technical Consultation Manual, Rate Setting, p. 15. For 2010, \$0.40 of the average Schedule 1 premium rate of \$2.30 was for “administrative expenses consisting of legislative obligations and overhead” which included the cost of operating the four Safe Workplace Associations and other entities. Together, these expenses account for about 17% of the average Schedule 1 premium rate.

Headers and References	Citation, Chart or Comment
Section 5.5.6, page 76, column 1, paragraph 1	
“For present purposes...15 years prior to 2010, rebates exceeded surcharges by...total of \$2.5 billion...contribution to the WSIB’s UFL.”	WSIB Technical Consultation Manual, Incentives, p. 21. The WSIB reported that for the period from 1994 to 2010 rebates exceeded surcharges by \$2.458 billion “and this has added to the UFL.”
Section 5.5.6, page 76, column 1, paragraph 1	
“Virtually everyone is agreed...should not generate such an ‘off-balance,’...WSIB made considerable progress towards eliminating it.”	WSIB 2010 Annual Report, p. 32. For 2010, the WSIB reported that experience rating net refunds declined to \$20 million from \$37 million in 2009. The decline was attributed to changes in administration of the Second Injury Enhancement Fund (SIEF) rather than formulae/program modifications.

CHAPTER SIX – EMPLOYER INCENTIVES AND EXPERIENCE RATING

Headers and References	Citation, Chart or Comment
Section 6.2, page 78, column 1, paragraph 1	
“The recommendations...by Tony Dean (the Dean report) were unanimously accepted in principle by the then-Minister of Labour.”	Ministry of Labour: News Release, “McGuinty Government Welcomes Recommendations from Tony Dean’s Expert Panel,” December 16, 2010 [available at http://news.ontario.ca/mol/en/2010/12/new-chief-prevention-officer-to-oversee-workplace-safety.html]; Minister Charles Sousa, Statement to the Legislature March 3, 2001 [available at http://www.labour.gov.on.ca/english/news/ms_ohsa.php]. Former Minister of Labour Peter Fonseca is quoted as saying, “I wholeheartedly embrace these recommendations that will help ensure that Ontario workers return home safely at the end of each day.” Subsequently, former Minister of Labour Sousa affirmed “we have accepted the recommendations of the Expert Panel.”
Section 6.2, page 78, column 1, paragraph 1	
“Some...translated into law by Bill 160...come fully into force by April 1, 2012.”	<i>Bill 160</i> , ss. 29(3), (4)(a). Pursuant to these provisions, implementation of many of the provisions in Bill 160 are deferred until “the earlier of April 1, 2012 and a day to be named by proclamation of the Lieutenant Governor.”
Section 6.2, page 78, column 1, paragraphs 2-3	
“While Bill 160...Dean report recommended that ‘[t]he Workplace Safety and Insurance Board...with the new prevention organization...revise existing financial incentive programs... [recommendation 22].’ ”	Tony Dean Report, pp. 40-41: “With the exception of SCIP, all current programs are either partially or entirely based on claims experience, with particular emphasize on lost-time injury (LTI) claims.... With that in mind, the Panel strongly believes that financial incentives should not simply be tied to claims experience.”

Headers and References	Citation, Chart or Comment
Section 6.3, page 78, column 2, paragraph 3	
“These programs...cover over 120,000 employers...registered with the WSIB.”	WSIB Technical Consultation Manual, Incentives, p. 5. An estimated 120,000 employers collectively paying about \$3 billion annually in premiums participate in the three mandatory experience rating programs: CAD-7, MAP and NEER. Employers who pay less than \$1,000 per year in premiums are at present exempt from experience rating.
Section 6.3, page 79, column 1, paragraph 2	
“Employers with a high frequency of injuries must participate in the Workwell program.”	WSIB Technical Consultation Manual, Incentives, pp. 6, 19. Workwell is administered pursuant to section 82 of the WSIA. According to the WSIB, any “high risk” Schedule 1 employer with more than five employees may be audited under Workwell.
Section 6.3, page 79, column 1, paragraph 2	
“Furthermore...two voluntary practice-based programs — the Safe Communities Incentives Program (SCIP) and the Safety Groups Program (SGP).”	WSIB Technical Consultation Manual, Incentives, pp. 16-17. The Safe Communities Incentives Program (SCIP) is designed to encourage small to medium-size employers to further develop their health and safety programs. The Safety Groups Program (SGP), open to any employer, is based on actual improvements to an employer’s health and safety program as measured by various health and safety metrics such as compliance with the <i>Occupational Health and Safety Act</i> . The incentive in both programs is a premium rebate for successful employers.
Section 6.3, page 79, column 1, paragraph 2	
“Under Bill 160, responsibility for accreditation programs will shift to the Chief Prevention Officer.”	<i>Bill 160</i> , ss. 4.1(2), 7-8. Pursuant to Bill 160, the Ministry of Labour (MOL) will explicitly assume responsibility for the promotion of occupational health and safety and the prevention of accidents/occupational diseases. The MOL will also assume responsibility for certification and training standards.

Headers and References	Citation, Chart or Comment
Section 6.3, page 80, column 1, paragraph 1	
“As...even if all the incidents reported...(and additional incidents featured in a <i>Toronto Star</i> series in 2008) actually occurred...fraction of all accidents involving Ontario workers over the years.”	<i>Toronto Star</i> , “Hiding injuries rewards companies,” June 29, 2008. The <i>Star</i> reported, “Since 2000, companies have reported thousands of seriously injured Ontarians as having missed no time off work.” Between February and September 2008, the <i>Star</i> published four articles alleging claims suppression attributable to employer incentive programs.
Section 6.3, page 80, column 1, paragraph 3	
“It laid 174 charges and secured 96 convictions against 49 employers.”	Source: WSIB Regulatory Services Division database updated to April 30, 2011.
Section 6.3, page 80, column 2, paragraph 2	
“And...2002 study suggested that unreported workplace accidents may represent as much as 40% of the total.”	Harry S. Shannon and Graham S. Lowe: “How Many Injured Workers Do Not File Claims for Workers’ Compensation Benefits?” <i>American Journal of Industrial Medicine</i> 42: 467-73 (2002).
Section 6.3, page 80, column 2, paragraph 3	
“Of course...evidence that claims...declined sharply since the introduction of experience rating in 1984....”	WSIB 2010 Annual Report, p. 71; WSIB Technical Consultation Manual, Incentives, pp. 10, 14. The two primary experience rating programs (CAD-7 and NEER) were introduced in 1984. Total new claims have declined from 371,000 in 2001 to 249,500 in 2010.
Section 6.3, page 81, column 1, paragraph 2	
“However, they offer no statistically reliable estimate of the extent of such behaviour.”	An estimated 25,000 work-related claims were not reported in 2007. Morneau Experience Rating Report, p. 9.

Headers and References	Citation, Chart or Comment
Section 6.3, page 81, column 1, paragraph 2	
“On...same studies (and others) offer only modestly compelling evidence that experience rating produces the desired outcome...”	Douglas E. Hyatt and Terry Thomason: <i>Evidence on the Efficacy of Experience Rating in British Columbia, A Report to the Royal Commission on Workers' Compensation in BC</i> , May 1998. Professors Hyatt and Thomason, in one of the most comprehensive reviews of experience rating to date, concluded that employers respond to such programs by attempting to reduce claim costs.
Section 6.3, page 81, column 1, paragraph 3	
“Their report can be briefly summarized...experience rating probably creates incentives for abuse such as claims suppression.”	Morneau Funding Report, pp. 125-26, Appendix 3.B, Overview of Empirical Evidence for Experience Rating Programs.
Section 6.4, page 82, column 1, paragraph 2	
“Specifically, material produced by the WSIB...states that one program — NEER — ‘is aimed strictly at insurance equity and is only cost based.’ ”	WSIB Technical Consultation Manual, Incentives, “Goal of employer incentive programs is not clear: are they designed to incent prevention of injuries or provide insurance equity?...— one large program (NEER) is aimed strictly at insurance equity and is only cost based....Difficult to attribute impact of incentives to prevention improvements or to tie them to reductions in benefit costs” [p. 24].
Section 6.4, page 84, column 1, recommendation 6-2.3, bullet 2	
“The WSIB should establish...special compliance unit...track all reports of abuse...refer cases for administrative disposition....”	Currently, the WSIB’s Audit Branch and Regulatory Services Division are primarily responsible for compliance functions including audits and prosecutions. Both department heads report to the WSIB’s General Counsel. In select instances, algorithmic models are used to identify employers who potentially pose a high risk of non-compliance.

Headers and References	Citation, Chart or Comment
Section 6.4, page 85, column 2, paragraph 3	
“Second, the Dean panel recommended improved enforcement of occupational health and safety laws.”	Tony Dean Report, pp. 42-46. “Enforcement and Penalties,” recommendations 25 to 28.
Section 6.5.2, page 88, column 1, paragraph 2	
“WSIB management commissioned Nexus Actuarial Consultants to prepare a study... submitted to the Funding Review in June 2011.”	Nexus Report, <i>A Pricing System Conceptual Design for Moving Forward</i> .
Section 6.5.2, page 88, column 2, paragraph 2	
“It is simple...(for those who favour ‘insurance equity’)...firms pay premium rates in proportion to the costs they generate.”	Nexus Report: “a new pricing system that sets each employer’s premium rate based upon each employer’s own experience by essentially integrating experience rating into the rate setting exercise” [p. 10].
Section 6.5.2, page 89, column 1, paragraph 1	
“Given that accident rates and new claims costs in Manitoba are considerably higher than in Ontario...safety.”	Sources: Manitoba Workers’ Compensation Board, 2010 Annual Report, p. 15; WSIB UFL Perspectives Report, pp. 10-11; WSIB Technical Consultation Manual, Funding, p. 36; Morneau Funding Report, p. 129. For 2010, Manitoba reported a lost-time injury (LTI) rate of 3.3 per 100 full-time equivalent (F/T) workers whereas Ontario reported a LTI rate of 1.44. Manitoba’s new claims costs (NCC) in 2010 were \$1.52 compared with Ontario’s \$1.13 to \$1.14. Morneau noted and commented in its report that the WSIB’s improvement in injury frequency was better than Manitoba’s for 2000-09 and that Manitoba’s accident frequency was 2.7 times higher than Ontario’s.

CHAPTER SEVEN – FUNDING OCCUPATIONAL DISEASE CLAIMS

Headers and References	Citation, Chart or Comment
Section 7.1, page 93, column 1, paragraph 1	
“Under the WSIA...‘is entitled to benefits under the insurance plan as if the disease were a personal injury by accident...impairment were the happening of the accident’ [s. 15(2)].”	<i>WSIA</i> , s. 2(1) defines “Impairment” as “a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.”
Section 7.1, page 93, column 2, paragraph 2	
“Some diseases...statute: workers...diseases will be entitled to benefits if they meet specified conditions....”	<i>WSIA</i> , ss. 15.1, 15.2; O. Reg. 253/07 as amended. These provisions established rebuttable presumptions for firefighters and fire investigators who sustain heart injuries or certain cancers.
Section 7.1, page 93, column 2, paragraph 2	
“Others are dealt with in Schedules 3 and 4...presumption of causation...has worked in a particular type of workplace.”	<i>WSIA</i> , s. 15(3), (4); O. Reg. 175/98 as amended. Schedule 3 creates rebuttable presumptions regarding causation whereas the presumptions under Schedule 4 are not rebuttable if the condition, and corresponding work process, both exist. Schedule 3 at present lists 30 diseases and Schedule 4 lists four. Both schedules are set out in Ontario Regulation 175/98.
Section 7.1, page 94, column 1, paragraph 2	
“They represent...6% in 2000 to about 10% in 2010.”	WSIB 2010 Annual Report notes that occupational disease claims are expected “to continue to grow” and that the most significant increase since 2000 has been with respect to noise-induced hearing loss [p. 2].
Section 7.2, page 94, column 2, paragraph 1	
“It has allowed \$600 million...whose symptoms have not yet been manifested by claimants).”	WSIB 2010 Annual Report, p. 22; Morneau Funding Report, p. 66. The \$600 million is an increase in the existing contingency allowance for occupational disease claims “to provide for future occupational disease claims that have not yet been incurred.”

Headers and References	Citation, Chart or Comment
Section 7.2, page 94, column 2, paragraph 2	
“However...\$600 million...reasonable mid-range estimate of possible future occupational disease costs.”	Morneau Funding Report, p. 66. While the WSIB’s \$600 million for unknown emerging occupational disease liabilities is a reasonable estimate for funding purposes, relying on 2010 data, Morneau projects the liability range to be anywhere from \$450 million to \$825 million, depending on the success of prevention efforts and diagnosis.
Section 7.2, page 94, column 2, paragraph 2	
“Parenthetically, new standards...by the Canadian Institute of Actuaries...will require that such a set-aside be made.”	Chair, Actuarial Standards Board, Canadian Institute of Actuaries (CIA), public memo dated February 4, 2011. Early in 2011, the CIA issued a new standard for “Public Personal Injury Compensation Plans.” This standard requires actuaries who are calculating benefit liabilities for Canadian workers’ compensation plans to include a provision in the benefit liabilities for potential unknown occupational disease claims with long latency periods. Implementation of this standard has been deferred to December 31, 2012.

CHAPTER EIGHT – BENEFIT INDEXATION FOR PARTIALLY DISABLED WORKERS

Headers and References	Citation, Chart or Comment
Section 8.1, page 99, column 1, paragraph 2	
“Until 1987, benefits...adjusted <i>ad hoc</i> to compensate them...for increases in the cost of living.”	<i>Bill 81</i> , ss. 138, 139. Effective January 1, 1987, Bill 81 introduced automatic indexation based on annual changes to the Consumer Price Index (CPI) for Canada for all items, as published by Statistics Canada.
Section 8.1, page 99, column 1, paragraph 2	
“These reductions...Friedland formula; and in 1998...introduction of the so-called Modified Friedland formula.”	<i>Bill 165</i> , section 34; WSIB Technical Consultation Manual, Indexation, pp. 4-5; <i>Bill 99</i> . Bill 165, which took effect on January 1, 1995, established two-tier indexation. Fully disabled workers and survivors continued to receive full CPI inflation protection whereas the partially disabled were subject to the “Friedland formula”: 75% of CPI minus 1%, subject to a cap of 4% and floor of 0%. Bill 99, which took effect on January 1, 1998, replaced the “Friedland formula” with “Modified Friedland”: 50% of CPI minus 1%, with a maximum of 4% and minimum of 0%.
Section 8.1, page 99, columns 1-2, paragraphs 3-1	
“In order...government...in each of 2007, 2008 and 2009...2.5% <i>ad hoc</i> inflation adjustments to their benefits.”	<i>Bill 187</i> , Schedule 41, ss. 5-7; WSIB Technical Consultation Manual, Indexation, p. 5. The three consecutive annual <i>ad hoc</i> amendments of 2.5% set out in Bill 187 increased the UFL by an estimated \$570 million.
Section 8.2, page 100, column 1, paragraph 2	
“This...none of them distinguish between the two classes of injured workers....”	Association of Workers’ Compensation Boards of Canada, “Adjustment of Existing Compensation Payments” chart.

Headers and References	Citation, Chart or Comment
Section 8.2, page 100, column 1, paragraph 2	
“They...study by...(IWH) that suggests that injured workers...replace over 90% of their pre-injury earnings through a combination of WSIB benefits and wages.”	Institute for Work and Health (IWH), (i) <i>Briefing Note: Adequacy and equity of compensation for workers experiencing permanent impairments in Ontario</i> , November 2009, p. 4; (ii) <i>The Adequacy of Workers’ Compensation Benefits</i> , April 2011, p. 1. The latter study concluded that the “earnings replacement rate, after taxes, for permanently disabled claimants injured prior to 1998 was at least 90 per cent on average for every category....” In contrast, the earlier study concluded that permanently impaired workers had earnings losses disproportionately larger than their impairment rating.
Section 8.2, page 100, column 2, paragraph 3	
“And...repudiated the so-called ‘deal’ by introducing further reductions in both indexation and other entitlements.”	<i>Bill 99</i> . In addition to replacing the Friedland indexation formula with Modified Friedland, Bill 99 reduced the earnings basis for computation of wage loss benefits from 90% of net average earnings to 85% of net average earnings.
Section 8.2, page 101, column 1, paragraph 1	
“Or...is it fair...long-term erosion of benefits for some injured workers and not for others?”	Morneau Funding Report, p. 76, Table 5.3.2 – Summary of Results by Cohorts.
Section 8.2, page 101, column 1, paragraph 2	
“Full inflation protection on a going-forward basis...increase in the WSIB’s long-term liabilities of about \$1.7 billion...increase in average premium rates of about \$.10 per \$100 of payroll.”	Morneau Funding Report, p. 75, “Scenario 1.”
Section 8.2, page 101, column 1, paragraph 2	
A further...\$.06...to fully offset the additional \$1.3 billion cost of restoring the base...had full inflation protection been maintained from 1995 onward.”	Morneau Funding Report, p. 75, “Scenario 3 – Upgrade of Partial Disability Benefits on an Individual Basis.”

Headers and References	Citation, Chart or Comment
Section 8.2, page 101, column 1, paragraph 2	
“However...partial restoration of the benefit base at a cost of \$.5 billion...average rate increase of \$.02 — still a significant increase.”	Morneau Funding Report, p. 75, “Scenario 2.”
Section 8.3, pages 101-102, columns 2-1, paragraphs 3-1	
“If, indeed, premium rates for 2012 have already been set...postpone implementation...following year.”	WSIB 2010 Annual Report, p. 32. The WSIB Board of Directors has approved an average premium rate of \$2.35 for 2011 and \$2.40 for 2012 as part of the 2011-13 Corporate Business Plan.
Section 8.3, page 102, column 1, paragraph 4	
“The...precise adjustment of each worker’s benefit base is technically infeasible.”	Morneau Funding Report, pp. 73-74, “Scenario 3 – Upgrade of Partial Disability Benefits on an Individual Basis.”
Section 8.3, page 102, column 2, paragraph 4	
“If a special fund of \$.5 billion...distributed...it would produce the following results....”	Morneau Funding Report, p. 76. Table 5.3.2 – Summary of Results by Cohorts.

CHAPTER NINE – ISSUES NOT WITHIN THE MANDATE OF THE FUNDING REVIEW

Headers and References	Citation, Chart or Comment
Section 9.2, page 106, column 2, paragraph 1	
“Rather...appoint Board members from various backgrounds...as it was until 1998...”	<i>Bill 165</i> , s. 56(1). Bill 165 mandated a bi-partite governance structure by requiring an equal number of employer and worker representatives on the Board of Directors. The bipartite governance structure was formally replaced in 1998 by a multi-representative Board effective January 1998 [<i>WSIA</i> , s. 162].
Section 9.3, page 106, column 2, paragraph 2	
“(Non-covered employers...14,000....”	Data and information supplied by the WSIB.
Section 9.3, page 106, column 2, paragraph 2	
“As a result, about 30% of all Ontario workers are not covered at all by the WSIA.”	Conference Board Report on Ontario Job Market. Estimates that about 61.5% of Ontario employers are covered under Schedule 1 and 10% by Schedule 2. In 2009, total employment under Schedule 1 was about 4 million and 658,000 for Schedule 2 [p. 4].
Section 9.3, page 106, column 2, paragraph 2	
“Coverage under Schedule 1...lower than comparable coverage in other provinces....”	Association of Workers’ Compensation Boards (AWCBC), “Scope of Coverage Industries/ Occupations” summary. For example, the AWCBC reports that British Columbia, New Brunswick and Quebec all insure well over 90% of their provincial workforces.
Section 9.3, page 107, column 1, paragraph 1	
“While...study...by the Conference Board... indicates that, between 1985 and 2009, WSIB coverage declined...coverage will likely stabilize....”	Conference Board Report on Ontario Job Market. Surmises that WSIB coverage of Ontario’s workforce under Schedule 1 has gradually declined over the last 20 years due primarily to the shrinking manufacturing workforce [pp. 14, 16, 23]. For more information on projected coverage under Schedule 1 and insured employment, see charts 3 and 4 in the Conference Board report.

Headers and References	Citation, Chart or Comment
Section 9.3, page 107, column 1, paragraph 1	
“The Schedule 2...governments...and other industries.”	Ontario Regulation 175/98 as amended under the <i>Workplace Safety and Insurance Act</i> , Schedule 2. Schedule 2 comprises mainly government operations (both provincial and municipal) and interprovincial and federally regulated businesses such as airlines and railroads.
Section 9.3, page 107, column 1, paragraph 1	
“While...reconfigured by the long-term decline of manufacturing...increased...‘other’ services.”	Conference Board Report on Ontario Job Market. Expects Schedule 1 employment to increase marginally by about 1.1% per year until 2030, primarily in service industries such as retail and wholesale trades [pp. 13-16].
Section 9.3, page 108, column 1, paragraph 2	
“Their position is challenged by a recent study... suggests...few job losses will occur, and...will soon be recouped.”	Hyatt Coverage Study. Concluded that expansion of coverage would result in statistically insignificant job losses of about 4,700 by year 4 but these minimal job losses would be reversed by year 7 [pp. 16-17].
Section 9.3, page 108, column 1, paragraph 3	
“In fact, the WSIB commissioned such a study... never released it.”	Brock Smith, Chair of the Coverage Review: <i>Final Report, Coverage Under the WSI Act Report to the Board of Directors</i> , October 8, 2002. A copy of Mr. Smith’s report is publicly accessible in the WSIB’s Reference Library.
Section 9.5, page 109, column 2, paragraph 3	
“An assessment...benefits comprise over 80% of its annual expenditures.”	WSIB 2010 Annual Report, p. 42, Consolidated Statement of Cash Flow. According to its cash flow statement for 2010, almost \$3.5 billion of the \$4.2 billion in expenditures was benefits-related.

Headers and References	Citation, Chart or Comment
Section 9.5, pages 109-110, columns 2-1, paragraphs 3-1	
“For example...policies that ‘deem’ a worker... regardless of whether he or she has been able to find employment....”	WSIA, s. 43(4); WSIB, Operational Policy Manual, Document 18-03-02. Pursuant to its policy, the WSIB essentially deems a worker’s post-injury earnings under section 43(4) to be equal to the earnings in the “identified suitable occupation (SO).”
Section 9.5, page 110, column 1, paragraph 3	
“Figures...suggest...administrative costs compare favourably with those of other Canadian workers’ compensation systems.”	WSIB Technical Consultation Manual, Funding, p. 39; Association of Workers’ Compensation Boards of Canada (AWCBC), Annual Key Statistical Measures (KSM) Standard Report 2010(available at https://aoc.awcbc.org/KsmReporting/KsmSubmissionReport/2). According to the AWCBC, Ontario’s administrative costs per \$100 of payroll were \$0.32 in 2009, slightly higher than the Canadian average of \$0.30.
Section 9.5, page 110, column 2, paragraph 2	
“The WSIB...received) an external value-for-money audit of its adjudication practices....”	KPMG Value for Money Report on Claims Administration available at www.wsib.on.ca/files/Content/VFMA2010VFMAfullreport/VFMAReportFINAL2011-08-30.pdf .
Section 9.6, page 111, column 1, paragraph 3	
“Workers’...pointed to the heavy losses sustained by the WSIB in 2008...contributed significantly to the UFL.”	WSIB Technical Consultation Manual, Investments, p. 7. The WSIB incurred consecutive investment losses of almost 1% in 2007 and 16% in 2008.
Section 9.6, page 111, column 1, paragraph 3	
“Others...agency with investments currently valued at \$15 billion...financial difficulty.”	WSIB 2010 Annual Report, p. 40. Investments were valued at about \$15.1 billion as of December 31, 2010.

Headers and References	Citation, Chart or Comment
Section 9.6, page 111, column 1, paragraph 4	
“Employer representatives...liquidated some of its assets...meet its annual costs of operation.”	AG 2009 Annual Report. Noted that the WSIB has incurred “annual deficits averaging over \$900 million” since 2001 [pp. 316, 334-35].
Section 9.7, page 112, column 1, paragraph 3	
“The WSIB...developing a special experience rating scheme for firms with modest payrolls...other accommodative measures.”	Morneau Funding Report, p. 49. Merit Adjusted Premium (MAP) is a performance-based incentive program for small employers who pay annual premiums of \$1,000 to \$25,000. Employers who pay less than \$1,000 per year in premiums are not experience-rated.
Section 9.8, page 113, column 2, paragraph 1	
“Under...Law Society of Upper Canada, and reinforced by the WSIB’s policy...lay advocates are not allowed to appear...legal proceedings...unless...licensed or employed...organization funded by the WSIB.”	Law Society of Upper Canada (LSUC), <i>By-Law 4</i> , s. 31; WSIB, <i>Appeals System Practice & Procedures</i> (effective September 1, 2010) available at www.wsib.on.ca/files/Content/AppealsAppealsPP/AppealsP&P.pdf . This WSIB document incorporates by reference the Law Society of Upper Canada restrictions on unlicensed representatives [p. 10].

GLOSSARY

Actuary: a business professional who analyzes the financial consequences of risk. Using statistical information and financial theory, actuaries assess uncertain future events and probabilities.

Annuitization: the process of converting an unsecured promise to pay into one backed by an annuity.

Annuity: the income from an investment paid annually to provide a steady income stream for the beneficiary.

Average premium rate: the average premium rate paid by Schedule 1 employers to cover the anticipated costs of the workplace safety and insurance system, including the cost of new claims, administration expenses, legislated obligations and a charge towards paying for the unfunded liability. It is also the average of the premium rates for all rate groups that make up Schedule 1, weighted by the rate groups' insurable earnings.

CAD-7 (Council Amended Draft #7): a retrospective experience rating program designed for mid to large construction employers with average premiums greater than \$25,000 per year.

CIA (Canadian Institute of Actuaries): the national governing body for actuarial professionals in Canada. Among other functions, it establishes common Rules for Professional Conduct and guiding principles to be observed by actuaries in performing their functions in specific fields.

Class: see Industry class

CPI (Consumer Price Index): a common and widely accepted measurement of change in consumer prices. The cost of specific goods and services are compared over a fixed period of time.

CU (Classification Unit): a classification unit is the base element for industry classification. Each CU consists of a seven-digit identifier (CU code) based on Statistics Canada's four-digit Standard Industry Classification Codes (SICs). The WSIB currently has 828 classification units. In the WSIB's classification scheme, each rate group comprises one or more CUs.

Deeming: a wage loss benefit scheme whereby workers are compensated for their expected "loss of earning capacity" based on the difference between their pre-injury wages and what they are "deemed to be" likely able to earn after their injury.

Discount rate: the interest rate used by the WSIB to determine the present value of future liabilities including future benefit payments. The discount rate and expected long-term rate of return on investments are usually identical.

Employer Incentives: programs designed for employers to encourage accident prevention, return to work, and better health and safety practices using different metrics. See also (ER) (Experience rating).

ER (Experience rating): employer incentive programs that provide rebates or surcharges to employers based on their individual claims experience and claim costs.

Friedland formula: formula used to determine the level of indexation on loss of earnings and other benefits for partially disabled workers between January 1, 1995 and December 31, 1997. The formula is $(0.75 \times \text{CPI}) - 1\%$ with a cap of 4% and a floor of 0%. See also Modified Friedland formula.

Fully funded: an insurance plan/fund that has sufficient assets to pay all liabilities (i.e. present value of projected future costs) on existing claims.

Funding ratio: the ratio of assets to liabilities in an insurance plan/fund at a particular point in time. A funding ratio of 100% or more means assets available match or exceed liabilities (fully funded). A funding ratio below 100% means that assets are not sufficient to cover liabilities.

Gains and losses: premium rate setting requires that the WSIB estimate the anticipated cost of new claims, administration expenses, etc. prior to the year in which those costs are actually incurred. A gain or loss is the difference between the initial estimate and the actual cost or expense.

Indexation: periodic increases made to benefits to mitigate the negative impact of inflation on the purchasing power of benefits.

Industry class: a broad economic and legal descriptor used in the WSIA to describe a group of common business activities, for example “manufacturing” or “retail and wholesale trades.” The existing nine industry classes are set out in Schedule 1 of Ontario Regulation 175/98.

Legacy costs: remaining costs of prior claims that have not yet been fully funded.

Legislated obligations: payments the WSIB is legally or contractually compelled to make to government agencies. For example, the WSIB is required to fund the operating costs of the Workplace Safety and Insurance Appeals Tribunal, the Offices of the Employer Adviser and the Worker Adviser, and enforcement of the *Occupational Health and Safety Act*.

Loss of earnings benefits: wage loss benefit paid under section 43 of the WSIA to workers who miss time from work, and are not paid by their employer, because of a work-related injury or illness.

MAP (Merit Adjusted Premium): a prospective experience rating program tailored to small firms with average premiums greater than \$1,000 and less than \$25,000 per year.

Modified Friedland formula: formula used to determine level of indexation on loss of earnings benefits for partially disabled workers after January 1st, 1998. The formula is $(0.50 \times \text{CPI}) - 1\%$ with a cap of 4% and a floor of 0%. See also Friedland formula.

MOU (Memorandum of Understanding): an administrative agreement between the Minister of Labour and the Chair of the WSIB. The MOU establishes the accountability framework and sets out the respective roles and responsibilities of the two parties and their organizations.

NCC (New claims costs): the estimated full cost of new claims for injuries expected to occur in a given year. These costs typically include health care, loss of earnings benefit, labour market re-entry, non-economic loss benefits and survivor benefits. New claims costs are one of three principle components relied on to establish premium rates.

NEER (New Experimental Experience Rating): a retrospective experience rating program for mid-sized to large non-construction employers with average premiums greater than \$25,000 per year.

Off-balance: an actuarial term used by the WSIB to describe the loss it incurs when experience rating rebates exceed surcharges over a period of time.

Operating deficit: an accounting term used to describe a shortfall of income over expenses in a specific period of time — usually a quarter or a fiscal year.

Operating surplus: an accounting term used to describe an excess of income over expenses in a specific period of time — usually a quarter or a fiscal year.

Premium rate: amount paid per \$100 of insurable earnings by Schedule 1 employers to cover the expected costs of the workplace safety and insurance system, including the cost of new claims, administration expenses, legislated obligations and a charge towards paying for the unfunded liability. Premium rates are normally set annually for Schedule 1 and its rate groups reflecting trends in each rate group's claims and cost experience.

Present value: today's estimated value of an amount that is expected to be paid at some point in the future.

Prevention Council: under Bill 160, the Minister of Labour is required to establish a Prevention Council composed of representatives of trade unions, provincial labour organizations, employers, non-unionized workers, health and safety experts, and the WSIB. The Prevention Council will be responsible for a number of functions, including providing advice to the Chief Prevention Officer on the prevention of workplace injuries and occupational diseases.

Prospective experience rating program: employers' annual premiums are adjusted for the coming year based on their previous accident record. Employers with good accident records receive a premium rate discount. Employers with poor accident records receive a rate increase.

RG (Rate Group): one or more classification units combined together for rate-setting purposes. There are currently 154 rate groups, clustered on the basis of the similarity of business activity and relative injury risk of member firms. Each rate group pays a share of the overall system costs commensurate with its own claims/cost experience and an allocation of other costs according to the WSIB's rate-setting methodology.

Rate-setting methodology: the actuarial methodology followed by the WSIB for setting the annual average premium rate and the premium rates for each of the rate groups. Rate setting takes into account various actuarial and management assumptions for the expected frequency of claims, average claim costs, insurable earnings, administrative costs including legislated obligations, and other financial requirements.

Retrospective experience rating program: an incentive program whereby employers either receive a refund or surcharge based on a percentage of annual premiums that have already been paid. The refund/surcharge is based on an employer's actual claims costs compared with the expected costs for their rate group.

SCIP (Safe Communities Incentive Program): a rebate-only incentive program for small businesses that pay less than \$90,000 in average premiums per year.

SGP (Safety Groups Program): a voluntary rebate-only incentive program for Schedule 1 employers. These programs provide an opportunity for employers to learn from each other's health and safety programs. Improved performance of the group can lead to a maximum rebate of 6% of the annual premiums of group members, subject to a monetary cap.

SIEF (Second Injury Enhancement Fund): a claims cost relief program to encourage employers to re-employ workers with pre-existing illnesses or disabilities. SIEF provides claims cost relief to any Schedule 1 employer where a worker's pre-existing condition or disability causes or contributes to a subsequent compensable injury. If the SIEF request is allowed, a percentage of the costs associated with a particular claim will be transferred from the accident employer's record to SIEF, thereby reducing the employer's claim costs for experience rating purposes.

SWA (Safe Workplace Association): designated entities, funded by the WSIB, responsible for providing sector-specific health and safety training, products, services and information.

Schedule 1: business activities listed in Ontario Regulation 175/98 for which there is mandatory workplace and insurance coverage under the WSIA. Schedule 1 comprises nine industry classes. An employer carrying on a business activity covered under Schedule 1 is required to register with the WSIB and pay premiums to the insurance fund.

Schedule 2: business activities listed in Ontario Regulation 175/98 for which the employers are self-insured and therefore do not pay premiums into the insurance fund. An employer carrying on a business activity described in Schedule 2 is individually liable to pay benefits for any compensable injuries experienced by his/her workers.

Schedule 3: a chart in Ontario Regulation 175/98 that identifies specific compensable diseases and industrial processes causally related to those diseases. Pursuant to section 15(3) of the WSIA, any worker who contracts an enumerated disease after employment in the related industrial process is presumed to have contracted the disease as a result of their employment. The presumption is rebuttable.

Schedule 4: a chart in Ontario Regulation 175/98 that identifies specific compensable diseases and industrial processes causally related to those diseases. Pursuant to section 15(4) of the WSIA, any worker who contracts an enumerated disease after employment in the related industrial process is conclusively deemed to have contracted the disease as a result of their employment.

UFL (Unfunded Liability): an accounting term used to describe the situation when the present value of an organization's liabilities exceeds its assets at a particular point in time.

Validation Unit: a program originally established by the WSIB to enhance oversight of the experience rating programs. Currently the Unit is responsible for enforcing the Fatal Claim Premium Rate Adjustment Policy.

Workwell: a mandatory audit program under the WSIA that performs on-site health and safety evaluations of employers when their injury experience indicates that the risk of injury at their workplace is higher than that of employers engaged in the same business activity. An employer who fails a Workwell evaluation and does not undertake the required remedial action incurs a financial penalty.