
***Bill 135: An Act respecting financial and
Budget measures and other matters;***

SCHEDULE 21 WORKPLACE SAFETY AND INSURANCE ACT, 1997

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A. Summary and impact of changes – LAL commentary

1. **Schedule 21 of Bill 135** (the “Bill”) amends key financial sections of the *Workplace Safety & Insurance Act*, S.O.1997, c. 16, Sch. A., as amended [“WSIA”], specifically those sections dealing with the Board’s requirement to maintain the accident fund “*so as not to burden*” “*employers in future years.*”
2. The Bill defers to (unwritten) regulations to provide the governing details with respect to funding levels and funding plans (**amended s. 100**), removing a significant amount of discretion from the Board to deviate from an established plan.
3. The Board’s funding obligations are clearer. The current WSIA prescribes a “duty” on the Board to ensure the sufficiency of the insurance fund to make payments (**current s. 96 (2)**) and to maintain the accident fund “*so as not to burden*” “*employers in future years*” (**current s. 96 (3)**).
4. The Bill defines and divides the Board’s funding responsibilities between “*current benefits*” and “*future benefits*” (**amended s. 96 (1)**) and *requires* the Board to maintain the insurance fund to “*pay for current benefits*” and “*to provide for future benefits*” (**amended ss. 96 (2), (3), (4)**), all the while maintaining the requirement “*not to burden*” employers (**amended s. 96 (5)**). However, while the current WSIA requires the Board not to burden employers “in future years”, the Bill (**amended s. 96 (5)**) speaks only of “*Schedule 1 employers*” clearly meaning current employers in current time, as well as future employers.
5. The Board must develop a funding plan (**new s. 96.1(1)**) consistent with the Regulations, and must ensure the insurance fund is sufficient by the prescribed dates (**new s. 96.1(2)**, in accordance with the Regulations, not yet written). The Board may revise a plan (**new s. 96.1(3)**) subject to the Regulations, and must submit the plan to the Minister (**new s. 96.1(4)**) and report on the Board’s progress (**new s. 96.1 (5)**) at times determined by the Minister.
6. The Minister may obtain a review (by an actuary or auditor) of: i) the sufficiency of the insurance fund; ii) the Board’s funding plans; and, iii) the Board’s implementation (**new s. 96.1(6)**).

7. While the Minister is not empowered to accept or reject the Board's plan, should the Minister's review conclude that it is unlikely the insurance fund will become sufficient (by the prescribed date in the Regulations), the Board *must* revise its plan (**new s. 96.1 (9)**).
8. The current WSIA (expressly) does not require the Board to maintain a reserve fund "*that at all times equals the capitalized value of the (future) benefits*" so long as the Board is of the view the fund is sufficient (**current s. 97 (2)**). This is repealed.
9. The Bill amends the current WSIA to allow the Board "*make payments out of the reserves funds*" when the insurance fund is insufficient (**new s. 97 (2.1)**). New **ss. 97 (1), (2) and (2.1)** allow the Board to establish and maintain a reserve fund "*once the insurance fund is sufficient*" (as defined by **new s. 96(3)**); to use the reserve fund before sufficiency is reached to meet its obligations; and, after sufficiency is reached, to use the reserve funds if funds are inadequate.
10. The Bill removes the broad (and never used) Ministerial power to issue policy directions to the Board (**current s. 167**, and a core element of the 1997 amendments, **Bill 99**). The removal of this provision means that the government is not in a position to lawfully intervene should the Board decide to drastically raise employer premiums (to maintain insurance fund sufficiency) even if the economy is unable to absorb such increases. The only control on the Board's taxation power is the requirement for the Board to maintain the fund "*so as not to burden unduly or unfairly*" employers (**new s. 96 (5)**).

B. Commentary:

1. It is clear that the Bill responds to the Auditor General's ["AG"] critique of the WSIB, the Board's funding, the independence of the Board (from the government) and the "ownership" of the unfunded liability ["UFL"].
2. The government is removing direct controls over the Board and is no longer able to issue official policy directives. Moreover, the Minister does not approve or reject the Board's funding plans, but may question those plans and engage an independent auditor or actuary to review the Board's plans.
3. Even then, the Minister will not direct the Board, but the WSIA will compel the Board to revise its plans in the event the Minister's review concludes that the insurance fund is unlikely to become sufficient by the date prescribed (in the Regulations).
4. The Bill itself is void of specifics and is clearly an empty pre-emptive shell awaiting the results of the **Arthurs' Funding Review**. The **Funding Review** will provide the details for the actual funding targets and will provide the "*meat in the sandwich*" culminating in the regulatory language.
5. The Bill is driven mainly by the Regulations, as yet unwritten and unknown.
6. One strong hint as to some likely content of the regulations is provided in the definition of the Board's funding obligations, now defined as two distinct obligations; one to

provide sufficient funding for “*current benefits*” and the other to “*provide for future benefits*”. I anticipate that the Regulations will require current benefits to be fully funded and paid by current revenues, unless there are unforeseen circumstances, and thus, avoid operating losses contributing to the UFL (investment fluctuations and other factors will still be at play however). Some shortfalls funded through the future reserves will still be permissible.

7. The Bill does not remove the government’s discretion to set indexing levels above the prescribed amounts (**current WSIA, s. 52.1**). Thus, the government is still open for direct lobbying with respect to increasing worker benefits beyond the prescribed amounts (modified Friedland).
8. On the funding and premium rate side of the ledger, the Bill effectively insulates the government from employer lobbying. The government is statutorily powerless to intervene with WSIB funding and premium rate decisions, except where there is evidence the Board’s funding plans may not be met, and even then, to only order a review.

Appendices:

Appendix 1: The narrative of the changes excerpted from Bill 135

*Appendix 2: Bill 135 amendments compared to the current *Workplace Safety & Insurance Act**

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November 23, 2010

Appendix 1: The narrative of the changes excerpted from Bill 135

SCHEDULE 21 WORKPLACE SAFETY AND INSURANCE ACT, 1997

The Bill amends the *Workplace Safety and Insurance Act, 1997* with respect to the insurance fund.

Subsections 96 (4), (5) and (6) of the Act are repealed on Royal Assent.

Section 96 of the Act is re-enacted on proclamation.

The **new section 96** requires the Board to maintain an insurance fund to pay for current benefits and to provide for future benefits under the insurance plan. Subject to the regulations, the fund must be maintained so that the amount of the fund is sufficient to allow the Board to meet its obligations under the Act to make payments under the insurance plan for current benefits as they become due and to provide for future benefits.

If, at any time before the prescribed date, the insurance fund is insufficient, the **new section 96.1** requires the Board to develop and implement a plan to achieve sufficiency that complies with the prescribed requirements. The section sets out the Board's obligation to submit the plan to the Minister and the Minister's authority to obtain a review of the plan and the sufficiency of the fund.

If, at any time after the prescribed date, the insurance fund is insufficient, the **new section 96.2** requires the Board to comply with the prescribed requirements to make the fund sufficient.

The **new subsection 97 (2.1)** comes into force on Royal Assent and states that if, prior to the insurance fund becoming sufficient, there is not sufficient money available in the fund to pay current benefits as they become due, the Board may make the payments out of the reserve funds.

Section 97 of the Act is amended on proclamation.

The **new subsections 97 (1), (2) and (2.1)** state that once the insurance fund is sufficient, the Board may establish and maintain one or more reserve funds to provide for future benefits. If, before the fund is sufficient, there is not sufficient money in the fund to pay current benefits as they become due, the Board may make the payments out of the reserve funds. Subject to the regulations, if, after the fund becomes sufficient, there is not sufficient money in the fund to pay current benefits as they become due and to provide for future benefits, the Board may make the payments out of the reserve funds.

Section 100 of the Act is repealed on Royal Assent.

The **new section 100** sets out the regulation-making powers of the Lieutenant Governor in Council.

Section 167 of the Act is repealed on Royal Assent.

Transitional matters are provided for and consequential amendments are made to the Act.

Appendix 2: Bill 135 amendments compared to the current Workplace Safety & Insurance Act

SCHEDULE 21 WORKPLACE SAFETY AND INSURANCE ACT, 1997	The current <i>Workplace Safety & Insurance Act</i>, S.O.1997, c. 16, Sch. A., as amended [“WSIA”]
<p>1. (1) Subsections 96 (4), (5) and (6) of the <i>Work-place Safety and Insurance Act, 1997</i> are repealed.</p>	<p>Direction re sufficiency of fund 96. (4) If the Lieutenant Governor in Council is of the opinion that the insurance fund is not sufficient to meet the standards described in subsections (2) and (3), the Lieutenant Governor in Council may direct the Board to increase employers’ premiums to the extent that the Lieutenant Governor in Council considers necessary to ensure that the fund meets those standards. Same (5) The Board shall increase the rates used to calculate premiums in accordance with the direction of the Lieutenant Governor in Council. Same (6) The Board shall promptly notify employers of the increase in rates and shall require employers to pay the additional premiums within such time as the notice may specify.</p>
<p>(2) Section 96 of the Act is repealed and the following substituted: Insurance fund Definitions 96. (1) In this Part, “current benefits” means the benefits payable under the insurance plan in the current calendar year; “future benefits” means the present value of the cost of benefits that will become due under the insurance plan in the future in respect of current or past claims, as determined by the Board’s actuary. Insurance fund (2) The Board shall maintain an insurance fund for the following purposes: 1. To pay for current benefits and to provide for future benefits under the insurance plan to workers employed by Schedule 1 employers and to the survivors of deceased workers. 2. To pay the expenses of the Board and the cost of administering this Act. 3. To pay such other costs as are required under any Act to be paid by the Board or out of the insurance fund. Sufficiency of fund (3) Subject to the regulations, the Board shall maintain the insurance fund so that the amount of the fund is sufficient to allow the Board to meet its obligations under this Act to make payments under the insurance plan for cur-rent benefits as they become due and to provide for future benefits. Same (4) The Board shall meet its obligation under subsection (3) in accordance with the regulations. Same (5) 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. Plan, sufficiency of fund 96.1 (1) If the insurance fund is insufficient for the purposes</p>	<p>Insurance fund 96. (1) The Board shall maintain a fund for the following purposes: 1. To pay for benefits under the insurance plan to workers employed by Schedule 1 employers and to the survivors of deceased workers. 2. To pay the expenses of the Board and the cost of administering this Act. 3. To pay such other costs as are directed under any Act to be paid by the Board or out of the insurance fund. Sufficiency of fund (2) The Board has a duty to maintain the insurance fund so that it is sufficient to make the required payments under the insurance plan as they become due. Same (3) 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. Direction re sufficiency of fund (4) If the Lieutenant Governor in Council is of the opinion that the insurance fund is not sufficient to meet the standards described in subsections (2) and (3), the Lieutenant Governor in Council may direct the Board to increase employers’ premiums to the extent that the Lieutenant Governor in Council considers necessary to ensure that the fund meets those standards. Same (5) The Board shall increase the rates used to calculate premiums in accordance with the direction of the Lieutenant Governor in Council. Same (6) The Board shall promptly notify employers of the increase in rates and shall require employers to pay the additional premiums within such time as the notice may specify. Transition (7) The accident fund maintained under the</p>

SCHEDULE 21 WORKPLACE SAFETY AND INSURANCE ACT, 1997	The current <i>Workplace Safety & Insurance Act</i>, S.O.1997, c. 16, Sch. A., as amended [“WSIA”]
<p>set out in subsection 96 (3) at any time before the date prescribed under clause 100 (b), the Board shall develop and implement a plan to achieve sufficiency that complies with the prescribed requirements.</p> <p>Same</p> <p>(2) The Board shall ensure that the plan sets out the steps the Board will take to ensure that the insurance fund is sufficient by the date prescribed under clause 100 (b).</p> <p>Revision of plan</p> <p>(3) Subject to any regulation made under clause 100(d), the Board may revise the plan.</p> <p>Plan submitted to Minister</p> <p>(4) The Board shall submit the plan and any revisions made to the plan to the Minister.</p> <p>Report to Minister</p> <p>(5) The Board shall report to the Minister on the progress of the plan at such times as the Minister may determine and shall address in the report such matters as the Minister may specify.</p> <p>Minister may obtain review</p> <p>(6) If, at any time before the date prescribed under clause 100 (b), the Minister determines that it is unlikely that the insurance fund will become sufficient by the pre-scribed date, the Minister may obtain a review of the following:</p> <ol style="list-style-type: none"> 1. The sufficiency of the fund. 2. The plan made under subsection (1) and the Board’s implementation of the plan. <p>Same</p> <p>(7) The review shall be conducted by an actuary or auditor appointed by the Minister.</p> <p>Report on findings of review</p> <p>(8) The actuary or auditor shall,</p> <ol style="list-style-type: none"> (a) on completing the review, submit a written report to the Board and the Minister on the findings of the review; and (b) address in the report such matters as the Minister may specify. <p>Revised or new plan</p> <p>(9) If a finding of the review is that it is unlikely that the insurance fund will become sufficient by the date pre-scribed under clause 100 (b), the Board shall revise its plan or make a new plan and subsections (1) to (5) apply to the plan with necessary modifications.</p> <p>Costs of review</p> <p>(10) The costs of the review are an administrative expense of the Board.</p> <p>Insufficiency of fund after prescribed date</p> <p>96.2 If the insurance fund is insufficient at any time after the date prescribed under clause 100 (b), the Board shall comply with the prescribed requirements to make the fund sufficient.</p> <p>Transition</p> <p>96.3 The accident fund maintained under the <i>Workers’ Compensation Act</i> is continued as the insurance fund.</p>	<p><i>Workers’ Compensation Act</i> is continued as the insurance fund. 1997, c. 16, Sched. A, s. 96.</p>
<p>2. (1) Section 97 of the Act is amended by adding the following subsection:</p> <p>Use of reserve funds</p> <p>(2.1) If there is not sufficient money available in the insurance fund to pay current benefits as they become due</p>	<p>Reserve funds</p> <p>97. (1) The Board shall establish and maintain one or more reserve funds to pay benefits in future years in respect of claims for accidents that happen in a year.</p> <p>Same</p>

<p style="text-align: center;">SCHEDULE 21 WORKPLACE SAFETY AND INSURANCE ACT, 1997</p>	<p style="text-align: center;">The current <i>Workplace Safety & Insurance Act</i>, S.O.1997, c. 16, Sch. A., as amended [“WSIA”]</p>
<p>without resorting to the reserve funds, the Board may make the payments out of the reserve funds.</p>	<p><u>(2)</u> 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).</p> <p>Same</p> <p><u>(3)</u> The Board may provide for larger reserve funds for some classes of industry than for others.</p> <p>Investment</p> <p><u>(4)</u> The money in the reserve funds shall be invested only in such investments as are authorized under the <i>Pension Benefits Act</i> for the investment of money from pension funds and shall be invested in the same manner as is authorized for those pension funds.</p> <p>Responsibility for agent</p> <p><u>(5)</u> If the Board designates an agent to make the investments authorized under subsection (4), it shall select as an agent a person that it is satisfied is suitable to perform the act for which the agent is designated.</p> <p>Same</p> <p><u>(6)</u> The Board is responsible for prudent and reasonable supervision of the agent.</p> <p>Standards for agent</p> <p><u>(7)</u> The agent is subject to the standards that apply, with necessary modifications, to an administrator of a pension plan under subsections 22 (1), (2) and (4) of the <i>Pension Benefits Act</i>.</p> <p>Insurance fund</p> <p><u>(8)</u> The reserve funds form part of the insurance fund. 1997, c. 16, Sched. A, s. 97.</p>
<p>(2) Subsections 97 (1), (2) and (2.1) of the Act are repealed and the following substituted:</p> <p>Reserve funds</p> <p>(1) Once the insurance fund is sufficient for the purposes set out in subsection 96 (3), the Board may establish and maintain one or more reserve funds to provide for future benefits.</p> <p>Use of reserve funds</p> <p>(2) If, before the insurance fund becomes sufficient for the purposes set out in subsection 96 (3), there is not sufficient money available in the fund to allow the Board to meet its obligations under this Act to make payments under the insurance plan for current benefits as they become due without resorting to the reserve funds, the Board may make the payments out of the reserve funds.</p> <p>Same</p> <p>(2.1) Subject to the regulations, if, after the insurance fund becomes sufficient for the purposes set out in sub-section 96 (3), there is not sufficient money available in the fund to allow the Board to meet its obligations under this Act to make payments under the insurance plan for current benefits as they become due and to provide for future benefits without resorting to the reserve funds, the Board may make the payments out of the reserve funds.</p>	
<p>3. (1) Section 100 of the Act is repealed.</p>	<p>Exceptional circumstances</p> <p><u>100.</u> The following rules apply if there is not sufficient money available in the insurance fund to make the required payments as they become due, without resorting to the reserve</p>

<p style="text-align: center;">SCHEDULE 21 WORKPLACE SAFETY AND INSURANCE ACT, 1997</p>	<p style="text-align: center;">The current <i>Workplace Safety & Insurance Act</i>, S.O.1997, c. 16, Sch. A., as amended [“WSIA”]</p>
	<p>funds:</p> <ol style="list-style-type: none"> 1. The Board may make the payments out of the reserve funds or, if it is not expedient to do so, the Lieutenant Governor in Council may direct that an amount be advanced to the Board from the Consolidated Revenue Fund to make the payments. 2. The Board shall require the appropriate employers to pay additional premiums in order to replace any money taken out of a reserve fund or advanced from the Consolidated Revenue Fund. 3. The Board shall remit to the Minister of Finance the amount advanced from the Consolidated Revenue Fund. 1997, c. 16, Sched. A, s. 100.
<p>(2) The Act is amended by adding the following section:</p> <p>Regulations</p> <p>100. The Lieutenant Governor in Council may make regulations,</p> <ol style="list-style-type: none"> (a) prescribing anything referred to in this Part as prescribed; (b) prescribing the date by which the insurance fund must become sufficient and prescribing interim dates by which the fund must become partially sufficient; (c) prescribing the amount of the insurance fund required to make the fund sufficient by the pre-scribed date or partially sufficient by prescribed interim dates, or prescribing the method of determining those amounts, including any formula, ratio or percentage to be used to calculate the amounts; (d) prescribing the requirements for a plan for the purposes of subsection 96.1 (1), including the contents of the plan and the time period within which the plan is to be established by the Board and submitted to the Minister; (e) prescribing the requirements with which the Board shall comply for the purposes of section 96.2, including the time period within which the Board must comply with those requirements; (f) prescribing any terms, conditions, limitations or requirements on the use of reserve funds for the purposes of subsection 97 (2.1); (g) providing for such transitional matters as the Lieutenant Governor in Council considers necessary or advisable in relation to this Part and the regulations made under it. 	
<p>4. Section 167 of the Act is repealed.</p>	<p>Policy directions</p> <p>167. (1) The Minister may issue policy directions that have been approved by the Lieutenant Governor in Council on matters relating to the Board’s exercise of its powers and performance of its duties under this Act.</p> <p>Same</p> <p>(2) In exercising a power or performing a duty under this Act, the Board shall respect any policy direction that relates to its exercise.</p> <p>Report</p> <p>(3) The Board shall report to the Minister whenever it exercises a power or performs a duty that relates to a policy direction. 1997, c. 16, Sched. A, s. 167.</p>

SCHEDULE 21 WORKPLACE SAFETY AND INSURANCE ACT, 1997	The current <i>Workplace Safety & Insurance Act</i> , S.O.1997, c. 16, Sch. A., as amended [“WSIA”]
5. (1) Clause 183 (1) (a) of the Act is amended by striking out “sections 15.1 and 52.1” and substituting“ sections 15.1, 52.1 and 100”.	<p>Regulations</p> <p>183. (1) Subject to the approval of the Lieutenant Governor in Council, the Board may make such regulations for carrying out this Act as may be considered expedient including regulations,</p> <p style="padding-left: 2em;">(a) prescribing anything that must or may be prescribed under this Act, except under sections 15.1 and 52.1;</p>
(2) If subsection (1) does not come into force before the day on which subsection 11 (1) of the <i>Workplace Safety and Insurance Amendment Act, 2008</i> comes into force, subsection (1) is repealed on the same day that subsection 11 (1) of the <i>Workplace Safety and Insurance Amendment Act, 2008</i> comes into force.	
<p>Commencement</p> <p>6. (1) Subject to subsection (2), this Schedule comes into force on the day the <i>Helping Ontario Families and Managing Responsibly Act, 2010</i> receives Royal Assent.</p> <p>Same</p> <p>(2) Subsections 1 (2), 2 (2), 3 (2) and 5 (1) come into force on a day to be named by proclamation of the Lieutenant Governor.</p>	