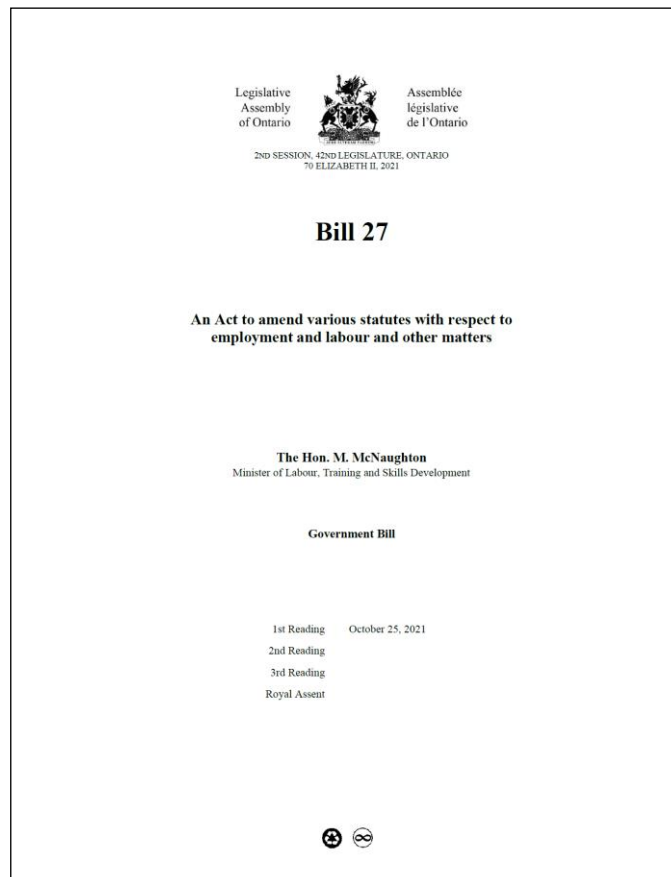


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**Comment on Bill 27**  
**An Act to amend various statutes with respect to**  
**employment and labour and other matters**  
**with a focus on Schedule 6:**  
**Workplace Safety and Insurance Act**

**Introduced by The Hon. M. McNaughton**  
**Minister of Labour, Training and Skills Development**

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*Prepared:*  
**October 25, 2021**

## **Comment on Bill 27; Schedule 6**

### **A. Background**

1. **Bill 27, Schedule 6**, flows from “recommendation one” of the twenty five recommendations from the November 2020 [Workplace Safety and Insurance Board operational review report](#).

**Recommendation 1:** The government should adopt a regulation that prescribes a sufficiency ratio corridor of 115% and 125% for the WSIB for the five-year period between 2020 and 2025.

2. This “corridor issue,” as it was once known, has morphed into what the government now calls the “WSIB Insurance Fund Surplus Distribution.” See the consultation paper “[WSIB Insurance Fund Surplus Distribution Model Consultation](#)” released July 15, 2021.
3. The **Construction Employers Coalition (for WSIB and Health & Safety and Prevention)** (“CEC”) filed submissions (found [here](#)) and which are attached at **Appendix A**.
4. The essence of the CEC recommendations is reflected in a proposed draft regulation:

#### **CEC Proposed Regulation**

##### **Distributing excess funding**

##### **The funding target is 100%**

XX (1) Subject to this section, the amount of the fund sufficient to allow the Board to meet its obligations under this Act shall be deemed to be 100% on a sufficiency basis.

##### **Distribution of excess between 115% - 125% funding**

(2) Subject to subsection 4, when funding exceeds 115% but is less than 125% the Board shall submit a plan to distribute excess funding to employers to the Minister, and the plan shall be publicly released.

(3) The excess funding identified for distribution by subsection (2) must be distributed no later than two years following the commencement of the plan.

(4) If there are prudent evidence based reasons not to distribute excess funding when funding exceeds 115% but is less than 125%, the Board shall provide those reasons to the Minister and publicly release those reasons.

##### **Minister may obtain review**

(5) The Minister may obtain a review of the Board’s reasons not to distribute excess funding, and if the Board’s reasons are not supported by the review, the Board shall review its reasons or submit a new plan to distribute excess funding to employers to the Minister.

(6) The review shall be conducted by an actuary or auditor appointed by the Minister.

##### **Report on findings of review**

(7) The actuary or auditor shall,

(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.

**Costs of review**

(8) The costs of the review are an administrative expense of the Board.

**Board shall establish guidelines**

(9) The Board shall establish guidelines for the operation of subsection (4) and those guidelines must be approved by the Minister and upon approval shall be incorporated into the Memorandum of Understanding.

**Distribution when funding exceeds 125%**

(10) If the insurance fund has achieved 125% funding on a sufficiency basis, the Board shall submit a plan to the Minister to distribute funding exceeding 120% on a sufficiency basis to employers, and the plan shall be publicly released.

(11) The excess funding identified for distribution by subsection (10) must be distributed no later than two years following the commencement of the plan.

5. The Hon. M. McNaughton, Minister of Labour, Training and Skills Development, [introduced](#) the omnibus [Bill 27, Schedule 6](#) of which addresses the surplus distribution issue, for first reading on October 25, 2021.
6. This paper will set out the provisions of **Bill 27, Schedule 6**, and offer commentary as appropriate.

**B. Overall impressions of Bill 27, Schedule 6**

1. Bill 27 is effectively just the first step as it is highly dependant on yet to be developed or disclosed regulations. The regulations will set out not just the details of the surplus distribution, but will effectively determinatively define the specific intentions of the government.
2. The full effect and implications of **Bill 27, Schedule 6**, therefore are not known beyond the broad empowerments set out in the bill. However, there is nothing in **Bill 27** that excludes the policy goals of the CEC. Moreover, the bill is clearly advancing the policy objective of disgorging the WSIB of the accumulation of an excessive surplus, a goal consistent with the intentions of the CEC.
3. The analysis which follows will set out the amending section and offer explanation and comment.

**C. Analysis Bill 27, Schedule 6**

1. [WSIA section 96.1](#), which requires the Board to develop and submit a plan to achieve funding sufficiency, is repealed, as it is effectively redundant, as the Board did develop such a plan and did realize funding sufficiency. The overarching intent remains and is now addressed in a new s. 100(c).
2. [WSIA section 97\(2\)](#), which allowed the Board to tap into its reserve funds before it acquired funding sufficiency is repealed as it as well is redundant.
3. The following sections are added to the WSIA:

**Amendment:**

**Distribution of surplus**

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

**Comment:**

This is the essence of the bill and effectively provides the WSIB with the discretionary authority to return a funding surplus to employers when funding is between 115% and 125%. It is clear though that the Board's discretion will be constrained to some degree by the not-yet-developed regulations which will set-out the "*such criteria as may be prescribed*" (as per new section 100(f.3)). The criteria will be established by the government which will serve to focus WSIB discretion. These criteria will ultimately be the key to the statutory intent. However, the Board still is required to have regard for "*such other factors as the Board considers appropriate*" which is an interesting and potentially broad discretionary power. It would be advisable that the future regulation defines the scope and nature of the Board's discretion through careful construction of the criteria.

**Amendment:**

**Same**

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

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

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

**Comment:**

The government potentially has full directive control over the disbursement of a surplus when the sufficiency ratio exceeds 125%. The regulation (as empowered by new s. 100 (f.1)) is again the key, potentially setting out the resulting disbursement beyond the influence of WSIB discretion, if the regulation under s. 100(f.1) prescribes the percentage of the disbursement. This is consistent with the CEC proposed regulation which required the Board to reduce the sufficiency ratio from 125% to 120% under such circumstances. The bill leaves this potential available. However, the proposed s. 97.1(2)(b) seems to anticipate that a set percentage disbursement may not be prescribed in s. 100(f.1), which then confers significant discretionary authority to the WSIB. In such a case, the Board is empowered to determine the amount of the disbursement still having regard for the as yet prescribed criteria.

The government must be encouraged to prescribe the amount of the disbursement (i.e., as per new s. 100(f.1)) when funding hits 125% (see the CEC paper for the argument), and not leave the amount to WSIB discretion. Clearly, the statutory goal being sought is prudent disbursement between sufficiency levels

115% to 125%. Arguably the amended Act does not anticipate that funding will reach 125% in the normal course. Therefore, if funding does hit 125%, notwithstanding adherence to the “criteria,” and while the Board would administer its discretion properly and prudently, the objective was nonetheless frustrated by likely better than expected circumstances and the deliberative actions of the WSIB. In such an instance, the amount of the disbursement should be prescribed by the regulation, with the Board possessing the discretion to only *increase* that amount if circumstances warrant.

The first sentence in s. 97.1(2) qualifies the requirement to disburse even at 125% funding by setting out the potential for an exception “*in such circumstances as may be prescribed*” as per new s. 100(f.2). In other words, even if 125% funding is achieved, under certain circumstances, disbursement is not required. Those circumstances must be precise, specific and narrow to ensure that the statutory goal being sought is not inadvertently thwarted.

**Amendment:**

**Distribution of different amounts**

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

**Comment:**

This is a broad discretionary power that requires careful and thoughtful construction of the criteria. The section is overly broad, vague and ambiguous as written, with no statutory guidance offered as to what policy objective is being sought, other than potentially providing lower disbursements to non-compliant employers. The section should be withdrawn and redrafted with specific criteria set out, or at the very least, the remedial intentions made clearer.

**Amendment:**

**No distribution**

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

**Comment:**

The same comment as the preceding applies.

**Amendment:**

**Timing of disbursements**

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

**Comment:**

This is likely an appropriate power consistent with different remittance schedules of different employers and also allowing for administrative timetabling of disbursements to ease internal WSIB bottle-necks.

**Amendment:**

**Form of disbursements**

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

**Comment:**

This provides significant latitude on the part of the WSIB to determine how disbursements are to be made. There are many alternatives from which to choose, such as, cheque issuance, account credits, premium rate reductions, etc. The CEC has advocated for premium rate reductions as being the simplest. As the disbursement of the surplus is the *de facto* mirror transaction of the unfunded liability (“UFL”) surcharge, and as the UFL surcharge was a function of premium rates, it makes sense to adopt the same protocol. However, employers are unlikely to object to any WSIB designed disbursement mechanism providing it is fair, efficient and expedient.

**Amendment:**

**Same**

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

**Comment:**

This is likely acceptable to employers.

**Amendment:**

**Determination of amount in fund**

**(8) For the purposes of this section, the sufficiency ratio of the insurance fund shall be calculated in accordance with the method prescribed under clause 100 (f.5).**

**Comment:**

No comment is required

**Amendment:**

**No right of reconsideration or appeal**

**97.2 A determination made by the Board regarding distributions or disbursements under section 97.1 is not a decision or a final decision of the Board for the purposes of Part XI of this Act and an employer has no right of reconsideration by, or appeal to, the Board or the Tribunal in respect of a determination made by the Board under that section.**

**Comment:**

This is *very* problematic. It is clear that the Board will be considering innumerable factors relating to certain employer conduct and will be making significant discretionary judgements with far reaching impacts on individual employers. The Board will be prescribing its own policies, assessing individual fact situations against those policies and rendering judgements based on the Board weighing factual evidence against policy. It of course does this daily with determinations that are appealable, internally and ultimately to the independent Appeals Tribunal. As we know, the Board is a fallible institution requiring an elaborate decision review mechanism to ensure individual fairness in individual determinations, all of which is particularly important as the WSIA provides a powerful privative clause ([WSIA, s. 118\(3\)](#)), barring judicial intervention. There is no administrative law reason to treat these determinations any differently.

**Amendment:**

**4 (1) Clauses 100 (b), (c) and (d) of the Act are repealed and the following substituted:**

**(b) prescribing the date by which the insurance fund must become sufficient;**

**(c) prescribing the amount of the insurance fund required to make the fund sufficient by the prescribed date or prescribing the method of determining that amount, including any formula, ratio or percentage to be used to calculate the amount;**

**Comment:**

The current WSIA ss. 100, (b), (c) and (d) read as follows:

100 The Lieutenant Governor in Council may make regulations,

(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 prescribed 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;

The deletions and new wordings are appropriate.

**Amendment:**

**(2) Section 100 of the Act is amended by adding the following clauses:**

**(f.1) prescribing, for the purposes of subsection 97.1 (2), an amount, expressed as a ratio or percentage, that is greater than a sufficiency ratio of 115 per cent but less than a sufficiency ratio of 125 per cent;**

**Comment:**

Addressed above. The government must be encouraged to develop a s. 100(f.1) regulation or else as per proposed s. 97.1(2)(b), the WSIB is conferred the discretionary authority to determine the amount to be disbursed.

**Amendment:**

**(f.2) prescribing circumstances for the purposes of subsection 97.1 (2);**

**Comment:**

The “circumstances” as discussed earlier will define under what conditions a disbursement will not occur even though funding exceeds 125%. Those “circumstances” must be precise, specific and narrow to ensure that the statutory goal being sought is not inadvertently thwarted.

**Amendment:**

**(f.3) prescribing criteria for the purposes of section 97.1;**

**Comment:**

The development of the “criteria” is key.



**Amendment:**

(f.4) prescribing requirements for the purposes of subsection 97.1 (5);

**Comment:**

See above.

**Amendment:**

(f.5) prescribing the method of calculating the sufficiency ratio for the purposes of section 97.1, including any formula, ratio or percentage to be used to calculate the amount;

**Comment:**

This is not new. See [O. Reg. 141/12](#), s. 1(3), which directs that the sufficiency ratio “*shall be calculated by dividing the value of the insurance fund assets . . . by the value of the insurance fund liabilities.*” Unless there is a deviation from current, this is in order.

**Amendment:**

5 Section 159 of the Act is amended by adding the following subsection:

**Agreement re administration of Part VII**

(11.1) The Board may enter into an agreement with any person or entity for the purpose of administering Part VII.

**Comment:**

[Part VII of the WSIA](#) deals with “Employers and Their Obligations” and comprises ss. 67 – 80 of the WSIA. This is a massive change that has not been subject to any public debate. The genesis for this idea has not been disclosed. This idea was not even introduced in the [WSIB operational review report](#). This is an “add-on” amendment, does nothing to further the policy framework for surplus disbursement and should be removed from **Bill 27, Schedule 6**. If there is a sound administrative or policy reason to proceed with this amendment, it should be introduced on its own merits and not included as an add-on clause in an omnibus bill.

**LAL**  
**October 25, 2021**

**Appendix A: CEC August 6, 2021 submission on distributing funding surplus**

**WSIB Insurance Fund Surplus Distribution  
Model Consultation**

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**A. CEC- Who we are**

1. The Construction Employers Coalition on Workplace Safety and Insurance Board Health and Safety and Prevention (“CEC”) represents more than 2,000 firms employing approximately 80,000 workers. The CEC (initially named the Construction Industry WSIB Task Force) was formed in 2011 for the purpose of studying and responding to issues related to construction workers and employers in Ontario.
2. Construction, with one of the highest average premium rates, contributes almost \$1 billion in premiums to the WSIB annually, which in turn represents about 25% of the total system premium, making Ontario’s construction sector almost as large as the entire Alberta Workers Compensation Board.
3. CEC members include: Ontario General Contractors Association (OGCA), Ontario Road Builders’ Association (ORBA), Mechanical Contractors Association of Ontario (MCAO), Ontario Sewer & Watermain Contractors Association (OSWCA), Kingston Construction Association, Niagara Construction Association, Ottawa Construction Association, Sarnia Construction Association, Merit Ontario, Ontario Home Builders Association (OHBA), Heavy Construction Association of Toronto (HCA), Progressive Contractors Association of Canada (PCAC), Residential Construction Council of Ontario (RESCON), Ontario Residential Council of Construction Associations (ORCCA), including its members: Residential Tile Contractors of Ontario (RTCA); Ontario Concrete and Drain Contractors Association (OCDC); Masonry Contractors Association of Toronto (MCAT); Ontario Formwork Association (OFA), and Residential Framing Contractors Association (RFCA),

**B. Introduction and Overall Comments**

1. Overall, we are enthusiastic with the policy direction of the paper, “**WSIB Insurance Fund Surplus Distribution Model Consultation**” [the “Paper”] released July 15, 2021.
2. While we will advance several suggestions, we strongly support the proposed policy direction and as we understand them, the policy objectives being sought. Our suggestions complement and assist in perfecting the policy proposal. We encourage the government to proceed with legislative and regulatory reform.
3. The recommended approach is infinitely superior to where we are, i.e., funding levels entirely at the discretion at the WSIB with no legal capacity to compel the Board to be disgorged of excess funding.

4. The suggested position, if the recommendations we are about to suggest are accepted, is consistent with a policy theme the CEC has been advancing for many years, most recently presented in a letter of June 9, 2021 to Minister McNaughton (attached at **Appendix A**).
5. We propose regulatory language consistent with and compatible to funding directions currently set out in the *Workplace Safety and Insurance Act* (“WSIA”). See **Section F**.

**C. A comment on the 100% funding target and the 115-125% corridor**

1. It is clear that most employer associations view the parameters of a 115%-125% corridor as too high. The CEC shares these concerns. While we have historically proposed a corridor of 90%-110%, we are prepared to aggressively modify our proposal to 110%-120%, providing our understanding of the intent of the corridor is reflected in the legislation/regulation as we propose.
2. We are encouraged that the overall funding target of 100% has been affirmed by both the WSIB (in recent discussions) and the government. This adjusts the contextual meaning of the term “corridor,” which since 2011, while never officially defined, has been interpreted as being the “funding corridor.” It is now more aptly interpreted as the “distribution corridor.” In this submission, we will apply the term “disgorge” as being synonymous with the act of distributing excess funding.
3. The CEC fully expects and requests that the legislative/regulatory amendments clearly and unequivocally set the funding target of the Ontario workplace safety and insurance system at 100%.
4. Notwithstanding our preferred corridor parameters are 110%-120%, for the purposes of this submission, we will adhere to the parameters set out in the Paper, i.e., 115%-125%.

**D. 115-125% WSIB discretion**

1. The WSIB acquires discretion to disgorge if funding is between 115-125%. *What does this mean?*
2. Absent a contextual analysis, it could mean any number of things, and presuming that the WSIB conducts itself prudently (as required by WSIA s, 163(2)), that the WSIB has complete unfettered discretion to do nothing, or to disgorge to any level of funding above 100%.
3. Our analysis suggests that neither would be permitted.
  - a. A reasonable expectation of prudent governance would likely support a decision to maintain funding at or slightly above 115%, notwithstanding a 100% funding target.
  - b. With that noted, while the Board would not have the direction to disgorge excess funding below 115%, it would maintain the discretion not to increase premium rates if funding sat within 100%-115%. The act of disgorgement and premium rate policy are related but distinct considerations.

- c. So, in our view, the Board would not have the discretion to reduce funding through disgorgement to below 115% and any such move may be open to legal challenge by stakeholders (workers and/or employers) and/or the government directly. This point does not require additional comment but highlights the need for a reasonable lower threshold (hence our 110% parameter).
  - d. Nor would the WSIB have the luxury of doing nothing. It is our contextual reading of the codification of a threshold (115%) *as creating an obligation on the part of the Board to address the question as to whether or not disgorgement should occur once funding reaches 115%*.
4. The requirement of the Board to turn its mind to disgorgement once funding reaches 115%:
- a. We suggest a *de facto* expectation of disgorgement if funding reaches and/or exceeds 115% unless there is a sound, evidence-based reason not to disgorge, and this expectation should be codified in the legislation/regulation.
  - b. The regulation must also require the WSIB to develop guidelines to be approved by the Minister for the exercise of this discretion, and for those guidelines to form part of the Memorandum of Understanding.
  - c. We propose that the regulation require that at 115% or higher that the Board is required by the WSIA to publicly release its decision to the Minister on disgorgement, with full reasons (either way).
  - d. If the decision is to disgorge, the publicly released reasons will be accompanied by a publicly released plan for distribution.
  - e. Section 96.1 which deals with a funding plan can serve as a guiding template. As in s. 96.1, the Minister will have the capacity to ask for a review of the WSIB's decision. This checks the Board's discretion without limiting that discretion in any manner.
  - f. The bottom line is that there be a structural expectation of disgorgement unless there is a sound evidence-based reason not to. The default is to disgorge.

**E. At 125% the Board must disgorge**

- 1. As the structural expectation is that the Board will be disgorged of excess funding above 115% unless there are evidence-based reasons not to, once funding reaches 125% it must be presumed that either the Board erred or improperly fettered its discretion.
- 2. The WSIA must instruct the Board to disgorge at 125% funding.
- 3. This must be a significant disgorgement as the structural expectation is that the 125% upper threshold will never be reached.

4. It is proposed that the WSIA will direct the WSIB to disgorge to a 120% funding level and that the Board must immediately file its plan to the Minister and facilitate the implementation of the plan in no less than two years.

**F. The CEC recommended legislative/regulation template**

**Distributing excess funding**

**The funding target is 100%**

**XX (1)** Subject to this section, the amount of the fund sufficient to allow the Board to meet its obligations under this Act shall be deemed to be 100% on a sufficiency basis.

**Distribution of excess between 115% - 125% funding**

(2) Subject to subsection 4, when funding exceeds 115% but is less than 125% the Board shall submit a plan to distribute excess funding to employers to the Minister, and the plan shall be publicly released.

(3) The excess funding identified for distribution by subsection (2) must be distributed no later than two years following the commencement of the plan.

(4) If there are prudent evidence based reasons not to distribute excess funding when funding exceeds 115% but is less than 125%, the Board shall provide those reasons to the Minister and publicly release those reasons.

**Minister may obtain review**

(5) The Minister may obtain a review of the Board's reasons not to distribute excess funding, and if the Board's reasons are not supported by the review, the Board shall review its reasons or submit a new plan to distribute excess funding to employers to the Minister.

(6) The review shall be conducted by an actuary or auditor appointed by the Minister.

**Report on findings of review**

(7) The actuary or auditor shall,

(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.

**Costs of review**

(8) The costs of the review are an administrative expense of the Board.

**Board shall establish guidelines**

(9) The Board shall establish guidelines for the operation of subsection (4) and those guidelines must be approved by the Minister and upon approval shall be incorporated into the Memorandum of Understanding.

**Distribution when funding exceeds 125%**

(10) If the insurance fund has achieved 125% funding on a sufficiency basis, the Board shall submit a plan to the Minister to distribute funding exceeding 120% on a sufficiency basis to employers, and the plan shall be publicly released.

(11) The excess funding identified for distribution by subsection (10) must be distributed no later than two years following the commencement of the plan.

**G. Discussion of the three questions (at page 3)**

1. Should all Schedule 1 employers be eligible to receive a surplus or should some exclusions be established (e.g., employers with accounts in bad standing)? **Response:** All employers should be eligible.
2. What method should be used to allocate surpluses (e.g., distribute surplus based on the proportion of premiums paid by individual employers compared to the total premium base)? **Response:** Keep it simple. As a function of premiums is easiest.
3. How should the surpluses be distributed (e.g., credit to employer's account, premium reductions)? **Response:** Premium reductions. It is the simplest.

**David Frame, Chair**

**Construction Employers Coalition on WSIB Health  
and Safety and Prevention**

**August 6, 2021**