

The Liversidge Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

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

8 pages

Bill 149: Benefit increases greater than inflation? *Not so sure that's a good idea!*

A surprise announcement on November 8, 2023

On November 8, 2023, very much as a surprise, at least to me, the Minister of Labour, Immigration, Training and Skills Development, the Hon. David Piccini, [announced](#) that:

The Ontario government will soon introduce legislation that would, if passed, support injured workers by **enabling “super-indexing” increases to Workplace Safety and Insurance Board (WSIB) benefits above the annual rate of inflation.**

For an injured worker who earns \$70,000 a year, a two per cent increase could mean an additional \$900 annually **on top of cost-of-living adjustments, which were 6.5 per cent in 2023.**

“Our government has heard loud and clear that injured workers need more support, which is why we’re taking action,” said David Piccini, Minister of Labour, Immigration, Training and Skills Development. (emphasis added)

There were no hints this was on the government workers’ compensation reform agenda. Just the week earlier, on October 31, 2023, the Ontario government [announced](#), *“In the last year, the WSIB provided a 6.5 per cent cost of living increase to people receiving income replacement benefits.”* In my opinion, the government in fact may have jumped the gun a bit with its November 8th proposed inflation adjustment announcement. In the [Statistics Canada Consumer Price Index, October 2023](#) report, published November 21, 2023, it was reported that, *“In October, the Consumer Price Index (CPI) rose 3.1% on a year-over-year basis.”* More than jumping the gun, on the workers’ compensation file this may prove to be the government’s *“jump the shark”* moment, with this policy innovation at odds with the original purpose of inflationary protections of worker benefits. It certainly runs counter to the lessons learned over the past 40 years, especially the last 15 after the release of the [2009 Auditor General Report](#) and the stellar restorative work undertaken by David Marshall *et al* from 2010 (see [The Liversidge Letter](#) series detailing my interviews with [David Marshall](#) and [Tom Teahen](#)).

In this issue of [The Liversidge Letter](#), I will introduce readers to [Bill 149, the Working for Workers Four Act, 2023](#), explain what it does, and to the best of my ability, try to explain the “why” behind the bill, although admittedly, that will be rather tough since no clear explanation, in my view, has yet been proffered by the government. I will present my opinion on why this bill and approach, while likely well intended, is misguided, and antithetical to the core design purpose of the Ontario workers’ compensation system. A re-think would be a good idea.

Bill 149 – What it does

Bill 149, a mini-omnibus bill amending several statutes, including the *Workplace Safety and Insurance Act* (WSIA), was introduced for first reading on [November 14, 2023](#). **Schedule 4** of **Bill 149** amends the WSIA, creating a new presumption for firefighters with respect to esophageal cancer, which I will not comment on, and as well, provides the government with the extraordinary authority to prescribe additional indexing over and above the already required CPI annual indexing increase. This will be my focus. From the **Explanatory Notes** of the bill itself:

The Act is amended by adding a new section 52.0.1 and by making corresponding amendments to sections 54 and 111 of the Act. These provisions govern the annual adjustment of payments provided for in, or otherwise determined under, the Act. **The amendments provide that a prescribed additional indexing factor may be applied on such dates as may be prescribed.** The Lieutenant Governor in Council is given related regulation-making powers. (emphasis added)



The WSIA already indexes worker benefits to keep pace with inflation

Here is the problem I have with this bill. *There is simply no reason for it!* The WSIA *already* fully indexes worker benefits for inflation as directed by WSIA s. 49(1):

Indexing factor

49 (1) Subject to subsection (2), on January 1 of every year, **an indexing factor shall be calculated that is equal to the amount of the percentage change in the Consumer Price Index** for Canada for all items, for the 12-month period ending on October 31 of the previous year, as published by Statistics Canada.

Same, minimum

(2) The indexing factor calculated under subsection (1) shall not be less than 0 per cent.

For 2022 the Board indexed benefits 2.7%; for 2023 6.5%; and, for 2024 4.4%.

A short diversion

I pause for a moment to present a small point of explanation. I should note that the indexing factor actually applied by the Board and the CPI indexation factor as at October 31 of the previous year often differ. For example, the CPI report "[Consumer Price Index, October 2023](#)," which sets the 2024 benefit indexing factor, reports that in "*October, the Consumer Price Index (CPI) rose 3.1% on a year-over-year basis*," while the Board applied a [4.4 percent indexation factor](#). The Board addresses this on its website under "[Frequently Asked Questions](#)":

Why is the WSIB indexation factor of 4.4 per cent different from the CPI 12-month change published in the Statistics Canada Consumer Price Index Portal?

The WSIB uses the 12-month *average* Consumer Price Index (CPI) from the period November 1, 2022 to October 31, 2023 and compares it to the 12-month average CPI from the period November 1, 2021 to October 31, 2022.

The Consumer Price Index Portal, meanwhile, does not use averages. Instead, it takes the CPI from December 2023 compared to December 2022. The WSIB's period of CPI used in calculating the indexing factor is specified in Section 49(1) of WSIA. (emphasis added)

I must add another layer of complication I am afraid. The injured worker community, as represented through the injured worker advocacy group, the [Ontario Network of Injured Workers Groups](#), disagrees with this approach and is of the view that the Board's policy is contrary to the WSIA. Without getting deep into the specifics or merits of the disagreement, for today's purposes, it is sufficient to note that this question proceeded to the Ontario Divisional Court, and as reported in [Grisales v Workplace Safety and Insurance Board, 2023 ONSC 3846 \(CanLII\)](#) the court ordered the issue to be considered at the Appeals Tribunal, and that is where the case lies at the moment. (That the WSIB took the position that this was not an appealable issue - hence explaining why this proceeded to Divisional Court in the first place - is a story for another day. In my view, this is a disturbing position for the Board to advance and thankfully

the Divisional Court rather quickly cast-aside that approach, affirming the Appeals Tribunal's jurisdiction. Again, more on this case and similarly concerning WSIB jurisdictional contortions in future issues of **The Liversidge Letter**.) In the *Grisales* case, I tend to side with the [injured worker interpretation](#) as being the most reasonable. While it may be that in the fullness of time, on average, it may all come out in the wash, depending on the timing of a specific injured worker's claim, an individual worker may gain or lose under the Board's approach and that's simply wrong in my view. At any rate, for the purposes of this discussion on **Bill 149**, none of this distracts from the core point that the WSIA already requires the Board to adjust benefits by CPI each and every year, thus protecting benefits from the impacts of inflation.

So, why is the government doing this?

This is THE question – *why is the government doing this?* First, let me advance the basic starting principle that I believe most (all?) readers accept without question: injured worker benefits should keep pace with inflation. I have been supporting this view for decades (see for example, the [September 12, 2007](#) issue of **The Liversidge Letter**). Today, in a fully funded (plus) system, that is a no brainer. I have not heard of any group petitioning the government for less than full inflation protection, and even if one did, the appeal would go nowhere. Full benefit protection against inflation is rock solid these days. I will examine the history of workers' compensation benefit indexing in Ontario, as full benefit indexing has experienced a bit of a legislative roller coaster over the past 40 years.

As discussed, the WSIA, as a matter of law, does protect injured worker benefits from inflation with annual adjustments calibrated to CPI (WSIA, s. 49). Similarly, the maximum insurable earnings fluctuate each year, ensuring the benefit ceiling also keeps pace with inflation by tagging the ceiling to "*175 per cent of the average industrial wage for Ontario*" (WSIA, s. 54). So, it seems that the law ensures that injured worker benefits are not eroded by inflation. That is quite clear.

If evidence shows injured workers are falling behind, the root cause must be identified

So, again, why is the government doing this? If there was empirical evidence or some reliable study that shows that despite the statutory inflationary protections in the WSIA injured workers are falling behind, a case for the **Bill 149** discretionary powers perhaps could be made.

I suggest that even if such evidence or study did reach this conclusion, the better response would be to adjust the statutory calibration mechanisms to automatically provide better inflationary protections. This should not be left to the periodic whim of any government. Nonetheless, this is a rather moot point since, to my knowledge, no such evidence and no such study exists. If the government does possess such evidence, I recommend that it be released pronto *before* **Bill 149** proceeds.

Does Hansard offer any hints as to the government's reasons?

Since I have been unable to find any solid basis for this curious amendment, we at least have the Hansard record of the First and Second reading debates. Perhaps there's something there. Let's take a look.

Introduction of Bill 149: November 14, 2023

Minister Piccini introduced **Bill 149** on [November 14, 2023](#).

Hansard November 14, 2023

November 14, 2023; 43rd Parliament, 1st Session
Working for Workers Four Act, 2023

Mr. Piccini moved first reading of the following bill:
Bill 149, An Act to amend various statutes with respect to employment and labour and other matters

The Speaker (Hon. Ted Arnott): Is it the pleasure of the House that the motion carry? Carried.
First reading agreed to.

The Speaker (Hon. Ted Arnott): Would the Minister of Labour, Immigration, Training and Skills Development care to briefly explain his bill?

Hon. David Piccini: Thank you, Speaker; I would. I, David Piccini, as labour minister, am proud to stand in this House to explain a bit about the bill.

This is the fourth piece of legislation we're doing in Ontario to work for workers of this great province. When Premier Ford and our government say that we've got to build a stronger Ontario, what does that mean? It means, for communities like mine in rural Ontario, which saw decades of school closure under the Liberals, inaction when it came to hospitals, the roads and bridges that move our goods to market, from the farmers' fields to the tables here in Toronto, it's going to require a workforce to build all of that.

That's why, each and every year, we table working for workers legislation. And I'm excited to table this—a piece that works for workers, protects them, supports them, supports heroes on the front line, and, most importantly, has the backs of hospitality workers in our great province.

Well, not too much insight into the bill there and nothing specifically about the super-indexing approach at all. In fact, the vagueness of that introduction garnered a soft rebuke by the Speaker, the Hon. Ted Arnott:

The Speaker (Hon. Ted Arnott): I appreciate that.

I'll remind members, when they introduce bills, it's best to read the explanatory note to explain the purpose of the bill and keep the explanation as brief as possible.

OK. So, no explanation there. The substance of **Bill 149** wasn't even touched. **Bill 149** moved along for **Second Reading** November 21, 22 and 23 before being referred to the **Standing Committee on Social Policy** (see the current status of **Bill 149** [here](#)). Let's examine that debate to assess the "why" behind the bill.

Bill 149 Second Reading - November 21, 22 & 23

The Minister kicked off the Second Reading debate with this on [November 16, 2023](#):

Hon. David Piccini: While the number one goal is always to give these men and women the support they need to return to work, we know it's not always possible. That's why our legislation would support injured workers by enabling super-indexing, which increases Workplace Safety and Insurance Board benefits—increases the benefits for injured workers. This would protect injured workers' and survivors' benefits against the effects of the rising cost of living, because we know the pandemic has hit injured workers hard, and they deserve to know that their government has their back. **Speaker, I can't believe this hasn't been done in the past.**

The additional indexation increases would be applied to all active worker and survivor claims in the WSIB system. We're working to support injured workers in this province. While someone is recovering from an injury or occupational disease, they shouldn't have to worry about how they're paying their bills.

There's a bit to unpack there, but not much. Lots of rhetoric but no specifics. The main points seem to be these: a) super-indexation supports injured workers against the rising cost of living; b) the pandemic has hit injured workers hard; and, c) the Minister can't believe this hasn't been done in the past. I will respond to all three ideas but make this introduction on the last point first. ***This actually has been done before*** – about 17 years ago in fact. I will remind readers of those reforms, and contrast them to today's plans. **Spoiler Alert:** Those 2007 reforms were set loose just a couple of years before the infamous [2009 Auditor General Report](#), the quintessential "game-changer" which addressed the need to link funding to benefit enhancements if the system is to maintain financial integrity.

I pored over Hansard and found little help understanding the reasons behind the bill. One member, on [November 22, 2023](#) echoed the Minister's [November 8, 2023](#) announcement:

Additionally, our government is introducing legislation that would, if passed, support injured workers by enabling super-indexing increases to Workplace Safety and Insurance Board—WSIB—benefits, above the annual rate of inflation. What this means is that for an injured worker who earns \$70,000 a year, a 2% increase could mean an additional \$900 annually on top of the cost-of-living adjustments, which were 6.5% in 2023. The proposed super-indexing amendment to the WSIB would, if passed, enable the government to make regulations setting out additional indexation increases and the dates on which they are to be imposed. This would require the board to apply the prescribed increases to benefit amounts—increasing the money injured workers receive. The proposal would deliver on our government's public commitment to increase WSIB benefit payments to injured workers and survivors. **This increases fairness to these recipients and helps them at a time of rising costs.**

Again, not much in the way of policy clarity except increasing benefits beyond inflation is somehow fairer. On [November 23, 2023](#) the Second Reading debate continued.

Another member in support said:

Moreover, we speak on behalf of the hard-working people of Ontario and to advocate for a cause that touches the very heart of our community: the welfare and security of injured workers. **Our government is bringing forth legislation that signifies a monumental shift in support for those who have suffered injuries on the job. This legislation, if passed, will implement super-indexing of Workplace Safety and Insurance Board benefits, or WSIB, which will go above and beyond the annual rate of inflation.**

Consider the case of a worker earning \$70,000 a year. With a 2% increase through super-indexing, this individual could see an additional \$900 annually. This is not just an adjustment for inflation, which was 6.5% in 2023, but recognition of the real and increasing costs that injured workers face. It's a step toward ensuring that when a worker is injured, they are not left behind by an economy that continues to move forward.

With that, let us delve deeper into the significance of this change. **The current system adjusts for inflation, but as we all know, the cost of living, medical expenses and the financial demands on families often outpace inflation. Super-indexing ensures that our injured workers are not just keeping up, but are genuinely supported through their recovery and beyond.**

This speaker acknowledges that **Bill 149** super-indexing above inflation is a “monumental shift.” I indeed agree with that. However, the rationale of injured workers experiencing increasing medical expenses and cost of living outpacing inflation, respectfully, makes no sense at all. First of all, injured workers have *all* injury related medical expenses picked up by the WSIB (WSIA, 33(1)):

33 (1) A worker who sustains an injury is entitled to such health care as may be necessary, appropriate and sufficient as a result of the injury and is entitled to make the initial choice of health professional for the purposes of this section.

And, it is unlawful for a health care provider to charge an injured worker directly (WSIA, s. 33(5)):

33 (5) No health care practitioner shall request a worker to pay for health care or any related service provided under the insurance plan.

Moreover, the list of items covered under the health care provisions of the WSIA is impressive (WSIA, s. 32):

32 In this Part,

“health care” means,

- (a) professional services provided by a health care practitioner,
- (b) services provided by or at hospitals and health facilities,
- (c) drugs,
- (d) the services of an attendant,
- (e) modifications to a person's home and vehicle and other measures to facilitate independent living as in the Board's opinion are appropriate,
- (f) assistive devices and prostheses,
- (g) extraordinary transportation costs to obtain health care,
- (h) such measures to improve the quality of life of severely impaired workers as, in the Board's opinion, are appropriate.

As expressed, the medical cost rationale makes little sense, since injured workers have all medical expenses paid

by the WSIB. This rightfully includes many expenditures not funded through OHIP or supplementary health insurance for non-injured workers. On health costs, injured workers are well protected. The inflation costs above inflation argument is a head-shaker. I just don't follow it. How is the increasing cost of living greater than inflation when they are essentially one and the same? The **International Monetary Fund** defines inflation as “. . . the overall increase in prices or the increase in the cost of living in a country.”

Rhetoric doesn't supplant the need for sound analysis

How inflation for injured workers is greater than inflation overall deserves clarity, if this in fact is the core thinking behind the bill. If it is the case that injured workers, as a class, are falling behind as a result of inflation, by all means correct the problem. As explained, the current WSIA ensures worker benefits keep pace with inflation by linking indexing to CPI (WSIA, s. 49)). If this is not working, if injured workers are still falling behind, I respectfully suggest that it is incumbent on the government to explain why this is. Spinning rhetoric doesn't supplant sound policy analysis. My first order of advice to the government – share the analysis that spurred the thinking behind the bill. A momentous change like this requires a lucid, evidence driven analysis. My guess is there isn't one.

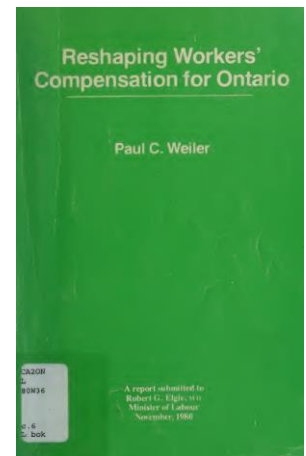
The history of injured worker benefit indexing

The history of injured worker benefit indexing is a long and winding road (perhaps my earlier descriptor as a “roller coaster” is more apt) over the past four decades plus. I will attempt to distill this twisting narrative as best I can.

Prof. Paul Weiler first raised the profile of benefit indexing 44 years ago

Prof. Paul Weiler in his ground-breaking 1980 report, “[*Reshaping Workers' Compensation for Ontario*](#)” presented the first extensive public dialogue on worker benefit indexing (at pp. 68 – 77). While written almost 44 years ago, Weiler's views remain relevant today and were profoundly influential in introducing automatic indexing to Ontario workers' compensation. Prof. Weiler wrote this:

Thus, I am satisfied that the real question is not *whether* to adjust workers' compensation benefit pensions to inflation, but how to do so. There is an easy way. By simple legal mandate, index the level of compensation pensions to the changing Consumer Price Index (CPI). This would have the virtues of eliminating the political maneuvering, delays, and hardships which surround the current adjustment process. The CPI measures the changes in price of goods and services which the injured worker has to buy with his pension. It is the standard and popularly-accepted measure of inflation in the country.



Automatic indexing did eventually come to Ontario in 1987. Before that, adjustments were *ad hoc* at the call of the Ontario legislature through specific legislative amendments, with often the need to “catch-up” leading to the “political maneuvering” referenced by Prof. Weiler.

Automatic indexing comes to Ontario workers’ compensation effective January 1, 1987

As long-time readers of **The Liversidge Letter** know, the 1980 Weiler recommendations were extensive and included a new independent Appeals Tribunal, a new configuration for the WCB Board of Directors and a total revamp of the wage replacement and benefit delivery model. Indexing was finally addressed and [Bill 81](#) was introduced by the Peterson government in 1985. For the first time, an automatic annual benefit indexing tied to CPI, just as Weiler suggested, was put in place. This was the new amended Act, which while receiving Royal Assent December, 1985, became effective January 1, 1987:

139. (1) On the 1st day of January in each year, beginning in 1987, an indexing factor shall be determined, based on the percentage change in the Consumer Price Index for Canada for all items, for the twelve month period ending the 31st day of October of the previous year, as published by Statistics Canada.

This reads pretty close to the current WSIA s. 49(1). This is an excerpt from Minister of Labour Bill Wrye’s [December 17, 1985](#) First Reading speech:

The bill establishes January 1 in each year as the adjustment date for workers' compensation benefits, utilizing an indexation formula based on movements in the consumer price index over the 12-month period ending the previous October. **This will ensure that injured workers and their families will be protected from the hardships caused by inflation.**

The pain, the loss, the disruption and the disorientation caused to a worker and his or her family by a disabling injury is suffering enough. **We should never add to this suffering the indignity of having to come cap in hand to the steps of the Legislature angrily demanding merely the protection of compensation benefits from the annual rate of inflation. From this day forward, injured workers will never again be in that humiliating position.**

Full indexing didn’t last long – the NDP adopted the “Friedland Formula” in Bill 165

Well, full indexing did not last too long. Within a few years, the overall finances of the WCB were attracting high level concerns. Premier Bob Rae struck a blue-chip “Premier’s Labour and Management Advisory Council” (PLMAC) which, among other things recommended adjustments to the full indexing provisions of the *Workers’ Compensation Act*. (See the [March 11, 1994](#) issue of **The Liversidge FaxLine**.) As a result, the NDP introduced [Bill 165](#) which altered full indexing rather significantly, although dependents and injured workers receiving 100% benefits continued to receive full CPI protection. This became known as the “Friedland Formula,” named after [Prof. Martin Friedland](#) of the University of Toronto. The formula was developed for other than workers’ compensation

considerations. This is how Dr. Arthurs explained it in his seminal report, [Funding Fairness, A Report on Ontario’s Workplace Safety and Insurance System \(2012\)](#), at p. 99:

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.

This is what Labour Minister Mackenzie said in introducing [Bill 165](#) on [May 18, 1994](#):

We are providing an amendment that would result in the adoption of what is known as the Friedland indexing formula, but with provisions that would ensure that the most vulnerable workers could continue to receive benefits fully indexed to the consumer price index. **The Friedland formula indexes pensions to 75% of the CPI, less 1%, with a cap of 4% a year.**

Certain groups will continue to receive fully indexed benefits. They are those people who receive survivor and dependant benefits, those receiving 100% pensions for injuries that occurred prior to 1990, those receiving 100% wage loss awards for injuries that occurred after 1989 and those receiving the \$200 increase I have just mentioned.

We believe the amendments to the Workers' Compensation Act that we are introducing today will help us achieve the three main objectives we have set for reform of the workers' compensation system. They are ensuring the future financial viability of the system, early return to work for injured workers, and protection for the most financially vulnerable injured workers.

Full indexing, applied to all benefits, was simply too expensive it would seem, at least by the mid-1990s. This is the [Bill 165](#) amendment:

Indexing factor

148. (1) On January 1 in each year, an indexing factor shall be determined using the formula,
Indexing factor + [3/4 A] - 1
in which “A” is the amount of the percentage change in the Consumer Price Index for Canada for all items, for the 12-month period ending October 31 of the previous year, as published by Statistics Canada. The indexing factor shall be not less than 0 per cent and not greater than 4 per cent.

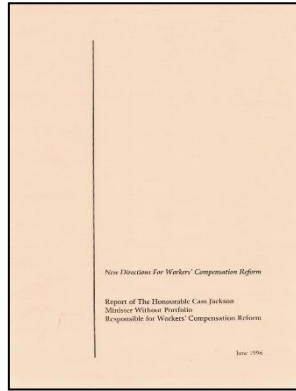
As noted, those on 100% benefits and dependents had benefits fully indexed to CPI (1996 WCA, s. 148 (1.2)).

The Progressive Conservative Bill 99 adjusted indexing downwards even more

By the time the Mike Harris PCs came to power in 1995, workers’ compensation was seen by some as a bit of a dumpster fire, and actually became a campaign issue (see the [Common Sense Revolution](#) campaign document, p. 15). The Board’s unfunded liability had been growing since the early 1980s and seemed out of control. A commitment for broad workers’ compensation reform was triggered, and Minister Cam Jackson commenced a fast-paced study.

■ Cutting Workers Compensation Board Premiums
WCB premiums will be cut by 5%. This will save Ontario employers an estimated \$98.5 million. We will also implement our previously published six-point program for reforming the WCB, which will eliminate the unfunded liability by 2014, as demanded by the Employers' Council of Ontario. The WCB will have to be revamped altogether to restore business confidence, protect workers and bring fiscal sanity to the Board's operations.

In his June 1996 report, “[New Directions for Workers’ Compensation Reform](#),” Minister Jackson recommended (at pp. vi, 49, & 51) what became known as the “**Modified Friedland Formula**,” which was the same as the NDP model except rather than $\frac{3}{4}$ CPI, the new approach would reduce that to $\frac{1}{2}$ CPI. This is the formula as it appeared in [Bill 99, Workers’ Compensation Reform Act, 1996](#):



General indexing factor

49. (1) On January 1 every year, a general indexing factor for the year shall be calculated using the formula, $(1/2 \times A) - 1$ in which "A" is the amount of the percentage change in the Consumer Price Index for Canada for all items, for the 12-month period ending on October 31 of the previous year, as published by Statistics Canada. However, the indexing factor shall be not less than 0 per cent and not greater than 4 per cent.

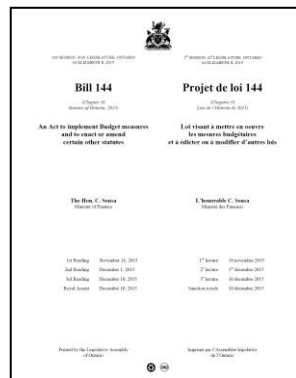
As with the NDP Friedland Formula, those receiving 100% benefits and dependents were exempt from the “Modified Friedland Formula” and had benefits indexed at full CPI.

The Liberals reinstated full-indexing in the 2015 Budget Measures Act – Bill 144

The 1996/1997 reforms (Bill 99) were pretty much how things stood until the end of 2015 when the Liberals introduced the [2015 Budget Measures Act – Bill 144](#), which amended the WSIA restoring full indexation. While passed in December 2015, the indexation adjustments of the WSIA ([Schedule 23 of Bill 144](#)), did not come into force until January 1, 2018. The likely reason for the delay, my guess, was to ensure the WSIB was back to full funding status before additional financial strains were in motion. The delay worked. Full funding was reached in 2018. I add that when it comes to benefit indexation, the funding implications are not just year-to-year cash outflows, but the needed reserves actuarially determined to fund the future costs of benefit indexation. 2015’s [Bill 144](#) introduced the current WSIA s. 49 (1).

Indexing factor

49 (1) Subject to subsection (2), on January 1 of every year, **an indexing factor shall be calculated that is equal to the amount of the percentage change in the Consumer Price Index** for Canada for all items, for the 12-month period ending on October 31 of the previous year, as published by Statistics Canada.



Since January 1, 2018 injured worker benefits have been indexed fully against inflation.

The 2007 Budget was the last major ad hoc adjustment

I left out part of the benefit indexing story, although I alluded to it when I responded to the Minister’s suggestion this had not been done before. It has. On [March 22, 2007](#) the McGuinty Liberal Government introduced [Bill 187, the Budget Measures Act](#), which provided three years of 2.5% indexing *in lieu of* the general indexing factor. This is from the explanatory notes from [Schedule 41 of the Budget Measures Act](#):

Section 49 of the Act is amended to establish a temporary indexing factor of 2.5 per cent for the years commencing January 1, 2008 and January 1, 2009. This factor will be applied instead of the general indexing factor described in subsection 49 (1) of the Act, and an additional adjustment of 2.5 per cent will be made on July 1, 2007. Corresponding amendments are made to sections 51 and 52 of the Act.

According to the WSIB the [2007 Budget Measures](#) added \$750 million to the Board’s liabilities (see [WSIB 2007 Annual Report](#), pp. 18, 21 & 24; while purged from the WSIB website, the 2007 Annual Report is available [here](#)). The rationale offered by Greg Sorbara, Minister of Finance, reads almost identical to Minister Piccini’s Second Reading [speech](#) (*plus ça change, plus c'est la même chose*):

Workers injured on the job deserve our support. Many of them have benefits that have not kept pace. We propose to improve WSIB benefits for about 155,000 injured workers. The increase would be 2.5% each year for the next three years.

There was a bit of a difference. In 2007 benefits *were not* keeping pace with inflation (Modified Friedland). [Bill 149](#) may have borrowed the idea of Executive Council directed “temporary indexing factors” from 2007’s [Budget Measures](#). From the [Budget Measures](#) explanatory notes:

New section 52.1 of the Act authorizes the Lieutenant Governor in Council to make regulations prescribing a temporary indexing factor for any calendar year and prescribing an additional adjustment on any specific date.

Reality soon outpaced political desire. By the time the Auditor General released his 2009 game-changing [report](#), the focus had shifted from benefit enrichment to financial integrity and system survival and no temporary indexing regulations were ever tabled.

I discussed the 2007 Budget Measures at the time

I wrote [14 issues](#) of [The Liversidge Letter](#) dissecting what I labelled the [2007 Budget Reforms](#), arguing that a) full indexing is supportable but it should be prescribed and costed (as it has since 2018); b) a reliance on *ad hoc* adjustments will spawn perpetual politicking (as warned by Prof. Weiler); c) Cabinet decreed adjustments compromise the legislative process and diminishes the role of the legislature; and d) the financial implications of indexing, *ad hoc* or otherwise, must be publicly declared, properly priced and accounted for. All of those comments of 17 years ago apply to [Bill 149](#).

Why ad hoc indexing is bad public policy

Dr. Harry Arthurs, in [Funding Fairness](#), said it most succinctly (at p. 99):

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.

If this was an unsound method 12 years ago, it remains so today. A better approach, as already mentioned, is to first determine if injured workers are falling behind, and if so, determine the reasons for that and, then develop the structural enhancements that address the root problem. This simple approach addresses each and every one of Dr. Arthurs' concerns.

What are the financial and funding implications of Bill 149?

So far, there has been no disclosure of the financial and funding implications of **Bill 149**. I remind of the observation set out in the already mentioned Minister Cam Jackson June 1996 report, "[New Directions for Workers' Compensation Reform](#)," where Minister Jackson, in speaking to the enhancements to worker benefits in the late 1980s and early 1990s, noted:

However, the costs of these improvements were not balanced by measures to guarantee adequate reserves to meet current and future financial obligations. Understandably, expansion and enrichment in the name of improved equity have proved popular. However, governments in the past have chosen not to address the critical but difficult problem of how to finance these benefit changes.

Let's hope we are not back to the mind-set observed by Minister Jackson. **Funding Fairness** presents a more complete analysis of this phenomenon "in-play" in assessing the reasons why the Board was perpetually (until recently) underfunded (see **Funding Fairness, Chapter 2, The WSIB's UFL History and Significance**," pp. 18-21).

Dr. Arthurs proposed a series of intellectually simple remedies that were certainly adhered to during the post-2009 Auditor General Report, David Marshall *et al* restorative period. I suggest that administrative and political allegiance to these principles must continue:

Funding Fairness Recommendation 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.

Funding Fairness 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.

The 2020 [Workplace Safety and Insurance Board operational review report](#) (the Linda Regner-Dykeman, Sean Speer report), presented an almost identical suggestion:

Recommendation 3: The government should amend the WSIA to clarify that any legal or policy changes that impose costs on the WSIB should come into effect in the year in which the WSIB can account for these costs in its rate-setting process.

The government should release Bill 149 costing estimates

Of course, the essential ingredient to ensure that WSIB funding keeps pace with legislative enhancements is to cost those enhancements. Pretty simple. Basic in fact. Yet, and quite incredibly, no costing of **Bill 149** has been made public. Respectfully, this is quite outrageous and an affront to the stellar and exhaustive work undertaken from 2010 to 2022. I strongly urge the government to immediately release the cost implications and the specific impacts on funding and employer premium rates *posthaste*.

The WSIB Board of Directors is legally obliged to evaluate proposed benefit adjustments

It is important to point out that the WSIB Board of Directors has the legal duty to "*evaluate the consequences of any proposed change in benefits*" (WSIA, s. 161(2)). This is, I suggest, a public duty and not part of any private or privileged communication between the Board and government under the rubric of ministerial direction (WSIA s. 167(1)), or "advice to government" (*Freedom of Information and Protection of Privacy Act*, s. 13). The legislative direction set out in WSIA s. 161(2) is unambiguous. The Board must evaluate proposed legislation that changes benefits, as **Bill 149** clearly does. One must presume that the WSIB has fulfilled this statutory obligation and this analysis exists. It must be released. Now. Not only is there no legitimate reason not to do so, a failure to release this information undermines the confidence building protocols of the David Marshall *et al* restorative period. Whether it comes from the Board or government matters little, although it is the Board's duty, not that of the government. As we saw with the **2007 Budget Measures**, both the government and the Board were forthcoming, setting out the cost implications of similar provisions. The same should occur now.

It is interesting, and significant I suggest, that unlike the 2007 specific and time limited temporary indexing adjustments under **2007's Budget Measures Act**, which were limited to 2.5% for each of three years, the **Bill 149** discretionary indexing powers are unlimited in time and scope. In speaking to the 2007 adjustments, the Auditor General, in his 2009 report (at p. 330) said this:

If the government were to introduce further benefit increases after January 1, 2009, similar to those implemented in the previous three years, the WSIB estimates that such changes would increase its expenses by \$1.6 billion and add \$1.6 billion to the unfunded liability in 2010 (because, under generally accepted actuarial standards, the WSIB's actuary would likely need to assume that this indexing rate had at that point become permanently built into the system).

At what point is the Board obliged to consider potentially open-ended discretionary adjustments facilitated at the call

of the Executive Council in its long-term costing analysis? Both the Board and the government must speak to this. While the **Bill 149** indexing powers will be driven by as yet unknown and not tabled regulations (itself quite concerning), through the government's November 8, 2023 [announcement](#), the "super-indexing" plan will include at least a 2% hike in benefits over and above inflation. It is unlikely that this power is planned for one year and one year only. It must be inferred that this additional discretionary authority will be regularly exercised and therefore, must be taken into account in the WSIB's costing analyses.

Did the pandemic impact injured workers more than other workers?

One of the reasons presented by the government for Bill 149 is "*because we know the pandemic has hit injured workers hard*" (Second Reading Speech, [November 16, 2023](#)). Respectfully, this is a bit revisionist. We all lived through the tragedy of the pandemic and recall the shut-downs, work stoppages and general social grief, involving for many, loss of employment and significant loss of income. The [Canada Emergency Response Benefit](#) (CERB), for those that were [eligible](#), awarded only a maximum of \$500 per week to a maximum of 28 weeks. Small business owners were hit particularly hard. See the [January 3, 2022 statement](#) from the **Canadian Federation of Independent Business** which advised that two years after the commencement of the start of the pandemic, "*only 35 per cent of Ontario's small firms are at normal revenues.*" The Ontario regulation that prescribed lock-down rules, [O. Reg. 82/20](#), was amended more than 70 times from March 2020 to March 2022.

Injured workers of course were impacted by the pandemic, as was each and every single Ontarian. However, unlike many Ontarians, injured worker levels of compensation continued during recovery, with injured workers, rightly and properly, continuing to receive full and complete benefit entitlements, including yearly inflation adjustments. To my knowledge, there is no evidence that suggests injured workers were impacted more than Ontarians in general. If there is such evidence, this should be released pronto. Common sense however suggests otherwise.

Does benefit indexing above inflation compromise the remedial intent of the Workplace Safety and Insurance Act?

All Ontario statutes are remedial ([Legislation Act](#), 2006, s. 64(1)). The purpose of the *Workplace Safety and Insurance Act* includes the requirement "*to provide compensation*" (WSIA, s. 1, para. 4). In a workers' compensation context, "compensation" is generally interpreted to mean to make one whole and to restore (see for example **Black's Law Dictionary** [definition](#)). Arguably and reasonably, indexing benefits to inflation, as through CPI for example, is consistent with the remedial intent of the WSIA. However, providing benefits beyond the loss incurred, such as indexing benefits above inflation, the

precise intent of **Bill 149**, transforms the Ontario workers' compensation system beyond its prescribed objects. The system becomes something more than compensatory. Unless there is an evidence based established "loss" attributable to workplace injury, and to this date no such evidence has been presented, **Bill 149** risks transforming the workers' compensation system into a differently focused social program. Again, at the risk of being repetitive, the government is obliged to present the evidence that establishes the need for **Bill 149** and to clearly outline how **Bill 149** remains consistent with the remedial intent of the WSIA.

Why the super-indexing provisions of Bill 149 should not proceed

First, the super-indexing provisions of **Bill 149** should not proceed absent an in-depth analysis exploring and explaining the contended problem that is being solved. Respectfully, rhetoric, no matter how eloquently spun, does not supplant the need for evidence showing exactly what the problem is and how it came about. In this short discussion I have explained why the super-indexing provisions of **Bill 149** are not needed. If the government possesses the evidence to refute this analysis, release it. If it doesn't have such a study, develop it. But, do not proceed without it. If no such evidence can be found, then there is no problem to solve, and the super-indexing exercise should be dropped.

Second, if evidence does in fact establish that injured workers are falling behind inflation wise, determine the reason. Since injured worker benefits have been fully indexed to CPI since 2018, the only plausible conclusion would be that CPI is an inadequate predictor of the impacts of inflation. Since CPI is widely recognized in Canada as a reliable gauge, this is unlikely. Nonetheless, if so established, a better alternative must be presented to avoid the pitfalls of *ad hoc* periodic adjustments addressed earlier.

Third, until the specific costs of the super-indexing proposal, along with a clear outline of the immediate and long-term funding implications, are developed and publicly released, the super-indexing provisions should be shelved.

Lastly, unless a sound public policy explanation is presented and properly costed, the **Bill 149** super-indexing provisions risk undermining stakeholder confidence, especially from employers who fund the system. After the extraordinary effort to solve the 2009 funding crisis, which included several years of large employer premium increases, employers expect the type of sound governance as practiced by the government and WSIB in the post-2010 restorative period. Should **Bill 149** proceed absent a proven need, I predict that Ontario employers will be far less receptive to demands for future premium increases, should circumstances so require. If the **Bill 149** super-indexing provisions are viewed as pure politics and not sound policy, this risks undermining accrued employer goodwill earned during the funding crisis. The obligation rests with the government to prove the need for **Bill 149** super-indexing. So far, it hasn't.