

# 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.

3 pages

## Bill 149 Update Still on track – Still a bad idea

### LAL appeared before Standing Committee on February 12, 2024

As I reported on February 12, 2024 I appeared before the [Standing Committee on Social Policy](#) offering my views on [Bill 149, the Working for Workers Four Act, 2023](#). I thank [COCA](#) and Ian Cunningham, COCA President, for sharing his time with me. It is appreciated. To offer a complete update, I was hoping the Committee Hansards would be available by now (they are slower than the daily House Hansards). They aren't. However, thanks to the superb Ontario Legislative staff, I have received preliminary transcripts for the two days of hearings (February 12 & 13, 2024) and have all of the written submissions that were presented to the Committee.



### Bill 149 status

Bill 149 completed two days of hearings February 12 & 13 at the Standing Committee, and returned to the House for Third Reading February 22 and 28, 2024. Third Reading is not yet complete but it appears that the Schedule 4 “super-indexing” provisions are likely to be passed. In my [February 12, 2024 issue](#) of **The Liversidge Letter**, I explained why **Bill 149** is a bad idea. Readers will recall that Schedule 4 of **Bill 149** amends the **Workplace Safety and Insurance Act**, 1997 (WSIA) and provides the government with the *discretionary* ad-hoc power to prescribe an additional indexing factor greater than the normal inflation adjustment. As I said on February 12, 2024:

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).

I set out a comprehensive set of reasons why **Bill 149** was a bad idea. This is the thumbnail summary: a) the WSIA already indexes worker benefits to protect against inflation; b) no reasons for the bill have been provided; c) if in fact

injured workers *are* falling behind because of inflation, that would mean that the current CPI indexation provisions of the WSIA are inadequate; d) yet, no evidence has been presented – not one iota – to support this notion; e) since no evidence has been presented, I can only conclude none exists; f) increasing benefits by inflation (CPI) as the current WSIA does, is consistent with the compensatory purpose of the workers’ compensation system; g) increasing benefits greater than inflation, in my view, transforms the workers’ compensation system beyond its original intent and it becomes something more than compensatory, and may in fact be beyond the legal scope of the WSIA.

### LAL’s appearance before the Committee

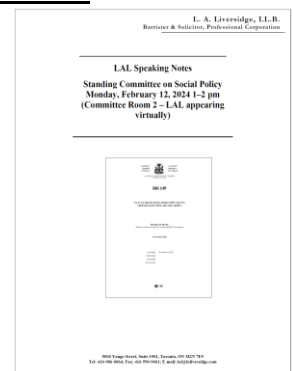
I presented the Committee with my [February 12<sup>th</sup>](#) issue of **The Liversidge Letter** along with a [brief summary](#) which effectively became my speaking notes. This is what I presented:

### LAL Speaking Notes: Bill 149

My name is Les Liversidge. I am a lawyer with a workers’ compensation practice. I have been involved in every workers’ compensation reform initiative over the past four decades dating back to the seminal 1980 study by Prof. Paul Weiler, *Reshaping Workers’ Compensation*, which leaves as its legacy much of the modern workers’ compensation scheme, including automatic benefit indexing. I have concerns over the “super-indexing” provisions of Bill 149. That will be the limit of my participation. I present four concerns:

*One*, no evidence for the need for these provisions has been presented, beyond assertions that:

- Injured workers must be supported: I entirely agree;
- Super-indexing supports injured workers against the rising cost of living; I disagree – injured workers are already protected against inflation erosion through automatic yearly CPI adjustments and have been since 2018 (WSIA, s. 149(1));



- The pandemic has hit injured workers particularly hard; I don't disagree – every Ontarian was impacted by the pandemic. However, for injured workers, benefits, including benefit indexation, continued. Many other Ontarians saw job and earnings losses during that unprecedented tragedy. There is no evidence that injured workers were specifically economically impacted by the pandemic. If there is such evidence, this should be released.

*Two*, indexing benefits greater than inflation adjusts the remedial compensatory nature of workers' compensation. Keeping benefits in-sync with inflation is compensatory. Absent evidence that injured workers have fallen behind as a result of inflation, and providing increases greater than inflation, morphs the scheme beyond its original compensatory intent.

*Three*, if there is evidence that injured workers are falling behind due to inflation, the CPI approach then is proved inadequate. This must be remedied with a better automatic mechanism. Injured workers should not be required to appeal for discretionary top-ups from time to time. This has been a consistent theme expressed over the past 40 years, by Prof. Weiler in 1980, and by many past legislators. Labour Minister Bill Wrye, when introducing the first automatic full CPI indexing in 1985 said, "From this day forward, injured workers will never again be in that humiliating position" of "having to come cap in hand to the steps of the Legislature."

*Four*, the WSIB has an unambiguous legal duty to "evaluate the consequences of any proposed change in benefits" (WSIA, s. 161(2)), which presumably has been fulfilled. This analysis must be publicly released or else there is no public understanding of the impacts of Bill 149 on employer premiums and WSIB funding levels.

### **Most of the Committee members appeared uninterested in these submissions**

It became clear to me that there is no political opposition to the super-indexing provisions of **Bill 149**. The opposition, the Liberals and the NDP, seem to be agree with the super-indexing proposal. For example, on the first day of Committee hearings, Liberal MPP John Fraser said, "*I think the super indexing benefits is something that is favourable toward workers.*" The only MPP asking questions about my overall **Bill 149** thesis was the remarkable independent (conservative) MPP for Haldimand-Norfolk, [Bobbi Ann Brady](#). Ms. Brady's own political story itself is [quite extraordinary](#).

Ms. Brady, after considering the submissions presented, said, "*And, in my opinion, there seems to be no problem to solve.*" Ms. Brady asked what the WSIB costs for Bill 149 would be. I responded, "*We don't know; we should know. The Board is obliged to inform the government. No doubt they have done so. I would presume that a study exists that establishes the cost. But I do know that the last time, in 2007, when temporary measures were initiated and passed, the Liberal government put in three years of increases of 2.5% per year for three years, and those were priced at \$750 million.*"

MPP Brady asked me, "*One last question: If the minister could provide the data that proved that indexing was warranted, can you think of other ways that we could increase benefits without super-indexing?*"

I responded: "*Yes, I can. First of all, if you have the data that said you need this, then that means there's some problem with the current act, because the current act was designed so that you don't need it – exactly that. That goes way back, that injured workers really should not have to come, as Bill Wrye said almost 40 years ago, cap in hand, 'Please sir, may we have more'? That's simply inappropriate. It's wrong, and it is not the way this system should be structured. If you do need it, that means the . . .*" and at that my time expired and I was cut off.

### **Does the injured worker lobby support Bill 149 super-indexing**

As longtime readers of **The Liversidge Letter** are aware, I have long respected the advocacy effectiveness of the injured worker advocacy community, especially during the crucial period from the mid to late 1970s to the early 1990s. I always paid close attention to thoughtful, considered views expressed by the injured worker advocacy community. While to my knowledge the government has not yet posted the submissions presented to the **Standing Committee on Social Policy**, I requested and received all of the submissions presented to the Committee. Several were quite interesting, which I will highlight here.

### **IAVGO Community Legal Clinic**

The Industrial Accident Victims Group of Ontario (IAVGO), has been a leading advocate for injured worker interests for almost 50 years. In a submission filed with the Committee on IAVGO said:

#### **A Discretionary Increase does not support the needs of injured workers**

Injured workers know that discretion does not work, and ultimately does not benefit them. The WSIB has demonstrated time and again that measures of discretion will not be placed in favour of workers. Bill 149 does not meet the needs of workers, and serves as window dressing rather than substantial and needed changes to support workers.

The paper then proceeded to present a list of other suggested reforms, such as ending "deeming"; increase loss of earnings benefits to 90% of net; increase the maximum non-economic award; increase injured worker retirement contribution; and increase the terminal age for loss of earnings benefits from 65 to 70. I won't comment on the suggested alternatives, but most are long-standing injured worker demands, with some, such as eliminating deeming, tracing back decades. Whether I agree with them or not, most of these warrant a serious policy discussion. With respect to **Bill 149** super-indexing, IAVGO is not a supporter, and sees it, correctly I suggest, as "window dressing."

### **Injured workers action for justice**

A group called "Injured Workers Action for Justice," a "diverse group of migrant injured workers, injured workers,

and allies organizing with Injured Workers Action for Justice,” submitted that:

The proposed legislation to “super-index” benefits is discretionary and does not go far enough. It’s like putting a Band-Aid on a gushing wound . . .”

This group proposed an alternative list of enhancements similar to those presented by IAVGO.

### **Injured Workers Community Legal Clinic**

The Injured Workers Community Legal Clinic supported the proposed **Bill 149** super-indexing, seeing this as an opportunity for the government to “*rebalance the workers’ compensation system*” since funding is “*over-funded at 118%*.” I do not interpret this as a policy reason. It is more of a political reason. No matter how one wishes to describe the rationale, I suggest that this approach to policy design is rather dangerous, especially for injured workers. If over-funding should drive benefit enhancements, it follows that the obvious corollary is that under-funding should drive benefit curtailments. This type of policy dualism would be a chaotic mess.

### **Parkdale Community Legal Services and Workers’ Action Centre**

Parkdale Community Legal Services and the Workers’ Action Centre suggested that the proposed super-indexing provisions “*is likely in response to the legal challenges by injured workers to have the Act’s annual cost of living adjustments done properly so that workers benefits do actually rise based on the previous year’s Consumer Price Index,*” concluding that the “*WSIB should comply with section 40(1) of the WSIA and annually index benefits based on the previous 12-month CPI, not averaging over a longer period.*” I commented on this legal issue in the February 12, 2024 issue of **The Liversidge Letter** (at page 2). I won’t repeat the commentary here. However, I very much doubt that the legal controversy on the calculation of the CPI adjustment drove the **Bill 149** super-indexing provision. With that said, as I noted on February 12, 2024, I think the Board is likely quite wrong about how it calculates the yearly CPI adjustments. Worker groups are likely right.

### **There was no clear policy explanation for super-indexing placed on the record during the Committee hearings**

After the hearings, in my view, we are no further along in understanding why the super-indexing provisions are being proposed than we were before. However, I think the Injured Workers Community Legal Clinic is the closest to the real reason. This policy change is being proposed for no other reason that the Board, for the moment at least, is experiencing a high level of funding and those excess funds should be dispersed to injured workers. This is a political gambit. I don’t think it is any more complicated than that. There is no policy reason for these provisions. There is no evidence that injured workers are falling behind due to inflation. There is no structural defect in the current CPI mechanism (other than how the Board calculates the CPI adjustment, which is presently under litigation). **Bill 149**

represents a return to workers’ compensation policy thinking at its very worst. In words pretty identical to those presented when the bill was introduced for First and Second reading, the Minister did not offer reasons other than that super-indexing would “*support injured workers.*” In Committee, MPP Brady directly asked the Minister, “*But I’m still waiting for the rationale and the evidence that there is not adequate compensation.*” Minister Piccini’s disappointing response was a lost opportunity to present some real reasons. He said this, “*What I would say is it’s never a bad day to put more money in the pockets of injured workers . . .*” And, that was pretty much it. I affirm what I wrote in the February 12, 2024 issue of **The Liversidge Letter**:

### **Rhetoric doesn’t supplant the need for sound analysis**

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.*

### **How much will Bill 149 super-indexing cost? The Board and the government know – they just aren’t telling**

It is pretty clear by now that there is no policy explanation for **Bill 149** super-indexing. None. So, even at this stage, with the bill continuing through the Third Reading process, we don’t know the reasons for super-indexing. Similarly, we don’t know the potential costs of these provisions. As I said on February 12, the Board is legally obliged to cost out these types of proposals:

### **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).

I have learned that the costing projections do exist, but the Board is refusing to release them. A colleague advanced an FOI request and on February 29, 2024 the WSIB denied access to this information relying on s. 13 of FIPPA, the “*advice to government*” exemption for disclosure and FIPPA s. 12 (Cabinet records), citing a Supreme Court of Canada case, [\*John Doe v. Ontario \(Finance\)\*, 2014 SCC 36](#). I disagree with this disclosure refusal decision, since, as I have pointed out, the WSIB has an express *independent* requirement to evaluate proposed benefit adjustments (WSIA, s. 161(2)). Nonetheless, even if the exemption decision is correct from the viewpoint of the Board, the government can (and certainly should) release this information. It’s puzzling. *Why is this such a big secret?*