The Liverside Letter

An *Executive Briefing* on Emerging Workplace Safety and Insurance Issues

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WSIB Funding Surplus Distribution of $2.0 Billion!

Part 4: LAL suggestions for a fairer, more predictable statutory, regulatory and policy framework for future surplus distributions

The story so far

The last three issues of **The Liverside Letter** have focused on the recently announced $2.0 billion funding surplus distribution to Ontario employers. **Part 1** introduced the WSIB and government announcements. **Part 2** presented a history of WSIB funding and set out the current statutory, regulatory and policy framework governing funding surplus distribution (what I referred to as the "three-legged-stool"). **Part 3** explained the term "sufficiency ratio," reviewed the 2022 surplus distribution ascribing certain standards to that initiative, and advanced an argument that a $2.0 billion distribution was too low and applying the 2022 standards should be closer to $2.5 billion, 25% more. In this **Part 4**, the last of the series, I present my suggestions for a fairer and more predictable statutory, regulatory and policy template ("three-legged-stool") that better respects the idea of inter-generational employer equity, what I consider must be the exclusive driving principle for funding surplus distribution.

The directives suggested from the "three-legged-stool"

As set out in **Part 2**, the **WSIA**, **O. Reg. 141/12** and the **WSIB Funding and Pricing Policy** (**Funding Policy**) form the "three-legged-stool" for surplus distribution decisions. Solid guidance emerges offering "sign-posts" for funding surplus distribution. I present my interpretation of these "sign-posts."

The scope of WSIB discretion: While the WSIA directs the Board to distribute funds in excess of 125% to bring funding to 115.1% **(WSIA, s. 100 f.1 and O. Reg. 141/12, s. 2)**, the Board is granted the discretion to distribute funds when the sufficiency ratio is between 115% - 125% **(WSIA, s. 97.1(1))**.

WSIB policy sets the operational funding targets: The Board's **Funding Policy** outlines that the Board "*aims to establish and maintain the Sufficiency Ratio within the Target Funding Range of 110 per cent to 120 per cent*."

When funding hits 125%: The Board is statutorily compelled to reduce funding to 115.1% (**WSIA, s. 97.1 (2), O. Reg. 141/12, s. 2**), and must issue a surplus distribution within "*30 days of the Board determining that the amount of the insurance fund meets a sufficiency ratio that is equal to 125 per cent*."

The significance of the 115.1% threshold: The 115.1% direction in the WSIA and regulation is a deliberate and meaningful threshold. **WSIA s. 97.1 (2)** directs that the Board disgorge surplus funding to the amount "*prescribed under clause 100 (f.1)*." **WSIA s. 100 (f.1)** permits the Executive Council (Cabinet) to prescribe in regulation "*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*." The Cabinet did just that and in **O. Reg. 141/12, s. 2** set for "*the purposes of clause 97.1 (2) (a) of the Act, <u>115.1 per cent is the amount prescribed</u> under clause 100 (f.1)*." The government had the option to choose any funding level between 115% and 125%. It did not choose 122.5%. Or 120%. Or 117.5%. By choosing 115.1%, it is my opinion that the government is presenting an implicit direction to the WSIB in the exercise of its discretionary authority when funding is between 115% and 125%.

The clear statutory and funding intent: It is clear that the statutory and policy intent is to ensure a sufficiency ratio between 110% at the low end and 120% at the high end, with the median 115% funding level being the implicit target. This is rendered crystal clear by the statutory directive to reduce funding to 115.1% if and when funding hits 125%.

What does this mean when funding is between 115% and 125% - *Can the WSIB do whatever it wants*?

I borrow the analysis set out by the **Construction Employers Coalition** (CEC) in their August 6, 2021 submission on the (then) proposed surplus distribution model (and as excerpted in the January 8, 2025 issue of **The Liverside Letter**, page 4). A summary of the CEC's key points follows. I agree with all of them.

- The Board should maintain funding at or slightly above 115% notwithstanding a 100% funding target (*ed*., recall that I, along with the CEC, support a 90% - 110% target corridor as the better policy - this analysis applies current funding parameters).
- The WSIB has discretion to disgorge a funding surplus if funding is between 115% - 125% to any level it "considers appropriate" above 100% (**WSIA, ss. 97.1 (1) (c), 100 (c); O. Reg. 141/12, s. 1 (2)**).
- It normally would be imprudent to disgorge a funding surplus below a 115% sufficiency ratio.
- The WSIB maintains the discretion not to increase premium rates if funding is between 100% - 115%.
- Surplus disgorgement and premium rate policy are related but distinct considerations.
- When funding is between 115% and 125% the WSIB cannot simply do nothing.
- Once funding exceeds 115% a *de facto* expectation of disgorgement is implied unless there is a sound, evidence-based reason not to disgorge.
- That analysis must be mandatory and publicly disclosed.

Analysis and comment on the WSIB's discharge of its surplus distribution discretion so far

As the WSIB has approved two funding surplus distributions (2022 and 2025) one may ask if that is not clear evidence that the WSIB follows these expectations and appropriately discharges its discretionary authority. I will examine that proposition.

To begin, as addressed in **Part 3** of this series, I presented an argument supporting that "*the sufficiency method is a reliable tool to measure the long-term funding viability of the WSIB, and is an effective tool to gauge the prudence of a funding surplus distribution*." The sufficiency ratio "*is the determinative "guiding light" and not the IFRS "cash" basis*." This ongoing discussion adopts these propositions.

Since 2022 is effectively the first year a surplus distribution was permissible (**O. Reg. 864/21** which amended **O. Reg. 141/12** was filed December 21, 2021 and ***Bill 27, Working for Workers Act, 2021***, which amended the WSIA, was proclaimed December 2, 2021), I will focus on the state of WSIB funding at year-end 2021, 2022, 2023 and 2024 (most current data is 2024 Q3).

Did the WSIB properly exercise its discretion for the 2022 surplus distribution?

The short answer is "yes." See the chart (next column) from the **2021 Annual Sufficiency Report** (p. 14). At 2021 year-end the sufficiency ratio was 121.2%. Not only did the Board properly exercise its discretion to issue a surplus distribution in 2022 (funding was significantly greater than 115%), the amount of the distribution was about right ($1.5 billion approved; $1.2 billion actually issued). As reported in **Part 3** (p. 3), by 2022 Q3 the sufficiency ratio dropped to 115.4%, and bounced back ending the year at 118.2%.

Workplace Safety and Insurance Board

2021 Annual Sufficiency Report

Sufficiency Ratio Statement
December 31, 2021
(millions of Canadian dollars)

Sufficiency Ratio Statement

	Note(s)	Dec. 31 2021	Dec. 31 2020
Total assets under IFRS	4	40,532	40,837
Less: Asset adjustments	2,4	(2,403)	(849)
Less: Sufficiency Ratio non-controlling interests	2	(756)	(2,569)
Sufficiency Ratio assets	4	37,373	37,419
Total liabilities under IFRS	4	32,517	34,011
Less: Liability adjustments	3,4	(1,681)	(2,118)
Sufficiency Ratio liabilities	3,4	30,836	31,893
Sufficiency Ratio (assets divided by liabilities)		**121.2%**	**117.3%**

Did the WSIB properly exercise its discretion in deciding not to issue a surplus distribution for 2023?

The chart below is from the WSIB **2022 Annual Sufficiency Report (p. 12)**. Since by the end of 2022 the sufficiency ratio was 118.2%, the answer is "*arguably, no, but we do not know for certain*."

Workplace Safety and Insurance Board

2022 Annual Sufficiency Report

Sufficiency Ratio Statement
December 31, 2022
(millions of Canadian dollars)

Sufficiency Ratio Statement

	Note(s)	Dec. 31 2022	Dec. 31 2021
Total assets under IFRS	4	36,351	40,532
Add (Less): Asset adjustments	2,4	2,398	(2,403)
Less: Sufficiency Ratio non-controlling interests	2	(463)	(756)
Sufficiency Ratio assets		38,286	37,373
Total liabilities under IFRS	4	32,728	32,517
Less: Liability adjustments	3,4	(335)	(1,681)
Sufficiency Ratio liabilities		32,393	30,836
Sufficiency Ratio (assets divided by liabilities)		**118.2%**	**121.2%**

We do not know if the WSIB considered the question. There is no reference to this in the 2022 and 2023 WSIB Annual Reports, except this: "*As at December 31, 2023, no surplus distribution was declared to eligible businesses*" (**2023 Annual Report, p. 103**).

While funding was within the 110% to 120% corridor (see the **Funding Policy** excerpt in **Part 2**, p. 5), it was considerably above 115% at 118.2%. I introduce a quarrel I have with the **Funding Policy**, which I discuss more completely later. I suggest that the focus of the **Funding Policy** has less to do with inter-generational employer equity, and more to do with simply avoiding reaching the 125% sufficiency threshold which triggers a mandatory disgorgement to a 115.1% sufficiency ratio (**WSIA, s. 97.1 (2), O. Reg. 141/12, s. 2**).

I introduce two expectations, which I return to later. *One*, when funding is above 115%, the Board should address whether or not a funding surplus distribution is appropriate under the circumstances; and *two*, the Board's reasons, either way, should be disclosed.

Did the WSIB properly exercise its discretion in deciding not to issue a surplus distribution for 2024?

The WSIB did not issue a surplus distribution in 2024. A 2025 surplus distribution was declared in late 2024 (see **Part 1** of this series), but no surplus disgorgement was ordered for 2024.

In my view there was every reason to declare a surplus distribution for 2024. There was no reason not to. The **WSIA**, **O. Reg. 141/12** and **WSIB Funding Policy** support a surplus distribution for 2024. By the end of 2023, WSIB funding hit a sufficiency ratio of 122.5%, which at that time was the high-water-mark. See the chart below from the **WSIB 2023 Annual Sufficiency Report, p. 13**:

Workplace Safety and Insurance Board

2023 Annual Sufficiency Report

Sufficiency Ratio Statement
December 31, 2023
(millions of Canadian dollars)

Sufficiency Ratio Statement

	Note(s)	Dec. 31 2023	Dec. 31 2022 *restated*
Total assets under IFRS	1,2	38,164	35,889
Add: Asset adjustments	2,3	1,846	2,860
Less: Sufficiency Ratio non-controlling interests	3	(294)	(463)
Sufficiency Ratio assets		39,716	38,286
Total liabilities under IFRS	1,2	33,050	31,174
Add (Less): Liability adjustments	2,4	(637)	1,219
Sufficiency Ratio liabilities		32,413	32,393
Sufficiency Ratio (assets divided by liabilities)		**122.5%**	**118.2%**

Recall that the December 2021 sufficiency ratio of 121.2% was enough to warrant a $1.5 billion surplus distribution approval for 2022. A very simple question presents itself – *if a 121.2% sufficiency ratio was a sufficient level of funding to approve a $1.5 billion distribution for 2022, why wasn't a December 2023 122.5% sufficiency ratio good enough for the same treatment for 2024?*

If the guiding principle is inter-generational employer equity, there seems no reason not to approve a surplus distribution for 2024. As I suggest in **Part 3** "*there may be different motivations that have less to do with the concept of inter-generational employer equity, which should be the exclusive driver, and more to do with simply avoiding hitting the decisive 125% funding level*."

I am of the view that the WSIB did not properly exercise its discretion in deciding not to issue a surplus distribution for 2024. Moreover, we do not know why. I will be proposing a remedy.

In my opinion, the WSIB's funding and pricing policy is tuned towards the wrong goal

The Board's **Funding Policy** is the third leg in the "three-legged-stool" and in many ways is the most influential. It is this policy which drives the Board's administration of the **WSIA** and **O. Reg. 141/12**. For the following reasons, it is my opinion that the **Funding Policy** does not properly apply the concept of inter-generational employer equity and tilts towards perpetual over-funding.

I start with the **Funding Policy** "*Policy Statement*."

> **Policy statement**
>
> The WSIB shall make decisions governed under this Policy with the overall objectives of equity and fairness, in support of the following priorities listed in descending order of importance:
>
> 1. Maintaining sufficient funding, i.e. a Sufficiency Ratio of at least 100 per cent, and taking action to achieve high level of confidence in returning the Sufficiency Ratio to the mid-point of the Target Funding Range should it fall below the Target Funding Range;
> 2. ***Mitigating the risk of the Sufficiency Ratio reaching 125 per cent***; and
> 3. Maintaining premium rate stability, in combination with any target funding contributions.

It is the policy focus of "*mitigating the risk of the Sufficiency Ratio reaching 125 per cent*" with which I have a quarrel. As set out in this series, the policy objective sought by the **WSIA** and **O. Reg. 141/12** is inter-generational employer equity. While I agree that the **WSIA** and **O. Reg. 141/12** implicitly directs the Board to steer clear of 125%, the reason is that over-funding offends inter-generational employer equity. WSIB policy purports to adhere to maintaining a funding range between 110% and 120%. However, as discussed, when funding hit 122.5% at the end of 2023 the Board did not issue a funding surplus distribution. It could have. *It should have*. Unless there was a sound, evidence-based reason not to issue a surplus distribution in early 2024 (and no reason has been disclosed), the 110% to 120% desired funding range is more illusory than true. In practice, the upper parameter is greater than 120%. This is not the statutory intention.

From this it is easy to infer that the late-2024 decision to issue a funding surplus in early 2025 was focused less on inter-generational employer equity, and more on simply avoiding a 125% sufficiency ratio. Recall - at Q3 2024, the sufficiency ratio was 123.4%, a short hop from 125%.

Workplace Safety and Insurance Board

Third Quarter **2024** Sufficiency Report

Sufficiency Ratio Statement
September 30, 2024
(millions of Canadian dollars)

Sufficiency Ratio Statement

	Note(s)	September 30 2024	December 31 2023
Total assets under IFRS	1,2	41,303	38,164
Add: Asset adjustments	2,3	116	1,846
Less: Sufficiency Ratio non-controlling interests	3	(274)	(294)
Sufficiency Ratio assets		41,145	39,716
Total liabilities under IFRS	1,2	33,773	33,050
Less: Liability adjustments	2,4	(430)	(637)
Sufficiency Ratio liabilities		33,343	32,413
Sufficiency Ratio (assets divided by liabilities)		**123.4%**	**122.5%**

Based on my rough arithmetic, at the end of Q3 2024 with sufficiency assets at $41.145 billion and sufficiency liabilities at $33.343 billion, an increase of $0.534 billion (+1.3%) in the assets would put the sufficiency ratio over the 125% line and trigger the distribution to 115.1%.

The WSIB is right to avoid 125% funding - but - for different principled reasons

The WSIB is right to keep away from a 125% funding level but not for the reason to simply avoid the mandatory disbursement to 115.1%. If the Board adhered to what I believe is the guiding canon of inter-generational equity, the Board would in fact never get close to 125% unless there was a clear evidence-based reason to do so. The objective is not to get as far north of 115% funding without triggering the 125% mandatory distribution. I suggest that the principle of inter-generational employer equity *requires funding to stay as close to 115% as possible* while maintaining a prudent evidence-based "risk appetite" to ensure funding does not fall below 110% and most certainly avoids the statutory "*do-not-cross*" red-line of 100% (**WSIA, ss. 97.1 (1) (c), 100 (c); O. Reg. 141/12, s. 1 (2)**).

Is the WSIB's approach out-of-sync with the law and regulation?

For the reasons set out in my inter-generational employer equity argument, in my view, the Board's approach as articulated in the **Funding Policy** is at odds with the broad guidance of the **WSIA** and **O. Reg. 141/12**. With that said, the Board's policy is likely not "unlawful," meaning that any attempt to strike down the policy would fail. That does not mean at all that the Board's policy approach is the best or most appropriate, just that it is unlikely to be held to be "unreasonable" in a legal sense. I will not set out an elaborate administrative law analysis on the process required and principles involved to have the application of a WSIB policy declared *ultra vires* (beyond the power of the WSIB), beyond this thumbnail sketch (which admittedly does this broad and complicated subject little justice - pun intended).

The WSIB enjoys quite a powerful privative clause in **WSIA s. 118 (3)** ("*. . . an action or decision of the Board under this Act is final and is not open to question or review in a court*"). Privative clauses are designed to protect administrative actions from judicial scrutiny. As the WSIB has the power to "*determine its own practice and procedure*" (**WSIA, s. 131**), most WSIB policies, including the **Funding Policy**, fall into the general rubric of "subordinate legislation" (see the still relevant 1960 Driedger Law Review article, "**Subordinate Legislation**"). Two recent Supreme Court of Canada (SCC) cases, ***Auer v. Auer*, 2024 SCC 36** and ***TransAlta Generation Partnership v. Alberta*, 2024 SCC 37**, offer some clarifying guidance on the reasonableness versus correctness standards (see also this excellent SCC posted summary on the "standard of review" in administrative law cases). The WSIB **Funding Policy** would not likely be held to be *ultra vires* by any reviewing court. In my view, the real culprit here is **O. Reg. 141/12** which allows too broad a WSIB discretionary authority.

The real problem is the broadness of O. Reg. 141/12

If inter-generational employer equity is the desired guiding principle, **O. Reg. 141/12** should be amended. The following principles should apply:

- The WSIB should still have the discretionary authority to issue a surplus distribution, *or not*, when funding is between 115% and 125%.
- However, I suggest an expectation of disgorgement if funding reaches and/or exceeds 115% unless there is a sound, evidence-based reason not to disgorge. The Board must publicly explain that decision.
- The Board should be required to return to this question every year the sufficiency ratio is above 115%.
- The regulation must also require the WSIB to develop guidelines to be approved by the Minister for the exercise of the discretion not to disgorge a funding surplus. Those guidelines should be included in the Memorandum of Understanding (MOU).

Public accountability is enhanced by a duty to explain

While the Board maintains the same scope of discretionary authority, public accountability is enhanced through the requirement to consider and publicly explain the decision to disgorge or not. This is my suggestion for an amendment to **O. Reg. 141/12**:

Distribution of excess between 115% - 125% funding

5. Subject to section 6, when the sufficiency ratio exceeds 115% but is less than 125% the Board shall develop a plan to distribute excess funding to employers to the Minister, and the plan shall be publicly released.

6. If there are evidence based reasons not to distribute excess funding to employers when the sufficiency ratio exceeds 115% but is less than 125%, the Board may decide to not distribute excess funding to employers but the Board shall provide those reasons to the Minister and shall publicly release those reasons.

7. The Board shall review its reasons provided under subsection 6 by January 31st of every subsequent year the sufficiency ratio exceeds 115% and the Board shall provide the results of the review to the Minister and publicly release the results of the review.

Minister may obtain review

8. The Minister may obtain a review of the Board's reasons not to distribute excess funding to employers, 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.

9. The review shall be conducted by an actuary or auditor appointed by the Minister.

Report on findings of review

10. The actuary or auditor shall, on completing the review, submit a written report to the Board and the Minister on the findings of the review.

Board shall establish guidelines

11. The Board shall establish guidelines for the operation of section 6 and those guidelines must be approved by the Minister and upon approval shall be incorporated into the Memorandum of Understanding.

This amendment simply creates a "**duty to explain**" when funding is above 115%. ***I don't think that's too much to ask when so much is at stake***. Next issue: ***Bill 229*** and my suggestions to Schedule 1 and Schedule 2 employers.