Manufacturing Crisis in Workers' Compensation

David K. Wilken
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DAVID K. WILKEN

I. INTRODUCTION: TRIUMPH OF THE CRISIS LOBBY
Every year, a predictable scenario is played out in several jurisdictions across North America. Stories begin to appear in the media documenting the skyrocketing costs that have thrown workers' compensation into crisis, creating a nightmare for hapless employers. Experts appear on the scene to lay the blame on overly generous benefits and abuse of the system by workers.

Workers' compensation "reform" becomes a hot item. The competitiveness of the state or province in the global economy depends upon it. The result is a downward spiral of worker entitlements as governments race to outdo each other at the chopping block. The beneficiaries are employers, their lawyers and, in the United States, the private providers of their insurance and medical services.

In Ontario, a small army of business lobbyists, lawyers and consultants has been labouring for years to create the impression that the Workers' Compensation Board (WCB) is out of control. They have alleged that the WCB's rising debt and increasing assessment rates are symptoms of past irresponsibility on the part of politicians eager to reap the immediate political rewards of increased benefits without considering the long-term financial cost. The familiar prescription is to slash entitlements and hack away at benefit levels.

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Successive Liberal and NDP governments attempted to appease this powerful lobby, but to no avail. Bill 162\(^1\) overhauled the Workers’ Compensation Act\(^2\) (hereinafter, WCA) through the introduction of a dual award system in 1990, while Bill 165\(^3\) rolled back billions of dollars in future inflation protection on January 1, 1995. Needless to say, legal clinics and injured worker groups opposed these measures. But even these massive cutbacks, though accompanied by no comparable sacrifices on the part of employers, did not deter the lobbyists from their path — quite the contrary. One could even characterize the “reform” process of the late 1980s and early 1990s as a proving ground for employer options. Not only did the whole experience whet the appetite of employers for more cutbacks, it provided the impetus for them to develop detailed proposals for legislative action that could serve as rallying points for employer lobbying.

As an example, one may consider the bipartite process instituted by the NDP in the early 1990s. The Premier’s Labour Management Advisory Committee (PLMAC), made up of business and union leaders, was given the task of reaching a consensus-based workers’ compensation reform package. In the end, however, the very nature of the bargaining process between the two factions on the PLMAC, which was heavily dependent on the participants’ perceptions of what the government would or could impose if no agreement was forthcoming, meant that the employers were able to use the process as a stepping stone. At the end of the day, the diminishing fortunes of the NDP government allowed the employers on the committee to achieve a final legislative product containing substantial cutbacks, while every other employer in the province was free to attack the government for half-measures in cost-cutting and overly generous concessions to injured workers. Both opposition parties took up the call and promised further cutbacks if elected.\(^4\) Meanwhile, the dissident unions, injured worker groups and legal clinics who had opposed the legislative package in whole or part could only hope for a positive response from the Royal Commission created to examine all aspects of the system.\(^5\)

It is by now trite to point out that the Progressive Conservative government of Mike Harris which took office in the Summer of 1995 pursues a strategy of “creating a useful

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crisis" as a prelude to action. In the case of workers' compensation, the crisis lobby had been laying the groundwork for years. The government was able to begin acting within months of taking office by eliminating the Royal Commission, which it viewed as "high profile, high cost", and replacing it with a "more focused, time limited review process." In place of the Commission, Mr. Harris appointed Progressive Conservative MPP Cam Jackson as Minister Without Portfolio Responsible for Workers' Compensation Reform.

The process of change did not stand still while Mr. Jackson completed his review. In November 1995, Minister of Labour Elizabeth Witmer fired the WCB's bipartite Board of Directors and introduced Bill 157 which confirmed the change in the Board's governance. It also set out to "strengthen anti-fraud measures and eliminate abuses of the system." The measures designed to reach these goals included the creation of a number of new provincial offences and the strengthening of collection procedures for overpayments of benefits to injured workers. The rationale for these steps would become familiar:

We are acting now because the [B]oard is on the brink of a financial crisis. ... The unfunded liability calls into question the long-term financial viability of the [B]oard and its ability to provide future benefits to injured workers. ...

On top of that, Ontario employers already pay the second-highest premiums for workers' compensation in Canada. These excessive rates are a major barrier to job creation, new investment and growth in the province.

These themes were repeated in January 1996, when Mr. Jackson issued a discussion paper entitled New Directions For Workers' Compensation Reform (hereinafter, Discussion Paper), which outlined a number of options for cutting entitlements and


8. On the day Bill 15 was introduced, the Minister announced that the President of the Board would be allowed to rule by decree until a new Board of Directors was established. Ontario, Legislative Assembly, Official Report of Debates (Hansard), No. 20 at 598 (1 November 1995). This arrangement was retroactively raised to legality by virtue of s. 6 of the Bill.

9. Ibid.


11. Supra, note 8 at 597.

lowering the level of benefits for injured workers. The release of the Discussion Paper was followed by an opportunity for submissions and a series of closed-door meetings with interested parties, now known as “stakeholders”, in February and March, 1996. The public component of this process did not consist of public hearings, but amounted to a presentation on behalf of the government by hand-picked experts from around the world. The International Forum on Workers’ Compensation, Health and Safety was held in March, 1996. According to Mr. Jackson:

> Participants learned that workers’ compensation reform has been occurring around the world and that Ontario is lagging behind international reform trends. Speakers and participants expressed strong support for the analysis and the goals articulated in Minister Jackson’s Discussion Paper.\(^\text{13}\)

This “discussion” was followed by Mr. Jackson’s New Directions Report\(^\text{14}\) in June 1996. The government’s major legislative package, Bill 99,\(^\text{15}\) was introduced in November 1996 and contained significant revisions to Mr. Jackson’s recommendations. The Bill itself then went through a process of public hearings and numerous amendments, passing final reading and receiving Royal Assent in early November 1997. By the end of this two year process, there was considerable room for confusion over which proposals had actually been enacted.\(^\text{16}\)

It is no exaggeration to characterize Bill 99 as an attempt to place the workers’ compensation system on new foundations. It replaced the WCA with the new Workplace Safety and Insurance Act, 1997 [hereinafter, WSIA], which came into force on January 1, 1998. The change in name also affects the Board, which has become the Workplace Safety and Insurance Board (WSIB),\(^\text{17}\) as well as the Appeals Tribunal (now the WSIAT). The WSIA also introduces a new purpose clause which moves compensation for injured workers from first to last place in order of importance and even removes the qualification that such compensation should be “fair”.\(^\text{18}\) Among the more important substantive changes, it creates time limits for claims and appeals, reduces the rate of compensation from 90% to 85% of net average earnings, eliminates entitlement for chronic stress, allows for limits to be placed on benefits for chronic pain by regulation, and replaces the concept of vocational rehabilitation with that of “labour market re-entry”.

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16. For a discussion of Mr. Jackson’s recommendations and a comparison with the contents of Bill 99, see Hyland, supra, note 6, which also discusses a Cabinet Submission which was leaked during the period between the New Directions Report and Bill 99.
17. For the sake of clarity, this paper will continue to refer to “the WCB” or simply “the Board”.
18. Compare WCA, s.0.1 with WSIA, s.1.
The change with the largest financial impact is the further cut in the inflation indexing of benefits for permanently disabled workers. Not only does this cutback affect workers injured before 1998, it will for the first time subject tens of thousands of workers who had previously been exempt to benefit de-indexing. These radical changes have been justified by portraying the WCB as financially “out of control”, suffering from a rising unfunded liability and imposing uncompetitive assessment rates on employers.

The realities of the situation are more complex and less flattering to the business community and government. In fact, thanks to the bitter medicine already forced on injured workers, even the phony financial crisis that served as the crisis lobby’s rallying cry in the past had been solved before the present government’s overhaul of the system was completed. This paper seeks to illustrate that point by demonstrating the following:

- The system never was in financial crisis. It was designed to have a large unfunded liability, and this is still a good idea, validated as sound public policy by politically independent examinations of the issue.

- Even if the unfunded liability could properly have been viewed as a crisis, it was already in decline prior to the government’s attack on injured workers’ benefits. By that time, the WCB had a higher funding ratio than in 1984, and even the projections used by the government to show a worsening situation demonstrate that the Board’s funding ratio would have continued to improve without further cutbacks.

- The present amount of the unfunded liability is overstated by billions of dollars due to outdated assumptions.

- Despite published assessment rates, workers’ compensation costs were already at their lowest level since the mid-1980s even before the government gave employers a 5% reduction in assessment rates in accordance with its Common Sense Revolution promises.

- Employers stripped more than $1 billion in assets out of the WCB’s investment portfolio in the first half of this decade — at the same time they were declaring the WCB to be insolvent!

- Ontario’s workers’ compensation costs were competitive with its largest competitors in Canada and the U.S. before the “reform” process began.

These issues have not been rendered moot by the passage of Bill 99. Understanding how the government and the crisis lobby have successfully misrepresented the Board’s financial situation in the past serves several useful functions. First, it lessens the chances that those otherwise well-disposed towards injured workers will be dazzled

19. The details of this change are discussed in Section II below.
into accepting unnecessary cost-cutting measures in the name of future non-existent crises.\textsuperscript{21} Second, it clarifies the potential public relations pitfalls that future pro-worker reform efforts should avoid. And finally, it will assist in understanding the immediate future, as the Progressive Conservative government attempts to further the goals of its constituency by “spinning” financial news in its favour.

II. THE UNFUNDED LIABILITY: A PAPER TIGER

The first line of attack against injured workers has been the unfunded liability. According to the crisis lobby, the WCB

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\text{is } 11\text{-billion in the hole largely because generous politicians, over the past decade, kept improving the benefits paid to injured workers retroactively but ignored the matter of how to pay for them. }\ldots \text{ A private insurer forced into this situation would soon be bankrupt.}\textsuperscript{22}
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In 1993, business members of the Premier’s Labour Management Advisory Committee (PLMAC) formed by Bob Rae’s NDP government even claimed that “[t]he system is already technically bankrupt.”\textsuperscript{23}

The legislative package recommended by the entire PLMAC and enacted by the NDP government in 1994 sought to restore the Board’s financial viability primarily through an attack on the inflation indexing of the benefits paid to permanently disabled injured workers. This is clearly the plum that the employers were after all along, since the introduction of automatic annual indexing in accordance with the Consumer Price Index (CPI) by a Progressive Conservative government in 1985 was the prime example of a benefit improvement which applied retrospectively (not retroactively) to all injured workers.

The so-called Friedland formula for inflation indexing contained in the NDP’s Bill 165 replaced full indexing in accordance with the Consumer Price Index with the formula \((3/4 \times \text{CPI}) - 1\textsuperscript{24}\). The expected long-term effects were quite striking. A 35

\textsuperscript{21} In this context, it should be remembered that until the Bill 165 hearings in 1994, worker advocates had not offered a sustained critique of the crisis rhetoric around the unfunded liability. At that time, Michael Webster produced a paper entitled \textit{The Ontario W.C.B.'s Unfunded Liability: Myths and Realities} (Toronto: 1994), which formed part of the submissions to the Standing Committee on Resources Development by the Toronto Injured Workers’ Advocacy Group and the Union of Injured Workers. The shift in focus from the question of whether workers or employers should pay the price for the unfunded liability to questioning the meaning of the unfunded liability itself marked a real turning point.


\textsuperscript{23} Supra, note 21 at 1.

\textsuperscript{24} WCA, s. 148. Both this indexing formula and the modified version contained in the WSIA, s. 49 place a ceiling of 4% and a floor of 0% on the annual adjustment to workers’ benefits. However, neither contains a rollover provision to make up for inflation above the ceiling in later years of lower inflation. The name “Friedland formula” refers to a Task Force on private retirement pensions chaired by Professor Martin Friedland of the University of Toronto Faculty of Law. In that context, the formula was put forward as an alternative to the \textit{lack of inflation indexing} in many pension plans. The authors
year old injured worker would watch the purchasing power of his or her WCB benefits cut nearly in half by age 65.25 When the PC government came to power, no one could seriously argue that injured workers had not “shared the pain” of hard times. The sacrifices demanded of them at the altar of the unfunded liability had been both extreme and enshrined in legislation. What able-bodied worker, public or private sector, has been the subject of legislation mandating a 2% annual reduction in real pay in perpetuity?26

Yet the responsible Ministers and the crisis lobby continued to claim that further drastic cuts were immediately necessary. If they were not made, employer assessment rates would continue to grow, creating unfairness for future employers who would be forced to bear the cost of past accidents. Most audaciously, the suggestion continued to be made that future payments to injured workers would not be secure unless the unfunded liability was dealt with immediately.

The most drastic of the Bill 99 cutbacks which followed was a further reduction in benefit indexing through application of the formula \((1/2 \times \text{CPI}) - 1\).27 Under this new formula, the result is an annual reduction in real pay of 3% in perpetuity. The benefits of our hypothetical 35 year old injured worker are now expected to lose nearly 60% of their purchasing power by age 65.28 This “modified Friedland formula” which came into effect on January 1, 1998 will apply to all injured workers except those with 100% permanent disability pensions (injuries before 1990) or 100% future economic loss awards (injuries after 1989).29

In addition to this small group,30 the NDP scheme had exempted tens of thousands of mostly unemployed workers injured before 1990 and

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25. This estimate is based on the WCB’s standard actuarial assumption that inflation will average 4% in the long run. Over 30 years, the Friedland formula for inflation indexing introduced in January 1995, would decrease purchasing power by 44%.

26. This is exactly what the partial de-indexation of long-term benefits means. Application of the formula \((3/4 \times \text{CPI}) - 1\) results in only a 2% adjustment to injured workers’ benefits when inflation is 4%.

27. WSIA, s. 49.

28. Using the Board’s standard actuarial assumption that inflation will average 4% in the long run, the modified Friedland formula introduced in January 1998 is projected to decrease purchasing power by 58% over 30 years. Application of the modified formula results in only a 1% adjustment to worker benefits when inflation is 4%.

29. WSIA, s. 50.

30. For example, 100% future economic loss (FEL) awards represented only 10.3% of the awards made during the first 11 months of 1997, up from 8.8% in 1996. Interestingly, the total number of FEL awards made in the first eleven months of 1997 represents only slightly more than half of the awards made during 1996, 1,826 as opposed to 3,540. This may at least partially explain the apparent rise in 100% awards. Ontario Workers’ Compensation Board, Monthly Monitor (December 1997) at 11.
eligible for pension supplements. Their benefits have gone straight from full indexing to the modified Friedland formula with the passage of Bill 99.

While it should not distract us from the fact that the NDP scheme was itself an unjustifiable attack on the permanently disabled, the inclusion of the supplement recipients under the modified Friedland regime results in an enormous cutback. Actuarial projections contained in the New Directions Report indicated that the changes to the benefit indexation formula and de-indexing of supplement recipients alone would account for 62% of the operational savings from its proposed reforms within the first year, as well as 61% of the reduction in the unfunded liability expected by the year 2014. This cutback is directly targeted at injured workers who suffer from permanent disabilities, and nearly every other aspect of the so-called reforms will have a disproportionate impact on them.

Can this draconian approach to the permanently disabled be justified by the Board’s “funding crisis”? The answer is no. The fact of the matter is that it is perfectly responsible for the Board to carry a significant unfunded liability so long as it has sufficient reserves to meet its future obligations as they come due.

31. The supplements are paid under s.147(4) of the WCA for wage losses over and above the pension amount. As of November 1997, the number of recipients stood at 29,373. Ibid., at 18. Another element of the NDP’s Bill 165 effectively raised the cap on these supplements (set at an amount equal to the federal Old Age Security pension) by allowing for the payment of an “additional $200” under s. 147(14) of the WCA. The exemption from partial de-indexing was attached to the additional $200, rather than the s.147(4) supplement itself. This was important because the additional $200 is also payable to workers who would be eligible for the s.147(4) supplement but are excluded because they are eligible for OAS payments. The number of workers falling into this category is not regularly reported by the Board.


33. New Directions Report at 52. This represents $219 million out of $353.2 million in operational savings during the first year of implementation, and $9.3 billion out of $15.2 billion in savings on the unfunded liability by 2014. These figures should be approached with some care. First of all, the final version of Bill 99 which became the WSIA did not exactly replicate the report’s recommendations. Secondly, the first operational savings were predicted to occur in 1997, a year before the WSIA came into effect, and to save the Board from an operational deficit of $295.6 million. In fact, it seems likely that the Board will have an operating surplus in the hundreds of millions of dollars for 1997. See, for example, Ontario Workers’ Compensation Board, 1997 First Quarter Report (18 June 1997) at 4 which reports net income from operations of $84 million during the first three months of the year. This compares with income of $22 million at the same point in 1996, a year which the Board finished with a total net income of $432 million. Ontario Workers’ Compensation Board, 1996 Annual Report at 9 [hereinafter, WCB Annual Report followed by the year of the report]. As of January 1, 1998, no financial information has been released by the Board since the 1997 First Quarter Report, no doubt because it would have contradicted the government’s crisis discourse during the public hearings and legislative debate around Bill 99. Third, the available financial data also demonstrate that the government’s projections of where the unfunded liability was headed without further legislative action were overly pessimistic. This is discussed in Section III below. Nevertheless, the enormity of the cut in terms of its sheer size should not be underestimated, while its importance relative to the rest of Bill 99 is probably still more or less accurately represented by the percentage figures cited in the text above.
A. The Unfunded Liability is Not a Debt.

The crisis lobby’s main line of attack has been that the WCB was somehow financially insolvent. Many members of the general public have no doubt drawn the conclusion that taxpayers are responsible for this debt. The political resonance of this approach in the present era of deficit-cutting and fiscal restraint is hardly surprising. What is surprising is that the insolvency assertion has formed the backdrop to numerous stories in the popular media and even to government legislation despite the fact that it is patently false. Even if the WCB were in debt, the responsibility for payment would rest with the employers of Ontario rather than the public purse. But in reality, the WCB is not and has never been in debt. In fact, it had over $6.8 billion in assets at the beginning of 1995, when the NDP’s Bill 165 came into force. Since that time, its assets have grown to $7.9 billion by the end of 1996 and will continue to grow.\(^3\)

The unfunded liability is the net difference between present assets and the capitalized value of all future payments that the WCB estimates it will make to or on behalf of workers who have been injured to date. This includes payments that will not be made for over 50 years. If all of these payments had been payable at the end of 1996, there would have been a shortfall of a little less than $10.5 billion.

Statements to the effect that the WCB was “technically bankrupt” are intellectually bankrupt. Technically or otherwise, a person or company goes bankrupt when it cannot pay its debts as they come due. The WCB has never failed to pay its debts, either to injured workers or to external service providers. The fact of the matter is that it is impossible for the WCB’s estimated future liabilities to all come due in any given year. Some of the payments are for medical or other services that will not be rendered for years, while most wage loss benefits to injured workers must by law be paid in periodic instalments.

So what does the unfunded liability mean? A good model for thinking about it is the system of Registered Retirement Savings Plans (RRSPs) and Registered Retirement Income Funds (RRIFs) that many Canadians use to save for their retirement. Suppose that you are 65 years old and wish to supplement your other income with $2,000 per month from your personal plan. At age 65, you must have about $300,000 invested in your RRSP to cover your retirement. If that amount is rolled over into an RRIF with an 8% annual return, it will provide you with a payment of $2070 per month from age 65 to age 100.

Similarly, if the WCB was going to retire tomorrow,\(^3\) it would need about $18.3 billion invested at an annual rate of return equal to 3% over the rate of inflation. According

34. WCB Annual Report 1996 at 15. Note that this is so despite the conservative manner in which the Board values its investments. The latter constituted about $7.1 billion of the Board’s reported assets at the end of 1996. However, this “carrying value” may be contrasted with an actual market value of $8.6 billion at that same point in time. Since realized gains and losses in the Board’s equity portfolio are deferred and amortized over a five-year period, part of the difference between the market and carrying values may already have been realized. Ibid. at 18 and 19.

35. The figures used in this paragraph are current as of December 31, 1996. WCB Annual Report 1996 at 15. This is the last date for which audited figures are available and nearly the last date for which any
to the Board’s actuarial projections, this would allow it to continue paying the pensions, medical care and other benefits for all of the workers who have already been injured. Since it “only” has about $7.9 billion, its unfunded liability is nearly $10.5 billion (at the end of 1996).

If you were retiring at age 65 with only $129,000 instead of $300,000 to put in your RRIF, then you would have about the same ratio of assets to estimated future liabilities as the WCB (a little less than 43% at the end of 1996). Unlike the Board, you would be facing bankruptcy in a few years. Your only choice would be to either re-enter the workforce or cut your expenses. Since you would be unlikely to find a job at that age, the wisest course definitely would be to fully fund your retirement.

This would also be the prudent course for private insurance companies. They are required to fully fund their estimated future liabilities because, like a worker in his or her 70s, they cannot guarantee a future stream of income from other sources. Unlike the WCB, private insurers could be “retired” at any time by the competitive market for premium dollars. If they relied on premiums from future customers to meet indemnity payments to their current policyholders, these companies would be nothing more than pyramid schemes that could collapse due to losses in their share of the insurance market.

The Board, however, does not face these difficulties, because it is not about to retire. As a monopoly insurer, it does have a guarantee of future income unless and until it is “retired” by the legislature. Its RRSP only needs to be large enough to cushion disruptions in its regular stream of income.

B. Full Funding is Not Necessary

The [WCB’s] $11.4 billion unfunded liability ... threatens the viability of the workers’ compensation system.37

Hon. Cam Jackson

In my earlier discussions of inflation, I noted that the system is now only about half funded, given realistic assumptions about inflation, interest rates, and future adjustments to pension benefits to keep them abreast of rising prices. This does not pose a threat to the fiscal soundness of the program. [emphasis added] It simply means that the Board must use its power to levy assessments in later years to meet

figures are available. The practice of issuing quarterly reports has not been followed since the 1997 First Quarter Report, supra, note 33.

36. This is not to minimize the problem of incomplete coverage under Ontario’s workers’ compensation system. The Board is not about to retire, but it’s not as young as it used to be either, and expanding coverage over the growing service sector is necessary to improve its vitality. As noted in the Discussion Paper, Ontario has by far the lowest level of coverage in Canada with only 70% of the workforce covered, as opposed to 77.4% for Alberta. Coverage for the other provinces and territories ranges from 80.8% to 100%. Discussion Paper at 45.

future liabilities on a “pay-as-you-go” basis. The main virtue of this policy is that the Workers’ Compensation Board does not drain out of the private sector massive amounts of capital. ... 38

Prof. Paul C. Weiler, Harvard Law School

The requirement that social programs be “sustainable” has become a standard argument in support of benefit cuts. 39 However, there was absolutely no evidence to support the PC government’s assertion that the unfunded liability threatened the financial viability of the WCB. In fact, the system was designed with the intention that a large portion of its liabilities would be unfunded, and it successfully weathered both the Great Depression of the 1930’s and the Great Recession of the 1990’s without full funding. Politically independent examinations of the funding question have consistently reached the conclusion that full funding is not only unnecessary, but positively undesirable.

When Chief Justice W.R. Meredith was designing the system in the early part of this century, he considered the funding options in some detail. There were two broad paths to choose from:

full funding – each year the WCB collects and sets aside enough money to capitalize all of the future costs of the injuries occurring in that year; and
current cost financing – each year the WCB collects enough money to meet the payments which become due for present and past injuries.

During the hearings held by Chief Justice Meredith before he designed the system, the strongest proponent of current cost financing was Mr. Miles M. Dawson, representing the Canadian Manufacturers’ Association. Mr. Dawson pointed out that in the case of a public monopoly, there was no danger of bankruptcy, even if none of the insurer’s future liabilities were funded. 40

Mr. Dawson also tackled the question of fairness to future employers which exercises the crisis lobby’s imagination a great deal. 41

38. Ontario, Reshaping Workers’ Compensation for Ontario; A report submitted to the Minister of Labour by P. Weiler (November 1980) at 82.
40. “There is no danger of members leaving and joining another scheme, and consequently no danger of rates rising above normal even when no reserves are set up. It is possible, therefore, under such a system to merely assess the proper amount to meet each year’s current payments without setting up a reserve to provide for future payments.” Ontario, Interim Report on Laws Relating to the Liability of Employers (Toronto: King’s Printer, 27 March 1912) (Commissioner: Hon. Sir William Ralph Meredith, C.J., C.P.) at 107.
41. For example, the idea has been floated that every time an employer hires a new employee, it accepts responsibility for $4,000 of the unfunded liability. It is difficult to know what to make of this lament, since it is the crisis lobby and their government supporters who have been arguing that the unfunded liability should be retired at the expense of this generation of employers and injured workers. The nature of the calculations used to arrive at the dollar figure remains a mystery.
The only serious objection which can be urged against a system of current cost assessment is that it involves the throwing on future industry of some burdens accruing in the present. This objection is entirely outweighed by the consideration that the rate will not, when it reaches its maximum, be any larger than the capitalized rate, but as experience shows in Germany, will be much lower, and the further consideration that the immense sums of money which it would be necessary to lay aside as a reserve fund are left in active circulation in the employer's business. But the theoretical objection itself vanishes when it is remembered that employers and the community generally are now bearing, and will continue for a generation to bear the burden of the accidents of the past.\textsuperscript{42}

Chief Justice Meredith accepted the wisdom of these arguments and the workers' compensation system began on the basis of current cost financing with a reserve. This might also be called partial funding. In any event, it was well understood from the outset that the system would carry a significant unfunded liability.

Monopolies and other large employers listed in Schedule 2 of the Act, e.g. railroads and government bodies, were allowed to self-insure on a pay-as-you-go basis. These employers paid the cost of injured workers' benefits only as they came due. The manufacturing concerns and other employers listed in Schedule 1 of the Act paid assessments based on the risks of their industry. This basic scheme is still in place, with the exception of the shift in emphasis from current cost financing with adequate reserves to full funding for Schedule 1 employers.

When the Progressive Conservative government of Bill Davis asked Harvard Law School Professor Paul Weiler to review the system in the early 1980's, he revisited the funding issue in light of the movement towards inflation indexing that began in the mid-1970's. His conclusion was that

a requirement of total funding (on the basis of realistic assumptions about inflation adjustments) would be much too drastic a response to the problem of equity between generations of employers.\textsuperscript{43}

Examining the possibility of full funding, Professor Weiler noted that

Instead of being available for investment by the private entrepreneurial sector, this capital would have to be disposed of by public officials in accordance with a necessarily conservative investment program.

When he pointed this out to the business leaders he met with,

they shied away from full funding by the WCB. They believe that the prospects for economic growth in this province are enhanced by entrepreneurial rather than governmental control of this huge pool of capital. ... I would treat this gap in funding of workers' compensation as an implicit loan by the Board to the employers of Ontario.\textsuperscript{44}

\textsuperscript{42} Supra, note 40 at 111.

\textsuperscript{43} Supra, note 38 at 83.

\textsuperscript{44} Ibid., at 75.
Viewed in the light of these comments, it is clear that not only is full funding unnecessary, but moving too quickly to establish full funding violates the fundamental principle of funding fairness that was incorporated into the original scheme. Namely, in the absence of qualitative leaps in health and safety performance, the best guarantor of fairness between different generations of employers is the maintenance of a stable funding ratio. As Professor Andrew Stritch of Bishop’s University has noted:

by law, employers cannot be ‘unduly or unfairly’ burdened by payments to cover accidents that have happened previously; however, if assessment rates were quickly raised to a level necessary to achieve full funding, then the burden on employers would be substantial. A full-funding strategy may, therefore, be illegal.45

Although a full-funding strategy is almost certainly legal in the technical sense,46 Professor Stritch has clearly identified the policy issue. Fairness to today’s employers demands that they not be forced to pay for the accidents of previous generations within a short period of time. Rather, equity lies in extending this burden by amortizing the unfunded liability over a longer period or moving to a strategy of partial funding, or a combination of the two.

One should also keep in mind just who benefits from the partial funding of the Board. As noted above, partial funding keeps a huge pool of capital in the hands of employers rather than the Board. This “loan” to employers allows them to invest that capital as they see fit. The major beneficiary of this loan is small business, while only governments and large corporations benefit from the investments of a fully funded system. As Professor Weiler put it,

One often over-looked virtue of the current system is that the Workers’ Compensation Board is able to invest implicitly in small firms in a manner it could never do with its actual investment portfolio, which is composed of comparatively gilt-edged securities.47

Although the Board’s investment portfolio has since changed in some fairly dramatic ways that are very significant for other reasons,48 investment in small business is not one of those changes. Equity between the various employers of any given generation thus also favours a strategy of partial funding.

There is a final element in the “viability” defence of full funding, however, which asserts that it is necessary to secure future payments to injured workers. This could be charac-

46. Professor Stritch is obviously referring to s. 116(1) of the WCA, which states that the Board is to maintain a reserve fund sufficient to “prevent the employers in future years from being unduly or unfairly burdened with payments that are to be made in those years in respect of accidents that have previously happened.” A similar provision can now be found in s. 96(3) of the WSIA. However, neither provision contains wording which explicitly restricts the Board from forcing the present generation to pick up the tab for previous generations.
47. Supra, note 38 at 83.
48. See Section III.C. below.
terized as the Tet Offensive theory of system financing: "We had to cut the benefits in order to pay them". In fact, the proposition is even more illogical than that, since it overlooks the fact that an economic disaster sufficient to render pay-as-you-go financing impossible would also devastate the Board's investment portfolio. This should be too obviously ludicrous to merit further comment. However, the Business Caucus of the Premier's Labour Management Advisory Committee did put a new spin on this argument which cries out for a response.

The Business Caucus argued that full funding "avoids the tendency of later generations to cut benefits when sufficient funds are not available." This is an impressive display of faux naivete. The very group lobbying for massive cuts to worker benefits despite the existence of a reserve fund containing billions of dollars, believes that "later generations" will not be tempted to cut benefits if "sufficient funds" are available. And this was written at a time when their constituency was stripping hundreds of millions of dollars annually from the Board's reserves. It should be clear that in the event of serious economic hard times, a fully funded workers' compensation system would represent a tempting target for government and business exploitation rather than security for payments to injured workers.

C. What Level of Funding is Necessary?

If full funding is not necessary, what would be an adequate level of funding? The short answer is this: an amount "sufficient to cover all reasonable contingencies". During his investigation of the system in 1980, Professor Weiler noted that the Board's method of valuing its liabilities no longer accurately captured its financial situation. Although automatic annual indexing of workers' compensation benefits was not brought into the system until the passage of Bill 81 in 1985, de facto annual indexing had existed since 1974 by virtue of a series of ad hoc legislative increases. Here is what he had to say about the Board's true level of funding and its sufficiency:

[T]he system is now only about half funded, given realistic assumptions about inflation, interest rates, and future adjustments to pension benefits to keep them abreast of rising prices. This does not pose a threat to the fiscal soundness of the program.

In 1990, the WCB published adjusted funding ratio figures dating back to 1990 using the "realistic assumptions" referred to by Professor Weiler. The results for the period between 1980 and 1984 were as follows:

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50. See Section IV.B. below.


53. For a history of the ad hoc adjustments, see G. Dee et al., Butterworths Workers' Compensation in Ontario Service (Toronto: Butterworths, Looseleaf) Table 12-7.

54. Supra, note 38 at 82.
WCB Funding Ratio, 1980–1984\(^{55}\)

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<tbody>
<tr>
<td>Funding Ratio</td>
<td>51%</td>
<td>43%</td>
<td>38%</td>
<td>34%</td>
<td>32%</td>
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It was this steady decline in the Board’s funding ratio which led to the adoption of a long-term funding strategy in 1984.\(^{56}\) A major cause of the decline was the failure to raise employer assessment rates to pay for the Legislature’s \textit{de facto} commitment to inflation indexing. The 1984 funding strategy set out to retire the resulting unfunded liability by including an amount earmarked for its reduction in each year’s assessment rates. In making the annual determination regarding the amount, the year 2014 was to be used as the target date for the elimination of the unfunded liability. This date has become the touchstone for talk about eliminating the unfunded liability, even though the only rationale for using it is that in 1984 “[t]hirty years was considered a suitable amortization period”\(^{57}\).

When it became clear that the recession of the early 1990s, with its accompanying decline in revenue, would mean increasing assessment rates to meet the 2014 deadline, the Board began to reassess its funding strategy. In a discussion paper issued in February 1992, the WCB suggested that assessment increases could be avoided by lowering the funding ratio to be achieved and/or lengthening the amortization period for the unfunded liability. For the most part, the specific options presented in the paper consisted of either full funding or 70\% funding as a goal, with an amortization timetable for reaching that goal stretching to either 2014 or 2024.\(^{58}\)

Were these proposals financially responsible? For the most part, the timetable for amortization is simply a matter of choice. It represents a standard for setting assessment rates, measuring progress and demonstrating the resolve necessary to meet the final goal. In fact, considerations of fairness to the present generation of employers favour a longer amortization period rather than a shorter one. As the funding strategy discussion paper concluded,

> If the current $10.3 billion unfunded liability generated by claims prior to 1992 is fully paid off by employers from 1992 to 2014, this would constitute a heavy and unfair burden on that particular group. A more even-handed approach, which sought to spread the responsibility more gradually over time, could be considered more equitable.\(^{59}\)

With respect to the issue of adopting a partial funding strategy, the discussion paper notes that “[a]s long as the WCB’s assets are sufficient to cover all reasonable contingencies, then partial funding should be adequate.”\(^{60}\) The very presence of 70\% funding as an option

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56. For a brief discussion of the 1984 funding strategy, see \textit{supra}, note 51 at i-ii.
57. \textit{Ibid.}, at ii.
58. \textit{Ibid.}, at 3.
60. \textit{Ibid.}
indicates that the WCB’s actuaries must have considered it sufficient (and the same may be said for the 2024 amortization timetable as it relates to reasonable contingencies in the short and medium-term). In light of Professor Weiler’s comments to the effect that even 50% funding did not threaten the soundness of the system, the suggestion does not seem out of line. Indeed, the reasonableness of the 70% option is also accepted by Professor Stritch in a paper published by the C.D. Howe Institute. This is not a soft option for the fiscally faint of heart, but appears to be a sound response to employer concerns. As Professor Stritch states,

If this course were adopted as a long-term strategy, it would relieve some of the pressure for increased assessment rates, which is a major concern of Ontario’s employers. However, the adoption of this or any other funding strategy first requires the board to solve its overall decision-making problem.\(^6\)\(^1\)

Why did employers continue to campaign for full funding by 2014, even though it meant higher assessment rates and WCB control of a projected $45 billion by 2014?\(^6\)\(^2\) Why did the Harris government lend its unqualified support to the concept of full funding despite its rejection by Chief Justice Meredith and Professor Weiler? The Royal Commission appointed by the outgoing NDP government with a mandate to investigate funding options held months of public hearings and did not even have the opportunity to issue its detailed discussion paper before being abruptly terminated in favour of Mr. Jackson’s truncated review. His *Discussion Paper* did not even consider the question of alternative funding models, but simply proceeded from the assumption that the unfunded liability represented a financial crisis.

It was clear even before the 1995 election that the goal of the PC Party in the workers’ compensation field was to trim worker benefits. This is what the PC government has done, using the so-called crisis as its justification. Treating full funding and the 2014 amortization timetable as indisputable presuppositions in talk about WCB finances helped give focus to the rhetoric and exaggerated the impending “crisis”. With each year that employers successfully suppressed assessment rates, higher future assessments were projected as necessary to meet the 2014 goal. Alternatively, projections which assumed stable assessment rates seemed to show mammoth increases in the unfunded liability by 2014. Since the price of fully financing the Board’s existing obligations by 2014 was too high to pay, the only alternative was to cut those obligations by cutting injured workers’ benefits. In reality, however, the projections of impending doom put forward by the crisis lobby do not stand up to scrutiny.

**III. THE STATE OF THE UNFUNDED LIABILITY**

Even if everyone had been agreed that a strategy of partially funding the Board’s liabilities should be preferred, there remains the question of whether legislative action by the PC government was necessary in order to produce stability. On this score, the government

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61. *Supra*, note 45 at 166. The issue of employer concerns regarding “increased” assessment rates is addressed in Section IV of this paper.

certainly presented the unfunded liability as though it were growing at a rapid pace and could not be brought under control without drastic action. Although projections were produced to demonstrate this point, further examination reveals that the predicted growth in the unfunded liability results solely from the inflationary presuppositions of the projections themselves. In real terms, they project a decline in the unfunded liability, with an accompanying increase in the Board’s funding ratio. This should hardly be surprising in light of the fact that this decline began even before the PC government took power. Furthermore, the government’s projections have already proven to be overly pessimistic, and part of the explanation is that changes in the Board’s investment practices have resulted in an overestimation of the unfunded liability. It seems highly likely that a realistic appraisal of the Board’s assets would have placed its funding ratio squarely within the 50–70% range before Bill 99 ever came into force.

A. The Unfunded Liability Was Not Growing

Did you know that ... in just ten years, the unfunded liability of the Workers' Compensation Board has more than quadrupled from $2.7 billion at the end of 1984 to $11.4 billion at the end of 1994?63

Hon. Cam Jackson

The presentation of the unfunded liability’s growth in Mr. Jackson’s statement is grossly misleading. First of all, he ignores the fact that the WCB changed its method of calculating the unfunded liability in 1985 after the introduction of automatic benefit indexing by Bill 81. As noted above, Professor Weiler expressed the opinion that this revaluation should have occurred years earlier. If the unfunded liability at the end of 1984 is calculated using the present method, the amount is $4.57 billion instead of $2.7 billion.64

Secondly, since the unfunded liability is a capitalized value specific to the year in which it is calculated, a fair comparison of these figures must be adjusted for inflation. At the end of 1984, the unfunded liability was 4.57 billion 1984 dollars. Converted into 1994 dollars, the amount grows to $6.415 billion.65 Expressed in constant 1994 dollars, the ten year increase from $6.415 billion to $11.402 billion certainly does not represent a quadrupling of the unfunded liability, despite the severe economic downturn of the early 1990s.

Even more significantly, legislative changes and administrative efficiencies in 1994 resulted in a decrease in the unfunded liability of $130 million.66 As little as two years

63. This statement is taken from the “Media Kit” which accompanied the Discussion Paper.
65. Inflation adjustments to dollar amounts from past years have been made using the Consumer Price Index for Canada figures from December of each year as reported in CCH Canada Limited, Canadian Labour Law Reports (looseleaf) at ¶29.
66. The fact that the Board did turn the corner at that particular moment in time is attributable to Bill 165, which resulted in a $276 million decrease in benefit expenses for 1994. The de-indexing provisions reduced the capitalized value of future benefits by $1.805 billion, while the additional $200 amount paid to the recipients of pension supplements added $1.529 billion. However, even without Bill 165, the Board would have improved its position from an operational deficiency of $504 million at the end of 1993 to one of $146 million at the end of 1994, a situation which the Board ex-
earlier, it was not expected that the Board would turn this corner until the late 1990s. This was followed by further decreases of $510 million in 1995 and $432 million in 1996. Calculated in constant 1994 dollars, the total decrease in the Board's unfunded liability between its high point at the end of 1993 and the end of 1996 amounts to $1.498 billion. The WCB's financial performance through the first quarter of 1997 indicates that another decrease is likely for that year.

**WCB Funding Levels**

(Funding Ratio and Unfunded Liability)

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<tbody>
<tr>
<td>Funding Ratio %</td>
<td>31.8</td>
<td>32.5</td>
<td>35.6</td>
<td>38.0</td>
<td>40.0</td>
<td>40.8</td>
<td>38.3</td>
<td>37.4</td>
<td>36.6</td>
<td>37.4</td>
<td>40.0</td>
<td>42.9</td>
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...explained as resulting from improvements in service delivery, lower administrative expenses and higher net assessment revenue. WCB Annual Report 1994 at 13-14.

67. Supra, note 51 at 3.


69. Supra, note 33.

The most significant statistic, however, is the Board’s funding ratio, i.e. the ratio of its present assets to the capitalized value of the future payments for which it is liable. This figure actually rose from 32.1% in 1984 to 37.4% at the end of 1994, despite some setbacks caused by the recession. While the PC government was designing its legislative package, the Board’s funding ratio continued to improve, reaching 42.9% by the end of 1996. That represents the best showing since 1981, and once again the initial financial figures for 1997 indicate that further improvement should be expected. In fact, every projection of future performance released by the WCB or the government since 1994 has predicted that the unfunded liability would continue to decline in real terms and that the funding ratio would continue to rise indefinitely without any further legislative change or even changes in policy or administration. Yet successive administrations have used these same figures to push for further savings on the backs of injured workers.

B. Decreases in the Unfunded Liability Were Expected to Continue

Without intervention in the system, the unfunded liability is likely to increase to over $14 billion by the year 2014, rather than be eliminated.71

Hon. Cam Jackson

In projections released in 1994, after Bill 165 was a fait accompli and prior to the Progressive Conservative ascension to power, the WCB predicted that its unfunded liability would continue to decline in real terms without any further legislative intervention. In fact, although these projections were made public as an accompaniment to a package of cost-cutting policies, they demonstrated that even policy changes were not necessary to achieve a steady real decline in the unfunded liability. The policy package in question appears to have been brought forward solely in order to meet the artificial deadline of 2014 for the complete elimination of the unfunded liability.72

According to the Board’s projections, with no further action the unfunded liability in 2014 would have been $12.886 billion, an apparent increase. Converted to constant 1994 dollars, however, the amount is equivalent to $5.999 billion, a decrease of 47% in real terms over 20 years.73 During this same period, the funding ratio was projected to increase from 37.4% to 55.2%.74 None of this should come as a surprise in light of the benefit


73. Inflation adjustments for future projections of the unfunded liability contained in the FIP have been made using the WCB’s standard actuarial assumptions of 2.65% for 1995, 3.30% for 1996 and 4% thereafter. These assumptions are taken from Ontario Workers’ Compensation Board, Actuarial Services Branch, Workers’ Compensation Board Schedule 1 Projection, List of Assumptions, Basic Assumptions (11 August 1993). This list of assumptions was used in formulating the projections used by the PLMAC during the negotiations preceding Bill 165. The 47% decrease in the unfunded liability is calculated from the actual year-end figure for 1994 ($11.403 billion), rather than the projected figure for that year contained in the FIP ($11.012 billion).

74. Once again, the actual funding ratio for year-end at 1994 (37.4%) is used in place of the projection contained in the FIP of 37%.
cut-backs contained in the NDP's Bill 165, specifically the loss of full indexation. The capitalized value of the Board's total liabilities — i.e. the amount of money needed in the accident fund to make all future payments to and for the benefit of injured workers — was expected to drop from $18.2 billion in 1994 to $13.39 billion in constant 1994 dollars by the year 2014, a real decrease of 26%.

First Unfunded Liability Projection, 1994

Stable Assessment Rates

As quoted above, in his Discussion Paper, Mr. Jackson claimed to have revised estimates which showed that the unfunded liability would increase to over $14 billion by 2014 unless legislative action was taken. In fact the “Media Kit” which accompanied the paper specified $14.5 billion. Although the government did not release any further figures at that time, it was pointed out in an earlier version of the present text that even this figure would represent a real decrease in the unfunded liability and a funding ratio of over 50% and rising in 2014 — unless the revised projection involved radically new assumptions regarding inflation.

75. Supra, note 72.
76. Supra, note 63.
This was confirmed when details of the projection were released as “Appendix B” to the New Directions Report. Although the revision of some assumptions did result in a projected unfunded liability of $14.494 billion in 2014, the figure in constant 1994 dollars was only $6.893 billion. That would still represent a decrease of 40% in real terms from the 1994 figure of $11.403 billion. It would also mark an increase in the funding ratio from 37.4% to 54.1%.

Second Unfunded Liability Projection, 1995
Stable Assessment Rates

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<tbody>
<tr>
<td>Funding Ratio %</td>
<td>37.4</td>
<td>39.7</td>
<td>44.7</td>
<td>49.6</td>
<td>54.1</td>
</tr>
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However, by the time the New Directions Report was released in June 1996, a problem with the projection had arisen. Namely, the end of year financial statistics for 1995 had become available, and they exposed the conservative nature of the government’s predictions. By the end of 1995, the unfunded liability and funding ratio had already made gains which had not been expected for four to five years. The funding ratio had

10:2 The I.A.V.G.O. Reporting Service 1 at 12.

78. New Directions Report, Appendix B. Conversions to constant 1994 dollars have been made using the assumptions stated in the projection of 2.5% inflation for 1995, 2.75% for 1996, 3% for 1997, 3.5% for 1998 and 4% thereafter.
risen to 40%, while the unfunded liability had declined to $10.892 billion or $10.626 billion in constant 1994 dollars.

This led to a new projection which began from the actual 1995 results, but used the same methods that had led the initial projection to become obsolete in less than one year. Even using that conservative method, the results of this third projection basically restored the results publicized by the Board in 1994, before the PC government came to power. In fact, the projected unfunded liability of $6.004 billion 1994 dollars in 2014 is within $5 million of the first projection. However, the third projection did predict a funding ratio of 60.1% by 2014, an even better result than in the first projection.79

### Third Unfunded Liability Projection, 1996

#### Stable Assessment Rates

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<tbody>
<tr>
<td>Unfunded Liability (billions $)</td>
<td>10.892</td>
<td>11.730</td>
<td>12.490</td>
<td>12.831</td>
<td>12.626</td>
</tr>
<tr>
<td>Funding Ratio %</td>
<td>40.0</td>
<td>43.7</td>
<td>48.5</td>
<td>54.4</td>
<td>60.1</td>
</tr>
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79. The use of more conservative methods to value the Board’s liabilities means that although the dollar amount of the unfunded portion is basically the same, the amount of the overall liability is greater. The proportion of the liability that is funded is correspondingly greater.

80. *New Directions Report*, Appendix I. Conversions to constant 1994 dollars have been made using the figures set out at *supra*, note 78.
Obviously, this third projection was not a very impressive foundation for the government's crisis rhetoric, so a fourth projection was done at the same time. While based on essentially the same premises as the previous two, it also took into account the effects of the 5% cut in employer assessment rates promised during the 1995 election campaign and slated for implementation in 1997. The result was the biggest projection yet of the unfunded liability in the year 2014 — $18.435 billion. Even this figure, however, represents a real decrease in the unfunded liability from $10.626 billion to $8.767 billion constant 1994 dollars, accompanied by a relentless increase in the Board’s funding ratio.

**Fourth Unfunded Liability Projection, 1996**

**Reduced Assessment Rates**

![Graph showing projected unfunded liabilities and funding ratios](image)

### Table: Unfunded Liability and Funding Ratio

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<tbody>
<tr>
<td>Funding Ratio %</td>
<td>40.0</td>
<td>40.8</td>
<td>41.2</td>
<td>41.5</td>
<td>41.7</td>
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81. *New Directions Report*, Appendix II. Conversions to constant 1994 dollars have been made using the figures set out at *supra*, note 78.
Manufacturing Crisis in Workers' Compensation

It will be noted that although the projected increase in the funding ratio is relentless, it is also minuscule. So minuscule, in fact, that the funding ratio of 42.9% which the Board accomplished by the end of 1996 already far exceeded the 41.7% figure projected for 2014. In other words, in less than one year, the funding ratio improved by 2.9% when an increase of only 1.7% was projected for a period of 19 years. The first quarter results for 1997 indicated a further increase in the funding ratio to 43.8%.82 In short, the Board's funding ratio was growing at more than 40 times the rate predicted in the fourth projection. At that point, quarterly financial reporting ceased.83

C. The Amount of the Unfunded Liability has been Systematically Exaggerated

The projections released by Mr. Jackson are not the first doomsday scenarios which have failed to materialize. A major factor in both creating and dispelling these impending disasters is that the unfunded liability has been systematically exaggerated through the use of highly conservative methods to value the Board's assets and liabilities. Any estimate of the unfunded liability requires that assumptions be made regarding future inflation, the performance of the WCB's investments and the lifespan of injured workers. In recent years, the most important factor leading to an exaggeration of the unfunded liability has been the choice of the discount rate used to value the Board's liabilities.

Here the term "discount" refers to a deduction made for future interest or returns on investment. The significance in the workers' compensation context is that the Board's liabilities, the payments it must make to and on behalf of injured workers for accidents which have already occurred, take the form of payments to be made over many years. To cover the liabilities created in any given year, it is not necessary to set aside each dollar which will be paid in future years, but rather enough so that the amount set aside together with the earnings from investing it will be sufficient to meet the payments. The "discount rate" used to reduce the future stream of payments to a present lump sum for investment reflects the expected real rate of interest or return on investment, i.e. the return over and above the rate of inflation.

At the end of 1996, the capitalized value of the Board's future liabilities was set at $18.332 billion. This figure is based on the assumption that any investments made in the present will return 3% over the rate of inflation each year in the future. Since the Board had $7.872 billion invested at that time, it had a funding ratio of 42.9% and an unfunded liability of $10.460 billion. While there is certainly some virtue in erring on the side of caution in this matter, a 3% discount rate is below the industry standard for workers' compensation insurers. Consequently, it overestimates the amount of the unfunded liability.

82. See supra, note 33 at 4. At the end of the first quarter of 1997, the WCB had assets of $8.098 billion and liabilities of $18.474 billion.

83. Ibid.
The National Council on Compensation Insurance, a lobbying group for private insurers in the United States, recommends a discount rate of 3.5% for private insurance companies. Despite the fact that they are not monopoly insurers like the WCB, this is considered a responsible method for valuing their liabilities. The 3.5% rate is also used by Alberta’s Workers’ Compensation Board. If Ontario were to adopt this standard, estimates of the unfunded liability would be cut dramatically overnight. Could the Ontario Board justify raising its discount rate to 3.5%? The answer to this question is a clear “yes”, given that the actual performance of the investment fund has far outstripped even this revised rate.

### Annualized Market Returns

#### WCB Investment Fund

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<th>Year</th>
<th>3 Years</th>
<th>5 Years</th>
<th>10 Years</th>
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<tr>
<td>1994</td>
<td>8.2%</td>
<td>8.7%</td>
<td>10.5%</td>
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<tr>
<td>1995</td>
<td>11.5%</td>
<td>12.1%</td>
<td>10.4%</td>
</tr>
<tr>
<td>1996</td>
<td>10.7%</td>
<td>11.8%</td>
<td>10.8%</td>
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<table>
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<tr>
<th>Year</th>
<th>3 Years</th>
<th>5 Years</th>
<th>10 Years</th>
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</thead>
<tbody>
<tr>
<td>1994</td>
<td>6.8%</td>
<td>6.1%</td>
<td>7.0%</td>
</tr>
<tr>
<td>1995</td>
<td>10.3%</td>
<td>10.2%</td>
<td>7.2%</td>
</tr>
<tr>
<td>1996</td>
<td>9.3%</td>
<td>10.2%</td>
<td>7.8%</td>
</tr>
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These returns are not aberrations. Rather, they reflect a significant shift in the composition of the WCB’s investment fund since 1985. At roughly the same time that automatic annual indexing was introduced, the Board began pursuing a more aggressive investment policy. In particular, there has been a major shift from relatively low yielding long-term bonds and mortgages to equities. In fact, investments in equities rose from nothing to a little more than one-third of the Board’s portfolio between 1985 and 1994. By the end of 1996, this proportion had risen to more than one-half of the portfolio. Under an investment policy adopted by the WCB Board of Directors in 1993,

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84. Joanne Wojick, “Critics not swayed by state fund growth”, Business Insurance, (Sept. 16, 1991). It should be parenthetically noted that the “critics” of state funds in the U.S. are never swayed by anything. They are the private insurers who stand to lose profitable markets.


86. For example, when the Workers’ Compensation Board of British Columbia raised its discount rate from 2 3/8% to 3% in 1993, the value of its liabilities decreased by $400 million. Ibid. at 111. The B.C. Board reported this as a decrease of $390 million, or nearly 10% of its total liabilities of $4.219 billion at the beginning of 1993. Workers’ Compensation Board of British Columbia, Annual Report 1993: Part I - Corporate and Financial Information at 35 and 42.

equities and real estate may comprise up to three-quarters of the Board's investments. But the discount rate has never been adjusted to account for this change in the portfolio's asset mix, despite impressive returns such as the 16.6% market return for 1996.

### Composition of Investment Portfolio

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<tbody>
<tr>
<td>Long-term Bonds</td>
<td>72.4%</td>
<td>67.6%</td>
<td>44.8%</td>
<td>36.8%</td>
</tr>
<tr>
<td>Mortgages</td>
<td>21.1%</td>
<td>18.2%</td>
<td>4.7%</td>
<td>†</td>
</tr>
<tr>
<td>Short-term Securities</td>
<td>6.5%</td>
<td>8.5%</td>
<td>11.1%</td>
<td>2.6%</td>
</tr>
<tr>
<td>Real Estate</td>
<td>0.0%</td>
<td>0.0%</td>
<td>4.5%</td>
<td>†</td>
</tr>
<tr>
<td>Equities</td>
<td>0.0%</td>
<td>5.7%</td>
<td>34.9%</td>
<td>56.7%</td>
</tr>
</tbody>
</table>

All of this should lead to the conclusion that a discount rate of even more than 3.5% could be justified. There is some precedent for this. In 1991, the Colorado legislature authorized its state fund to adopt a discount rate of 6% even though it is a competitive fund rather than a monopoly insurer. If this discount rate had been used to value the WCB's liabilities, Ontario would certainly have had a funding ratio in the 50–70% range prior to the passage of Bill 99. Furthermore, if a 6% discount rate were used in projections of Board finances, these would predict a large surplus in 2014 even without any savings from Bill 99 or the collection of a single assessment dollar for the purpose of paying off the unfunded liability.

If nothing else, a consideration of the discount rate demonstrates the extent to which the unfunded liability is a malleable theoretical concept rather than a terrifying practical crisis. Now that the Bill 99 cutbacks are in place, the government is free to put a new spin on the Board's finances if it wishes. This is one of the major advantages of a manufactured crisis. In light of the change in the asset mix and the actual market

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91. Supra, note 84.
92. Applying the 6% discount rate to the FIP projections of the Board's future liabilities results in a surplus of over $20 billion and a funding ratio of over 200% in 2014, based on an annual market return of 10% on the investment portfolio. The 10% rate is chosen based on the WCB's assumption of 4% annual inflation in projecting its future liabilities. It is assumed that assessments would be collected only at a rate sufficient to cover the new liabilities created in each year.
returns since the mid-1980s, the government may raise the discount rate while remaining suitably conservative. The effect of such a change on top of the Bill 99 cuts would result in an immediate, precipitous drop in the Board’s total liabilities, while greatly accelerating the amortization of any remaining unfunded liability.

The flexibility which the government now enjoys extends to the area of assessment rates. The present low discount rate also explains how it is possible that the unfunded liability is not much larger, despite the fact that employers pay nothing near the target assessment rates set by the Board’s actuaries and appropriated $1.4 billion dollars in WCB assets during the period between 1989 and 1994.

IV. THE UNFUNDED LIABILITY AND WCB ASSESSMENT RATES

About 30 per cent of the $3.00 average rate or $.88 is dedicated to eliminating the unfunded liability by the year 2014. By contrast, unfunded liabilities are a small component of rates charged by U.S. insurers and state workers’ compensation administrators, and the rates are correspondingly lower.93

Hon. Cam Jackson

The liabilities of the workers’ compensation system are funded through assessments paid by employers. These assessments are expressed as an amount per $100 of assessable payroll which varies depending on the nature of the business that the employer operates. “Assessable payroll” is generally reported by employers using the gross wages from T-4 summaries sent to Revenue Canada, up to the maximum earnings which may be insured in any given year.94 The maximum in 1997 was $56,100.95

Every year the Board’s actuaries set target assessment rates for the various rate groups based on projections of the accident costs for the rate group in the coming year, the ongoing costs of administering the system, and an amount dedicated toward paying down the unfunded liability of the rate group by 2014.96 These target rates are submitted to the Board of Directors for approval. Often, the target rates are then lowered due to political pressure from employers. Such a change occurred in 1994 when the $3.20 average target rate was lowered to $3.01.97


95. *OPM*, Document No. 05-01-02 at 5. The maximum for each year is set at 175% of the average industrial wage for Ontario. Compare WCA, s.38(1)(c) and WSIA, s.54(1).


97. *Discussion Paper* at 44.
Under further analysis, the statement quoted above from Mr. Jackson’s *Discussion Paper* is really quite inaccurate and misleading. Since new accident costs and ongoing administrative expenses must be paid first, deviations from the target rate due to politically compromised rate-setting or revenue leakage directly reduce the portion dedicated to the unfunded liability. The 19¢ decrease in the 1994 target rate, for example, lowered the amount available to reduce the unfunded liability from 89¢ to 70¢. Revenue leakage in the form of rebates and bad debts that same year reduced the figure to 22¢.98

**A. Workers’ Compensation Costs Were Not as High as Claimed**

The target rates presented to the Board of Directors each year are estimates based on actuarial projections, as are the rates they eventually set. What Mr. Jackson presented as “Actual Average Rates” at page 44 of his *Discussion Paper* were actually the rates set by the Board of Directors. Determining the average actual cost of workers’ compensation coverage requires one to move beyond those projections and look at how the books balance at the end of the year. Only after several factors have been taken into account can the actual cost be determined.

First is the actual distribution of payroll based on reports from employers. When the WCB reports its average target or standard (Board of Directors) rates, it reports weighted averages based on projections of the assessable payroll in each of the rate groups. As an example of the weighted average concept, suppose there are only two rate groups, with standard assessment rates of $11 and $4, respectively. If the payroll for the two groups is equal, the average rate will be $7.50, i.e. $15.00 divided by 2 units of payroll. But if the payroll for the first group was 6 times larger than that for the second, the average would be $10. This takes into account 6 units of payroll at a rate of $11 plus 1 unit at a rate of $4, for a total of $70. Divided by 7 units of payroll, the weighted average is $10. This concept is especially important when comparing average rates across jurisdictional lines. Once the average rate set by the Board of Directors for 1994 is adjusted for the actual distribution of payroll that year, it is seen to be slightly higher than $3.01 at $3.09 per $100 of assessable payroll.99

Second, there is the problem of bad debts. Particularly during a period of economic downturn, the Board loses revenue through its failure to collect assessments in a timely fashion. This can create a situation where employers who leave Ontario or suffer business reverses receive free workers’ compensation coverage. When they later close or go bankrupt, their assessments remain unpaid. In 1994, the charge against lost

98. The actual cost of workers’ compensation coverage per $100 of assessable payroll in 1994 was $2.53. This figure is derived from a comparison of reported payroll with net assessment revenue from Schedule 1 employers in 1994. *WCB Annual Report 1994* at 16.

99. This figure is derived from a comparison of reported payroll ($82.818 billion) and actual gross assessments ($2.557 billion) for Schedule 1 employers in 1994. The deviation upward is caused by greater than expected economic activity in industries with relatively high assessment rates. *WCB Annual Report 1994* at 16.
revenue for employer bad debts was $173 million.\textsuperscript{100} This was followed by bad debt charges of $164 million and $98 million in 1995 and 1996.\textsuperscript{101}

Third, the experience rating off-balance costs the WCB hundreds of millions of dollars in lost revenue each year. The NEER and CAD-7 experience rating programs collect surcharges from and issue rebates to employers based on their accident cost experience.\textsuperscript{102} Those businesses within a rate group which have better accident cost records pay less than those with worse records. In theory, this provides an incentive to run safe and healthy workplaces.\textsuperscript{103} These programs were originally intended to be revenue neutral, with surcharges and rebates cancelling each other out. However, they have grown increasingly out of balance. Refunds charged against revenue in the 1994 accident year exceeded surcharges by $359 million.\textsuperscript{104} That is more than all of the short-term disability benefits paid to the workers of Schedule 1 employers in the same year, which amounted to $337 million.\textsuperscript{105} Net refunds were $247 million in 1995 and $297 million in 1996. The latter figure once again exceeded short-term disability payments for that same year ($242 million).\textsuperscript{106}

When employer bad debts and the experience rating off-balance are taken into account, along with interest and penalties charged to employers, the actual cost for insuring $100 of assessable payroll in 1994 drops to $2.53. This means that 18% of the assessments that employers should have paid based on their reported payroll and the rates set by the Board of Directors were either refunded or never collected.\textsuperscript{107} When this analysis is extended to cover the entire period between 1985 and 1994, it appears that workers’ compensation costs in Ontario were at their lowest level since 1985.

\textsuperscript{100} \textit{Ibid.}

\textsuperscript{101} The Board’s billing methods were changed in 1996 in an attempt to address the problem of bad debts. However, the $66 million drop in bad debts as compared with 1995 was partially offset by a $42 million drop in interest and penalties. \textit{WCB Annual Report 1996} at 11-12.

\textsuperscript{102} The CAD-7 (Council Amendment to Draft #7) plan operates in the construction industry, while the New Experimental Experience Rating (NEER) plan applies to other classes of industry. For an overview of these programs, see \textit{supra}, note 96 at 36-40.

\textsuperscript{103} Advocates for injured workers have long argued that in practice, these programs are really just an invitation to suppress claims and aggressively “manage” those claims which are filed. See Biggin et al., \textit{supra}, note 5 at 57-60. For an overview of academic appraisals see E. Tucker, “The Employer Response to Experience Rating: What Can the Studies Tell Us?” (December 1997)12:1 The I.A.V.G.O. Reporting Service 13. Professor Tucker reaches the conclusion that “the academic literature does not lend strong empirical support for the ER [experience rating] hypothesis. Indeed, much of the literature suggests ER promotes socially undesirable behaviour by employers.”

\textsuperscript{104} \textit{WCB Annual Report 1994} at 16.

\textsuperscript{105} \textit{Ibid.} at 28.

\textsuperscript{106} \textit{WCB Annual Report 1996} at 11 and 22.

\textsuperscript{107} An 18% reduction is arrived at beginning from the $3.09 rate based on actual payroll distribution. \textit{Supra}, note 99.
The above analysis covers the period from 1985 to 1994 due to the importance of these years in the documents put forward by Mr. Jackson. However, there are also certain inherent limitations to this type of analysis. First of all, it does not account for the actual distribution of payroll as a factor in the comparison. Thus, for example, the actual cost of workers’ compensation coverage jumps to $2.77 in 1995 and then declines slightly to $2.72 in 1996. However, the properly weighted average standard rate as set by the Board of Directors was also higher at $3.12 and $3.15, respectively.\(^{109}\)

This would seem to indicate that the only fair way to make year-to-year comparisons is by rate group. However, these are not strictly comparable on a year-to-year basis for the period in question, given that Ontario moved from 108 to 219 rate groups on January 1, 1993 to correct inequities within the groups.\(^{110}\) Furthermore, the discon-

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108. *WCB Annual Report 1985–1996, passim. Discussion Paper* at 44. Actual cost figures are derived from a comparison of reported payroll with net assessment revenue from Schedule 1 employers. The net assessment revenue amounts reported by the Board are adjusted for experience rating net refunds and bad debts as well as interest and penalties on late payments.


110. Association of Workers’ Compensation Boards of Canada, *Workers’ Compensation Industry Classifica-
tinuity was not confined to that particular year, since the process of adjusting rates as a result of the reclassification has been going on ever since. As of January 1, 1998, only one of the 219 rate groups had reached its proper rate. The annual change in any given group’s rate may reflect a shifting of costs within the system rather than a real increase or decrease in the cost of claims. Also, figures for the experience rating off-balance and bad debts are not publicly available by rate group.

Finally, while improvements in the Board’s performance with respect to the off-balance and bad debts increase the figures for actual cost, should these really be considered as “costs” in light of the large operational surpluses for 1995 and 1996? The choice to collect and retain revenue sufficient to create a surplus which is used to pay down the unfunded liability is, as explained above, a policy choice rather than a matter of financial necessity. The relatively modest surplus in 1994, however, means that the $2.53 figure for actual cost in that year should be considered reasonable.

The information necessary to make that calculation was available to Mr. Jackson at the time he issued his discussion paper. And if there could be any doubt as to whether he was aware that the true cost of workers’ compensation was much less than the standard Board of Directors rate of $3.01, the $2.53 figure was brought to his attention and even received some media coverage. Yet the impact of revenue leakage was downplayed, as Mr. Jackson and later Ms. Witmer attempted to shift the blame for its consequences onto the level of benefits paid to injured workers.

B. The Investment Fund has Suffered From Employer Greed

During the period 1991–95, the WCB was compelled to transfer substantial sums annually from its investment portfolio (assets) to general operations in order to pay each year’s benefit payments. To date, these operational cash shortfalls amount to $1.65 billion (of which $250 million was transferred back into investments at the end of 1995). The effect of transferring significant sums every year from investments to pay for ongoing benefit costs is that interest is lost on these sums and they cannot be re-invested to ensure asset growth.

Mr. Jackson’s statement conceals and distorts the cause of these investment fund transfers. In fact, not one penny was necessary to pay benefits to injured workers. Every cent was paid out to employers in experience rating net refunds and bad debts. While net transfers from the WCB’s investment fund to general operations for the period 1990–1994 totalled


$1.4 billion, WCB payouts to employers for that same period amounted to over $1.75 billion. Among other things, this represents a massive shifting of costs to small businesses who pick up the tab for the experience rating off-balance and the Second Injury and Enhancement Fund transfers that experience rating encourages.

**Asset Stripping by Employers**

Cumulative totals of investment fund transfers and revenue losses due to experience rating off-balance and employer bad debts

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<tr>
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<tbody>
<tr>
<td>Revenue Loss in millions (Cumulative)</td>
<td>$183</td>
<td>$424</td>
<td>$789</td>
<td>$1206</td>
<td>$1667</td>
</tr>
<tr>
<td>Investment Fund Transfers in millions (Cumulative)</td>
<td>$0</td>
<td>$200</td>
<td>$600</td>
<td>$1000</td>
<td>$1400</td>
</tr>
</tbody>
</table>

113. Based on the difference between gross assessments (expected revenue based on actually reported payroll) and net assessments for Schedule 1 employers. *WCB Annual Report 1990-1994, passim.*

114. Second Injury and Enhancement Fund (SIEF) relief allows an employer to shift a portion of the costs of a particular claim from its accident cost record to the notional SIEF fund when a pre-existing condition, whether compensable or not, contributes to an injury or enhances its effect. The laudable intentions of the program are to combat perceived disincentives to hiring injured and other disabled workers and to protect individual employers from the unpredictable cost consequences of claims involving "thin-skulled" workers. In reality, it also produces a great deal of cost-shifting from employers with the means to aggressively manage claims onto small business and others who do not engage in such behaviour.

If they took their own pessimistic scenarios seriously, one would have expected the crisis lobby and the government to strongly protest the experience rating deficit and uncollected assessments. No such protest occurred. This is not surprising given that those who benefit most from these phenomena are those who act as advocates for employers.

Far from provoking employer protests, the off-balance may be the *raison d'etre* of the Board’s experience rating programs at this point in time. As Professor Eric Tucker of Osgoode Hall Law School points out, empirical research to date does not provide strong support for the effectiveness of experience rating as a means of encouraging workplace health and safety.

Why then do we have ER [experience rating]? Largely because employers want it. The design of ER in Ontario has resulted in an enormous discrepancy between penalties and rewards. ... Large firms especially benefit from ER because they are able, through claims management, to reduce their compensation costs and qualify for substantial rebates, without making costly investments to improve occupational health and safety. Workers bear the cost of this practice. They are under pressure not to report claims, to report lost-time claims as non lost-time claims and to participate in inappropriate return to work schemes.116

One should perhaps add that those who advise and advocate on behalf of these large employers are the claims managers themselves. These same lawyers and consultants have no doubt advised other employers on how to move out of Ontario or declare bankruptcy while avoiding WCB assessments. The result is free workers’ compensation coverage for their final year of operation in Ontario. The shortfall must be made up by other employers — or through investment fund transfers.

Before 1990, when employers began strip-mining assets in earnest, the WCB managed to keep revenue leakage to less than 3% of expected assessment revenue. If this record had been maintained during the 1990–1994 period, the WCB’s funding ratio would have been over 45% at the end of 1994.117 Despite the severe economic downturn, the investment fund transfers were not necessary to meet benefits needs, and the Board did nothing to reign in employer greed. Instead, the Bill 165 cutbacks allowed the Board to reenter the black without decisive action on revenue issues, while Bill 99 was overkill by any standard.

C. *The Unfunded Liability Does Not Cause Assessment Rates to Rise*

One of the distinct advantages which a phony, manufactured crisis offers is the ease with which it can be resolved. This is certainly the case with the rising WCB assessment rates which supposedly endangered Ontario’s ability to compete in the


117. This assumes the Board’s 1994 valuation of its liabilities using the 3% discount rate ($18.2 billion) and also that the revenue lost would have earned the 5-year market return of 8.7% beginning on the last day of the year in which it was lost. The additional $1.576 billion in the investment fund at the end of 1994 would have resulted in a funding ratio of 46%.
global economy. There is little doubt that both the government and the Board were at all times well aware of the discrepancy between the standard rates approved by the Board of Directors and given wide publicity each year and the actual cost of WCB coverage.

As noted above in Section IV.A., when the Board of Directors set an average assessment rate of $3.01 per $100 of assessable payroll in 1994, the actual cost to employers was $2.53. This trend continued in 1995 and 1996, when the actual cost of coverage was $2.77 and $2.72 respectively, despite published rates of $3.00.

In 1997, the Board implemented the PC election promise of a 5% decrease in employer assessment rates, resulting in a published rate of $2.85. It will likely be some time before the actual cost to employers can be calculated, as the Board has suspended its practice of publishing quarterly financial reports. However, we have a clue in the 1998 assessment rates that were released on October 20, 1997.

One single sentence paragraph from a “News Release” issued on that date states that “The average rate for 1998 will be $2.59 down from $2.85 in 1997.” If one perseveres in reading the release and accompanying materials, however, one learns that “this does not result in a significant net reduction to the employer costs”. Rather, “it more accurately describes the true cost of the system.” In other words, the cost of coverage in 1997, before the passage of Bill 99 and with the Board operating at a surplus, was only $2.59.

And this figure does not even take employer bad debts into account. The phony decrease is based solely on the payment of experience rating refunds on a prospective basis. Rather than setting a $3.00 rate which is effectively reduced through the experience rating off-balance, experience rating rebates are paid up front in lower rates. As a result, employer costs not only seem to go down, but the experience rating off-balance becomes much harder to pin down.

Placing this spin on matters nearly triples the apparent effect of the 5% rate reduction, while at the same time accelerating the amortization of the unfunded liability. The latter is effected by applying the substantial savings from Bill 99 to the unfunded liability, rather than funnelling them directly to employers through even lower rates.

As previously noted, the Board’s standard rate-setting model consists of setting an amount for all future payments related to the injuries occurring in that year, an amount to pay for ongoing administrative costs of the Board, and an amount necessary to reach the goal of eliminating the unfunded liability by 2014. For 1998, these figures are $1.08 for current claims cost, 42¢ for administration and 79¢ for amortization of the unfunded liability, for a total of $2.29. The additional 30¢ on the published rate represents an amount which could be permanently dropped from the assessment rate due to Bill 99. Of that amount, half will be used in 1998 to fully fund the reinstatement of the

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118. Supra, note 33.
of survivor's benefits for spouses who remarried prior to 1985. This is a one time charge. The other half has been named “special reserve applied to unfunded liability” to reflect the fact that “it is essential that the savings created by the reform be applied directly to the reduction of the unfunded liability.” This presumably means that the entire 30¢ will be applied to the unfunded liability in the future.\textsuperscript{120}

In January 1996, Mr. Jackson wrote that “About 30 per cent of the average rate or $.88 is dedicated to eliminating the unfunded liability by the year 2014.”\textsuperscript{121} His point was to demonstrate that it was the unfunded liability which caused uncompetitive assessment rates. Benefits for injured workers therefore had to be slashed.

Two years later, about 36% of the average rate is dedicated to eliminating the unfunded liability, and we may expect this to rise to 42% in 1999. This will give the government significant flexibility over the coming years to cut assessment rates, eliminate the unfunded liability on an accelerated basis or pursue a combination of the two goals. For the time being, it has declared the intention to pay down the unfunded liability.\textsuperscript{122}

Meanwhile, on paper, assessment rates have gone down from $3.00 to $2.59 per $100 of assessable payroll based on a cut that would amount to only 14/100ths of one percent of payroll even if wages and workers’ compensation assessments were the only payroll costs. No clairvoyance is necessary to see that “lower” rates will soon be transformed into the achievement of a PC government which has helped to make Ontario’s businesses competitive again. It should, however, be clear that the following conclusions are more accurate: first, the unfunded liability does not raise or lower assessment rates — people do; and second, Bill 99 was not necessary to create competitive assessment rates. If post-Bill 99 rates are competitive, then so were the pre-Bill 99 rates.

V. WCB ASSESSMENT RATES AND COMPETITIVENESS

A. Ontario vs. Québec

Ontario employers currently pay an average premium of $3.00 for every $100 of payroll, which is the second highest in Canada and 32 per cent higher than the national average.\textsuperscript{123}

\textit{Hon. Cam Jackson}

As explained above, the actual cost of workers’ compensation in Ontario does not correspond to the average standard rate set by the Board of Directors. Using this figure

\textsuperscript{120} Ibid.

\textsuperscript{121} Discussion Paper at 8.

\textsuperscript{122} The difficulty here is the ongoing conversion to a more detailed classification system, resulting in drastic assessment increases and decreases for some employers. According to the materials released by the Board, 71 rate groups will have increased rates in 1998. Supra, note 119. Although the Board of Directors has placed a cap on how quickly rates may increase, pressure from these employers could result in concessions.

\textsuperscript{123} Discussion Paper at 7.
to portray Ontario's rates as out of step with the rest of the country was simply misleading. Ontario's closest Canadian competitor in terms of size, population, and industrial base is Québec. In the same section of his paper, Mr. Jackson presented a chart which put Québec's average assessment rate at $2.60 while Ontario's was $3.00, or 13% higher in 1995. The last year for which full financial data was available at that time was 1994. In that year, Ontario's average published rate was $3.01, while Quebec's was $2.75. But while the actual cost to Ontario employers was only $2.53, Quebec's employers actually paid $2.79.

But this comparison still overestimates Ontario's costs, due to differences in coverage between the two systems. Only 70% of Ontario's workforce is covered by workers' compensation as compared to 86% for Quebec. Since average assessment rates are weighted averages, the exclusion from coverage of classes of employers with relatively high payrolls but low assessment rates means that Ontario's costs are overestimated relative to Quebec's. Some prime examples are the banking, insurance and real estate sectors. The table on the next page lists industries which are mandatorily covered under Québec's worker's compensation scheme, but only by application in Ontario. It also lists the rates at which the payroll in these industries would have been assessed in Ontario in 1994.

Only three small industries (trapping, forest conservation and passenger water transport) have assessment rates which would tend to cause Ontario's weighted average rate to rise. The rest of the industries on this list would be assessed at rates far below Ontario's average rate and have a combined payroll in the tens of billions of dollars.

It must also be kept in mind that only 65% of Ontario's employers are covered under Schedule 1 of the Act. The payrolls of industries covered under Schedule 2 of the Act are not included in determining the average assessment rate, except to the extent that individual employers apply to be transferred to Schedule 1. To the very large extent that they do not, Ontario's average assessment rate is further skewed, since these also tend to be relatively high wage industries with relatively low assessment rates.

124. Ibid., at 8.
127. See Section IV.A. above.
129. In fact, some employers who applied for coverage under Schedule 1 long ago have been opting to become self-insurers again. In 1994, 45 school boards with assessable payroll of about $2.5 billion did exactly that. Since their payroll had been assessed at a rate of only 62¢, this had an immediate effect on Ontario's standard average assessment rate. WCB Annual Report 1994 at 16.
<table>
<thead>
<tr>
<th>Industry</th>
<th>Rate Group</th>
<th>Standard Rate (1994)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trapping</td>
<td>181</td>
<td>3.99</td>
</tr>
<tr>
<td>Forest Conservation</td>
<td>190</td>
<td>4.72</td>
</tr>
<tr>
<td>Water Transport (Passenger)</td>
<td>580</td>
<td>4.93</td>
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<tr>
<td>TV/Radio Stations</td>
<td>983</td>
<td>0.68</td>
</tr>
<tr>
<td>Banks/Finance Industry/Insurance</td>
<td>956</td>
<td>0.20</td>
</tr>
<tr>
<td>Insurance/Realty Agencies</td>
<td>956</td>
<td>0.20</td>
</tr>
<tr>
<td>Accounting Offices</td>
<td>956</td>
<td>0.20</td>
</tr>
<tr>
<td>Lawyers</td>
<td>956</td>
<td>0.20</td>
</tr>
<tr>
<td>Management Consultants</td>
<td>958</td>
<td>0.39</td>
</tr>
<tr>
<td>Business Services</td>
<td>958</td>
<td>0.39</td>
</tr>
<tr>
<td>Colleges</td>
<td>812</td>
<td>0.45</td>
</tr>
<tr>
<td>Universities</td>
<td>817</td>
<td>0.45</td>
</tr>
<tr>
<td>Private Schools</td>
<td>810</td>
<td>0.62</td>
</tr>
<tr>
<td>Group Homes</td>
<td>858</td>
<td>0.85</td>
</tr>
<tr>
<td>Drug/Alcohol/Mental Counselling</td>
<td>875</td>
<td>0.58</td>
</tr>
<tr>
<td>Social Services (Non-Institutional)</td>
<td>875</td>
<td>0.58</td>
</tr>
<tr>
<td>Dental Offices</td>
<td>875</td>
<td>0.58</td>
</tr>
<tr>
<td>Physician Offices</td>
<td>875</td>
<td>0.58</td>
</tr>
<tr>
<td>Social Workers</td>
<td>875</td>
<td>0.58</td>
</tr>
<tr>
<td>Associations</td>
<td>981</td>
<td>0.59</td>
</tr>
<tr>
<td>Motion Picture Production</td>
<td>962</td>
<td>0.58</td>
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<tr>
<td>Clubs</td>
<td>944</td>
<td>1.85</td>
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<tr>
<td>Recreational Services</td>
<td>944</td>
<td>1.85</td>
</tr>
<tr>
<td>Barber/Hairdressing Shops</td>
<td>944</td>
<td>1.85</td>
</tr>
<tr>
<td>Funeral Services</td>
<td>944</td>
<td>1.85</td>
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<tr>
<td>Photographers</td>
<td>958</td>
<td>0.39</td>
</tr>
<tr>
<td>Travel Agencies</td>
<td>958</td>
<td>0.39</td>
</tr>
<tr>
<td>Membership Organizations</td>
<td>981</td>
<td>0.59</td>
</tr>
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The following table lists industries which are included in the calculation of Québec’s average rate, but are covered under Schedule 2 in Ontario. It also lists the rate group and standard rates applied to the payroll of individual employers who transfer to Schedule 1.130

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130. Supra, note 128.
The dangers of facile comparisons between the average assessment rates of different provinces should be obvious. In this particular case, it seems evident that assessment rates in Ontario were actually lower than those in Quebec at the time Mr. Jackson was writing.

Given the variations in coverage and distribution of assessable payroll, the only fair way to compare workers’ compensation costs as a measure of competitiveness is to compare the rates for similar industries. Such a comparison has been done in studies released by the KPMG management consulting firm in March, 1995 and in 1996. At the request of the federal government, KPMG reviewed a number of benchmarks of competitiveness for selected provinces and states as they relate to high tech, high wage industries.

In the 1995 battle between Ontario and Québec, the study found that workers’ compensation costs were lower in Ontario for four out of six industries, with one tie. In the pharmaceuticals industry, the only case in which Québec came out on top, Ontario’s “competitive disadvantage” in workers’ compensation amounted to less than 2/10 of 1% of gross pay. By 1996, Ontario’s rates were lower across the board.

### Workers’ Compensation as a Percentage of Gross Pay
**Ontario & Québec**

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<tr>
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<tbody>
<tr>
<td>Autoparts</td>
<td>4.92%</td>
<td>4.56%</td>
<td>5.51%</td>
<td>4.27%</td>
</tr>
<tr>
<td>Environmental Services</td>
<td>5.00%</td>
<td>5.00%</td>
<td>5.40%</td>
<td>3.60%</td>
</tr>
<tr>
<td>Food Processing</td>
<td>4.08%</td>
<td>4.00%</td>
<td>4.32%</td>
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<tr>
<td>Medical Devices</td>
<td>1.34%</td>
<td>1.25%</td>
<td>5.13%</td>
<td>1.52%</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>1.50%</td>
<td>1.67%</td>
<td>1.35%</td>
<td>1.32%</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>1.15%</td>
<td>1.00%</td>
<td>1.94%</td>
<td>0.88%</td>
</tr>
</tbody>
</table>


B. **Ontario vs. the United States**

Although it is difficult to compare U.S. and Canadian assessment rates, Ontario’s average rate is estimated to be over 40 per cent higher than the average rate in neighbouring Great Lakes states.  

Hon. Cam Jackson

Whoever made these estimates for Mr. Jackson certainly did have difficulties with the comparisons. Concluding that Ontario’s assessment rates are over 40% higher than those in neighbouring states requires one to make all of the possible mistakes canvassed above with respect to the interprovincial comparison and then some. Even the slightest effort to deal with the confounding factors demonstrates that this could not possibly be true, and that a fair comparison would show lower costs in Ontario than in the U.S.

It should come as no surprise, then, that the 1995 KMPG report mentioned above also found that Ontario’s rates tend to be lower than those of the six U.S. jurisdictions studied, which include two Great Lakes states. Of the six industries in the comparison, Ontario’s workers’ compensation costs were the lowest in four cases and second lowest in two.

**Workers’ Compensation as a Percentage of Gross Pay**

**Ontario & U.S., 1995**

<table>
<thead>
<tr>
<th>Industry</th>
<th>Ontario</th>
<th>TX</th>
<th>OH</th>
<th>NH</th>
<th>MN</th>
<th>NC</th>
<th>CA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Autoparts</td>
<td>4.56%</td>
<td>6.84%</td>
<td>5.35%</td>
<td>9.38%</td>
<td>9.07%</td>
<td>5.04%</td>
<td>2.41%</td>
</tr>
<tr>
<td>Environmental Services</td>
<td>5.00%</td>
<td>22.00%</td>
<td>10.74%</td>
<td>18.73%</td>
<td>8.87%</td>
<td>9.43%</td>
<td>8.17%</td>
</tr>
<tr>
<td>Food Processing</td>
<td>4.00%</td>
<td>11.65%</td>
<td>6.22%</td>
<td>11.65%</td>
<td>14.90%</td>
<td>4.34%</td>
<td>6.95%</td>
</tr>
<tr>
<td>Medical Devices</td>
<td>1.25%</td>
<td>3.27%</td>
<td>3.16%</td>
<td>4.46%</td>
<td>2.97%</td>
<td>1.78%</td>
<td>1.52%</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>1.67%</td>
<td>5.41%</td>
<td>3.16%</td>
<td>4.20%</td>
<td>1.99%</td>
<td>0.79%</td>
<td>3.86%</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>1.00%</td>
<td>5.86%</td>
<td>3.04%</td>
<td>4.44%</td>
<td>4.58%</td>
<td>1.45%</td>
<td>1.52%</td>
</tr>
</tbody>
</table>


The 1996 comparison produced the same relative rankings for these six states and six industries.

**Workers’ Compensation as a Percentage of Gross Pay**

**Ontario & U.S., 1996**

<table>
<thead>
<tr>
<th>Industry</th>
<th>Ontario</th>
<th>TX</th>
<th>OH</th>
<th>NH</th>
<th>MN</th>
<th>NC</th>
<th>CA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Autoparts</td>
<td>4.27%</td>
<td>12.58%</td>
<td>6.94%</td>
<td>7.02%</td>
<td>9.07%</td>
<td>5.04%</td>
<td>2.41%</td>
</tr>
<tr>
<td>Environmental Services</td>
<td>3.60%</td>
<td>10.99%</td>
<td>7.97%</td>
<td>14.69%</td>
<td>8.87%</td>
<td>9.43%</td>
<td>8.17%</td>
</tr>
<tr>
<td>Food Processing</td>
<td>3.82%</td>
<td>11.55%</td>
<td>6.55%</td>
<td>9.28%</td>
<td>14.90%</td>
<td>4.34%</td>
<td>6.95%</td>
</tr>
<tr>
<td>Medical Devices</td>
<td>1.52%</td>
<td>3.72%</td>
<td>2.03%</td>
<td>7.28%</td>
<td>2.97%</td>
<td>1.78%</td>
<td>1.52%</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>1.32%</td>
<td>5.41%</td>
<td>2.90%</td>
<td>4.15%</td>
<td>1.99%</td>
<td>0.79%</td>
<td>3.86%</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>0.88%</td>
<td>5.86%</td>
<td>2.93%</td>
<td>3.74%</td>
<td>4.58%</td>
<td>1.45%</td>
<td>1.52%</td>
</tr>
</tbody>
</table>

Ontario’s competitive advantage in workers’ compensation should come as no surprise given the increased administrative costs of private for-profit systems, as well as the private medical costs with which even monopoly state funds must contend. Clearly, the competitiveness miracle in workers’ compensation will be phony. When the time comes, the government will likely have the competitiveness of Ontario’s workers’ compensation costs confirmed by respected management consulting firms.

**VI. REAL PROBLEMS REQUIRE THOUGHTFUL SOLUTIONS**

The question, in my opinion, is not what other countries have done, but what justice demands should be done.  

*Hon. Sir William Ralph Meredith*

The tremendous attack on injured workers represented by Bill 99 cannot be justified based on a situation of financial crisis at the Board or a lack of competitiveness with other jurisdictions. The explanations provided above as to why this is the case also reveal some of the strategies which will be at the government’s disposal in manufacturing the phony miracle cure that is sure to follow the passage of the Bill 99 cutbacks. Simply placing a positive spin on the situation and adopting a few perfectly sound actuarial adjustments would go a long way toward a cure even without the Bill 99 cutbacks.

With the cutbacks, the present government and Board administration may well astound even themselves with the rate at which the unfunded liability decreases. But this phony financial miracle will leave behind real problems. In fact, the universally held opinion of advocates for injured workers is that Bill 99 represents a quantum leap in the

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genuine crises related to health and safety in the workplace, and the mistreatment of those who are injured through systemic discrimination, chronic unemployment and gross undercompensation.¹³⁸ For those who suffer serious, permanent injuries, the growing gap between de-indexed benefit payments and the rising cost of living will result in a massive transfer of costs from employers onto injured workers, their families and taxpayer-funded programs such as welfare.

But Bill 99 and the policies used by the Board to implement it represent more than a cut in the level of benefits.¹³⁹ They also make the management of claims by employers mandatory, increasing the likelihood and probably the intensity of the undesirable behaviours initially encouraged by experience rating. More claims will be suppressed and more injured workers with permanent disabilities will be offered short-term jobs which are terminated after their benefits have been safely cut off. This will help to ensure that Ontario’s workplaces become safer on paper, while incentives for real health and safety are reduced by making compensation cheaper and safety regulation and enforcement more “flexible”.

At the same time, in apparent contradiction to the miracles produced by the government and the private sector in balance sheets and statistical compilations, the dissatisfaction of injured workers with the Board will grow as benefits are reduced, job search programs are denied to the unemployed and time limits for appeals are missed. No doubt a number of former crisis lobbyists will promote privatization as a solution. Eliminating the unfunded liability from the balance sheet also eliminates the primary obstacle to an open market for private insurance companies and to the unchecked growth of private rehabilitation services and claims management consultants. While the government has done what was necessary to resolve the financial crisis, and employers and workers have reduced accidents and the length of claims through self-reliance, the storyline may well read, the Board bureaucracy is simply incapable of providing decent service to its “customers”. The only cure for the useful crisis around “customer satisfaction” is full-blown privatization.

It is not clear whether the present or any future government would throw its weight behind such a scheme. There are certainly counterbalancing pressures, including the interest of employers in the price benefits that a non-profit, monopoly insurer provides.

¹³８. For an overview of these problems, see Biggin et al., supra, note 5.
¹³９. The role of policy should not be underestimated. One objection that government politicians or Board bureaucrats could raise to the arguments in this paper is that Bill 99 also gives the Board the tools it needs to deal with its “revenue leakage” problem. In this context, they might well point to s.146 of the WSIA, which allows the Board to pursue successor employers for unpaid assessment debts. In fact, they would probably have to point to this section, since the Board previously had the statutory powers necessary to collect nearly all assessment debts, including the power to place liens on employer property. Prior to Bill 99 the Board also had the power to maintain revenue neutrality in its experience rating programs. What was lacking was not statutory powers, but the political will to use them. In this connection, it is noteworthy that the provisional Bill 99 policies released by the Board in January 1998 are entirely silent on issues of “revenue leakage”. Ontario, Workplace Safety and Insurance Board, Bill 99 Operational Policies (1 January 1998).
While employer attitudes are likely to play the largest role in the foreseeable future, one hopes that pressure from injured workers to do "what justice demands should be done" will again become a force to be reckoned with. In formulating specific proposals for reform, and particularly in addressing the problem of inadequate benefit levels and indexation, care must be taken to ensure that they appear on the balance sheet in a way that can withstand both serious scrutiny and public relations attacks by employers.