

Submission to the Standing Committee on Finance and Economic Affairs

Regarding Schedule 21 of Bill 135

**the Helping Ontario Families
and Managing Responsibly Act, 2010**

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Injured Workers' Consultants is a community legal aid clinic providing advice and legal representation on workers' compensation matters without charge to the injured worker community since 1969. In addition to case by case representation of individual injured workers, our mandate includes public legal education and community development with injured worker organizations such as the Ontario Network of Injured Workers Groups. We also work with the members of provincial parliament and senior management at the WSIB to seek improvements in law and policy affecting injured workers. We are here today, on very short notice, to share our views on the proposals in Schedule 21 of Bill 135. These are the proposed changes to the *Workplace Safety and Insurance Act*. We take no position on the other parts of the Bill.

Essential Features of Schedule 21

- Sections 1 and 2 of the Schedule 21 in the Bill introduce a legislative requirement to fully fund the workers' compensation system by adding a requirement to establish a fund to provide for future benefits in addition to the existing requirement to maintain sufficient funds to make the required payments as they become due. In addition, they eliminate the requirement for the WSIB to raise the rates of employers in the event of an insufficiency of funds.
- Section 3 eliminates the safety net of a loan by the government to the Workplace Safety and Insurance Board in the event of a real insufficiency of funds among the employers of Ontario.
- Section 4 eliminates the Minister of Labour's authority to issue policy directives to the WSIB.

Recommendation

Over the next year, workers' compensation funding will be on trial in a public inquiry announced by the WSIB on September 30th. At the end of this trial, Professor Harry Arthurs will give his verdict; either finding in favour of full funding or in favour of steady state / current cost funding. By legislating full funding now, the government is writing the verdict before the trial has taken place. This will do irreparable harm to the public credibility of the Arthurs review and will discourage those who may wish to support steady state funding from participating in the review at all.

It is our recommendation to:

1. Delete Schedule 21 from Bill 135. (That is, remove any reference to the workers' compensation system from the Bill.)

or

2. To give the provincial government and Auditor General peace-of-mind, maintain one, and only one, part of Schedule 21: s. 3(1) "Use of Reserve Funds" Section 100 of the Act is repealed." (That is, allow for the removal of the safety net of a government loan presently outlined in Sec. 100 of the Act.)

Reasons for the Recommendation:**1. There is No WSIB Funding Crisis**The unfunded liability

The unfunded liability is not a debt, it is a future cost. It is calculated by taking the amount needed to cover the total future costs of all workers' compensation claims that are currently 'on the books' and subtracting from that the amount of financial reserves that the Board has already put away.

Using round numbers, the money needed 'in the bank' today to be able cover the total future cost for all the claims now 'on the books' until the last injured worker has passed away, without collecting another cent from employers, is about \$28 billion, the WSIB has a reserve fund of about \$16 billion, so the unfunded liability is roughly \$12 billion. That means that our workers' compensation system is now roughly 55% funded. Is that good or bad?

Full Funding vs. Steady State (Current Cost) Funding

Ontario's workers compensation system was set up on the basis of the 1913 Royal Commission Report by Sir William Meredith, a former conservative premier of Ontario. The employer representatives called for a current cost system in which the WCB collects enough money from employers each year to cover the anticipated cost of benefits to be paid out in the year. The Canadian Manufacturers' Association's actuarial evidence was that employer rates would be lower under a current cost model than employer rates under a fully funded model. In addition, when employers are basically only paying this year for what the WCB has to pay out this year, they keep their money in their business until the WCB collects it to pay it out to injured workers.

The other approach is a fully funded system. The Board would charge employers up front for the total future expected costs of each injury from the day of injury until the day

the worker is expected to pass away. In a fully funded system, there is no unfunded liability.

Meredith's Report recommended a middle ground known today as steady state financing and used by the Canada Pension Plan. He recommended a current cost system with a reserve fund sufficient to cover emergencies such as a downturn in the economy or major industrial accident. He recommended that the size of the reserve fund be left to the discretion of the WCB because it is in the best position to decide what will be sufficient.

That is how Ontario's workers compensation system has been funded for the past 95 years. It survived two world wars, the 'Great Depression' of the 1930's and the 'economic tsunami' of 2008 and everything in between.

The concept of an "unfunded liability" really has had no place in the discussion of our public workers' compensation system until recent years. It is a concept that applies to the private insurance industry. A private insurance company is required by law to be fully funded because it could go bankrupt or close down tomorrow and must leave enough money behind to cover the claims on its books. Ontario's economy is in no danger of closing down or going bankrupt. As long there is business in Ontario, our workers compensation can continue to be funded on a current cost / steady state model.

Full Funding Works Against the Economic Interests of Employers

Will Ontario's employers be better off to have a fully funded workers' compensation system? That means that means that an additional \$12 billion (the current unfunded liability) is tied up in the WCB instead being left in their own business until it is time to pay injured workers. In a presentation to the Standing Committee on Public Accounts earlier this year, the WSIB President and CEO David Marshall estimated that the current WSIB financial reserves are sufficient to continue to pay all the claims now on the books for at least 25 years. It is not in the interests of Ontario's employers or Ontario's economy to hand over \$12 Billion today when the WSIB will not begin to pay any of it out until 25 years from today.

What would have happened if Ontario had a fully funded system in 2008 when the recession peaked and the value of all investments fell dramatically? With a \$25 billion investment fund, the WSIB would have lost well over \$4 billion in a flash, a huge disgrace. Would employers then be told to pay up *again* or would injured workers benefits then be cut?

A fully funded system would make our workers' compensation system more vulnerable to drops in the market caused by another economic downturn. This suggests that full funding of the workers' compensation system may not be financially responsible.

As a fully funded system, the WSIB would have had to collect that \$4+ billion immediately in order to restore full funding. Would Ontario's employers prefer to have a

fully funded system where, if the economy goes sour, they could be forced to contribute billions of additional funds for claims they already paid for?

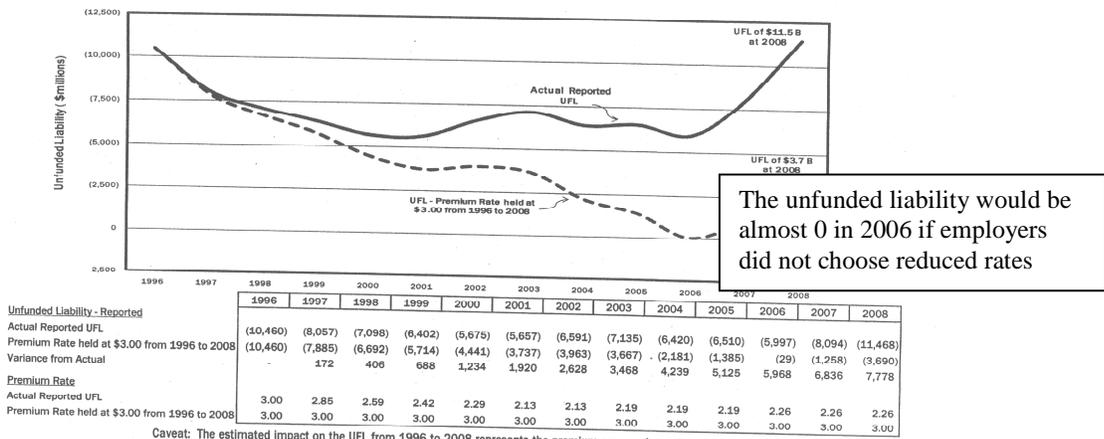
Injured Workers Have Already Paid for Full Funding

Cost of living adjustments were virtually eliminated in 1995 and 1998 and benefit levels were cut from a maximum of 90% of net earnings to 85% of net earnings and the loss of retirement income payment was cut from 10% to 5% in the name of the ‘war against the unfunded liability.’ This produced significant savings for the workers’ compensation system due to reduced benefit payments to injured workers. According to the WSIB, if employers continued paying the same rates and allowed the savings from the reduced benefits for injured workers to build up at the WCB, it would have increased the financial reserves and completely eliminated the unfunded liability.

However, employers, the WSIB and the government chose a rate reduction rather than a fully funded system. Employer assessment rates were reduced generously every single year from \$3.00 per \$100 of payroll in 1996 until they reached a low of \$2.13 in 2002. They are now \$2.30 per \$100.00 of payroll, still about 25% less than they were in 1996.

Ontario had the opportunity to reach full funding in 10 years without any additional cost to employers. It could not have been made any easier for employers to reach a fully funded system. They chose not to work towards full funding. The WSIB produced the chart below which demonstrates that if employers’ assessment rates had simply been kept at the 1996 level, by the year 2006 there would be no unfunded liability. The Ontario workers’ compensation system would have been fully funded in 2006 by the cuts to injured worker benefits.

1996 - 2008 Unfunded Liability & Premium Rates



	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Unfunded Liability - Reported													
Actual Reported UFL	(40,460)	(8,057)	(7,098)	(6,402)	(5,675)	(5,657)	(6,591)	(7,135)	(6,420)	(6,510)	(5,997)	(8,094)	(11,468)
Premium Rate held at \$3.00 from 1996 to 2008	(10,460)	(7,885)	(6,692)	(5,714)	(4,441)	(3,737)	(3,963)	(3,667)	(2,181)	(1,385)	(29)	(1,258)	(3,690)
Variance from Actual		172	406	688	1,234	1,920	2,628	3,468	4,239	5,125	5,968	6,836	7,778
Premium Rate													
Actual Reported UFL	3.00	2.85	2.59	2.42	2.29	2.13	2.13	2.19	2.19	2.19	2.26	2.26	2.26
Premium Rate held at \$3.00 from 1996 to 2008	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00

Caveat: The estimated impact on the UFL from 1996 to 2008 represents the premium revenue increase only and does not include any favourable investment impact. The higher premium revenue would have lowered investment withdrawals to fund operations, thereby increasing investment net assets and allowing for higher investment income, which would have lowered the UFL even further by 2008.



Compare With Canada Pension Plan Funding

Compare the funding of our workers' compensation system with the funding of our Canada Pension Plan. In April 2007, the Federal Office of the Chief Actuary released a study called "Optimal Funding of the Canada Pension Plan". In that study, the Chief Actuary reviews the options for funding a social security scheme. The report explains why the Canada Pension Plan has chosen a funding system like our WSIB that it calls "steady state" financing. The Canada Pension Plan is about 22% funded and its target is to reach 25% funding by the year 2025. The Canada Pension Plan keeps a financial reserve sufficient to cover future benefits for about 5 years. The Canada Pension Plan is highly regarded for its investment and funding strategy, but our WSIB is more than twice as well funded.

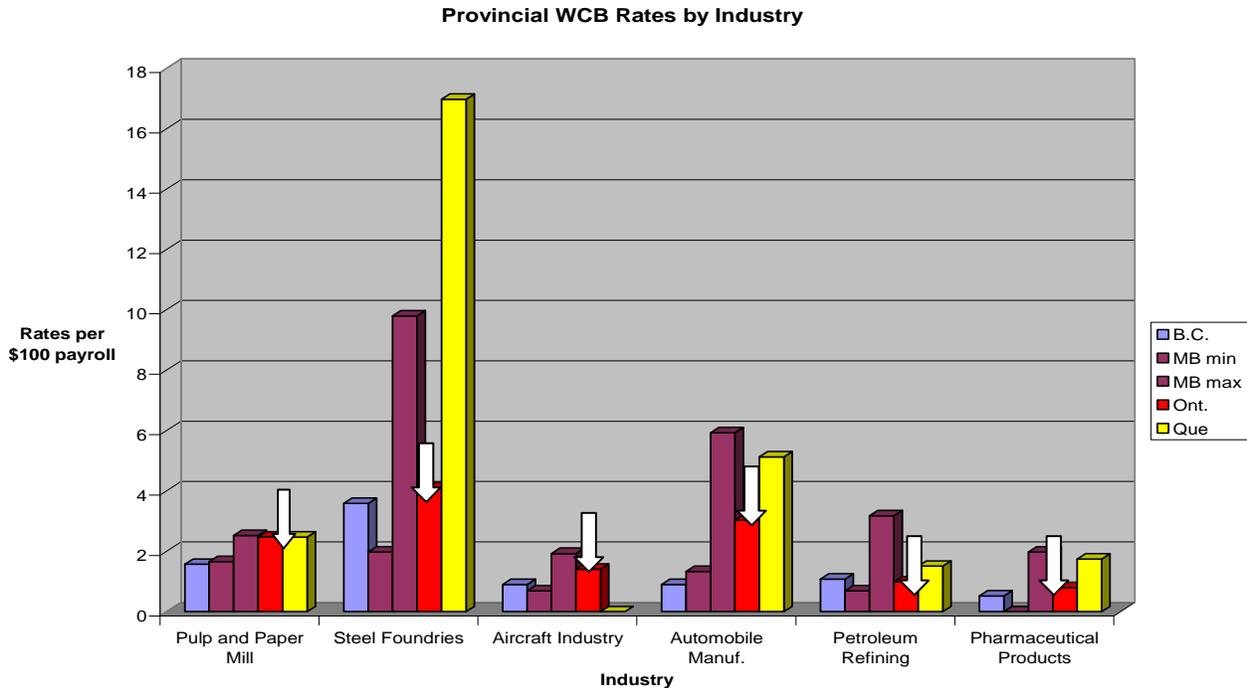
2. Schedule 21 Will Create Problems For The Workers' Compensation System In Ontario

Employer responsibility removed.

The proposed repeal of subsections 96 (4), (5) and (6) removes the clear and simple directive that if an insufficiency of funds exists, the Board shall raise the rates of employers accordingly. Repealing this directive removes employer fundamental responsibility to provide the funds for the system. This responsibility was carefully placed in the Act as part of the original Historic Compromise in which injured workers gave up the right to sue for secure compensation. Justice Meredith made it clear that employers should pay because they could pass the cost on, but injured workers could not.

This may be due in part to a claim by some that Ontario's workers compensation rates are higher than other provinces. Claims that Ontario's average premium rate is among the highest in Canada are misleading. Coverage of Ontario's workforce remains among the lowest in the country. This produces, in effect, an artificially high average employer rate for Ontario, since the non-covered sector involves employers that would pay a low premium rates. Comparing Ontario's average rate to provinces with a higher workforce coverage rate, therefore, amounts to comparing apples and oranges and is statistically inaccurate.

Comparison of workers' compensation rates between provinces is only relevant when you compare rates on an industry by industry basis. The following table uses data from the Association of Workers' Compensation Boards of Canada. It shows that when rates are compared industry by industry, Ontario's workers compensation rates are generally 'middle of the road.'



Government responsibility removed

The recent concern about workers' compensation funding appears to arise from the December 2009 Report of the provincial Auditor General who suggested that the unfunded future liabilities of the WSIB might be added to the calculation of the provincial debt. The proposed repeal of s. 100 removes the provision for a loan from the government of Ontario in the event of a real insufficiency of funds among the employers of Ontario. Repealing this section eliminates the safety net for injured workers of a temporary loan from the government in the event of a real economic crisis. There is some irony in a Bill titled "Managing Responsibly" that removes responsibility on the part of employers and government for the financing of the workers' compensation system. It would be appropriate to await the outcome of the WSIB funding review before proceeding with this type of amendment.

However, since the provision has never been needed since the system began in 1915, and since the workers' compensation system has financially survived two world wars, the great depression of the 1930s and the recessions of the early 1990s and 2008, we expect that s.100 will not be missed. For that reason, if it will relieve the anxiety of the provincial government and the Auditor General, we would not see the repeal of s.100 as problematic (s.3(1)) provided that all other provisions of Schedule 21 were removed.

Introduction of complexity and uncertainty.

There is a proposed replacement of Section 96 (4),(5) and (6) regarding employer rates, with Sec. 96.1 (1),(2),(3),(4),(5),(6),(7),(8),(9), and (10) which calls for the Board to

“develop and implement a plan to achieve sufficiency . . .” The idea of developing a “plan” brings in un-necessary and expensive complexity. It must be developed, it must be discussed, it must be amended, it must be approved, it must be promoted and defended, and it must be implemented. It is much more straightforward to raise the rates. A system is already in place. It is an understood and integral part of the functioning of the system. No surprises. No room for controversy.

There can be no doubt that any “plan” will be the subject of controversy. The Board and the Government will be undoubtedly be subject to numerous appeals and demands as to what the “plan” should and should not contain. This cannot be considered managing responsibly.

Who will pay for any perceived insufficiency of funds?

Under the current law, it is very clear that the Board must charge rates that provide for the sufficiency of the fund. If that is taken away, the door is wide open for others to pay. Really, the only others are injured workers. At present, the Board and government are barely in compliance with the law. The Government has signalled through the Auditor General’s report that it believes there is an insufficiency of funds. As such it is incumbent under the current Act for the Lieutenant Governor in Council to direct the Board to raise the rates to the extent necessary to ensure that the fund meets the required amount. While the employers received a small increase it has not been sufficient and it is clear that the Board intends to find a significant source of the required amount by reducing what is paid to injured workers.

Last February 24th, 2010, WSIB/WCB President David Marshall, spoke to the Standing Committee on Public Accounts. The topic was how the Board planned to respond to the future costs sometimes called the unfunded liability. The public, including injured workers and their advocates, were not permitted to speak to this committee---however we did follow the transcript. Mr. Marshall indicated that there would be some pain involved in the process. He did not specify who would feel the pain, however he did say [1340]: “I am going to challenge our team as to how much we can do down that path, whether we can reduce our rate of long-term beneficiaries by half. What would that do to our income stream?”

We wonder what it will do to injured workers and their families. Under the system of deeming workers to have jobs and wages that are non-existent or at best insecure, the Board reduces what it pays, while the injured are reduced to poverty and must turn to social assistance. With deeming in place it is of little concern to the Board and its fund that studies consistently show that in Canada and around the world, people with disabilities are not desired by employers—leaving between 40% and 70% without actual jobs.

Once the current protection under the Act is removed that requires the Board to charge employers at higher rates, the propensity to shift the cost to injured workers, their families, and the public purse will only grow.

This shift is contrary to the purposes of the compensation system and undermines its integrity.

Reliance on unreliable data undermines the system.

Most unfortunately a significant contributor to the Auditor General's idea that funds were insufficient at the Board, was a study conducted by the WSIB/WCB with the assistance of the Institute for Work and Health. The Auditor General clearly took note of some of the charts and conclusions, however he did not take note that the study is not complete, nor is the analysis. We obtained the study through a Freedom of Information request and studying the same data drew opposite conclusions. That is, for example, that the number of injured workers receiving full benefits is not skyrocketing, but rather is plummeting. We would be pleased to return to this committee with the study in hand and show you the data in detail.

An unbalanced approach exposes the lack of concern for workers and prevents the Board from fulfilling its historic mandate.

If there is a genuine concern about a funding crisis at the WSIB/WCB, then this government needs to use this opportunity to amend the Act to extend the system to cover all workplaces in Ontario. Due to the shifting nature of the economy, Ontario is losing many of the traditional employers who are mandatorily covered by the Act. Replacing them are industries without mandatory coverage. At present nearly 40% of Ontario's workforce is not covered. The Auditor General recognised this problem and flagged coverage as one of the ways to increase the coffers of the Board. Enacting full coverage would address funding issues, while increasing protection of workers at the same time. This would surely be a far more appropriate response to the funding concerns. Why is this completely missing from the picture?

Conversion to full funding is a controversial issue which requires study.

Our compensation system was carefully established with a steady-state funding concept and we have elaborated elsewhere in this submission our knowledge and view of the possible systems of funding. We cannot help but predict that the rapid and unstudied move to require full funding at the Board will lead to unpleasant and unintended consequences which will undermine its strength as a public institution protecting both the interests of employers and workers through the Historic Compromise.

3. Legislation on Workers' Compensation Funding Will Destroy the Credibility of the WSIB Funding Review

How should Ontario's workers' compensation system be funded? On September 30, 2010 the WSIB announced that in 2011 it will be holding a public inquiry into workers' compensation funding and several other matters, chaired by law professor Harry Arthurs.

Injured workers organizations support the Meredith principles and the continuation of the 'steady state' funding model that has served the Ontario workers' compensation well since 1915 and is used by the Canada Pension Plan. Other interest groups support a full funding model like the private insurance industry.

Over the next year, workers' compensation funding will be on trial. At the end of this trial, Professor Harry Arthurs will give his verdict; either finding in favour of full funding or in favour of steady state / current cost funding.

By legislating full funding now, the government is writing the verdict before the trial has begun. This will do irreparable harm to the public credibility of the Arthurs review and will discourage injured worker organizations and others who may wish to support steady state funding from participating in the review at all. This legislation leaves no room for the opinions of those who question the alleged financial crisis and who bring the principles of the Meredith Report and the steady state funding model that carries our Canada Pension Plan, and has served our workers' compensation system well for the past 95 years.

Schedule 21 should be removed from the Bill until the WSIB Funding Review has been completed.

All of which is respectfully submitted this 2nd day of December, 2010.

Injured Workers' Consultants Community Legal Clinic

Appendix: Relevant Provisions of the Current Workplace Safety and Insurance Act

PART VIII INSURANCE FUND

Insurance fund

96. (1) The Board shall maintain a fund for the following purposes:

1. To pay for benefits under the insurance plan to workers employed by Schedule 1 employers and to the survivors of deceased workers.
2. To pay the expenses of the Board and the cost of administering this Act.
3. To pay such other costs as are directed under any Act to be paid by the Board or out of the insurance fund.

Sufficiency of fund

(2) The Board has a duty to maintain the insurance fund so that it is sufficient to make the required payments under the insurance plan as they become due.

Same

(3) The Board has a duty to maintain the insurance fund so as not to burden unduly or unfairly any class of Schedule 1 employers in future years with payments under the insurance plan in respect of accidents in previous years.

Direction re sufficiency of fund

(4) If the Lieutenant Governor in Council is of the opinion that the insurance fund is not sufficient to meet the standards described in subsections (2) and (3), the Lieutenant Governor in Council may direct the Board to increase employers' premiums to the extent that the Lieutenant Governor in Council considers necessary to ensure that the fund meets those standards.

Same

(5) The Board shall increase the rates used to calculate premiums in accordance with the direction of the Lieutenant Governor in Council.

Same

(6) The Board shall promptly notify employers of the increase in rates and shall require employers to pay the additional premiums within such time as the notice may specify.

Transition

(7) The accident fund maintained under the *Workers' Compensation Act* is continued as the insurance fund. 1997, c. 16, Sched. A, s. 96.

Reserve funds

97. (1) The Board shall establish and maintain one or more reserve funds to pay benefits in future years in respect of claims for accidents that happen in a year.

Same

(2) The Board is not required to maintain a reserve fund that at all times equals the capitalized value of the benefits that will become due in future years, unless the Board is of the opinion that it is necessary to do so in order to comply with subsections 96 (2) and (3).

Same

(3) The Board may provide for larger reserve funds for some classes of industry than for others.

Investment

(4) The money in the reserve funds shall be invested only in such investments as are authorized under the *Pension Benefits Act* for the investment of money from pension funds and shall be invested in the same manner as is authorized for those pension funds.

Responsibility for agent

(5) If the Board designates an agent to make the investments authorized under subsection (4), it shall select as an agent a person that it is satisfied is suitable to perform the act for which the agent is designated.

Same

(6) The Board is responsible for prudent and reasonable supervision of the agent.

Standards for agent

(7) The agent is subject to the standards that apply, with necessary modifications, to an administrator of a pension plan under subsections 22 (1), (2) and (4) of the *Pension Benefits Act*.

Insurance fund

(8) The reserve funds form part of the insurance fund. 1997, c. 16, Sched. A, s. 97.

Special reserve fund

98. (1) The Board may establish a special reserve fund to meet losses that may arise from a disaster or other circumstance that, in the opinion of the Board, would unfairly burden the employers in any class.

Same

(2) Subsections 97 (3) to (8) apply with necessary modifications with respect to the special reserve fund. 1997, c. 16, Sched. A, s. 98.

Deficiency in premiums

99. (1) If there is a deficiency in the amount of premiums in any class because of a failure of any of the employers in the class to pay an amount owing or by any other circumstance that, in the opinion of the Board, would unfairly burden the employers in that class, the deficiency shall be made up by a payment of additional premiums by the employers in all the classes.

Apportionment of payment

(2) If the employer responsible for the deficiency in subsection (1) pays to the Board any part of the amount owing, that amount shall be apportioned among the other employers in proportion to the amount they contributed to the deficiency.

Continued liability of defaulting employer

(3) If a deficiency is paid for by the other employers, the employer responsible for the deficiency continues to be liable for the amount of the deficiency. 1997, c. 16, Sched. A, s. 99.

Exceptional circumstances

100. The following rules apply if there is not sufficient money available in the insurance fund to make the required payments as they become due, without resorting to the reserve funds:

1. The Board may make the payments out of the reserve funds or, if it is not expedient to do so, the Lieutenant Governor in Council may direct that an amount be advanced to the Board from the Consolidated Revenue Fund to make the payments.
2. The Board shall require the appropriate employers to pay additional premiums in order to replace any money taken out of a reserve fund or advanced from the Consolidated Revenue Fund.
3. The Board shall remit to the Minister of Finance the amount advanced from the Consolidated Revenue Fund. 1997, c. 16, Sched. A, s. 100.

Memorandum of understanding

166. (1) Every five years, the Board and the Minister shall enter into a memorandum of understanding containing only such terms as may be directed by the Minister.

Contents

(2) The memorandum of understanding must impose the following requirements:

1. Each year, the Board must give the Minister a strategic plan setting out its plans for the following five years.
2. The Board must give the Minister an annual statement setting out its proposed priorities for administering this Act and the regulations.

3. The Board must give the Minister an annual statement of its investment policies and goals.

Same

(3) The memorandum of understanding must address any matter that may be required by order of the Lieutenant Governor in Council or by a direction of Management Board of Cabinet.

Same

(4) The memorandum of understanding may address the following matters:

1. Any direction by the Minister about the programs to be reviewed under section 168.
2. Any matter proposed by the Board and agreed to by the Minister.
3. Any other matter the Minister considers appropriate.

Compliance

(5) The Board shall comply with the memorandum of understanding. 1997, c. 16, Sched. A, s. 166.

Policy directions

167. (1) The Minister may issue policy directions that have been approved by the Lieutenant Governor in Council on matters relating to the Board's exercise of its powers and performance of its duties under this Act.

Same

(2) In exercising a power or performing a duty under this Act, the Board shall respect any policy direction that relates to its exercise.

Report

(3) The Board shall report to the Minister whenever it exercises a power or performs a duty that relates to a policy direction. 1997, c. 16, Sched. A, s. 167.

Value for money audit

168. (1) The board of directors shall ensure that a review is performed each year of the cost, efficiency and effectiveness of at least one program that is provided under this Act. 1997, c. 16, Sched. A, s. 168 (1).

Same

(2) The Minister may determine which program is to be reviewed and shall notify the board of directors if he or she selects a program for review. 1997, c. 16, Sched. A, s. 168 (2).

Same

(3) The review must be performed under the direction of the Auditor General by one or more public accountants who are licensed under the *Public Accounting Act, 2004*. 1997, c. 16, Sched. A, s. 168 (3); 2004, c. 17, s. 32; 2004, c. 8, ss. 46, 47 (2).

Audit of accounts

169. (1) The accounts of the Board shall be audited by the Auditor General or under his or her direction by an auditor appointed by the Lieutenant Governor in Council to audit them. 1997, c. 16, Sched. A, s. 169 (1); 2004, c. 17, s. 32.

Remuneration, etc.

(2) The Board shall pay the remuneration and reasonable expenses of an auditor appointed by the Lieutenant Governor in Council. The remuneration and expenses are administrative expenses of the Board. 1997, c. 16, Sched. A, s. 169 (2).

Annual report

170. (1) The Board shall give the Minister an annual report concerning its affairs.

Tabling

(2) The Minister shall submit the report to the Lieutenant Governor in Council and shall lay the report before the Assembly if it is in session or, if not, at the next session. 1997, c. 16, Sched. A, s. 170.

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Regulations

183. (1) Subject to the approval of the Lieutenant Governor in Council, the Board may make such regulations for carrying out this Act as may be considered expedient including regulations,

(a) prescribing anything that must or may be prescribed under this Act, except under sections 15.1 and 52.1;

Note: On the first anniversary of the day the Statutes of Ontario, 2008, chapter 20, section 9 is proclaimed in force, clause (a) is repealed by the Statutes of Ontario, 2008, chapter 20, subsection 11 (1) and the following substituted:

(a) prescribing anything that must or may be prescribed under this Act other than anything in respect of which this Act expressly permits the Lieutenant Governor in Council to make a regulation;

See: 2008, c. 20, ss. 11 (1), 12 (3).