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RE: MLST Submissions to Justice Cunningham on the Interim Report of the Ontario Automobile Insurance Dispute Resolution System Review

The Medico-Legal Society of Toronto (MLST) was founded in 1950 by a group of doctors and lawyers to promote medical, legal and scientific knowledge, cooperation and understanding between the professions in the interest of justice and in the best interests of patients and clients.

The MLST's Submissions Committee is mandated to advocate on behalf of and in alignment with the MLST's mission, vision and objects, and to monitor and respond to government and stakeholder issues as well as calls for input. We are pleased to have this opportunity to provide comment and we support initiatives that would assist in improving the automobile insurance dispute resolution system in Ontario.

The MLST disagrees with the recommendation to have independent medical consultants on matters before FSCO, as this raises issues of additional costs, unnecessary additional opinions, and quality control. We suggest that the system maintain the use of experts put forward by parties, and that each expert be required to certify his or her duty to the Court to provide fair, objective and non-partisan evidence with a certificate similar to Form 53 under the *Rules of Civil Procedure*.

The MLST submits that medical experts should be required to certify in their reports prior to giving evidence that their duties are owed to the adjudicative tribunal and not to the particular

party that has paid them. Experts should recognize that their duty is to provide independent advice to the adjudicative tribunal on the issues on which they have been consulted. Experts should recognize that their duty of fairness and impartiality requires that they resist attempts by counsel to get them to change or shade their opinions.

Accident Benefits disputes are different in that by the time a case enters the dispute resolution process, many experts have already been retained by the parties and significant funds have already been extended on the instruction, retention and arrangement of reports from those experts. Scientific evidence is rarely at issue in a first party arbitration. Normally there are credibility issues with respect to the nature and extent of the injuries. Experts usually rise or fall on how the arbitrator views the applicant. To add another layer of experts into this already expert-laden landscape would not assist the litigation process. Further unless an arbitrator is bound by the findings of the independent expert; it becomes just an additional overlay of expense, similar to the demise of the Designated Assessment Centre (DAC) system.

In first party cases, we also do not see the value of requiring opposing parties, who have retained different experts; to have a further layer of expense of having an independent medical consultant who may not even have conducted an in-person examination, unlike the parties' experts, prepare a further report to the arbitrator. This proposal does not appear to appreciate the nature of first party arbitration and the extent that it relies upon lay witnesses and the credibility of the applicant. The medical issues in personal injury do not invite the same type of scientific examination related to causation or duty of care as in other types of litigation cases.

The MLST disagrees with restrictions being imposed on the size and content of expert reports. This ties the hands of the expert and deprives the parties and arbitrator from the complete medical opinion evidence. If reports are generated that appear excessive in length or duplicative this may be dealt with by the arbitrator by way of costs in the proceeding.

The MLST appreciates the opportunity to make this submission for your kind consideration.

Yours very truly,

Philippa G. Samworth
Chair, Submissions Committee
Medico-Legal Society of Toronto