Response by FSCO Arbitrators
to Justice Cunningham's Interim Report

We thank Justice Cunningham for his interim report on his review of Ontario's automobile insurance dispute resolution system. As neutral adjudicators, we rarely make public comment (except through our decisions). In this case, however, the Ministry of Finance has invited comment and the Director of Arbitrations has granted us permission to do so. We are grateful for the opportunity to provide our feedback. We believe that we offer a unique and valuable perspective, and we hope that our feedback contributes constructively to the effort to improve the current system. We have always been and we remain committed to finding ways to improve the system for our stakeholders.

Our Mandate

For over twenty years, the mandate of the Dispute Resolution Services Branch has been to ensure a **fair**, **accessible** and **timely** process for resolving disputes in respect of a person's entitlement to statutory accident benefits. For many of the reasons outlined in the Interim Report, timeliness in particular has suffered over the past few years and many of the recommendations in the Interim Report are meant to address that concern.

We agree in principle with many of the tentative recommendations put forward in the Interim Report; Justice Cunningham has identified some changes that may improve procedural efficiency and enhance proportionality. Such changes, together with efforts to curb abuse of the system, may help make the process **timelier**.

Nevertheless, we are concerned that other recommendations may actually have unintended results that could make the process **less fair** and **less attractive** to insured persons and their representatives.

Below, we discuss briefly the recommendations from the Interim Report that we think are most promising and we also outline some potential problems that we see with some of the recommendations. We then focus on the area of our **greatest concern** -- suggested changes that would significantly erode adjudicative independence.

Timeliness, Proportionality, Streamlining

In principle, we agree that the imposition of statutory time limits may well expedite the process. Introduction of different levels of procedure with different timelines (i.e., different "tracks" or "streams") may also help ensure proportionality between the nature of the procedure and the nature of interests that are at stake. We support overhauling FSCO's rules of procedure and, in fact, we have been asking for such changes for years. It is beyond the scope of this response to detail all the changes that may be necessary but we would be happy to participate in any substantive discussions about changes to process.

Care must be taken, however, to ensure that changes to the process intended to create a faster system are not introduced at the expense of fairness.

For example, assignment to one stream or another cannot be based solely on the value of the benefits in dispute. Justice Cunningham gave as an example a case in which the dispute is over the purchase of a $1,200 orthopaedic mattress. We agree that, all things being equal, this seems to be a simple case that might be resolved through some sort of paper review. Appearances can be deceiving, however.

What if the insurer refused to pay this benefit because it alleges that there was no accident at all and is seeking a hearing of that issue? Such a hearing involves an assessment of the *credibility* of the applicant and other persons who were allegedly involved in the incident, testimony of independent witnesses and, often, considering the evidence of an engineer (who the applicant will usually want to cross-examine). Obviously, the hearing of such a preliminary issue could not be done by paper review and it would likely delay the determination of the applicant's substantive claim(s). Complex preliminary issues have become quite common and any system that fails to anticipate such issues is likely to fail.

We also note that many disputes arise from a complaint that chronic pain is allegedly impairing the insured person's functional abilities. More often than not, such cases turn upon an assessment of the character and credibility of the insured person, based upon testimony from the insured person and from people who have seen that person regularly and in different settings (such as family members and treatment providers). Medical evidence is of limited value in deciding this issue since there is no objective test that can conclusively determine how much pain a person is experiencing or the extent to which that pain limits the person's ability to function. Rarely can such a case be determined simply by choosing between two medical reports.

Other cases (such as determination of catastrophic impairment) are inherently more complex or can involve multiple issues in which millions of dollars can potentially be at stake.

Thus, we find to be unrealistic the suggestion that *all* cases can be resolved within a maximum of 90 days and after a hearing that lasts no more than one day.[1]

Furthermore, if the suggestion is to have *individual* claims resolved within 60-90 days, this may lead to a multiplicity of proceedings. Instead of the current situation in which you typically have one application that will resolve many issues, under the system contemplated by Justice Cunningham you could have multiple applications from the same applicant, each determined at a different time, by a different adjudicator, with the possibility of inconsistent results. It is unclear how that would improve either efficiency or fairness.

[1] We note that reference is made in the Interim Report to summary dispute resolution processes that exist in other jurisdictions or within other adjudicative bodies in Ontario. Caution should be used in relying upon such comparisons or attempting to adopt their procedures, since the legal landscape in which those systems operate may be quite different from the one here. For example, in other systems, the government may be a party to the dispute. Even within Ontario, the mandate and procedures may vary from tribunal to tribunal. For instance, an appeal at WSIAT, although a hearing *de novo*, is essentially an uncontested process in which decisions are based largely upon a written record with little or no *viva voce* evidence and where a previous decision was already rendered by a first-level decision-maker (the WSIB).

Accessibility

We agree that any system must remain accessible to consumers. To enhance accessibility, we continue to support: simplification of procedures; creation of more instructional/educational materials (written, video, etc.) in multiple languages; continued provision of interpretation services; and provision of free legal assistance (advocacy services) to unrepresented applicants. We also agree with Justice Cunningham that increased application fees would likely pose a financial barrier to access.

Costs

The appropriate fee to charge users (and at what stage to levy such fees) is a decision best left to the government. We make the following observations, however. First, there appears to be a misconception that claimants do not have "any skin in the game"; under the current expense provisions at FSCO, an unsuccessful party (whether it be an insurer or an applicant) will often be ordered to pay the legal expenses of the successful party. Second, as noted above, increasing fees to applicants will likely pose a barrier to access to justice. Finally, since the dispute resolution system is funded primarily through the fees paid by insurers, any reduction in insurer fees means less money (fewer resources) to support the dispute resolution system. Inadequate funding would jeopardize the ability of such a system to fulfill its mandate.

Mediation

Despite recent challenges, mediation has historically been very successful in resolving a significant proportion of accident benefit disputes at an early stage and with relatively little cost to the parties. We support the continued use of mediation as part of any alternative dispute resolution system and that such mediation continue to be done by those with expertise in statutory accident benefits.

Predictability

We agree that predictability is important to any legal system. We also agree that it is not our role to set policy. Yet we are charged with interpreting the law and applying the law to the facts of the cases that come before us.

Justice Cunningham would like to see a system in which arbitrators consider relevant policies when making their decisions. As a result of a very recent amendment to the legislation, arbitrators are now bound by Superintendent's Guidelines and it would be a reviewable error for arbitrators not to follow Guidelines that have been incorporated by reference into the SABS. Binding Guidelines, together with a comprehensive minor injury protocol (expected in 2014), may result in greater predictability.

With respect to the proposal that we be given access to independent medical consultants, we suggest that this requires further study. The DAC process in the past failed largely due to the lack of confidence of all stakeholders. Also, despite the fact that many of the issues that come before us are related to injuries and impairments, the determination of whether a person meets statutory tests for entitlement to accident benefits involves questions that are ultimately legal in nature and often turn upon assessments of credibility. The determination can rarely be made exclusively on the basis of medical evidence. A medical professional, even an "independent" one, cannot usurp the role of either an arbitrator or a judge.

Predictability is enhanced by: (1) well-crafted legal provisions; (2) clear guidelines; and (3) stability within the system. With respect to the first two factors, it would be inappropriate for us to provide comment.

With respect to stability, we note that there have been at least four major overhauls to the statutory accident benefits schedule in about 20 years, as well as numerous smaller amendments. The result has been a constantly shifting legal landscape. Just as case law begins to coalesce into some sort of consensus position, and just as stakeholders begin to understand the system and can predict with some degree of certainty how the law will be interpreted and applied, the entire regime changes, thrusting all parties into another period of uncertainty.

A good recent example is in the area of catastrophic impairment. Over a period of about ten years, there was heated debate over many provisions related to this classification. These debates centered on questions of whether the rating of whole person impairment should be based upon both physical and psychological impairment and whether determination of catastrophic impairment could be based on a finding of a "marked or extreme" psychological or behavioural impairment in only one of four spheres. While we note that some of the FSCO decisions related to these issues have been criticized in the written submissions of at least one party representing insurers, it is important to note that the interpretation adopted in decisions from FSCO were consistent with most of the relevant court decisions. If there was any lack of predictability, it was no greater at FSCO than within the court system. In fact, in only a very small number of instances have any decisions from FSCO been overturned on appeal.

In any event, the interpretations of FSCO arbitrators with respect to catastrophic impairment were ultimately approved and adopted by the Ontario Court of Appeal. Since the Court of Appeal decisions settled this area of law about a year ago, there has been predictability. Thus, if predictability were the goal, one would think we would now be entering into a period of stability. Yet, a major overhaul of all provisions related to catastrophic impairment is currently being considered. Regardless of the content of any such new provisions, the one thing that is certain is that major regulatory changes result in a period of uncertainty until a new body of case law is developed. The greater the changes, the longer that period of uncertainty will last.

Similarly, significant changes to how disputes are resolved, and by whom, can also result in a lack of predictability. The most worrisome of the proposed changes are those that would dramatically curtail the independence of decision-makers. The balance of our response focuses on this issue.

Who Should Adjudicate?

The purpose of the arbitration unit has been to provide insured persons with an alternative to going to court; they were offered quasi-judicial determination, by independent, full-time, expert adjudicators who were given concurrent jurisdiction with the Ontario Superior Court.

The expertise of FSCO arbitrators has been widely accepted. The Ontario Court of Appeal has found that the decisions from FSCO arbitrators and Director's delegates are deserving of deference.

To be considered a fair process, decision-makers must be independent and be perceived to be so. The Supreme Court of Canada has stated that the hallmarks of independence are: (1) security of tenure; (2) financial security; and (3) institutional independence. It has also recognized that administrative decision-makers (and not just judges) must be independent of the government, but that the extent of that independence varies with the types of decisions that are made.[2] Administrative bodies perform an array of functions -- some regulatory, some purely administrative and some quasi-judicial. We respectfully suggest that since we are deciding the exact same issues as judges of the Superior Court and since applicants can choose to have their disputes adjudicated either in court or at FSCO, public confidence in the process requires FSCO arbitrators to have a level of independence comparable to that of judges.

Institutional Independence

Dealing first with the requirement of institutional independence, some have found it confusing that adjudicators who interpret the SABS would be housed in the same building as the people who write the SABS, set auto insurance rates and regulate the industry.

Justice Cunningham reports that some parties are confused when FSCO arbitrators make decisions that seem inconsistent with FSCO policy -- like striking down FSCO-approved forms. We are not sure why this is an issue. We adjudicate fairly and impartially all issues that are raised by the parties, even if those issues involve a challenge to the regulations or FSCO's forms and procedures. This should be no more confusing than when a judge strikes down a provision as being contrary to human rights legislation or the *Charter* or when the Supreme Court of Canada ruled that a FSCO-approved form failed to contain sufficient information to satisfy the requirements of the *Insurance Act*.[3]

It is not surprising that some stakeholders are unhappy with some decisions. The quality of an adjudicative decision, however, ought to be based on the correctness of that decision, not on its popularity. An adjudicator must feel free to make the decision that he or she believes to be correct, even if it may be unpopular with the regulator or a stakeholder. Parties who believe that a decision is incorrect have the right to challenge the decision through appeal or judicial review. The government has the ability to express its will through amendments to legislation and regulations. The regulator can give direction through binding interpretation guidelines.

---

[2] *Canadian Pacific Ltd. v. Matsqui Indian Band* [1995] 1 SCR 3, 1995, CanLII 145 (SCC), 122 DLR (4th) 129, [1995] 2 CNLR 92, 26 Admin LR (2d) 1, 85 FTR 79. For a scholarly discussion on the hallmarks of independence and the factors that should inform good design of administrative decision-making bodies, see also: S. Ronald Ellis, *Unjust by Design, Canada's Administrative Justice System* (Vancouver: UBC Press, 2013).

[3] *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 SCR 129.

Justice Cunningham also suggests that having adjudicators housed within FSCO may expose them to attempts to unduly influence their decisions. While we believe that our decisions demonstrate our independence, we concede that having us located within FSCO may not provide us with the appearance of independence and that such an appearance could be enhanced by physical separation of arbitrators from FSCO, along with a change in organizational and reporting structure. At the end of the day, however, where arbitrators are housed is a relatively insignificant issue compared to whether they *actually* are independent.

Security of Tenure and Financial Security

What gives current arbitrators at FSCO true independence is that most of us are permanent public servants. This provides us with both security of tenure and financial security that begin to approach that of judges. While this situation is unique, it is also appropriate since, as far as we are aware, we are the only adjudicative body in the province with concurrent jurisdiction with the Superior Court of Justice.

In his interim report, Justice Cunningham describes several possible alternative models to the current system of adjudication. These alternatives include the following: a roster of on-call arbitrators; a stand-alone tribunal with part-time members who are paid only for the services they provide; and, having alternative dispute resolution services provided by a private, for-profit organization, that would also pay part-time adjudicators for the services they provide. In our view, none of these *per diem* models offer *independent* decision-makers.[4]

Without security of tenure and financial security, adjudicators would be susceptible to influence and they would not be perceived to be independent. Under the models referenced in the Interim Report, an adjudicator would basically work part-time only, at the pleasure of the government or a private company and would only get as much work as that organization deems appropriate. Such an adjudicator is clearly susceptible to influence[5] and stakeholders would, rightly, have little confidence in a process that relied upon that sort of decision-maker.

Many of us have worked as appointees in federal and provincial tribunals. We know what it is like to be insecure about re-appointment. Some of us have been part-time members and understand the consequences of a lack of financial security. We chose a life of public service and chose to work at an organization where we had sufficient security of tenure and financial security to permit us to make the decisions we think are correct, without fear of influence or reprisals. Until now.

---

[4] Unlike the *per diem* models referred to in the Interim Report, *long-term, full-time* positions as vice-chairs do offer appointees some security of tenure and financial security. Even such vice-chairs, however, have to worry about re-appointment every few years and, therefore, may be subject to influence. That is one reason that the current trend in tribunals, boards and agencies has been towards longer public appointments. Our concurrent jurisdiction with the courts may offer a rationale for the government's decision to hire full-time employees as arbitrators when it initially set up the accident benefits dispute resolution model.

[5] Query whether a *per diem* decision-maker, worried about getting more work or being re-appointed, would feel unfettered to rule, for example, that a FSCO form failed to comply with the requirements of the *Insurance Act* (or regulations thereunder) or to rule that a provision of the SABS was inconsistent with the *Human Rights Code* or the *Charter of Rights and Freedoms*.

It may seem like a contradiction, but it is the truth that (except for judges) only permanent public servants have sufficient security of tenure and financial security to truly be independent from the influence of government (and stakeholders).

Of the written submissions considered by Justice Cunningham for his Interim Report, none representing the interests of consumers and only a few of those representing the interests of insurers voiced any support for the idea of having part-time private or public contractors providing adjudicative services. None of the submissions from legal professionals supported such a proposal. It is, therefore, difficult to see either the demand or the rationale for moving the decision-making away from public servants and effectively stripping arbitrators of their independence.

Conclusion

We believe that there is room to improve the current automobile dispute resolution system. We support many of the proposals set out in Justice Cunningham's Interim Report and we would be happy to participate in any discussions concerning the details of possible procedural changes.

We oppose, however, any system that is dependent upon decision-makers who are not experts in this field, who do not devote their full time and attention to this work, and who lack independence and the appearance of independence. We also oppose procedural rules that are too rigid and time-lines that are unrealistically short.

Parties have come to expect the following from the dispute resolution process: flexibility, fairness, expertise and independence. If these features are not maintained, applicants and their legal representatives will not see the system as being a *viable* alternative to proceeding to court and the already overburdened court system may have to absorb tens of thousands of new accident benefits disputes. Obviously, such an outcome would improve neither the timeliness nor the accessibility of automobile insurance dispute resolution in Ontario.

Date: November 29, 2013

Pamila Ahlfeld, LL.B., LL.M.
Suesan Alves, B.A., LL.B.
Eban Bayefsky, B.A., LL.B., LL.M.
Robert Bujold, B.A. (Hons.), LL.B.
Alec Fadel, B.A. (Hons.), M.A., LL.B.
Richard Feldman, B.A., LL.B., B.ED., LL.M.
Jessica Kowalski, J.D.
Alan Mervin, B.A., LL.B.
Maggy Murray, B.A. (Hons.), LL.B., LL.M.
Stuart Mutch, B.A., J.D., LL.M.
Deborah Pressman, B.A., LL.B, LL.M.
Lloyd (J.R.) Richards, B.A., LL.B.
Jeffrey Rogers, B.A., LL.B.
Susan Sapin, B.A., LL.B.
Anne Sone, B.A., J.D., LL.M.
John Wilson, B.A., LL.B.