Aviva Canada Submission for the Review of Ontario Auto Insurance Dispute Resolution System

September 20, 2013

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I Introduction

Aviva Canada ("Aviva") is the second largest general insurer in Canada and the sixth largest insurer in the world. We are privileged to work with 3 million policyholders across the country, including over 1 million in Ontario. Ontario auto insurance comprises a significant part of our business. In 2012, Ontario Personal Auto represented $895 million of Aviva's Gross Written Premium. Aviva insured 570,000 autos in Ontario; sold insurance through 600 brokers and handled 48,000 Ontario auto insurance related claims.

II Recommended Objectives of the Review

The letter from Pat Deutscher, Assistant Deputy Minister and Chief Economist, inviting input from stakeholders on the Ontario Auto Insurance Dispute Resolution System, does not explicitly state the goals of the Review. Aviva respectfully submits that the Review should strive to produce recommendations that significantly improve the current dispute resolution system by focusing on the following three goals:

1. Provide claimants with access to dispute resolution in a timely and cost effective manner;
2. Reduce the costs associated with dispute resolution. This goal is especially important in the wake of the 15% mandatory rate reduction introduced by the Government in the Automobile Insurance Rate Stabilization Act.
3. Increase stability and certainty in the Ontario auto insurance system in order to eliminate the ongoing reform cycle that has plagued Ontario auto insurance.

III Current Issues

Aviva will focus its comments and recommendations on the FSCO ADR process. However, Aviva is concerned about the significant delays in the Ontario Court system. Litigants in Toronto and Brampton are waiting up to 2-1/2 years for civil trials on the lengthy trial list. The Ontario Court system backlog impacts Bodily Injury claims but there is also some impact to Accident Benefits (AB) claims.

Ontario Auto is comprises approximately one-third of Aviva's total business. AB Claims have a significant financial impact on the profitability of the auto insurance product and therefore Aviva's overall profitability. To put AB claims into perspective, in 2012 Aviva handled 10,700 AB claims. Aviva has approximately $1 billion set aside in case and IBNR reserves. The IBNR reserves are high due to the volatility and instability of the product.

Aviva believes that the current dispute resolution system is broken and requires complete transformation. A number of significant issues plague the current system and these are discussed below:

a) Demand Exceeds Capacity

The FSCO ADR system cannot handle the number of disputes that are being generated. The total number of disputes in the system has increased by 128% from 17,028 in 2007 to 38,899 in 2012 .The current system was not designed to handle this volume of disputes and lacks the capacity to do so. There are too many disputes entering the dispute resolution system.

Table 1 – Volume of Mediation and Arbitration Applications[1]

Year	Mediation Applications	Arbitration Applications	Total Applications
2007	14,281	2,747	17,028
2008	16,318	3,045	19,363
2009	20,918	3,421	24,339
2010	27,956	4,193	32,149
2011	36,496	5,260	41,756
2012	28,389	10,510	38,899

As illustrated in Table 1, the number of applications for mediation rose from 14,281 applications in 2007 to 28,389 in 2012 with a high of 36,496 in 2011. This is an increase of 98.7% over a 6 year period. The increase in mediation applications led to a large backlog that reached 29,305 in 2011. After the Ontario Auditor General noted this problem in his 2011 report, FSCO embarked upon an initiative to reduce the backlog and hired ADR Chambers to complement its own mediation staff. The mediation backlog has been reduced to 1,016 as of July 2013. It currently takes an average of 91 days to proceed with the mediation after filing. While this is still a lengthy period of time, it is down considerably from the 12 to 18 months delay that users of the system experienced at the height of the mediation backlog.

The backlog has moved from mediations to arbitrations. Applications for arbitrations have increased by 282% from 2,747 in 2007 to 10,510 in 2012. Parties to arbitration currently wait 12- 18 months for the arbitration. This trend shows no sign of reversing as the number of arbitration applications doubled from 2011 to 2012 alone. The increase in arbitration applications may have a number of causes.

Over time, mediations have become less effective. Aviva currently settles only 26% of its cases at mediation. This is down from 52% in 2011. Aviva is taking a tougher stance on fraud and the interpretation of key provisions of the 2010 reforms, such as minor injury and incurred expenses. Historically, reforms have been watered down by arbitration and court decisions. The Government's mandated 15% rate reduction is based heavily on savings from the 2010 reforms.[2] Insurers cannot afford to have another round of "watered down" reforms.

[1] http://www.fsco.gov.on.ca/en/drs/Pages/mediation-statistics-timelines.aspx
http://www.fsco.gov.on.ca/en/drs/Pages/mediation-backlog-initiatives.aspx

[2] Minister of Finance's policy statement at
http://www.gov.on.ca/ontprodconsume/groups/content/@onca/@so/@gazette/documents/document/ont06_028126.pdf

The 2012 court decision of *Hurst v. Aviva Insurance Comp*any, 2012 ONCA 837[3] may also be driving the increase in arbitration applications. In this case, the Court ruled that claimants can by-pass mediation and proceed directly to arbitration if the mediation does not occur within 60 days from the date that the application for mediation is filed.

b) As Disputes Increase So Do Costs

The increase in the volume of disputes has led to a sharp increase in costs. An insurer is billed $500 by FSCO for each mediation application received, and $3,000 per arbitration application. Total filing fees billed to insurers have increased by almost 200% from $15 million in 2007 to $45.7 million in 2012 (see Table 2). Aviva has experienced an even more dramatic increase of 325% in filing fees from 2007 to 2012. These costs are borne entirely by insurers. **Claimants do not pay to access the FSCO ADR system.**

Table 2- A Comparison of Filing Fees

Year Av	Mediation Applications	Mediation Filing Fees	Arbitration Applications	Arbitration Filing Fees	Total Applications	Total Filing Fees
2007	14,281	$7,140,500	2,747	$8,241,000	17,028	$15,381,500
2008	16,318	$8,159,000	3,045	$9,135,000	19,363	$17,294,000
2009	20,918	$10,459,000	3,421	$10,263,000	24,339	$20,722,000
2010	27,956	$13,978,000	4,193	$12,579,000	32,149	$26,557,000
2011	36,496	$18,248,000	5,260	$15,780,000	41,756	$34,028,000
2012	28,389	$14,194,500	10,510	$31,530,000	38,899	$45,724,500

The higher volume of disputes has driven increases in a number of other expenses. From 2007 to 2012, Aviva's external legal fees to defend AB disputes increased from $5.39 million to $8.15 million (+51%). Aviva also doubled its ADR and litigation staff from 2010 to 2012 thereby increasing staffing costs by $2.7 million. Insurers' Examinations still generate significant costs. Insurers' Examinations result in medical reports/ evidence that are used in disputes. The 2010 reforms sought to reduce the costs of examinations/assessments by introducing a limit of $2,000 per examination/ assessment. In 2012, Aviva spent $12.7 million on Insurer's Examinations and this is down considerably from $17.7 million in 2011. However, it is worth noting that the actual volume of Insurers' Examinations remained relatively stable. The decrease in costs is driven by the $2,000 assessment cap.

[3] The appeal involved a group of cases: Hurst v. Aviva Insurance Company, Cornie v. Security National o/a TD Meloche Monnex, Singh v. Aviva Canada Inc., Clark v. State Farm Mutual Automobile Insurance Company

c) Issues in Dispute

There are too many disputes in the current system and it might be insightful to understand the issues in dispute. In 2012, Aviva began to track the prevalence of issues in dispute.[4]

Table 3- Prevalence of Issues in Dispute

Issue	2012 Total	2013 YTD
Interest	**27%**	**29%**
Med/ Rehab	**24%**	**25%**
Housekeeping	**18%**	**10%**
IRB/ Caregiver/ Non-Earner	**17%**	**18%**
Attendant Care	**12%**	**8%**
Examinations	**10%**	**8%**

The fact that Interest is the top issue in dispute speaks to the generosity of the interest provisions of the SABs (2% compounded monthly on an amount found owing, regardless of whether the expense had actually been incurred. Interest rate changed to 1% compounded monthly as part of the 2010 reforms). For Med/Rehab, Housekeeping, IRB Caregiver Non-Earner and Attendant Care, disputes may involve entitlement and/ or quantum. Examinations refer to requests for examination by the claimant pursuant to s.25 of the SABs that have been assessed and denied by Aviva. Disputes involving the provisions of the 2010 reform are becoming more prevalent. In 2013, 25% of Aviva's mediation applications involved Minor Injury claims. The incurred expense provision was an issue in 16% of applications. This is not unexpected as the claimants and insurers work through ambiguities in the 2010 reforms.

There is an opportunity for the Superintendent to issue clarifying guidelines that would address some of the common issues in dispute.

d) Decisions That Undermine Legislative Intent

In the ADR system, quality is as much a problem as quantity. There is a longstanding pattern of Court and FSCO arbitration decisions that **undermine legislative intent routinely expand insurance coverage and add significant costs into the system**. Over the years, Aviva has been actively involved with Government in drafting reforms. Through this work, Aviva has an excellent understanding of the intent of the reforms as well as the projected cost savings. Aviva has taken a strong position to maintain the integrity of the legislation and reforms and deliver anticipated cost savings. In the last two years alone, Aviva has litigated four key cases[5] that have been critical to the interpretation and operation of the SABs. Aviva lost each case. It is extremely frustrating and disappointing to see the continual erosion of the

[4] A claim may have several issues in dispute. In that case, each issue is recorded.

[5] Pastore v. Aviva Canada Inc. 2012 ONCA 642; Hurst v. Aviva Insurance Company, 2012 ONCA 837; Aviva v. Parveen et al. (FSCO P12-00023 and P12-00024; Simser v. Aviva (FSCO A11-0004610)

legislation and the associated negative financial impacts. The problem is compounded by the fact that insurers cannot go back to their customers and "re-price" the policy in order to recoup these additional costs. The additional costs are factored into new rates that are dependent on FSCO for approval. This type of decision making directly contributes to the instability of the Ontario automobile insurance product and the recurring cost pressures.

The following cases are examples of decisions that have ignored legislative intent and the impact of those decisions:

- ***Scarlett and Belair Insurance Company Inc. (FSCO A12-001079***

This is the first FSCO arbitration decision to consider the Minor Injury designation and Guideline. The decision limits the Minor Injury designation by excluding psychological impairments, chronic pain and tempo-mandibular joint disorder (TMD). The Arbitrator blatantly ignored the Superintendent's Minor Injury Guideline, calling it non-binding and failing to recognize that the test for escaping Minor Injury is statutorily incorporated into the SABS. The arbitrator also suggested that the burden is on the insurer to prove that the insured falls within Minor Injury despite language to the contrary. Lastly, the arbitrator defined "compelling evidence" to mean "credible". The decision has been appealed but it is already undermining the Minor Injury provisions, a key feature of the 2010 reforms and projected to generate significant cost reduction. Ironically, as the decision was released, the NDP was demanding that insurers cut premiums because of cost savings delivered by the 2010 reforms.

> ***Impact***- This case has been appealed and the final outcome is not known. However, Aviva has experienced an increase in the number of mediation applications relating to Minor Injury since this decision. Aviva has already seen a change in how clinics assess Minor Injuries. There is a marked difference in the list of diagnoses that clinics are including in minor injury assessments. Aviva suspects that assessors are trying to fit claimants into the Scarlett decision. The decision has already eroded the Minor Injury provisions although it is too early to quantify the financial impact of this.

- ***Henry v. Gore Mutual Insurance Company, 2013 ONCA 480***

This case considers the "incurred expense" provisions introduced as part of the 2010 reforms. The Court ruled that a non-professional caregiver is entitled to claim up to the maximum entitlement for attendant care benefits upon proof of any economic loss, regardless how small.

> ***Impact***- This decision undermines the "incurred expense" provisions introduced as part of the 2010 reforms and has a negative financial impact to the industry. An Aviva case, *Simser v. Aviva (FSCO A11-0004610)* is currently pending appeal. This case will consider the definition of "economic loss". An adverse decision will have a further negative financial impact.

- ***Fredirico v. State Farm Mutual Automobile Insurance Company (FSCO A08-001138)***

The Arbitrator held that the transitional provisions do not apply to reduce the interest rate from 2% compounded monthly to 1% compounded monthly on overdue payments accruing after September 1, 2010. This decision undermines the transitional provision regarding interest rates introduced with the 2010 reforms.

> ***Impact-*** This impact of this decision will have a negative financial impact on accidents that occurred prior to September 1, 2010 (approximately 25% of Aviva's current open claims). This decision will incentivize claimants to file disputes over interest.

- ***Zefferino v. Meloche Monnex Insurance, 2012 ONSC 154***

The Ontario Court of Appeal upheld a lower court ruling that insurance companies bear the responsibility for ensuring that consumers are making fully informed decisions when deciding whether to purchase optional coverage. The Court also held that insurance companies are at risk of providing optional benefit levels that have not been paid for if the claimant can make a convincing case that he/she was insufficiently aware of the consequences of declining enhanced coverage.

> ***Impact-*** This decision creates concern for brokers and direct writers of insurance as it potentially increases their liability.

- ***Desbiens v Mordini (2004) O.J. No. 4735, Kusinierz v. Economical Mutual Insurance Company, 2010 ONSC 5749, Pastore v. Aviva Canada Inc. 2012 ONCA 642***

These Court decisions have lowered the threshold for CAT determination by allowing for physical and psychological factors to be combined (Desbiens, Kusinierz). The Pastore decision further lowered the bar by supporting that a single "marked" impairment on the mental and behavioural tests is sufficient as opposed to an overall "marked" impairment is sufficient.

> ***Impact-*** This line of cases has had a significant adverse financial impact for the industry. As a result of the *Kusinierz* and *Pastore* decisions alone, Aviva increased reserves on pending claims by $15.4 million. In the aftermath of these decisions, it is now easier for claimants to be designated as "catastrophically impaired". Aviva has taken steps to track catastrophic claims more closely and the results are very concerning. From December 2012 to July 2013, Aviva's number of open catastrophic claims increased from 88 to 115 (+30.7%). The Gross Incurred Losses associated with this group of claims increased from $88.9 million to $124.2 million (+40%) in the same time period. The financial impact of these adverse decisions will continue to erode any savings generated by the 2010 reforms. Aviva implores the Government to take action on catastrophic impairment.

- ***Hurst v. Aviva Insurance Company, 2012 ONCA 837***

The Court ruled that claimants can by-pass mandatory mediation and proceed directly to arbitration if the mediation does not occur within 60 days from the date that the application for mediation is filed.

Impact – This case highlighted the mediation backlog. As discussed above, the decision has led to an increase in arbitration applications and costs.

- ***Aviva v. Parveen et al. (FSCO P12-00023 and P12-00024)***

The FSCO arbitrator ruled that the "Settlement Disclosure Notice" mandated by the Superintendent does not comply with the requirements of the Insurance Act. Claimants can potentially use the Settlement Disclosure Notice as a means of undoing any settlement even one concluded with legal advice.

Impact- This decision essentially says that insurers cannot rely on forms that have been mandated by FSCO. This decision introduces more uncertainty into the system.

Aviva is extremely concerned about the impact of these decisions. Unless changes are made, Aviva expects FSCO to reflect these negative impacts in their benchmarks and rate approval process.

e) FSCO as Regulator and Arbiter

There is an inherent conflict in the roles that FSCO plays in the current system. FSCO is responsible for the administration of the dispute resolution system that handles most SABS related disputes. FSCO is also the regulator of insurance companies, one of the parties to the dispute. The conflict is further exacerbated when FSCO's staff (mediators and arbitrators) ignore or rule against policy directives or guidelines issued by the Superintendent who is also their boss. The conflict may also prevent the Superintendent from more actively managing the quality of decision making for fear that he is interfering in the administration of justice. These conflicts undermine confidence in the system.

IV Recommendations

a) Privatization of the ADR system

i) Creation of Mediation and Arbitration Roster

Aviva recommends that the dispute resolution system be entirely privatized. Insurance companies and plaintiff injury lawyers are already familiar with private mediation as it is mandated in the Ontario Rules of Civil Procedure. The Courts have already established rosters of mediators. Private mediation and arbitration is also commonplace in commercial disputes and Ontario legislation already contains the rules that apply to private arbitrations. The Insurance Act provides the Superintendent with statutory authority to create mediation and arbitration rosters. The existing rosters and rules can be leveraged to build out the process for SABs disputes.

ii) Eliminate Mandatory Mediation

Mediation is mandatory in the current system. As discussed above, mandatory mediation adds significant costs without corresponding benefits. Aviva recommends the elimination of mandatory mediation. In order to promote settlement discussion, both parties to a dispute should be required to

certify that settlement discussions have occurred prior to the hearing. This type of certification already exists in Rule 76 of the Rules of Civil Procedure.

iii) Arbitrations

Arbitrations should also be private disputes. Arbitrators' decisions should remain private between the parties. The decisions should not be published in a database or be binding on future disputes. This would limit the negative impact of arbitration decisions and yet provide resolution to the parties in dispute.

iv) Appeals

Aviva recommends the elimination of the Director's Delegate role. All appeals from arbitrations should go into the Court system and be heard by a single judge of the Superior Court. This is the approach already used in the Ontario Arbitrations Act.

v) Cost of Mediation and Arbitration

The cost of mediation and arbitration should be borne equally by both parties to the dispute. A rule could be implemented whereby the winner recovers his/her/its filing fees from the losing party at arbitration.

b) Role of FSCO in the Dispute Resolution System

Privatizing the ADR process would eliminate FSCO's responsibility for the administration and operation of the ADR system and allow FSCO to fulfill a broader mandate. The Ontario Automobile Insurance Anti-Fraud Task Force addressed FSCO's mandate in their November 2012 Final Report [6] and recommended that FSCO evolve from acting as the regulator of the auto insurance industry to the regulator of the auto insurance marketplace. FSCO should be accountable for ensuring that auto reforms deliver the projected cost savings so that premium reductions can occur. FSCO should also be responsible for correcting the system when it is going off-course through adverse court decisions. Aviva recommends that FSCO create a small policy team to review private arbitration decisions and all appeal applications. This team should be responsible for understanding the impact, especially financial, of any decisions. The team would also be responsible for recommendations to the Superintendent for the issuance of further guidelines or rules of interpretation. This role would liaise with the Financial Accountability Office that has been announced by the Government.

c) Limiting Areas of Dispute

In order to reduce costs, there should be limitations on the issues that can be disputed. This recommendation is best achieved through product reform. Disputes should be limited to questions of eligibility and/or entitlement.

[6] http://www.fin.gov.on.ca/en/autoinsurance/final-report.html

Eligibility would encompass the following types of issues (and this list may not be exhaustive):

- Is there a valid Ontario automobile insurance policy?
- Do the injuries/ impairments arise from an "accident"?
- Is the claimant an insured person under the policy?

Entitlement would encompass the following types of issues (and again, this list may not be exhaustive):

- Does the claimant meet the criteria of a Minor Injury of Catastrophic Impairment?
- Does the claimant qualify for income replacement benefits?
- Is the claimant entitled to attendant care benefits?

Additional programs of care should be implemented that clearly outline the treatment and costs that are reasonable and necessary for common injuries. The programs of care employed by WSIB should be leveraged. This would provide further certainty around treatment and eliminate disputes.

d) Moving Claims Out of the System

The stability of the auto insurance system would be enhanced if claims were concluded in a more timely fashion. Under the current system, a claimant who has sustained an injury other than a minor injury, is entitled to medical and rehab benefits for 10 years or until the financial limit[7] is reached, whichever occurs first. In order to increase stability, claims need to exit the system more quickly. Ontario is the only province that makes med/rehab benefits available for 10 years. In Alberta, claimants are entitled to $50,000 in med/rehab for 2 years. In Nova Scotia and New Brunswick, med/rehab limits have recently been increased to $50,000 for 4 years. This change would reduce the number of pending claims and therefore, limit the financial impact that an adverse court decision would have on pending claims. This change would also result in a significant premium reduction.

e) Catastrophic Impairment should be an Optional Coverage

The Catastrophic Impairment definition and associated benefits drive a significant volume of disputes. The current definition has been eroded and significant costs continue to leak into the system. An alternative definition was proposed by the Expert Panel commissioned by FSCO. However, to date, the Government continues to review and consult while costs mount. Aviva recommends the elimination of catastrophic impairment coverage. The coverage does not exist in any other province in Canada. Aviva recommends that it be replaced by an optional Catastrophic Impairment coverage which would define "catastrophic impairment" in much simpler and clearer terms. This would have a significant impact on the dispute resolution system and the overall cost of the Ontario auto insurance product.

[7] The med/rehab financial limit is $50,000 for non-Minor Injury/. Non-Catastrophic claims and $1 million for Catastrophic claims.

V Conclusion

The FSCO ADR process is no longer working and it is time for a significant change. The FSCO ADR process creates too much uncertainty and instability in the system. Insurers will not be able to fulfill the mandated rate reductions with the current system in place. Ontario drivers deserve an auto insurance system that is stable and affordable. Aviva asks the Government to take action to implement reforms as soon as possible. Aviva thanks the Government for the opportunity to submit its views and recommendations.