The County & District
Law Presidents' Association

L'Association Des Bâtonniers
De Comtés et Districts

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Dear Sir:

The County and District Law Presidents Association (CDLPA) welcomes the opportunity to provide these written submissions relative to the Ontario Insurance Dispute Resolutions System (DRS). CDLPA is particularly well positioned to provide advice and a perspective on this topic. As an association representing the practicing bar across Ontario – mostly in small and sole practice – our members have a front-line perspective on the challenges presented by the current auto-insurance DRS in this province. Prior to preparing these submissions, we consulted with our affiliate, the Toronto Lawyers' Association and lawyers from various areas of the Province, including Kingston, Ottawa, London, Toronto, Windsor, and Hamilton. These lawyers represent a cross-section between those who typically act on behalf of insured persons and those who typically act on behalf of insurers, but the common thread is that they all work on the front lines and have a practical view of the system.

CDLPA makes the following recommendations, each of which will be discussed more fully below:

1. Mediation should no longer be mandatory. Mediation should be at the option of the applicant party.

2. There should be a process of summary arbitrations in writing where the issues in dispute relate to benefits payable under sections 14, 15, 16, 21, 22, 23, 24, 25, 26 or 27 of the Statutory Accident Benefit Schedule, so long as the amount in dispute is $25,000.00 or less or where the dispute relates as to whether the insured person falls under the Minor Injury Guideline (MIG) .

3. Mediators should be given the authority to make interim awards up to reasonable level (we suggest $1,000.00 to begin with, regularly adjusted for inflation) where the issue in dispute relates to denied treatment.

1. Optional Mediation

In almost all disputes, it is the insured person who files for mediation. In some cases, mediation is helpful in assisting the parties to resolve not only the issue in dispute, but the entirety of the accident benefit claim. However, in other cases, mediation is considered an expensive and time wasting exercise. The insured person or his/her representative is in an optimum position to appreciate whether mediation is likely to succeed or fail. This appreciation will be borne from the nature of the dispute in issue and the manner in which the claim has proceeded since its onset. If it is the belief of the filing party that mediation will most likely end in failure, the time and cost of the mediation should be avoided rather than mandating mediation.

Given the increase in the number of mediation applications over the years, and appreciating that the population in Ontario has increased, and is projected to increase by close to 1% per year for the next 20 years[1], it is only reasonable to conclude that the rate of applications for mediation will continue to increase.

The current system of mandatory mediation for all disputes is unsustainable. There are simply too many disputes and too few mediators to cope with the volume of work. Mandatory mediation adds a layer of process that is time consuming and expensive. Where the dispute involves a denied Treatment Plan, mandatory mediation can add to further delay the care and recovery of an injured person.

The cost of mandatory mediation is obvious. The cost relates to all involved: FSCO, the insurance industry and the insured person. It is submitted that if mediation was at the option of the filing party, a great deal of time and expense to all parties could be saved. It must always be kept in mind that in making mediations optional, the parties are in no way discouraged or prohibited from having discussions to try to resolve the dispute in issue. Settlement discussions take place routinely in disputes relating to accident benefits. However, these discussions are most fruitful when the involved parties are prepared to settle and not when settlement discussions are made mandatory.

2. Summary Arbitrations in Writing

CDLPA's recommendation for summary arbitrations in writing, goes hand in glove with the recommendation for optional mediation. In certain types of dispute and where the monetary amounts in dispute are relatively modest, such as denied Treatment Plans, arbitration hearings are not an appropriate forum in which to resolve the dispute. The current DRS model, when it comes to arbitrations, is often too slow and too expensive for the issue in dispute. For example, if an insurer refuses to fund $5,000.00 in Treatment Plans, by the time the dispute works its way through the arbitration system, which includes pre-arbitration hearings and the arbitration itself, too much time has elapsed where the insured has not received recommended care. Thus, by the time the issue is determined, the therapeutic benefit of the recommended treatment may no longer be available, or the cost of treatment might now exceed the $5,000 allowed,

[1] See Ontario Population Projections Update, www.fin.gov.on.ca/en/economy/demographics/projections/

because the injury has become more persistent. This can only have a negative impact on the insured person's care and ultimate recovery from injury.

Additionally, the cost of the arbitration could well exceed the actual amount in dispute. In an arbitration hearing involving a disputed Treatment Plan(s), it would be typical and appropriate for the recommending treatment provider and the insurer's medical examiner to attend and give oral evidence. The arbitration itself could last a day or days. Between the expense of the insured person's and insurer's representatives and the expense of expert witnesses testifying on behalf of both the insured and the insurer, together with the administrative expense of the arbitration itself, the cost of the arbitration hearing will no doubt greatly exceed the amount in dispute. This reality often results in injured persons not being able to afford to carry on with their dispute after mediation has failed. Ultimately, the insured person simply cannot afford the fight and is therefore faced with the choice to either pay for their own treatment or not obtain the treatment at all. This obviously impacts on their ultimate recovery from injury.

A similar problem relates to whether an insured person falls under the MIG. For an insured person to take the MIG to arbitration, he/she is best advised to have legal representation. Expert evidence would be called by both the insured person and the insurer for the sole purpose of determining whether the injured person is insured for $3,500.00 or $50,000.00 in medical and rehabilitation benefits. At the end of that process, the insured person is then faced with the cost of paying his/her representative and the expert witnesses who testified on his/her behalf. Given the current limitations as to the expenses payable at arbitration, the cost to the insured person in trying to get out of the MIG is excessive and, in many cases, unaffordable. Again, if the insured person cannot afford the arbitration process on the MIG issue, they are forced to either pay for their own treatment or do without.

If the current system were amended to allow for summary arbitrations in writing for certain benefits and where the monetary issues in dispute are $25,000 or less or where the issue in dispute relates to whether the insured falls under the MIG, it is submitted that the following benefits would be realized:

(a) The arbitration process would be more timely, cost-effective and affordable for insured persons, insurers and for FSCO,
(b) The arbitration process would be more accessible to injured persons,
(c) The cost of arbitrations would be more proportionate to the issues in dispute;
(d) Given that many of the arbitrations in writing will relate to denied Treatment Plans, the system will prioritize the care and recovery of injured persons.

Our working group gave some consideration as to which statutory accident benefits should be the subject of arbitrations in writing and the appropriate monetary amount that should act as the maximum ceiling. The amount of $25,000.00 is recommended because that equates to the maximum amount under the current Small Claims Court regime in Ontario. It is believed that disputes relating to medical/rehabilitation benefits, lost educational expenses, expenses of visitors, housekeeping and home maintenance expenses, damage to clothing, cost of examinations, death benefits and funeral benefits would be well suited to summary arbitrations in writing. Due to the amounts of money involved and the potential

that the result of the arbitration will have a more long lasting impact on an insured person's life, it is submitted that disputes relating to matters such as income replacement benefits, non-earner benefits, issues related to catastrophic impairment, etc. would be better suited to the current system of arbitration hearings which are preceded by pre-arbitration discussions.

In advocating for a system of summary arbitrations in writing, it is important to appreciate that the alternative of the court system should always be available, as it is under the current DRS. Therefore, in those cases where the insured person is not comfortable with the notion of resolving the dispute in writing and would prefer to "have their day in court", that option should always be open to them. However, it is submitted that where the amount in dispute is relatively modest and, in particular, when a dispute involves denied treatment, the combination of optional mediation and arbitrations in writing, provides a means by which to resolve disputes in a manner that is timely, cost-effective and affordable to all Ontarians. Such a system would result in enormous savings to insured persons, FSCO and the insurance industry.

Perhaps this is appreciated by the recently released Dispute Resolution Services Initiatives[2] where it was reported that the number of arbitration applications received by FSCO in 2012-2013 was double that received in 2011-2012. The study also notes that, currently, about 72% of failed mediations proceed to arbitration at FSCO.

It is not realistic to think that the current arbitration model is sustainable. There are too many applications for arbitration for the system to handle in such a way that all disputes are being adjudicated upon in a manner that is timely, cost-effective and affordable. The system must change to be effective and it is submitted that summary arbitrations in writing for certain specific disputes affords a most advantageous alternate arbitration system.

3. Interim Awards for Treatment at Mediation

Where an insured person opts to file for mediation, it is recommended that, in certain circumstances, the mediators be given the authority to make an interim award up to $1,000.00 – indexed to inflation going forward - to allow the insured person to obtain treatment pending the outcome of the dispute. Obviously, this discretion would only be exercised where the mediation failed. It is recommended that where the mediator is of the view, based on the medical reports submitted, that there is good reason to believe the injured person's care and recovery would suffer if treatment were delayed, the mediator ought to be provided with the authority to make an interim award for the purpose of funding treatment. Such an interim award would afford the injured person the opportunity to receive at least some level of treatment pending the outcome of either a summary arbitration in writing or a trial through the court process. This would then act to prioritize the care and recovery of the injured person.

[2] www.fsco.gov.on.ca/en/drs/Pages/mediation-backlog-initiatives.aspx

The County and District Law Presidents Association appreciates the opportunity to make these submissions and would welcome any opportunity for further discussion.

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