The County & District
Law Presidents' Association

L'Association Des Bâtonniers
De Comtés et Districts

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Sent by e-mail

Dear Sir:

On behalf of the County and District Law Presidents' Association (CDLPA), we thank you for allowing us an opportunity to respond to The Honourable J. Douglas Cunningham's Interim Report relative to the Ontario Automobile Insurance Dispute Resolutions System (DRS).

Generally speaking, CDLPA supports many of the suggestions and recommendations made within the Interim Report. However, as with so many dispute resolution systems whether automobile insurance, worker's compensation or otherwise, "the devil is in the details".

The Interim Report clearly identifies a rising tide in applications for arbitrations before FSCO. Unless the DRS is modified in some way, the people of Ontario are facing a potential arbitration backlog similar to that which clogged up the mediation system. The Interim Report also identified that many of the issues in dispute between insureds and insurers are, from a financial perspective, relatively modest. A full arbitration hearing to resolve issues and disputes concerning such things as, Treatment Plans that are worth only a few thousand dollars, is too slow and expensive for both insureds and insurers. CDLPA therefore welcomes the suggestion that at least some disputes be directed to a paper hearing process.

With that in mind, CDLPA makes the following comments relative to the framework proposed for possible changes to the existing DRS:

(i) The Court Option

First and foremost, CDLPA very strongly encourages and supports the choice of an insured person to take their dispute to court, whether to Small Claims Court or the Superior Court of Justice. As a principle of our democratic rights as citizens, this option must always remain open. In our view, it would be a mistake to turn the entire auto insurance DRS into an administrative tribunal process only and having two paths (administrative tribunal and Court of Justice) available to both sides in a dispute will be better for the system. Insured persons should always have the option to have their dispute tried before a court of competent jurisdiction using the Rules of Civil Procedure and with evidence that complies with both the common law and the *Evidence Act*.

(ii) Insurer Internal Review Process

We generally support the proposal for an insurer internal review process and agree that a thirty day timeframe is reasonable. However, CDLPA is uncertain as to how that process would unfold. The Interim Report states that the claimant would first have to "meet" with their insurer. We are unclear as to exactly what is proposed by the word "meet". We suggest that the internal review process could be accomplished either in writing, over the telephone or by way of an in-person meeting. We also suggest that the criteria for an internal review would be most effective if, in certain circumstances, the insured's interest in the dispute could be articulated by a treatment provider. For example in a situation where a Treatment Plan is denied, it would probably be more helpful to the insured and the insurer if the person who proposed the Treatment Plan is the same person who "meets" the insurer to see if the dispute can be ironed out.

(iii) The Case Manager Gatekeeper

CDLPA supports this suggestion. So long as the timelines in this part of the process are relatively short so as not to unduly delay the dispute, it makes sense that a knowledgeable person take on a gatekeeper function to ensure that the process and documents are in order.

(iv) The Combination of the Mediation and Pre-Arbitration Process

CDLPA also supports this initiative as it will help in either bringing the dispute to a conclusion or, if settlement cannot be achieved, will keep the process moving without any further delay. This should also help the parties focus on the dispute. We would recommend that should mediation fail, the parties be prepared not only to set a date for whatever type of hearing was going to unfold, but also be expected to disclose the evidence that they are going to rely upon in support of their position at the hearing. This should then focus the participants' attention to the issues in dispute so as to ensure that they know their file in advance of the mediation session.

(v) Paper Hearing, Expedited In-Person Hearing or Full Hearing

CDLPA supports this initiative. As stated in our original submissions, not all disputes need to go to a full in-person hearing. Some disputes between insurers and their insureds are such that from a cost perspective, it makes no sense to have an arbitration hearing, when the cost may well exceed the monetary value of the dispute. It would be preferable to have some direction as to what types of matters are considered to be appropriate for a paper hearing as opposed to an expedite in-person hearing, or a full hearing.

One matter that we do want to address is the reference near the bottom of page 36 of the Interim Report where it is stated that in more complex cases, such as catastrophic impairment determinations, the hearing would be "limited to a short timeframe". It is unclear what is meant by "a short timeframe". Some disputes between insureds and their insurers can have a significant impact on the insured. This could include whether the insured is entitled to ongoing income replacement benefits or non-earner benefits or whether the insured meets the definition of catastrophic impairment. Some of these issues can be difficult and may require the testimony of a number of expert witnesses from various backgrounds. We would not want to see any arbitrary time limit placed on the proceedings which could inadvertently prejudice the client's right to a full hearing on the merits.

(vi) The Courts vs Alternative Dispute Resolution

As earlier stated, CDLPA strongly advocates that an insured person have the option to take their dispute to court. This raises a number of issues. These issues include:

(a) The Interim Report makes reference to various policy directives or interpretive guidelines to be published by FSCO. While an administrative tribunal, through an ADR process, may be expected to follow such directives and guidelines, it is difficult to envision a Court being bound by such publications. Obviously, it would be extremely important that there be a consistent body of decisions, based on the same principles, between the courts and the ADR arbitrators. We obviously cannot have a conflicting body of decisions where the ADR arbitrators feel bound to follow policy directives and interpretive guidelines whereas the judges of Ontario do not feel so constrained. Accordingly, it may be necessary to ensure that any "policies" are also codified into regulation, which in turn would be binding on the Courts.

(b) In dealing with the issue of costs, it is our understanding that the insurance industry would like to see insured persons have more "skin in the game". To this end, we would caution the insurance industry to be careful what they wish for. If too many fees are downloaded onto insured persons, the vast majority of whom are, if not impecunious, close to it, they will simply elect

to take their dispute to court. It must be remembered that it only costs $75.00 to issue a claim in Small Claims Court and $181.00 to issue a claim in Superior Court. Assuming the insured person can find a paralegal or lawyer who will take the dispute on a contingency retainer basis, unless a court orders costs against the insured, they have no other exposure to pay. If the ADR stream places too much costs on the insured person, there may be a significant increase in the number of claims that are disputed through the courts. This really raises the following question: Does this review committee and the government have a preference that most, if not all, disputes go to ADR so as not to burden an already overworked civil justice system? If there is a preference from either this review committee or the government that disputes be resolved through the ADR process, as opposed to the court process, then the ADR process should be designed so that it is the more attractive alternative to the insured person. The cost of the process goes a long way in the insured's choice as to which stream they choose.

(vii) Appeal Process

CDLPA supports the idea of an appeal to a single judge of the Superior Court of Justice.

We do appreciate this opportunity to make these submissions and to attend with other stakeholders on December 13, 2013 for further discussion of these issues.

All of which is respectfully submitted,

____ORIGINAL SIGNED BY_____
Janet Whitehead,
Chair, CDLPA

_____ORIGINAL SIGNED BY ____
Michael J. Winward,
Civil Justice Review and Rules Committee
CDLPA