RESPONSE TO THE HONOURABLE JUSTICE CUNNINGHAM'S INTERIM REPORT REGARDING ONTARIO AUTO INSURANCE DISPUTE RESOLUTION SYSTEM REFORM

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Introduction

The following submissions have been prepared by Intact Financial Corporation ("Intact"), in response to The Honourable Justice Cunningham's request for further stakeholder input following the release of the Interim Report regarding reform to the Ontario Auto Insurance Dispute Resolution System ("DRS Reform") in respect of Statutory Accident Benefits ("SABs") disputes before the Financial Services Commission of Ontario ("FSCO").

Intact is encouraged by the overall vision of the Interim Report and commends The Honourable Justice Cunningham, and his team, for their tremendous efforts to date.

With that being said Intact remains of the firm belief that certain direct and indirect changes to the dispute resolution system ("DRS"), as outlined in our original stakeholder submissions, are required. The overwhelming need for these changes becomes more apparent when examining the framework of the new model proposed in the Interim Report (i.e. A Possible Framework for Legislation).

What follows is an examination of specific issues addressed in the Interim Report, our position with respect to same, and solutions to address gaps in the new model.

Section 1: Composition of Tribunal

(a) Private vs Public:

Since the inception of the OMPP in June 1, 1990, which in turn created the Ontario Insurance Commission (the predecessor to FSCO), the insurance industry has now had nearly a quarter of a century experience of adjudicating matters before a public tribunal. It is from this wealth of experience, rather than nostalgia, that Intact submits that the adjudicative arm of FSCO ought to remain a public sector tribunal.

One must not underestimate the value of a captive audience of specialists solely responsible for adjudicating *SABS* disputes. The Interim Report clearly points out that auto insurance has undergone numerous changes in the last 23 years. If the past is indicative of the future one can safely assume that further changes to the *SABS* are a foregone conclusion. It is this environment of ever increasing legislative/regulatory complexity, overlapping successive *SABS* regulation, along with the recent increased use of interpretive Guidelines, which illustrates the need for a centralized body of experts to adjudicate *SABS* disputes.

Furthermore government oversight of the adjudicative tribunal can also ensure transparency, uniformity of application of legislation/regulation, predictability, and accountability in the DRS process.

A further advantage of a public sector tribunal is that its arbitrators remain independent to the parties to the *SABS* dispute. This independence can assure arbitrator neutrality and fairness as between the parties.

(b) Separation of Policy and Adjudicative Function:

We endorse the separation of the policy and adjudicative function at FSCO (provided that the adjudicative tribunal remain a public sector entity). This should remove any systemic (i.e. inherent) biases, if any, which may exist within the current model (i.e. wherein arbitrators do not operate at arm's length to the policy function at FSCO) and allow for greater arbitrator independence.

We further agree that the introduction of measures, similar to section 126 of the *Workplace Safety Board and Insurance Act*, should ensure that arbitrators adhere to the legislative intent of the *Insurance Act* and *SABS* and in turn curb arbitrator activism. Such an amendment provides far greater certainty that there will be a correct application of the *Insurance Act*, *SABS*, and interpretative Guidelines.

Section 2: The Route Best Travelled

(a) Tribunal vs Court:

The Interim Report still leaves the door open for claimants to choose either arbitration or Court to dispute their claim. Leaving this option available for a claimant most certainly undermines the Interim Reports principle of "timeliness". We would recommend that all disputes be handled via arbitration and the Court option be eliminated.

(b) Appeal Route:

We endorse the Interim Reports amendment of the appeal process, post-arbitration, to a single judge of the Superior Court of Justice.

Section 3: Opening the Door

(a) Health Care Provider Access to DRS:

We don't share the Interim Reports perspective that it would be a positive step forward to allow health care providers to access the DRS. It is suggested that the health care provider would be in the "best position", rather than the claimant, to argue "why the denied services are reasonable and necessary" (despite the fact that the claimant's medical condition and/or ongoing physical complaints, if any, is squarely at issue). Allowing such access will only perpetuate health care providers to use the DRS as a mean to collect outstanding accounts.

Section 4: The Med-Arb Model

(a) "Ease" of Access:

We applaud the Interim Report's conclusion that there is an issue with the "ease" in which a claimant can access the DRS. However, the Interim Report is silent as to specific measures that could be implemented, prior to the claimant submitting an application, to address this problem.

Procedural safeguards ought to be implemented to ensure that only genuine disagreements between the claimant and insurer find their way into the DRS.

The measures outlined below will address this issue whereby the claimant cannot access the DRS without first complying with basic procedurally mandated steps.

(b) Mandated Steps:

It remains our adamant submission that there must be indirect amendments to the *SABS* to:

- Mandate early production by the claimant of customary documentation relating to the various available benefits being claimed (page 7 of our stakeholder submissions). This can be completed through a regulatory amendment to the *SABS* (ideally section 33). Furthermore the claimant ought to be barred from initiating a dispute if this documentation has not been produced.

- Mandate that the claimant is unable to commence a dispute unless they have complied with and/or attended an Insurer Examination (with respect to the issue in dispute) and/or Examination Under Oath (page 5-6 of our stakeholder submissions).

- Legislate the ability for insurers to obtain signed statements from service providers to confirm that expenses submitted by a claimant have been incurred (i.e. attendant care, caregiver and housekeeping – page 9 of our stakeholder submissions).

- Suspension of the accrual of interest on outstanding benefits where the claimant fails to comply with the aforesaid mandated procedures.

The necessity of the mandated steps above is only further reinforced by the Med-Arb model being proposed within the Interim Report. The abbreviated duration of the

dispute (anticipated 6 months from start to finish) requires the claimant to demonstrate a vested interest in substantiating their initial entitlement to a benefit. After the claimant complies with the mandatory steps, and the parties remain at an impasse on entitlement, then, and only then, should the matter be able to enter the DRS.

(c) Case Manager:

Under the Med-Arb model the case manager would operate as the "gatekeeper" to ensure that matters are "ready to proceed through the system". The case manager could ensure that the aforesaid mandated productions have been exchanged, the claimant has attended the Insurer Examination and/or Examination Under Oath, and the claimant has facilitated the production of signed statements from service providers.

It strikes us that without insurer involvement, for instance which could be sought after the case manager receives notice of a dispute from a claimant, the case manager would be unaware if these procedural requirements had been met. The process could be similar to that proposed in our stakeholder's submissions (i.e. Stay of Proceeding Form). For example, the insurer, after receiving notice of dispute from the case manager, may file an objection to the case manager (within a stipulated timeframe) outlining what mandated steps have not been completed. The case manager, as suggested in the Interim Report, could return the application if there were any outstanding issues (if deficient the case would lose its place in the queue).

The case manager function also addresses our concern with respect to the deficiencies and/or lack of sufficient particularity in the notice of dispute (pages 11, 15-16 of our stakeholder's submission).

(d) Med-Arb Hearing:

The proposal to combine the mediation and pre-arbitration hearing will most certainly expedite the duration of the DRS process. The single Med-Arb hearing, however, will not be fruitful if the parties arrive at the table quibbling over outstanding productions, the claimant's failure to attend an Insurer Examination, EUO, and/or failure to provide substantiating statements from service providers. This regrettably may necessitate a further Med-Arb hearing, causing unnecessary delay, which could potentially prolong the DRS process outside of the 6 month goal. An expedited system, which envisions the parties having only one face to face meeting prior to arbitration, must place a heavy onus upon the parties to be compliant before entering the DRS. The solution is to provide clear, bright line, pre-requisite mandatory steps that must be completed.

The multi-faceted function of the arbitrator, who is conducting the Med-Arb hearing, is also a progressive step forward in revolutionizing the DRS. The arbitrator's ability to

provide a non-binding opinion of the case (evaluative process), to dictate the course of the dispute (i.e. identifying and fast tracking an issue), stipulating the length and method of hearing (in writing or not), and scheduling the eventual arbitration hearing are all positive steps to streamlining the process.

We would recommend, however, that the arbitrator in choosing the length and method of the arbitration hearing ought to be furnished with a list of factors to consider (possibly by way of a Guideline or Rule of Interpretation). Some of the factors, which may include but are not limited to, are:

- The quantum at issue
  (not merely the number on the application but considering what implications, if any, it may have for the long term entitlement and projected future quantum of that benefit - e.g. IRB entitlement of a 25 year old claimant at 104 week mark)
- The number of issues in dispute
- Are there different benefits in dispute (e.g. IRB and Med Rehab)?
- The complexity of the case (e.g. causation issues)
- Are there any other denied benefits that are currently in the DRS process?
- Are there any other denied benefits wherein a dispute will be initiated and is it ready to proceed through the DRS (i.e. mandatory steps completed)?
- Whether any current or future denied benefits ought to be joined to the present DRS dispute or whether it ought to form part of a separate dispute?
- Are there any fast track issues that can be bifurcated and addressed separately?

The length and method of the arbitration hearing ought not to be solely chosen based on the quantum at stake. The totality of the aforesaid factors can be examined so that the arbitrator can make an informed decision on the best course of travel for the arbitration hearing.

(e) Fast Tracking Issues:

We also endorse the Interim Report's suggestion that some issues (not specified) can be fast tracked through the DRS. Our stakeholder's submissions most certainly advocated this position for certain dispositive issues: staged accidents, re-payment of benefits, material misrepresentation of claim (page 18), and jurisdictional issues.

Under the Med-Arb model the case manager and/or the arbitrator (who is overseeing the Med-Arb hearing) could identify these issues and streamline the process to acquire a timely hearing on these dispositive issues.

Conclusion

We would again like to thank The Honourable Justice Cunningham for requesting our contribution regarding reform to the Ontario Auto Insurance Dispute Resolution System.

It is our belief that the foregoing submissions will assist the Ministry of Finance, FSCO, and the government to achieve the mutually desired goal of improving efficiency, expediting the DRS process, increasing procedural fairness to both Insureds and Insurers, and making auto insurance more affordable to Ontario drivers.

Intact looks forward to receiving any feedback The Honourable Justice Cunningham may have and welcomes the opportunity to make additional submissions, if requested.