TSB PERSONAL INJURY AND COMMERCIAL LITIGATION
TAYLOR, STEINBERG & BABER
PROFESSIONAL CORPORATION

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Senior Manager
Automobile Insurance Policy Unit
Industrial and Financial Policy Branch Ministry of Finance
95 Grosvenor Street, 4th Floor
Toronto, Ontario M7A 1Z1

Dear Madam/Sir:

Thank you for the opportunity to respond to your interim report concerning dispute resolution for accident benefits claims arising from motor vehicle accidents in Ontario.

Although your report mentions strong stakeholder support for moving dispute resolution to the private sector, my review of the submissions discloses only some support, with most submissions silent on this point. This might be because the request for submissions issued by the Ministry of Finance stated the following:

> Mr. Cunningham is seeking stakeholder perspectives on the Ontario auto insurance dispute resolution system. The interim report is expected to include recommendations on questions such as whether mediation should remain mandatory for all Ontario automobile insurance disputes, and what is the best approach to its delivery.

There is no mention in the initial request for submissions that you would be looking for recommendations on the possibility of dismantling the current arbitration system at FSCO. This is one of the reasons that I did not submit an initial submission. I believe a more open consultation is required in order to move on the kind of recommendations you suggest in your initial report.

Accident benefits is a very important, busy area of the law with serious ramifications for injured Ontarians and I submit it would be risky to take a chance on an untested model in Ontario. In your report, you refer to a private tribunal in New Jersey. While there may be a general movement in the Unites States to move institutions from the public to the private sector, I was unaware of a similar movement in Canada. I feel it would be risky to form a private tribunal based on an American form of justice and I suggest some sober thought before that type of decision is made. We are two different systems, and the difference in the quantum of personal injury awards alone is but one indicator of those differences.

My preference would be that the government focus on fixing the existing system. I feel this is the most fair and cost-effective alternative and an opportunity to make arbitration at FSCO a more workable system. To replace it entirely without addressing policy missteps or giving arbitrators tangible powers to move matters along would be

tantamount to 'throwing the baby out with the bathwater'. I would hate to see that opportunity wasted by simply incurring the costs and time to replace an already effective, experienced tribunal with a new one that is different only because it would employ *per diem* arbitrators. The resources required to start over could be better used to fix the existing model, which, it might be argued, has been under-resourced, and I remain unconvinced that the costs justify the experiment at this point in time.

The auto policy makers have relentlessly tweaked the *Schedules* over the years so that today we are left with a complex legislative mess (in my humble opinion). True and effective change would be achieved by starting to address where the problem arose, namely in auto policy. Give the community a clear set of rules and much more certainty will be given to the system.

You also refer to the increased use of legal representation at arbitration. While I have no idea of the numbers of unrepresented applicants, I can say that I would not want to be a layperson navigating accident benefits today without representation, which in my view is a consequence of complicated policy. At present, there are all sorts of timelines and a legislated order of doing things that it seems next to impossible for a self-represented layperson to figure out. One wrong step may result in the insurer no longer being liable to pay an otherwise legitimate expense because the applicant did not follow the procedure in the *Schedule* (for example, see 38(1.1) of the *Schedule).*

A move to a public tribunal also has its pitfalls. First of all, a transfer to a public tribunal comes with enormous cost and bureaucracy. Second, one difficulty with public tribunals is the appointment process itself, often of non-lawyers seen by the public as patronage appointments by the government of the day.

I believe that one of the main reasons parties choose arbitration at FSCO is the understanding that they will receive a fair hearing by experienced decision-makers who are unencumbered by considerations that affect their employment. One of the key elements to a system that makes the arbitration process work at all is the knowledge that the decision maker is independent, of which security of tenure is a significant component.

You suggest a plan to pay arbitrators on a *per diem* basis. My experience during the backlog relief efforts, for example, has served to illustrate that security of tenure is an integral component of the current tribunal, which has undisputed expertise in this area of the law, and whose expertise has been recognized by the courts. If a *per diem* model comes to fruition, I would rarely, if ever, recommend it to my clients. I would consider taking only my smallest files, where my clients have minimal exposure, to the type of arbitration where an arbitrator could determine that a paper review is warranted. Where credibility is even a minor concern (as it is in a substantial number of cases and perhaps one of the reasons FSCO arbitrators have parallel jurisdiction with the Superior Court), I would recommend that my clients proceed to court. This would in turn increase an already existing court backlog and not at all contribute to the goal of quick justice in

Ontario and would increase even more the time for my client to have a decision made regarding access to accident benefits.
The concerns with the length of time an arbitration takes are in part the blame of counsel, whose schedules are often full a year or two in advance. FSCO has often offered early dates for arbitration that the parties do not accept because of counsel schedules. Sometimes applicants' counsel have early dates that insurer's counsel do not. Perhaps a better place to start would be to give the existing tribunal powers to better move the process along such as rules on costs for behaviour that tends to prolong matters.

Thank you again for this opportunity. I look forward to your final recommendations but remain hopeful for effective repairs for a system that in my view could benefit from some repairs but that does not need to be replaced completely.

Yours very truly,

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