ONTARIO BAR ASSOCIATION
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L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Ministry of Finance
95 Grosvenor Street, 4th Floor
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RE: Interim Report - Auto Insurance Dispute Resolution System Review

Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to provide further comments as part of the expert auto insurance dispute resolution review being conducted by the Honourable Mr. Douglas Cunningham.

The OBA has reviewed Mr. Cunningham's Interim Report to the Minister of Finance of October 2013. We are pleased to provide the following comments jointly prepared by the OBA Working Group that contributed to the earlier submission, which is comprised of members of our Insurance Law Section, Civil Litigation Section, and the Alternative Dispute Resolution (ADR) Section.

The OBA looks forward to the opportunity to meet with Mr. Cunningham again to provide further input as the expert review proceeds.

Comments on the Interim Report Preliminary Observations and Recommendations

The Interim Report recommends that mediation no longer be mandatory in its current form, and that the government consider introducing a new system that consolidates the strengths of the existing mediation and arbitration processes to facilitate a more efficient model for resolving disputes.

In the OBA's prior submissions, we provided an overview of our view of mediation and the role it can play in helping to resolve automobile insurance disputes. The OBA believes that the principles underlying mediation can often work effectively to resolve or help resolve many auto insurance disputes fairly, quickly, and as cost effectively as possible. The experience under the existing process suggests that mandatory mediation can effectively resolve many simple cases, even where the parties initially believe resolution is unlikely. As we previously indicated, in complex cases such as those involving catastrophic impairment, mandatory mediation has not proven useful.

The OBA agrees with the recommendation in the Interim Report that a new process could use the strengths of mediation and arbitration together to create a more compressed and speedier process by having the mediation and the pre-arbitration hearing take place at the same time. We think that maintaining mediation as part of the process provides an opportunity to resolve a high volume of simple and straightforward cases expeditiously and at the lowest possible cost.

In assisting the streamlining of case resolution, the OBA also supports an emphasis on disclosure by the parties of all relevant information as early in the dispute resolution system as possible. In all cases, the extent of production needs to be proportionate to the claims in dispute, the determination of which could be addressed as part of the new system that consolidates the strengths of the mediation and arbitration processes. Timely and proportionate disclosure would increase the opportunity for early settlements and further the interests of natural justice by each party knowing the case it has to meet as early in the dispute resolution system as is possible.

The OBA agrees that another way to ensure that dispute resolution services are delivered in a timely fashion is to establish delivery standards with respect to timelines. As noted in the Interim Report, there is a lack of statutory time limits for scheduling arbitration pre-hearings and hearings. The absence of timelines for arbitrators to render decisions may also contribute to excessive delay in some cases. In our view, a time line of 6 to 9 months from start to finish may be reasonable to accommodate more complex cases.

The Interim Report also recommends that the government consider that FSCO's adjudicative functions be delivered externally.

The OBA's view is that as part of the auto dispute resolution system, FSCO has provided a specialized adjudicative ability with a demonstrated understanding of the subject matter. FSCO has developed a significant body of case precedent. While there may be opportunities to streamline the process by having the mediation and the pre-arbitration hearing take place at the same time, our view is that the preferred approach would be to build on the strengths of the existing FSCO system, with overflow into the private sector if necessary.

If there is a decision to relocate the FSCO dispute resolution functions to another public sector body or to the private sector, the OBA's view is that the private sector would be the preferable alternative. The OBA does not support the dispute resolution services being established in an independent public sector tribunal. A contracted service delivery model through the private sector would best provide flexibility and an ability to respond to varying demand.

The OBA supports a future system that could accommodate different processes based on the complexity of the case. An expedited process for simple cases or those where the benefits in

dispute are below a monetary threshold (e.g. $25,000) will promote the intended goal of proportionality.

The OBA agrees that for many minor cases, providing for a paper review may assist in streamlining the dispute resolution process. While it is agreed that paper reviews may lead to quicker hearings and decisions, they are not appropriate for all cases, and parties should have a right to a full hearing with *viva voce* evidence and cross examination for moderate and complex matters.

The OBA agrees that insurers should be mandated to provide an internal review process as a first point of review for a denial of benefits. However, the process should be optional for applicants. There is a real and substantial risk of an applicant expending costs and resources to prepare additional materials for an internal review, which would serve as an additional hurdle to an applicant's access to justice before entering the dispute resolution system.

The OBA does not support the option to have independent medical consultants on matters before FSCO, as this raises issues of additional costs, unnecessary additional opinions, and quality control. We suggest that the system maintain the use of experts put forward by parties, and that each expert be required to certify his or her duty to the adjudicator to provide fair, objective and non-partisan evidence with a certificate similar to Form 53 under the *Rules of Civil Procedure*.

Statutory Accident Benefits disputes are different than third party personal injury litigation in that by the time a case enters the dispute resolution process, many experts have already been retained by the parties and significant funds have already been expended on the instruction, retention and arrangement of reports from those experts.

Furthermore, expert scientific evidence is rarely at issue in a first party arbitration. Where a dispute exists, it is normally related to credibility issues on the nature and extent of the injuries. Adding another layer of medical experts would not assist the dispute resolution process.

The OBA appreciates the opportunity to make this submission, and looks forward to the opportunity to meet with Mr. Cunningham again to provide further input as the review proceeds.