ONTARIO TRIAL LAWYERS ASSOCIATION (OTLA)

OTLA's Submission on the Interim Report of the DRS Review

2/12/2013

The Ontario Trial Lawyers Association ("OTLA") has carefully and thoughtfully considered the Interim Report of the Hon. Mr. D. Cunningham, reviewing the Ontario Automobile Insurance Dispute Resolution System ("DRS"). OTLA is grateful for the opportunity to provide comments and submissions in response to the Report.

OTLA has more than 1,000 lawyer members, the vast majority of whom devote some or all of their law practices to the pursuit of claims on behalf of persons injured in motor vehicle accidents. Indeed, the majority of injured persons who retain lawyers for such claims hire OTLA members. OTLA is singularly well-situated to comment upon the functioning of the Dispute Resolution System in Ontario, and upon the advisability of any proposed changes to that system.

What follows is OTLA's response to the various observations, comments and preliminary recommendations set out in the Interim Report. A brief synopsis of OTLA's position on some of the key issues, to be expanded upon in the discussion, is provided thus:

1. OTLA holds the view that the Dispute Resolution System in Ontario is not "broken". Rather, adjustments involving certain elements of the system would achieve the laudable goals of fairness, efficacy and efficiency that the current review process seeks to promote;

2. OTLA does not agree with the suggestion to privatize the Arbitration and adjudication system. If instituted, this would inevitably lead to a much lower and inconsistent quality of adjudication which would prove to be a serious injustice to those injured in automobile accidents who would be relying, in good faith, upon a fair, independent and competent process;

3. OTLA supports the separation of the DRS arm of FSCO from the regulatory arm;

4. OTLA would maintain the current system of appeals to Director's Delegates, who over decades at FSCO have developed unparalleled expertise in accident benefits claims, and have earned considerable deference from within FSCO and the Courts. The channeling of arbitral appeals into the Court system would inevitably overburden an already-burgeoning civil docket, and would unrealistically and impractically require that Judges become specialists in an often complex and technical field best suited to specially trained and experienced Arbitrators;

5. OTLA supports the concept of a "paper review Arbitration" for medical- and rehabilitation-related claims having an upper limit of $2,500 as a means of achieving greater efficiency in the delivery of Arbitration services. However, OTLA's support for the paper review is predicated upon its adoption as an all-party, consent-based procedure;

6. OTLA maintains that claims which do not meet the requirements for a paper review Arbitration should remain subject to full hearings. Contrary to certain assumptions and assertions found in the Interim Report, the vast majority of Arbitration hearings conducted under the current system conclude within a matter of days rather than weeks or months.

Therefore, there is no demonstrable need to alter a hearing system that is functioning smoothly and efficiently for nearly all claims.

7. OTLA has no objection to a merger of Mediation and Arbitration services. Although the Mediation process in its own right has seen impressive issue-resolution levels, OTLA views the integration of the Mediation function into the adjudicative model as a reasonable way to streamline the dispute resolution process and accelerate the disposition of claims.

TIMELINESS

OTLA agrees that timeliness is an important principle in the DRS, and OTLA further agrees that injured persons should have speedy access to dispute resolution services without the necessity of invoking the Court process if they choose. However, OTLA disagrees that the DRS has been a victim of its own success. OTLA also disagrees that FSCO is struggling to keep up with the demand for DRS services. The Mediation backlog that was a problem for several years no longer exists. FSCO no longer needs the services of private sector Mediators to meet its statutory obligation of completing Mediation within 60 days. All Mediations are now being completed by FSCO Mediators within 60 days. This is the exact same timeline that existed in the 1990's when the DRS was created. With Mediation application volumes falling significantly over the past two years, it can be reasonably expected that FSCO will easily be able to continue to complete all Mediation applications within the 60-day time period.

With respect to the possibility that an Arbitration backlog will develop, OTLA believes this is unlikely. A recent survey of OTLA members revealed that in most cases FSCO is able to offer Arbitration dates as early as the parties request. Arbitration pre-hearing and hearing dates that are difficult to schedule are often the result of the unavailability of the parties. In other words, in many cases FSCO is able to provide pre-Arbitration and Arbitration dates earlier than the parties can accommodate.

As an example of the tardiness of the DRS, the Interim Report cites that disputes regarding the interpretation of the legislated changes to the Statutory Accident Benefits Schedule ("SABS") that occurred in September, 2010, have yet to reach Arbitration. On the contrary, perhaps the most significant change made to the SABS in 2010 – the creation of the "Minor Injury Guideline" ("MIG") – has already been the subject of an Arbitration hearing (*Scarlett v Belair Insurance Company, FSCO A-12-001079*), with a decision rendered, the decision appealed, the appeal heard and decision rendered. If there are changes to the SABS that have not yet been tested at Arbitration, it is because those changes have not been challenged, or they were subject to the mediation backlog that no longer exists.

The Interim Report states that the DRS has turned into a system parallel to the Courts, with claim processing times only marginally faster than the Court. OTLA disagrees with this assertion. The entire FSCO process, from the initial Application for Mediation to final

Arbitration, routinely takes no more than a year. The DRS therefore remains a much more speedy, simple and user-friendly system than the Courts. Indeed, in the Courts, status hearings are routinely brimming with lawyers seeking to explain two-year delays, yet requesting additional time to conduct examinations for discovery, medical examinations, complete undertakings and set actions down for trial.

OTLA is therefore of the opinion that the Dispute Resolution System at FSCO is already streamlined and not in need of a major overhaul. This can be further demonstrated by addressing certain apparent misconceptions that have found their way into the Interim Report.

The Interim Report has also suggested that the length of Arbitration hearings be limited, and that a limitation be imposed upon the number of witnesses. Given that there are fewer than 40 full Arbitration hearings a year at FSCO, with most of them conducted over a few days, any streamlining of the system as proposed would be unnecessary, and any cost savings would be minor.

Moreover, FSCO already limits the number of expert witnesses to two, rather than three as permitted in the Court system. Even then, it is not uncommon for parties to simply file all medical documents including expert reports, and to call only the applicant, a lay witness and perhaps a key treating physician or employer. This clearly underscores the fact that the FSCO system is already streamlined, fair and functional. As for cases involving a catastrophic determination – perhaps the most complex type of case before FSCO Arbitrators – these also typically proceed in a streamlined manner, with testimony limited to that of the applicant, a lay witness and the appropriate experts whose opinions are confined to the impairment issue only.

The Interim Report points out that FSCO Arbitration hearings have become protracted and can extend over weeks. OTLA disagrees with this generalization. On the contrary, protracted hearings are much more the exception than the rule, and are limited to those involving multiple and often complex issues. In fact, according to FSCO, in the past three years only seven hearings have lasted at least 10 hearing days, while the average hearing time is 1.8 days. The vast majority of hearings are completed in a matter of days rather than weeks, which sets the FSCO hearing process notably apart from the Court system. Both applicants and insurers need to be provided the opportunity to present their cases in a fair and balanced way, which is exactly what the current hearing system permits. Anything less would be in derogation of fundamental rights of fairness and due process.

The Interim Report discusses the problems some injured persons face in obtaining treatment funding. It goes without saying that funding only becomes a problem after an insurer has refused to pay for treatment that has been requested by the injured person's health professional. As well, the adoption of the MIG, with its $3,500 treatment funding limit, has undoubtedly created many situations where injured persons quickly exhaust their funding. Only a very tiny fraction (well below 1%) of all injured persons will seek funding for treatment from a litigation funding company. Advance payments from insurers to fund treatment are also exceedingly rare occurrences. Importantly, none of this is related to the functioning of the DRS.

The Interim Report suggests that there is a form of queue-jumping taking place where Mediation applications are being filed even before a benefit denial takes place. This is simply not the case. In fact, a Mediation application filed with FSCO will be promptly rejected unless it clearly indicates the nature of the treatment or benefit that was requested and the date the benefit or treatment was denied by the insurer. Therefore, it is not possible to file an application for Mediation unless there has been a denial of a claimed benefit. The intake department of the FSCO Mediation branch will not accept applications for Mediation that do not meet these strict criteria. While it is correct that additional denials can be added to an existing Mediation application that has yet to be heard, since Mediation applications are now received, processed and heard within 60 days, only new denials that occur within this 60-day period can be added to an existing Mediation file. This is a very positive practice in that it permits the injured person and the insurer to deal with all of the outstanding issues in dispute at one time without the need for successive Mediation applications. This preserves system resources rather than creating a drag on them.

OTLA's position is that it is both unfair and inaccurate to suggest that legal representatives can become barriers to the speedy resolution of injured persons' disputes. The vast majority of lawyers representing injured persons at FSCO welcome the opportunity to attempt to resolve their clients' disputes. At times, claimants' lawyers' schedules prevent the scheduling of a matter at the very first availability. It is the experience of the members of OTLA, however, that there are more scheduling delays caused by insurance companies than by injured persons. There is no benefit to an injured person having his or her claim delayed. In some cases there may be benefit to insurers. One only needs to consult the 2012 decision in *Hurst v. Aviva (2012 ONCA 837*) as support for this proposition. Injured persons' lawyers pushed hard to have their clients' Mediation applications completed within the 60-day legislated timeframe, yet the insurance industry opposed this all the way to the Ontario Court of Appeal. The insurance industry argued vigorously that injured persons should be forced to wait in line as long as it might take for their Mediations to be completed – at the time, up to a year and a half.

PROPORTIONALITY

OTLA supports the concept of proportionality as it relates to the current DRS. OTLA agrees that it can often be far more expensive to go through the full DRS involving Mediation and Arbitration than might be warranted in the case of small expense disputes.

The Interim Report cites the example of the inordinate expense that would be involved in conducting an in-person Arbitration hearing to determine whether an orthopaedic mattress was a reasonable and necessary expense. OTLA agrees with this. However the reality is that over the nearly 25-year history of FSCO, one would be hard-pressed to find an Arbitration decision where the only issue in dispute was a claim for a small expense. A review of past Arbitration decisions will quickly reveal that almost every decision relates to far more serious

and complicated benefit entitlement issues such as income replacement benefits, non-earner benefits, catastrophic impairments and attendant care benefits.

The Interim Report suggests that insurers are settling claims and paying injured persons lump sum settlements in circumstances where the claims being advanced by the injured person are frivolous. According to the Report, insurers have suggested that they are doing this because it is less expensive for them to pay a frivolous claim rather than dispute it. OTLA does not accept this to be the case. The experience of OTLA members is that the insurance industry is very sensitive to claims that it believes are frivolous. The insurance industry has never been reluctant to fight cases on principle.

What both the insurance industry and injured persons do on a daily basis is attempt to settle claims that are legitimately in dispute. Obvious claims are not commonly being disputed. They are generally being paid. Legitimate disputes involve risks to both sides. The settlement of such claims should be encouraged, rather than discouraged. The suggestion that insurance companies are somehow being coerced into settling what they consider to be frivolous claims, is not supported by any data or evidence.

OTLA supports modifications to the current DRS in order to facilitate faster and more economical adjudication of minor benefits disputes, so long as any new system maintains a level playing field for insurance companies and injured persons. The creation of a "paper review Arbitration" process for relatively low-value claims is a concept supported by OTLA, subject to the following requirements which are designed to promote the above-noted objectives:

1. The paper review should be categorically restricted to claims arising under the "medical" and "rehabilitation" provisions of the SABS;

2. The total amount in dispute should be subject to a monetary upper limit for all items to be adjudicated, of $2,500, exclusive of interest and a special award;

3. The paper review should be available only if both the claimant and insurer consent to the use of that summary procedure. Consent is an essential element since the Arbitrator's determination would not be subject to appeal, as described below;

4. The determination by the Arbitrator would be made, and the report of the Arbitrator rendered, within 14 days the Arbitrator's receipt of the parties' written submissions in respect of denial of the benefit;

5. The determination by the Arbitrator should be expressed as either "disputed claim allowed" or "disputed claim denied" for each separate claim in issue, without recording reasons for the determination. This particular format is proposed since a paper review lacks certain elements that would otherwise be present in a full hearing, such as credibility considerations. It would be unfair to the parties were reasons to be provided by the Arbitrator as this could

adversely impact and prejudicially bind the parties for all subsequent claims, and raise concerns regarding issue estoppel.

6. The arbitrator's decision should be binding and final, without recourse to appellate review. The need for an expeditious determination, coupled with the relatively low monetary value of the items in dispute in contrast to the disproportionate legal costs involved in pursuing such low value claims beyond the paper review, are in OTLA's view justification for removing the right of appeal following paper review adjudications;

7. Costs should not be recoverable as part of the paper review process, regardless of outcome. The costs already incurred by both sides in preparing a paper review should serve as a sufficient incentive to curb abuses.

ACCESSIBILITY

For the protection of consumers it is important that access to the DRS remains simple and cost effective. The reasons for the spike in Mediation applications over the past four or five years are complex. There were significant legislative changes to the SABS in 2010. Whenever changes to the SABS occur, uncertainty ensues and Mediation applications rise. However it is important to note that the number of Mediation applications has dropped significantly in the last two years. This trend is likely to continue.

It should also be kept in mind that an injured person can apply for Mediation only after there has been a denial of a benefit, or a delay in its provision, on the part of the insurance company. The rate of benefit denial needs to be investigated as a possible cause of increased Mediation applications. The denial rate for treatment plans has increased significantly in the past several years. This too, undoubtedly, has contributed to increased applications for Mediation.

The Interim Report states that there are few disincentives to the disputing of a benefit denial. As a matter of both public policy and consumer protection, the question needs to be asked whether the system should make it more difficult for an injured person to dispute an insurance company's decision to deny a benefit. OTLA believes that many insurer denials are improper and unfair. If insurer denials were reduced, perhaps by more thoughtful, nuanced and fair claims-handling procedures at first instance, then, logically, Mediation applications would decline even more than has already occurred.

The Interim Report remarks that there are no financial risks to an injured person who wishes to challenge an insurance company's decision to refuse a benefit. Nor do insurers have financial risk for excessive claim denials. There are no disincentives to poor claims handling. There are no disincentives to arbitrary treatment plan denials. In fact there are obvious financial incentives to insurers to carry out these practices. In order to keep the playing field somewhat level, injured persons need simple, time-sensitive, and cost-effective access to the DRS.

The Interim Report notes that efforts to screen out frivolous or undocumented disputes early in the process appear to have been ineffective. FSCO keeps no statistics, nor is there any definition of a frivolous application. For a system that receives tens of thousands of Mediation applications each year, some will undoubtedly lack merit. The system is certainly not being flooded by frivolous applications. The insurance industry is well able to respond to the few applications that it determines to be meritless. Insurers fail Mediations that they consider to be completely lacking in merit.

The Interim Report suggests that if costs were somehow at the back end of the dispute resolution process, that might provide some balance to the system by penalizing those who abuse it. OTLA agrees that there should be consequences to those who abuse the system. In fact such consequences already exist. As in the Courts, costs follow the cause at FSCO. At Arbitration the successful party is awarded its costs according to the parameters set out in the Dispute Resolution Practice Code. Similarly, unsuccessful parties are ordered to pay the costs of the successful party. This applies equally to insurance companies and injured persons. Virtually every injured person who is not successful at Arbitration, is liable to be ordered to pay the insurer's costs.

The Interim Report states that Ontario's first party automobile insurance system is extremely complicated. OTLA completely agrees with this and welcomes any initiatives that would make access to the DRS less complicated and less time-consuming.

The Interim Report points out that injured persons pay fees to their legal representatives. As the Report rightly indicates, injured persons need access to competent legal representation to provide a counterbalance to the significant resources available to insurance companies. Injured persons need to be able to freely seek out and hire legal representatives of their own choosing. Injured persons recognize that they would be at a significant disadvantage having to face the tremendous resources available to their insurance companies if they did not have access to good legal representation.

The Interim Report indicates that some jurisdictions provide injured persons with free advocacy services. These services are likely helpful in providing general information with respect to the operation of the dispute resolution process, however injured persons need to be able to hire whatever legal representation they determine to be best for their particular situation.

PREDICTABILITY

The Interim Report indicates that a lack of predictability in the automobile insurance system is a contributing factor to automobile insurance rates in Ontario. One needs to be mindful that a major contributing factor to unpredictability is the frequency of periodic fundamental changes in the law. With each amendment there are new definitions, new rules and new requirements. These require interpretation by the Courts and by Arbitrators. That is how our legal system

works. The frequent changes to the SABS over the years have occurred at the urging of the insurance industry, not at the urging of injured persons. To increase predictability, the SABS need to be simplified and stabilized. A by-product of stabilization and simplification will be fewer disputes and less demand for judicial resources in the Courts and at Arbitration. This will prove to be of benefit to both injured persons and insurers.

Legislative changes in 2010 introduced the new concepts of "minor injuries" and "incurred expense". Both of these new provisions have resulted in dramatic decreases in the benefits available to injured persons. Indeed the legislative changes that occurred in September 2010 (OTLA views the use of the word "reforms" when referring to these changes, as inappropriate) have resulted in very significant profits for insurance companies. It should come as no surprise that these dramatic legislative changes require interpretation at Arbitration and in the Courts. It always takes a few years for legislative changes to be interpreted. Any fair legal system needs to have checks and balances.

The Interim Report points out that the role of Arbitrators and tribunals is to provide adjudication, rather than to set policy. OTLA agrees with this statement. As in the Court system, the role of an adjudicator in a tribunal is to interpret the governing legislation. This argument has been in front of Judges for centuries. Interpret but do not legislate. The line between the two is often blurred. If a party feels that a tribunal has overstepped its authority and engaged in policy-making rather than legislative interpretation, there are checks and balances. There are appeals and judicial review available to both sides. It should be noted that in FSCO's 23-year history, its Arbitrators have only been reversed on judicial review in a handful of cases. This speaks volumes not only about the quality, competence and expertise found within the adjudication process at FSCO, but also about the deference accorded Arbitrators by the Courts.

If policy changes need to be made with respect to automobile insurance laws, those policy changes should come from the legislature. OTLA feels that it would be unwise and undemocratic if policy decisions with respect to the interpretation of the SABS are made by officials in a non-transparent and non-accountable process.

PRIVATE VERSUS PUBLIC

OTLA supports any change that will result in improvement to the DRS. As an organization, OTLA has significant concern, however, that any such change not destroy, either intentionally or as an unintended consequence, a specialized tribunal with a great deal of expertise and a large body of jurisprudence. As stated in our initial submissions, the recent decision of the Ontario Court of Appeal in *Pastore v. Aviva* is among a long line of authorities that have explicitly recognized and affirmed that FSCO Arbitrators bring a wealth of specialized expertise to the table in interpreting the SABS. It would be a mistake to assume that private contract Arbitrators could

match the experience and familiarity possessed by FSCO Arbitrators with respect to the SABS regime.

There is a well-established body of case law, including the landmark decision of the Supreme Court of Canada in *Smith v. Co-operators*, which makes it clear that the automobile insurance regime and related legislation is designed for the protection of the public. It will therefore be the public that suffers if the experience and expertise of the DRS adjudicative branch is lost.

All parties should expect that the adjudicative branch will make decisions based on the specific wording of the *Insurance Act* and the SABS, with reference to the principals of statutory interpretation and direction from higher Courts. Maintaining a public, specialized and independent tribunal helps to ensure the consistency, predictability, and fairness that is required in making these important determinations.

OTLA does support the separation of the adjudicative body from the regulatory body. Those who are adjudicating must maintain their independence and must have the benefit of tenure. Such a separation would insulate Arbitrators from any actual or perceived pressure from the regulatory branch, and would promote public confidence in the integrity and impartiality of the system.

For all of the above noted reasons, OTLA also submits that it is in the public interest to maintain the specialized expertise of the internal Director's Delegate Appeal for the approximately 40 Arbitrations appealed yearly. We favour the internal, specialized appeal process, rather than a process which requires a Superior Court Judge to make a decision in an area in which he or she may not have any specific understanding or familiarity. In OTLA's view, a Judge who might preside over only a few such appeals in his or her entire judicial career would not likely be able to provide the same level of adjudicative expertise that the Director's Delegate routinely provides.

OTLA disputes the suggestion in the Interim Report that there is *"strong support"* amongst stakeholders for moving dispute resolution to the private sector. As indicated above, groups and interests unhappy with established jurisprudence may be intent on initiating a wholesale change in the system, including the move to a private sector system of dispute resolution. There are few stakeholders, other than OTLA members, that make submissions on behalf of the tens of thousands of accident victims and consumers who are unable to get satisfaction from their own insurance companies. We would submit that there is little or no support for moving dispute resolution to the private sector from any stakeholder involved on behalf of the accident victims.

OTLA takes the position that since FSCO Mediators and Arbitrators work for the Ontario Public Service, they are in fact more independent than would be a private contract-based or *per diem* adjudicator. FSCO Mediators and Arbitrators have tenure almost commensurate with Judges, thus securing their independence. It is critical to a fair and independent dispute resolution system that this not be altered.

OTLA takes no position as to the remuneration model used to compensate Mediators and Arbitrators, with the exception that any change must protect and ensure the fundamental independence and specialized expertise that is the cornerstone of the DRS.

We disagree with the suggestion that the current dispute resolution system is somehow broken or dysfunctional. It is beyond question that, until recently, there was a significant and unacceptable backlog in the scheduling of Mediations. The reasons for this backlog were multi-factorial, but were at least partially related to the fact that insurer denials for basic treatment plans jumped from around 11% of requests submitted to somewhere in the order of 46%. Further, within the last year and a half, FSCO has done an admirable job of attacking this backlog which has been completely eliminated. There is no delay or problem with scheduling Mediations now.

Further, OTLA would dispute any suggestion that there is systemic delay caused by FSCO with respect to the scheduling of Arbitrations. There are, on average, fewer than 40 full accident benefits Arbitrations per year currently being adjudicated. The fact is that current delays in scheduling hearings are more likely a function of problems in coordinating the schedules of the parties than any problem or delays emanating from FSCO.

COSTS

As stated in the Interim Report, the insurance industry wants accident victims to have *"some skin in the game*". This sentiment overlooks the fact that victims have already borne the cost of the September 2010 reforms through drastically reduced insurance coverage. Accident victims have their *"entire lives in the game"* and their *"financial well-being in the game"*.

Although frivolous claims do exist in all systems including our Courts, WSIB, FSCO, and so forth, OTLA is not aware of any evidence suggesting that FSCO's experience in this regard is disproportionate, or that the cost structure of FSCO is impacted in any appreciable way as a result of the relatively small incidence of frivolous claims. It is OTLA's view, however, that any discussion of frivolous claims should equally include frivolous denials and the improper termination of accident benefits claims.

There also appears to be a misconception regarding cost sanctions at FSCO. The Interim Report states: *"Unlike the Courts, I did not find a system that assigned costs to a claimant following an unsuccessful Arbitration."* In fact, one sees from Section 281(11) of the *Insurance Act* and Section 12 of Ontario Regulation 664, that costs typically follow the cause at FSCO Arbitrations and appeals. This constitutes a major deterrent to frivolous claims.

As regards filing fees, the Interim Report suggests that the fees of $500 for Mediations and $3,000 for Arbitrations are *"often used to leverage settlements from insurers"*. These filing fees create a disincentive for insurers to improperly deny or terminate benefits. The fee system as it

currently exists contributes in its own way toward leveling the playing field between the parties, in that accident victims who cannot afford to pay an up-front filing fee are not shut out from advancing their claims.

CULTURE

The Interim Report suggests that some FSCO practitioners undermine the system by denying insurers' access to documents or medical assessments. If true, OTLA does not condone such actions. That said, it is OTLA's experience that insurers will often refuse or delay production of relevant, producible documents, and will schedule insurer examinations that do not conform to the requirements of the SABS. As mentioned in the costs section of this submission, there are punitive cost consequences that are designed to address such conduct at Arbitration, including the making of a Special Award.

Even more significant are the legislative tools available to Arbitrators to order documentary production. For example, section 22 of the *Insurance Act* provides to a FSCO Arbitrator, the powers vested in a Judge of the Superior Court to order productions, enforce summons to witnesses, and so on. It is therefore OTLA's submission that any alteration of these broad powers would be unnecessary, and that the existing system is functioning well and as intended.

As to any alleged abuse by claimants' representatives in resisting insurer examinations, Section 55 of the SABS enjoins an insured from commencing Mediation if the insured has failed to attend a properly scheduled insurer examination in accordance with the SABS. OTLA acknowledges that there are occasions when an accident victim will resist attending an insurer examination by the insurer on the basis that it was not scheduled by the insurer in accordance with the requirements of the SABS.

There are numerous arbitral decisions finding in favour of insureds on the basis that the insurer did not have the right to schedule the proposed examination. OTLA disagrees with the statement in the Interim Report that *"FSCO has difficulty applying certain procedural provisions of the SABS. The most frequent example I have been given is the lack of enforcement of Section 55 of the SABS*". While it is true that FSCO Mediators lack authority to enforce Section 55, FSCO Arbitrators do have that authority and, as mentioned, use it on a regular basis to enforce compliance with the SABS. Consideration should perhaps be given to providing Mediators with Section 55 adjudicative powers as well.

The Interim Report comments that certain jurisdictions provide their Arbitrators with access to independent medical opinions. The Interim Report rightly points out that the institution of this type of system in Ontario will likely add even more cost to the system and prolong disputes. The Interim Report also points out that it may prove to be an impossible task to identify medical consultants whose opinions are truly neutral. Unfortunately, it is accident victims who more often than not bear the consequences of that reality.

We reference the sentiments expressed by the victims' organization, FAIR (the Association of Victims for Accident Insurance Reform), in noting that in the current system there is still widespread concern that insurer medical examination reports are often biased, and that the assessors who write such reports operate without fear of professional sanction in an environment that lacks transparency and accountability.

This has created fertile conditions where auto accident victims bear a disproportionate share of the consequences of this state of affairs. It is the auto accident victims with serious, legitimate injuries that often go without adequate or timely treatment because of incomplete or biased reports. Further, even where these reports are found to be biased, it can take many years for victims to have their treatment and benefits reinstated. And, even if an assessor is found to have been biased, there is a considerable risk to accident victims who will have no way of knowing that an assessor has a particular finding against him or her, or a pattern of filing biased reports, because warnings issued by health care regulators are often buried in reports that may never see the light of day.

This is of great concern to automobile accident victims in Ontario. Currently, there are insufficient disincentives or penalties to discourage these practices which adversely impact the rights of accident victims and erode public confidence in Ontario's automobile injury compensation system.

The fact remains that the most frustrating delays for accident victims in the delivery of their accident benefits are found in the culture of the insurance claims handling process. It is not uncommon for insurers to deny reasonable requests for treatment early in the recovery process. Next come demands for multiple assessments, at times by unqualified and/or biased assessors. A broader solution must be found to accomplish the goal of timely access to treatment and elimination of the adversarial approach to claims handlings with the resulting reliance on the Mediation and Arbitration systems.

A FRAMEWORK FOR POSSIBLE LEGISLATION

OTLA proposes the following components of the possible new model.

A process that generally takes no more than six months is a goal worth working towards. OTLA recommends two streams for dispute resolution: a "paper review" adjudication system and the regular Arbitration stream.

The Interim Report calls for insurers to adopt an internal review process to take place within 30 days of the denial or termination of a benefit. OTLA cautiously supports this concept providing the review system is fair, open and collaborative, and does not add more delay to the ability of a claimant to access the DRS.

OTLA supports the use of case managers at an early stage of the DRS process to vet applications and to address various preliminary issues. To a certain degree this already occurs within FSCO, but changes to improve this process would be welcomed.

Once the paperwork is in order, the Arbitrator should arrange a Mediation session within 45 days, as recommended in the Interim Report. OTLA agrees that these sessions be an evaluative process, similar to Pre-Trials in the courts involving Judges who challenge the strengths and weaknesses of each party's case, attempt to mediate a settlement, provide an assessment of each party's case, and if need be deal with productions, witnesses, preliminary issues and the scheduling of various matters.

The Interim Report states that *"each case should be decided on the merits of that case alone."* If this means the principle of *stare decisis* will no longer apply, OTLA has strong reservations, as this offends basic principles of natural justice, and is incompatible with our common law system. Further it would significantly damage the concept of predictability which would serve only to further increase costs and the number of disputes.

The Interim Report calls for Arbitrators to follow the policy intent of the SABS, but as Arbitrators are already required to follow the governing legislation when interpreting the SABS OTLA feels that this is already taking place. The Interim Report calls for Arbitration decisions to be made within 45 days of a hearing and OTLA welcomes this recommendation. Finally, appeals from Arbitrators should still be to the Director's Delegate, followed by the normal procedures for Judicial Review. Consideration might be given to the elimination of the Divisional Court level of appeal.

CONCLUSION

OTLA appreciates the opportunity to participate in the review of Ontario's auto insurance Dispute Resolution System. We support any change in the DRS that will result in improvements for injured accident victims. As we have noted, victims bear a disproportionate burden in the system not limited to delays in the claims handling process and the provision of treatment, as well as concerns about biased insurer examinations.

We caution that changes to the DRS must not jeopardize the strong foundation of jurisprudence and expertise that has developed at FSCO over its 23-year history. Similarly, access to the system must remain timely, simple and effective, and must preserve the independence of the public service delivering these services. Within this framework, there are many opportunities to realize improvements, including a streamlined paper Arbitration procedure subject to certain qualifying conditions.

OTLA looks forward to participating in the next stages in the review of the DRS and to seeing the final report in the coming year.