FSCO DRS REVIEW - SUBMISSIONS ON THE INTERIM REPORT

BY THE CANADIAN CENTRE OF EXCELLENCE IN INJURY LAW

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ROLLING BACK PROTECTION OF AUTO INJURY VICTIMS

OVERVIEW

The proposed system outlined in the Interim Report ("Report") represents a significant reduction in consumer protection in the area of auto insurance in Ontario.

The various proposed changes to improve timely delivery of accident benefits, while they may improve the process, they do not represent significant financial savings, if any. The *only* substantial savings come from rolling back protection of injury victims through various proposed mechanisms to restrict and reduce payments of accident benefits.

Reducing protection in itself is *not* problematic if it is accompanied by *transparency* on profits, in order to ensure that Ontarians receive fair coverage at a fair premium. Unfortunately, the insurance industry and FSCO have not been able to provide transparent profit data despite repeated interest by stakeholders. Even lawmakers do not possess transparent data in order to engage in policy deliberations, as revealed during the debates before the Standing Committee on General Government on September 30, 2013. During the Hansard debates, the IBC could not produce transparent and reliable data as to its real profits.[1] Its profits are subject to substantial variations. Its own experts substantially disagreed with each other. It claims profits at 1.3% to 4% while another equally-expert estimate puts it at a very high 14% on an annual basis.

How can FSCO regulate the industry in the public interest, with confidence and excellence, when no one seems to publicly know the relevant data? Should the public have high confidence in FSCO when the Auditor General reported that FSCO approved premium increases at even *higher rates* than the rates some insurers were seeking, and doing so *without* proper documentation and without evidence of solvency concerns of the insurers in question?[2]

[1] Hansard, September 30, 2013, discussions start at G-245.
[2] Auditor General Report, 2011, pp. 58-9, http://www.auditor.on.ca/en/reports_en/en11/2011ar_en.pdf.

Our discussions below expand in the following order:

I. Preliminary Concerns
II. The Good
III. The Bad
IV. The Ugly
V. The Hopeful

I. PRELIMINARY CONCERNS

1. FSCO and the *Competition Act*

FSCO reported the following to the Auditor General:

> "FSCO informed us that it had expected the insurance companies to respond to its September 2010 reforms by more proactively challenging questionable claims. However, FSCO advised us that it soon identified actions by certain insurers as well as health-care providers that were inconsistent with the intent of the reforms. **As a result, FSCO issued a bulletin in March 2011 reminding insurers of their responsibility to challenge questionable or inappropriate claims**. According to the bulletin, FSCO was "aware that a small group of service providers and representatives were continuing to abuse the system." The bulletin goes on to say that "insurers are expected to have and use policies and procedures that comply with best practices and legislative requirements when adjusting all claims."
>
> Following a government announcement in the March 2011 Budget, FSCO made it a strategic priority in June 2011 to assess how well insurance companies implemented the September 2010 reforms to ensure that consumers are being treated fairly and in accordance with the Act. FSCO intends in future to conduct **compliance audits** of insurance companies that appear higher-risk, although no dates have been set. FSCO last assessed insurance companies' compliance with the SABS benefits using a self-assessment questionnaire to all insurance companies in 2006. On the basis of the responses, it made field visits to some insurers and reported on its findings in September 2007."[3] [emphasis added.]

The Centre is concerned that FSCO is not following its mandate of providing "*regulatory services that protect the public interest and enhance public confidence*…"[4] To the contrary FSCO in essence appears to help and push the insurers to conspire to alter free-market activities.

How would FSCO know whether a claim is inappropriate or questionable given the fact that it is not in the position to know the confidential facts in the claim including the subjective complaints of a

[3] Auditor General Report, *supra*. p.51.
[4] *Ibid*. p. 44.

bona fide injury victim? Is there not privacy legislation that prevents such disclosure of such personal information from insurers to FSCO?

When various insurers agree to abandon their free-market conduct, at the initiation or enforcement by FSCO, and adopt a united "conspiracy" against the injured public, does this not violate the letter or the spirit of the *Competition Act*, R.S.C., 1985, c. C-34, noting that fixing "price" includes the fixing of any "advantage", copied in part below:

PART VIOFFENCES IN RELATION TO COMPETITION

Conspiracies, agreements or arrangements between competitors

45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(*a*) **to fix, maintain, increase or control the price for the supply of the product**;

(*b*) to allocate sales, territories, customers or markets for the production or supply of the product; or

(*c*) **to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product**.

Definitions

(8) The following definitions apply in this section. …

"competitor" includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(*a*) to (*c*).

"**price" includes any discount, rebate, allowance, price concession *or other advantage* in relation to the supply of a product. [Emphasis added.]**

In 2007, the Competition Bureau interpreted some of its concerns to LSUC as it set about regulating paralegals in these words:

> "The regulatory environment should neither favour nor constrain the ability of particular market participants to compete in the market. In all markets, there will be some businesses that are more effective competitors than others. **A regulatory environment should not try to offset these differences or in any way try to establish equality among competitors. Rather, it should provide a market framework within which all firms thrive or fail on the basis of their ability to meet consumers' demands at the best combination of price**

and quality. Only where such conditions exist will the efficient allocation of output among competing suppliers be possible, and total welfare be maximized."[5] [Emphasis added.]

The above interpretation by the Competition Bureau suggests that the practice by FSCO to audit and enforce various insurers to become "*equal*" with regard to being aggressive and to challenge the claims of certain injured consumers would restrict an insurer's "*ability to meet consumers' demands at the best combination of price and quality*". In our respectful view, "*quality*" in auto insurance clearly includes claim experience.

2. "More skins in the game"

The Report proposes to see more financial "skins" in the game for victims, or greater costs consequences to injury victims. This proposal increases systemic barrier to injury justice as a result of increasing the unequal financial playing field for the parties.

Seasoned defence counsel avoid reminding plaintiff counsel that "defence counsel get paid every minute, but not so sure for plaintiff counsel", while newer defence counsel still frequently draw attention to this negotiating fact. Another popular version is "costs are a *drop in the bucket* for my client but your clients will *lose their house*". Mediators routinely remind plaintiffs when the going gets tough: "legal costs are just their *costs of doing business*, but for you, you *lose your life savings*".

Premiums fund the insurers' deep pockets and already set a vastly unleveled financial field. Their premiums also collectively fund all of the mediation and arbitration filing fees. While we must find solutions where abuse is founded on commensurate facts, we must be very careful before asking the vulnerable who are injured and may be out of work (or their legal representatives) yet for more skins.

Insurers do not like the $3,000 arbitration *filing fee* as some of their skins in the game, even though it is paid for and shared by all motorists collectively. It should be remembered that each and every injured victim has to pay a *settlement fee* of thousands, tens of thousands, or hundreds of thousands of dollars in the form of a reduction of their damages for settlement because their mortgaged family home is all the life savings they have.

3. Unfounded criticism of FSCO arbitration and appeal units

In our submissions, the mediation unit is distinct from the arbitration and appeal units. While there are sporadic concerns with the arbitration unit (such as some decisions which take a longer time to render, but this is not unlike some court judgments that take a longer time to render), they are not significant.

[5] January 25, 2007 letter to Paul Dray, LSUC, from Richard Taylor, Deputy Commissioner of Competition (Civil Matters) http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02277.html.

FSCO arbitrators are fair, diligent, capable, and have a committed sense of service to all litigants. A committed, talented and independent judiciary needs a high degree of security of tenure. Similarly for the auto adjudication branch at FSCO. The existing degree of security of tenure (namely being part of the Ontario public service) has not resulted in any significant problems for over two decades. Problems arose only recently and solely because the insurance industry lost some important FSCO arbitration or appeal decisions.

Time and space constraints do not suggest that The Centre discuss each and every concern regarding the arbitration and appeal units. But we look forward to being called upon in our meeting in person to further address any questions hereunder.

II. THE GOOD

Here we are with the Good in the proposed system:

1. Eliminating the mediation stage

We see that the proposed system will have an arbitrator involved at an early stage. In essence we have early case management by someone with power to make interim orders.

2. Committing to shorter hearings

Long hearings entail greater preparation and ultimately greater costs to the injured public. However, as further discussed below, we must be careful not to excessively rely on expert reports and not to excessively curtail viva voce evidence of the injured and lay witnesses. In auto injury litigation, credibility is routinely critical, in contrast with other kinds of litigation such as commercial litigation where written materials appear to carry great weight.

In auto injury litigation, there is much promise in curtailing the delays and costs associated with expert evidence. The analysis in *R. vs. Mohan*, [1994] 2 SCR 9 ought to be closely studied and applied to the area of auto injury litigation in particular. Far too many experts opine along the line of their paying masters, illustrating the fact that expert evidence in routine disability tests are arbitrary and unnecessary. Properly restricting expert evidence can go a long way in delivering much shorter hearing while retaining the pursuit for truth.

The *costly* practice of allowing an arguably necessary report into evidence and let it go to weight does not deter more reports, yet does encourage substantially more costs to Ontarians. This practice is a luxury that cannot be sustainable, and must be clearly curtailed by legislation.

It would be a great success in our view that in a new system, 80% of substantive hearings be done within 2 days; 90% within 3 days and the remaining 10%, i.e. the most complex of cases including CAT, within 4 to 8 days, having to take into consideration lay evidence and a full account of evidence and cross examination of the injured victim. Various tests for benefits require comprehensive evidence to compare and contrast, including the any occupation test which requires an assessment of education, training and experience; the complete inability test to carry on a normal life requires a full appreciation of significant activities pre-accident. All CAT impairment preliminary hearings should be done within 2 to 3 days. Interpreters' time though significant is included in our proposal.

The above timelines need the support of a *Reference Manual of Scientific Evidence in Auto Injury Cases* to help reduce cross examinations and expel excessive disputes on undisputed medical truths from hearings. Furthermore, the above timelines is predicated on a serious reduction on the reliance on hired gun experts in the system, through a reduction in medical assessments under SABs in the first place, and a *codified* reduction of expert evidence on ultimate issues in dispute in this ADR system.

The current low actual number of substantive FSCO arbitration hearings can be a desirable trait as it means that many proceedings settled (the desired outcome). This should not be taken for granted because a quick but busy arbitration system where 30% of applications for arbitration proceed to actual hearings may not be a good system. In New Jersey, 30% of 55,000 applications "make it to a hearing".[6] This means 16,500 arbitration *hearings*. Even if they are short hearings, it is hard to do more than two in a day. This means at least 8,250 of actual hearing days per year. At FSCO, judging by the number of full arbitration decisions on its website, we would venture to guess that there would be hardly close to 825 actual hearing days or 10% of New Jersey hearing days per year. New Jersey population is only 2/3 of Ontario (almost 9 million in 2013, while Ontario is 13.5 million). We are not incurring as many hearing days as New Jersey.

New York has a population of 19.5 million to Ontario 13.5 million. Yet it has more than 150,000 applications for arbitration filed a year[7] while Ontario SABS has some 25,000 mediation applications and some 5,000 arbitration applications in an average year. Something to consider - regardless of whether or not we are talking apples and oranges - given the Report is contemplating a potentially very busy system of dispute resolution with quick and short hearings.

[6] Report, p. 42.
[7] *Ibid*, p. 23.

III. THE BAD

1. Meeting with insurers after each denial before being allowed to litigate

This is not desirable. After removing mandatory mediation, this step is cumbersomely bureaucratic. Setting up a meeting for three or four people, and sometimes an interpreter, is always time consuming. Some claimants cannot travel unassisted, some requires a substitute decision maker. Who will pay for a claimant's transportation, parking etc…?

This step is like a quick mandatory mini discovery where the parties have to meet and talk. Allowing the insurer to retain customers by this public relations move, as reasoned in the Report, is not a proper consideration. Adjusters should be better trained to make reliable decisions the first time, to begin with. (A volunteer Teaching Faculty at FSCO, discussed below, can assist in the training of adjusters via the internet for free.)

2. Increase reliance on medical reports without cross examination

The proposed system appears to promise even more reliance on "experts" by having short hearings based on written reports, without cross examination.

The Centre submits that, to the contrary, we must reduce our dependence on experts. We must scrutinize closely the value of experts in ***auto*** injury cases and the reasoning in the SCC decision *R. vs. Mohan*.

We must not download adjudication role to medical doctors. What truly makes them experts is their expertise on diagnosis and prognosis and a few other limited things, but not on legal causation, not on disability, not on malingering etc.... These should be the findings by the triers of fact alone, not one expert reading one more volume of records than the other, not one interviewing one more collateral witness than the other. The parade of experts, mostly professional hired-guns, is unnecessary and it represents a lack of rigour in our injury justice system.

As an important example, whether a person sustained a marked impairment (as in *Pastore vs. Aviva*) as to meet the definition of CAT impairment requires a comprehensive understanding of the person's pre-accident and post-accident functioning in the four spheres of functions. How much time the expert would have to spend with the victim (and interpreter) in order to assess marked impairment? How many collateral witnesses will need to be interviewed by the expert? Then the whole process is to be duplicated, if not bettered, by the opposing expert? But is this process not what the hearing is all about? So, in other words, a claimant goes through ***three full and comprehensive*** assessments or hearings in order to reach a verdict? As credibility is important, each of the two opposing experts and the arbitrator will engage in credibility assessment too? Since when did we download credibility findings to medical experts?

IV. THE UGLY

Truncating Judicial Deference and Weakening of DRS Specialization

The IBC does not like some recent cases from FSCO DRS. Several cases are listed in its Addendum to its submissions.

Pastore vs. Aviva is one of those cases. In that case, the majority at the Divisional Court did not confer judicial deference to the FSCO appellate decision. On further appeal, the Divisional Court decision was overturned by the Court of Appeal, and the FSCO appeal decision was restored. The Court of Appeal expressly states that FSCO is entitled to deference given its full privative clause in its home statute since 1990.

The proposed system now seeks to truncate judicial deference which has been in force for more than 23 years. The proposed system also seeks to ensure that interpretations of SABS align with the industry's interpretations. Various mechanisms are proposed, including complete removal of the appeal unit, privatizing arbitration services or paying per diem rates, etc... Although the standards of review have not been discussed, appeals to a single non-specialist judge will replace the current specialist appeal unit.

All of the proposed changes to the employment arrangement of arbitrators and appeal officers, as well as the restructuring of appeal route are not done in order to save administrative costs or to increase timely delivery of accident benefits. They are prompted for one main reason, namely to secure insurer-friendly interpretations of the auto insurance contract. The industry seeks to significantly roll back victim protection this way. When the industry cannot do arbitrator-shopping, they seek to alter the entire culture at DRS, to hopefully change the faces of arbitrators.

The Centre sees no substantive cause and no merits in the various proposed changes which roll back protection of the injured public, and which is prompted merely by arbitrators and appeal officers doing their best in interpreting auto insurance law in a manner that is consistent with the instructions from the Supreme Court of Canada in *Smith vs. Co-Operators General Insurance Company*, [2002] 2 S.C.R. 129, including:

> *"There is no dispute that one of the main objectives of insurance law is consumer protection, particularly in the field of automobile and home insurance.*[8] *… [I]nsurance law is, in many respects, geared towards protection of the consumer."*[9]

Furthermore, The Centre believes that the proposed system goes against the modern trend of greater *specialization*, not greater generalization, in order to improve access to justice, as called for by the October 2013 Final Report of the national Action Committee on Access to Justice in Civil and

[8] Para. 11.
[9] Para 16.

Family Matters.[10] The Final Report is a product of five years of study by the Action Committee which was envisioned by Chief Justice McLachlin in 2008.

V. THE HOPEFUL

Below is a conceptual sketch of a new system which maintains expeditious and orderly proceedings while allowing urgent treatment matters to be heard swiftly. Additionally, we offer three hopeful recommendations to provide auxiliary support for any new system to meet its mandate.

1. Sketch of a new system

To achieve the stated goal of improving the timely delivery of benefits *especially treatment and rehabilitation benefits*, The Centre proposes a system with the following attributes:

a) Remove the mediation process to allow immediate engagement of the arbitration process. This has now been recommended in the Report.

b) If a claimant by her legal representative deems that a certain denied treatment or rehabilitation is crucial for the claimant, a motion for interim benefit (which is an existing mechanism in the current system) or an arbitration hearing can be done on an expedited basis. But this is an **opt-in** process, giving the claimant the freedom to initiate commensurately with his or her subjective sense of urgency. Such a motion or arbitration can be heard within one to two months from filing if not earlier. Expert reports given their expensive yet arbitrary nature, should not be strictly necessary, in order to keep costs down. With some form of a *Reference Manual of Scientific Evidence in Auto Injury Cases*, further discussed below, much of the routine medical evidence may not be needed on such motion or expedited arbitration. This mechanism swiftly addresses timely delivery of treatment and rehabilitation benefits.

c) Given that step b) addresses urgent treatment matters for the injured public, other matters can take the more usual path of a normal pre-hearing and subsequent hearing, supplemented by the mechanism of a motion for interim benefits. 80% of hearings should be completed within 2 hearing days, 90% within 3 days, and 4 to 8 days maximum is reserved for the most complex of cases (such as a case with all of these issues: employment vs. self-employment, retroactive 24/7 attendant care for 10 years, retroactive income replacement benefits for 5 years). One year from application to release of decision is neither too fast nor too slow.

[10] P.15 of Final Report http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf.

It should be noted that the proposed classification of hearings in the Report can give rise to complexities. The report proposes an expedited hearing for claims under $25,000. But what exactly does that entail? A dispute on whether the insurer should pay an accessible home assessment report for a brain injured victim is under $25,000. However, the report is more important than $25,000 because it is the gateway to securing the actual home renovations which can exceed $150,000. A weekly income replacement claim with $15,000 in arrears but will accumulate over $25,000 by the time of the arbitration order, or $300,000 over the lifetime of the claimant will be classified as an under $25,000 claim? These complexities are not unlike the complexities that have greeted the new Rule 53 expert evidence: which experts will have to sign a Form 53? It has been four years since that Rule came into force and the litigation is still going strong on the question of just exactly who has to write a report and sign a form: a "treating" doctor, a "medical-legal" doctor who subsequently "treats" the plaintiff, and/or a "medical-legal" doctor who does not "treat" the plaintiff? Next, what exactly is "treating"? These are all preliminary issues that should be resolved well in advance of an actual hearing.

2. Create a Teaching Faculty at FSCO for free

The Final Report of the national Action Committee on Access to Justice in Civil and Family Matters[11] calls for much simpler rules of evidence and much less complexity in legal proceedings to benefit the public, and to those who are self-represented.

To provide an effective interface between legislation and the public, we should create a top-notch Teaching Faculty at FSCO, supported entirely by experienced volunteers including personal injury professionals, from both plaintiff and defence bars. There is much passion and creative capital in talented and dedicated lawyers, paralegals and clerks. They will help produce top-notch teaching materials that promote organized and structured training relating to the Ontario auto injury landscape.

Currently many talented lawyers and dedicated adjudicators volunteer to speak at legal conferences and write for publications. Several leaders of the injury bar regularly attend FSCO Counsel Forum for years, helping to guide it on a responsive track. It is therefore not farfetched to believe that many more would engage to become volunteer members of a leading Teaching Faculty at FSCO.

Knowledge relating to the auto injury system is the same everywhere in Ontario, so why should each of the hundreds of law firms, dozens of insurance companies, thousands of auto injury lawyers in Ontario reinvent the wheels of training, repeatedly recreating training materials that others may have already done?

We can seriously save training costs by providing free and structured materials on the internet, prepared by a prestigious volunteer Teaching Faculty at FSCO. We can improve the quality of

[11] http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf.

assessment of files for settlement or adjudication by adjusters and representatives, leading to fairer resolutions faster.

Creating a free Teaching Faculty is also consistent with the call for innovation in the Final Report. To further innovate, the Teaching Faculty may also be able to generate charitable donations to support registered charities such as Lawyers Feed the Hungry program by The Law Society Foundation. Insurers and law firms may make ***direct*** donations (to ensure 100% transparency and zero processing costs by the Teaching Faculty) to charities. Doing so acknowledges their support for the training and value being provided by the volunteer teaching professionals to their workforce. Direct donations by insurers and law firms to charities *might* even be acknowledged on the Faculty's website. Everyone benefits including charities.

3. Create a *Reference Manual on Scientific Evidence in Auto Injury Cases*

Law and procedures can overwhelm skilled legal professionals. Adding medical arts and science into the mix and the learning curve is exponentially difficult for the participants including professionals, arbitrators and judges. In recent years, failure to guard against flawed scientific evidence from entering the justice system has led to regrettable miscarriages of justice, wrongful criminal convictions and likely flawed civil verdicts.

The Honourable Stephen T. Goudge, Commissioner of the Inquiry into Pediatric Forensic Pathology in Ontario, recommended: *"It would be useful if the Canadian Judicial Council, in conjunction with the National Judicial Institute, could examine the feasibility of preparing a Canadian equivalent to the Reference Manual on Scientific Evidence prepared by the Federal Judicial Center in the United States."*[12]

This recommendation resonates with The Centre's observation that there are scientific evidence that ought to be admitted into evidence without the need, and expense, of proving admissibility in each and every hearing. This practice of having a Reference Manual is parallel to the practice of having a Standard Casebook at the Court of Appeal for Ontario, where parties need not repeat the production of cases that are already included in the Standard Casebook. With a Reference Manual, the parties need not tender evidence that has already been accepted and included in it. Many recurrent and flawed disputes about undisputed medical knowledge can be expelled from our system, saving costs while improving its reliability.

[12] Inquiry into Pediatric Forensic Pathology in Ontario, Report released October 1, 2008, recommendation No. 135, at p. 32 of Executive Summary, http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v1_en.html.

4. Remove excessive medical assessments and evidence from SABs and SABs hearings

The billion-dollar[13] addiction on medical examinations, assessments, disbursements, and associated abuse should end, given the limited true utility of medical evidence in auto injury cases.[14]

Auto insurance is primarily a matter of contract. Just as numerous long term disability insurance policies do not provide for complex medical assessments, why do we need them in the auto policy? Why do we continue this path when we all experience frequently, if not invariably, the parade of predictable experts who aggravate injury victims and our search for justice with bald, bold, predictable, arbitrary, or flawed expert opinions, on both sides, in auto injury cases that borderlines a sad comedy?

If the dispute resolution system is much simpler, faster and less expensive, treatment disputes can be settled or adjudicated quickly. We would then have little need in propping up the medical assessment schemes in the SABS, which do not provide proportionate value to Ontarians. An expeditious, inexpensive and accessible dispute resolution system probably guards against undue stoppage of benefits more effectively than expensive and complex schemes of empty and predictable assessments.

The billion-dollar addiction must be, and can be, cut in half if not significantly more. A $500 million reduction in assessment expenses results in approximately a 5% reduction in premium per vehicle in Ontario,[15] a very significant potential source of savings when the government is looking at 15% over 2 years.

[13] Auditor General Report 2011, Figure 2, p. 49.

[14] We refer the reader to The Centre's supplementary submissions dated October 30, 2013 where we expand on our observations of the excessive medicalization and expertization of evidence in auto injury cases.

[15] Page 65 of the Auditor Report, 2011, states that a $10 increase per vehicle in Ontario results in $70 million dollars. Assuming the average premium per vehicle is about $1,400 (see Figure 3, p. 52), $500 million results in 5.07% reduction per vehicle.

CONCLUSION

An IBC representative spoke of the need for a new culture in auto insurance during debates before the Standing Committee on General Government on September 30, 2013.

The timely October 2013 Final Report of the national Action Committee on Access to Justice in Civil and Family Matters, envisioned by the Right Honourable Beverley McLachlin, Chief Justice of Canada, offers some relevant principles, which have been selectively adapted below, to help us move toward a new culture:

1. Collaborate and Innovate
2. Prevent and Educate for Free
3. Simplify, Simplify, Simplify
4. Focus on Outcome, Not Process

The Centre looks forward a new culture to help improve auto insurance and injury justice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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