**ONTARIO DISPUTE RESOLUTION SYSTEM REVIEW**

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**Submissions by:**

# The Canadian Centre of Excellence in Injury Law

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www.injurylawcentre.ca

## Introduction

The Canadian Centre of Excellence in Injury Law is founded to pursue the twin goals of (1) preventing and challenging systemic injury injustices while (2) raising charitable donations for charities such as Lawyers Feed the Hungry program by The Law Society Foundation.

The Centre seeks to advance the interests of Ontarians and Canadians, both as users and as funders of the injury justice system. The Centre does not use public funds while it serves the community and raises funds for the public.

## Recommendations and Submissions

### 1. Reduce Cost by Eliminating the Mediation Process

The mediation process has only limited success that is far from being commensurate with the added expense, delay, and complexity. For every mandatory step in a legal system, the benefits must clearly outweigh the costs. Some statistics suggest settlements at FSCO mediations well exceed 50% or 60%. But this depends on the definition of a settlement. A partial settlement of one of the many issues on one application for mediation apparently suffices the definition of a settlement. Accordingly, such statistics are of limited value.

Some keys questions to evaluate success of the mediation process include (1) how many cases settled on a full and final basis? And (2) had there been no mediation process, how many of those cases would have settled on a full and final basis directly by the parties themselves? In our experience, cases that settled at mediation are largely as a result of the willingness and reasonableness of the parties. Where such willingness and reasonableness exist, a mediator is not needed to settle a claim on a full and final basis.

Whatever limited values afforded by the mediation process are insufficient to justify its continuation. Maintaining the mediation process, even with an opt-out provision, still burdens injured Ontarians with regulation and complexity that can be avoided. The mediation process was first instituted in about 1990 when legislators, at the time, believed that lawyers would not be needed in the no-fault benefits system because the law would be so simple that injured victims could deal directly with adjusters and insurers. That belief though earnest has been proven wrong, as the complex jurisprudence has shown a real need for professional legal representation. The mediation process therefore has lost its "raison d'être".

A caution against continuation of the mediation process can also be drawn from observing how several insurers sought to appeal the recent court decisions in order to maintain the extensive delay arising from the recent mediation backlog. The insurers' insistence on maintaining thousands of mediation applications in the long mediation process suggests that they perceived an advantage flowing from such delay. Where was the interest in settling expeditiously and in good

faith? This observation reinforces the caution that another mandatory step can be just another delay.

Justice delayed is not civil justice.

## 2. Reduce Cost by Expanding FSCO Jurisdiction to Include Auto Tort Claims:

FSCO (or its predecessor the Ontario Insurance Commission) was established to expedite the delivery of no-fault benefits. However, it was also established to keep the costs of dispute resolution and adjudication down for taxpayers, by using an administrative tribunal where the costs are probably far less than half of the costs of administering through the court system (noting salaries of arbitrators alone are less than half of salaries of judges).

Rules of evidence are relaxed, procedures are streamlined and FSCO has been justifiably vigorous in keeping its procedures on a tight leash. Its hearings largely used to be completed within four days, despite the fact that the issues of weekly benefits can amount to over $500,000 for younger claimants over their lifetimes, amounts that exceed many court actions. The number of expert witnesses are kept well in check together with the related costs to the system. The lengths of FSCO written decisions are routinely much shorter than court decisions. In summary, quality injury justice at FSCO can be delivered for a lot less than can be delivered in court, a real benefit for any responsible government.

Despite its relaxed evidentiary rules, the quality of its decisions has been universally praised and respected by both defence and plaintiff bars, as evidenced by the rare but consistent consensus at FSCO Counsel Forum over the last many years. The various past and present Chairs of the Counsel Forum (consisting of 50-50 plaintiff and defence lawyers) will likely attest to this fact, confirming our own observations of the comments expressed at these meetings.

We now have nearly 25 years of able FSCO jurisprudence. There is little remaining concern to suggest that if we are to expand FSCO mandate to deal with auto tort claims, that they will not be able to continue to fashion a streamlined and responsive delivery of quality decisions. Funding can include the savings from the elimination of the mediation process, as well as the savings of judicial resources as a result of a reduced auto injury caseload.

Expanding FSCO mandate will have the corresponding effect of reducing cost in the judicial system by substantially removing the learning curve for trial judges who may otherwise have to acquire this second language that is *SABS*. In *Mercier v. Royal & Sun Alliance* [2003] O.J. No. 1233, at para. 4, Justice Quinn lamented on the complexity of SABS in a 113-page decision:

> "The primary issue before the court involves deciding whether the stoppage was justified; and this requires venturing into the Byzantine world of the SABS. Woe be to the injured person caught up in the world of accident benefits who does not have a lawyer in the family. Anyone able to fully understand the SABS should be entitled to claim bilingual status." [emphasis added.]

More recently another judge of the Superior Court who manages the long trial list reportedly pleaded to a courtroom of mostly injury lawyers to take their SABS actions to FSCO. This may occur more often if FSCO has a mandate that includes auto tort claims. Expanding FSCO jurisdiction and increasing the compliments of FSCO arbitrators will take the pressure off the civil justice system in a cost-effective manner while being responsive to the needs of injured and vulnerable Ontarians.

We are not suggesting that victims cannot go to court for auto tort claims. Presently, there is a choice of forum for accident benefits litigation. We should add a new choice of forum for auto tort claims as well. With this additional choice, it appears more conceivable that we can then require a claimant to bring all claims in one forum. We can thereafter also avoid the growing problem which causes extra delays and costs associated with changing forums midstream.

When the last "Five-Year Review" took place in 2008, a leader of the insurance industry suggested the establishment of a specialized court for auto claims. This idea can now be further examined if we are to achieve an effective "transformation" in the auto injury dispute resolution system as desired by the government. This specialized "court" can be FSCO with an expanded mandate.

Expanding FSCO mandate also has the effect of keeping legal costs down for Ontarians, and also for insurers who pay a maximum hourly rate of only $150 for arbitration expenses. This not only helps to keep legal costs down for insurers and injured victims, but also helps to level the financial playing field between insurers and individual Ontarians. Disparity in the ability finance litigation, hence access to justice, is a systemic barrier to injury justice.

### 3. Reduce Delays in the Court System by Expanding FSCO Mandate

The recommendation above importantly will reduce the delays in the court system which now has again reached unworkable levels (long trial dates are in 2017, motions are some seven months into the future). Many personal injury actions are on the long trial list.

### 4. Do not privatize FSCO DRS

It is unthinkable if we were to privatize the judiciary. Whatever security of tenure and hence much of independence will be eroded. The accompanying risks can destabilize any independence and impartiality of the judiciary, and may contravene the principles of fundamentals justice enshrined in the *Charter*.

Some measure of security of tenure and independence are necessary for FSCO arbitrators. FSCO arbitrators perform functions that are substantially similar to those of the judiciary with regard to no-fault compensation. Their decisions can fundamentally affect the life, liberty and security of the person for injured and vulnerable Ontarians. They must be afforded some meaningful measure of security and independence. Their employment should not be dictated by private interests and controlled largely by pecuniary or financial impulses. Privatization is not advisable, and its constitutionality might be a legitimate concern.

## Conclusion

The foregoing are broad stroke submissions to transform the current auto insurance dispute resolution system in order to support cost and rate reduction strategy for the government. Future fine tuning can address the nuts and bolts once the broad strokes are deemed worthwhile for further exploration.

***ALL OF WHICH IS RESPECTFULLY SUBMITTED***,

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