



**T O R O N T O   L A W Y E R S  
A S S O C I A T I O N**

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Delivered by email

**Re:            Ontario Automobile Insurance Dispute Resolution System Review**

The Toronto Lawyers Association (“TLA”) has been asked to comment on the current system for resolving automobile insurance disputes between claimants and insurers at the Financial Services Commission of Ontario (“FSCO”). The TLA believes that the review being performed by the Honorable Justice J. Douglas Cunningham is an important process to address the issues surrounding the mediation backlog and procedure followed by the FSCO.

The TLA supports any attempt to make the dispute resolution system for these claims more timely, cost-effective and accessible to all Ontarians. The TLA acknowledges the significant impact that mediation can have on resolving proceedings at an early stage. However, the TLA also recognizes that mediation may not be required or necessary in every circumstance. Additionally, the TLA agrees with the “Guiding Principles” of the Terms of Reference for this independent review which provide that the dispute resolution system should prioritize the care and recovery of injured persons above other pecuniary interests.

In addition to mandatory mediation, the TLA has considered other amendments to the process that may be implemented at varying stages to improve the dispute resolution process.

**Elective/Optional Mediation**

The TLA acknowledges that mediation and settlement discussions have the potential to dispose of disputes at an early stage in the proceeding. However, for mediation to serve a proper function, it must be available only when its use will be meaningful. The TLA suggests that mediation may not be required in every case and should only be utilized where both parties are committed to the mediation process and are prepared to make a genuine effort to resolve the dispute. If mediation was not mandatory, the claims could be filtered by the type of claim being advanced or at the election of the insured party.

## **Prioritizing Claims**

The TLA is a proponent of prioritizing the care and recovery of injured persons above other pecuniary interests. To facilitate a cost-effective and timely process, it is important that individuals who are unable to return to work or other personal obligations be given priority to expeditiously facilitate recovery of their benefits.

## **Other Considerations**

In the 2013 Budget, the Ontario government committed to, among other things, *transforming* the current automobile dispute resolution system. The TLA has therefore included in its preliminary analysis to the mandatory mediation component other potential changes to the current dispute resolution process.

### *Simplified Arbitration Process*

The availability of a summary or simplified arbitration process should be considered in this review. Such “simplified” arbitration process could result in arbitrations held entirely in writing and utilized for specific types of claims or claims under a certain monetary amount. The parties would have the option to elect to proceed without an oral hearing in an effort to expedite the adjudication of a claim. A simplified arbitration process would be cost efficient for both the parties and FSCO as certain arbitration steps (eg. medical expert testimony otherwise provided at an oral hearing) would be limited to written reports.

### *Streamlined Mediation*

The mediation process could also be streamlined by use of the pre-arbitration hearing as forum for the mediation itself. The TLA acknowledges the importance of settlement discussions and believes that the consolidation of steps in the process so that the mediation is held only once at the pre-arbitration stage may result in cost-savings to both the parties and FSCO, as well as a higher percentage of successful mediations. The goal would be that, by streamlining the mediation process and implementing it at a stage when the parties are fully briefed (i.e. when the “griddle is hot” as Winkler CJO would say), both parties would ultimately save time and money and would feel more pressure to resolve the dispute before an impending arbitration.

### *Discouraging Frivolous Claims*

In order to discourage frivolous claims and the potential abuse of the arbitration process, consideration should be given to increased cost consequences in necessary circumstances. There is presently no cost sanctions prior to the arbitration stage. It is suggested that an arbitrator be appointed at the outset of claim being made with the FSCO and provide such individual with broader case management functions, which could include the ability to impose cost penalties against those abusing the system and setting strict timetables for cases that require such oversight. If each claim had an arbitrator appointed at an early stage with authority to impose sanctions, the number of frivolous claims faced by FSCO could be reduced and ultimately the *bona fide* proceedings could be expedited.

## **Conclusion**

The TLA encourages the facilitation of access to justice and supports a process that best accomplishes this objective. The TLA suggests that making mediation elective in some circumstances could assist in that goal. Additionally, making changes to other aspects of the dispute resolution system may also make the overall process more timely and cost effective.

The TLA looks forward to reviewing the Honourable J. Douglas Cunningham's interim report on this matter.

Yours very truly,



Margaret Waddell,  
Chair, Advocacy Committee  
Toronto Lawyers Association