



The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

BY E-MAIL

December 2, 2013

Senior Manager
Insurance Policy Unit
Industrial and Financial Policy Branch
Ministry of Finance
95 Grosvener Street, 4th Floor
Toronto, ON M7A 1Z1

Dear Sir/Madam:

RE: Ontario Automobile Insurance Dispute Resolution System Review Interim Report

Introduction

The Advocates' Society (the "Society") is pleased to offer the following written submissions setting out its perspectives on the Ontario Automobile Insurance Dispute Resolution System Review Interim Report dated October 2013 (the "Interim Report").

The Society is a not-for-profit association of over 5,000 lawyers throughout Ontario and the rest of Canada. Our members practise as advocates in the resolution of disputes before courts, administrative tribunals, government bodies, arbitrators and other forums for dispute resolution. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

Over 1,500 of our members practise in the personal injury field, both as plaintiffs' counsel and as defence counsel. The members of the Society's Task Force who drafted this submission (a list of the members of this Task Force appears at the end of this letter) represent both sides of the bar and this submission is the product of vigorous debate over the competing interests of claimants and insurers. As a result, we believe that our comments represent a unique and balanced perspective.

These submissions build on the previous letter of the Society with regard to proposed changes to the Auto Insurance Dispute Resolution System, dated September 20, 2013.

General Comments

The Society believes that, while the current Dispute Resolution System is in need of some tweaking, it does not need to be completely overhauled. The current System is working effectively in a number of respects. In particular, FSCO hearings are generally quite efficient, with the majority of arbitrations being concluded within the 3 or 4 days allotted to them. The Society's submissions address certain tweaks which can be made to improve the efficiency and effectiveness of the current Dispute Resolution System.

Public vs. Private System for Dispute Resolution

The Society believes that the current Dispute Resolution System should remain with FSCO, and thus that FSCO should continue to exercise its adjudicative functions. While it is noted in the Interim Report that in some cases, FSCO's adjudicative and regulatory functions appear to be in conflict, the Society believes there is no conflict between these functions in practice which would warrant removing FSCO's adjudicative functions and having them be exercised in a private forum. As noted at page 31 of the Interim Report, "the mediators and arbitrators are very knowledgeable on issues related to the Statutory Accident Benefits Schedule (the "SABS") and have many years of adjudicative experience." This expertise and understanding of the regulations would be lost with the transition to a new private adjudicative model. The FSCO arbitration model has been in place for over 20 years. Eradicating this model and moving it to the private sector would invite extensive costs to replace what already exists.

Appeal Process

The Society believes that the current appeal process, where appeals are brought to the Director's Delegate, should remain in place (rather than having appeals brought before a single judge of the Superior Court of Justice). The Society is concerned that the Superior Court already has an overburdened docket in many jurisdictions, which would then be further burdened with appeals from FSCO arbitration decisions.

In addition, the subject matter of many FSCO cases is very specialized. The essence of an administrative tribunal like FSCO (when exercising its adjudicative function) is to have adjudicators with specialized knowledge who resolve disputes in specific areas. If appeals were moved to the Superior Court, the Society is concerned that more time and resources (both of the parties and of the courts) would be required for a judge to adjudicate on the specific issues. The current appeal process whereby appeals are brought to the Director's Delegate, an expert specialized appellate body, is functioning well. The Society believes that there is no need to modify it.

Combined Mediation/Arbitration Model

The Society agrees that a combined mediation/arbitration model which would allow adjudicators to take a more active role in dispute resolution at earlier stages of the proceedings should be a component of streamlining the dispute resolution process.

Litigation or Arbitration

Claimants should remain able to opt for litigation. There should be a requirement to make this election at the combined mediation/pre-arbitration hearing.

Internal Review Process by Insurers

The Society agrees that insurers should be mandated to provide an internal review process as a first point of review for a denial of benefits. Such a process may open up further avenues for resolution of a dispute resulting from the denial of a claim, and may obviate the need for an applicant to use the current Dispute Resolution System. However, the Society is strongly of the view that this process must be optional for applicants. There is a risk of an applicant expending costs and resources to prepare additional materials for an internal review which would simply

result in the same denial of benefits, and an applicant should not be forced into this process before embarking on the FSCO process.

Cases in Different “Streams”

The Society whole-heartedly supports the recommendation that disputes be triaged into different streams depending on factors that could include:

- the complexity of issues;
- the number of issues in dispute;
- the monetary value of the dispute, including the potential future value of a benefit in issue;
- whether the outcome of the hearing will create an issue estoppel on a broader issue;
- the degree of technical, factual and medical disagreement surrounding the issues in dispute;
- whether the resolution of the dispute is dependent primarily on statutory interpretation;
- and
- importantly, the consent of the parties.

The Interim Report contemplates that at a certain stage of the dispute, either a "Case Manager" or the Arbitrator would, depending on certain factors, triage all disputes into 1) a paper hearing, 2) an expedited in-person hearing, or 3) a regular in-person hearing. While the Society supports the streamlining of disputes, we recommend that the consent of both parties should be an influential factor in determining the hearing option that best suits the resolution of the issues.

The Society does not believe that an expedited in-person hearing should necessarily preclude the use of expert witnesses. The Society supports the idea of expedited hearings, but we believe that cost efficiencies and procedural fairness are best achieved by *limiting the time* parties are allotted to present their cases. Within the time allotted, the Society believes it should be left to the discretion of the parties as to whether it would be preferable to have an expert testify. Even where experts are used, the expedited hearing procedure could set time limits and rules pertaining to the use of experts. The Society suggests that a model similar to the Simplified Procedure under the *Rules of Civil Procedure* could be adapted for expedited hearings under the Dispute Resolution System (please see our letter dated September 20, 2013, Item #3 under “Proposed Changes to the FSCO Arbitration Process”, in this regard).

Expert Reports

The Society does not view the length of expert reports as a serious problem, and does not support content rules which might discourage experts who do not typically do this type of work from participating in the process.

Independent Medical Consultants

The Society believes that independent medical consultants, for the purpose of reviewing files and providing opinions on appropriate treatment, should not form part of the Dispute Resolution System. The use of independent medical consultants would result in additional expense and delay within the Dispute Resolution System. In addition, the choice of which medical consultants would comprise a panel of independent consultants would be controversial (as was seen under the former Designated Assessment Centre system) and may contribute to a negative perception that could undermine the “adjudicative” function of the Arbitration system. The Society believes that Arbitrators should retain their quasi-judicial function of weighing evidence, assessing

credibility and interpreting the SABS in a consistent manner. The Society does not believe that the presence of independent medical consultants would be a significant improvement.

Insofar as the use of experts is concerned, the Society recommends that any expert whose evidence is relied upon in an Arbitration proceeding be required to certify his or her duty to provide fair, objective and non-partisan evidence to the tribunal. This certification may be in the form of a certificate similar to Form 53 under the *Rules of Civil Procedure*. There is increasing evidence that medical practitioners, particularly those who frequently provide medical-legal evidence, must undergo a paradigm shift in their appreciation of the nature of their duty and to whom it is owed. This shift has begun in Court proceedings and the Society believes such a shift would be a welcome development in the way in which medical evidence is presented in SABS disputes.

Costs

A preliminary observation in the interim report was that claimants accessing the FSCO Dispute Resolution System should have "some skin in the game". After some consideration and reflection, the Society believes that an appropriate balance with regard to costs has generally been achieved. The Dispute Resolution System must ultimately be funded largely by the premiums of automobile drivers. The Society is concerned that an access to justice issue will be created if the balance is altered to significantly increase the costs to claimants who pursue a reasonable claim.

The Society supports a closer look at certain aspects of the costs system. We have several observations or areas of possible inquiry:

- In our letter of September 20, 2013, we recommended that consideration be given to barring clinics from commencing arbitration or litigation with respect to outstanding treatment or assessments. If the Dispute Resolution System, going forward, continues to permit rehabilitation professionals and clinics from advancing disputes in the name of the insured, it may be appropriate to develop cost provisions aimed at imposing some type of sanction for claims determined by the Arbitrator to be frivolous. To the extent that a treatment provider, and not the claimant, is in fact driving the dispute (e.g. to obtain leverage for a settlement), this area should be looked at more closely.
- As an adjunct to a general streamlining of the Dispute Resolution System, the Society proposes the aggregation of disputes, both at the mediation stage and at the arbitration stage, so that multiple sets of fees to be borne by the insurer can be avoided.
- The Society has not conducted its own study of related regimes, such as the Workplace Safety and Insurance Tribunal, but would encourage a study of other first party systems to determine what works well and what does not work well in terms of striking a proper balance between having access to the system and having "skin in the game". We say this noting that the existing cost provision, Section 281(11) of the *Insurance Act* and Section 12 of Ontario Regulation 664, already provides that costs should typically follow the cause at FSCO arbitrations and appeals. This should already represent a deterrent against frivolous claims. In this respect, the FSCO costs regime is not far removed from the costs system in the courts.
- The Society points to the fact that the system for reimbursing costs to claimants at FSCO arbitrations is less generous than what is otherwise available through the courts. For example, the cost of expert reports is arbitrarily capped and the allowable hourly rates

awarded to counsel are noticeably lower than in the courts. This is reflective of a trade-off in a consumer-oriented system. Whereas insurers do have fees which must be paid upfront, insurers who are unsuccessful in the Dispute Resolution Process are not exposed to as high a level of costs as they would be in Superior Court.

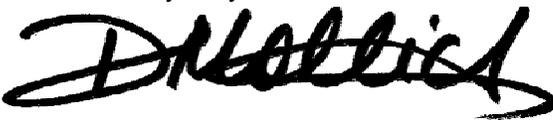
Timelines for Resolution of Matters

The Society whole-heartedly endorses the goal of speedy, predicable and lower-cost adjudication. While a six month start to finish timeline for the adjudication of all disputes is a laudable goal to be strived for, the Society simply cautions that it may not be realistic to achieve this goal in many circumstances. Apart from the fact that the schedules of counsel and the need for unavoidable adjournments may conflict with a six month timeline, it is important to emphasize the ultimate goal of any adjudication system is fairness – both procedural and substantive. Arbitrators should not be stripped of their over-riding jurisdiction to allow parties, in appropriate circumstances, to take the time they require to properly develop and present their cases.

Conclusion

The Society hopes to have the opportunity to further discuss these submissions with Mr. Cunningham and his team prior to the release of the final report in the new year.

Yours very truly,



per

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