Response to the Final Report of the Catastrophic Impairment Expert Panel

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Submitted to: **Financial Services Commission of Ontario**

Submitted by: **Ontario Bar Association**

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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The Ontario Bar Association ("OBA") appreciates the opportunity to comment on the Final Report (the "Report") of the Catastrophic Impairment Expert Panel (the "Panel") to the Superintendent, dated April 8, 2011.

The OBA

The OBA is the voice of the legal profession in Ontario. As the largest legal advocacy organization in the province, we represent 18,000 lawyers, judges, law professors and law students. OBA members practice in no fewer than 36 sectors, including Insurance Law, Health Law and Civil Litigation. Our active Insurance Law and Civil Litigation Sections have over 2400 members, including the leading experts in the field of statutory accident benefits. Our members represent insurance companies, health professionals and individual Ontarians who have suffered injuries. In addition to providing education to our members, the OBA assists government with legislative and policy development – both in the interest of the profession and, as in this case, in the interest of the public.

The Report's failure to understand the Operational Context of the Catastrophic Impairment Definition

The OBA does not support amending the definition of "catastrophic" in the Statutory Accident Benefits Schedule ("SABS") as recommended by the Panel. There is broad consensus among both lawyers who represent insurance companies and those who represent the injured, that the Report fails to properly translate scientific principles into the SABS context. It would appear that the Panel process failed to combine the expertise of health professionals with expertise on the corporate and legal contexts in which the new definition would operate. There does not appear to be sufficient analysis of whether certain kinds of claims were costing the system unduly or what definitions required clarity in order to reduce the costs of, and delays in, making determinations of impairment. Rather, the recommended reforms are definitions from various health fields, abstract from the operation of the Catastrophic Impairment designation process. The absence of crucial contextual understanding has resulted in recommendations that would add, rather than reduce, unnecessary complexity to the SABS process. This will, in turn, add cost and exacerbate delay for insurance providers, injured persons and the government.

One example of the failure to identify where problems, if any, lie is the proposed changes affecting paraplegia and quadriplegia. The current definition is sufficiently simple and understandable to avoid the necessity of litigating the issue. The recommended definition will significantly add to complexity, without any evidence of the need for change. An increase in the complexity and a reduction in the clarity of the mobility definitions will mean increased

litigation to interpret the definition, which will in turn mean increased costs to insurers, injured parties, courts and FSCO, as well as additional delay in adjudication of personal injury claims. This is so in a number of other respects in the report.

The recommendation that in-hospital care become, in some cases, a prerequisite to a catastrophic designation will result in regional and socio-economic discrimination, increased costs to our health care system and the deprivation of benefits to some deserving claimants. With respect to discrimination, the limited availability of beds to accommodate some injured people, often due to living outside large urban centres, would arbitrarily deprive some injured people of catastrophic status. Further, where injury is profound, there may be no value in providing in-hospital services to the injured person. Our health care system would have to be expanded to ensure that in-hospital care was available in every case.

In a number of circumstances, the recommendations attempt to add to the prognostication precision of the Catastrophic Impairment test. The replacement of the Glasgow Coma Scale is an example. However, a precise upfront prediction of the course an injury will take is neither possible nor necessary. The Panel has failed to recognize that designating a claimant as catastrophically impaired does not automatically entitle the injured person to any service or other benefit. The claimant must establish, on an ongoing basis, based on current medical evidence, that any benefit claimed is both reasonable and necessary. The definition needs to be considered in the context of this additional requirement. Adding an unnecessary requirement to attempt to predict and prove the future course of an injury will add to the number of claims that are litigated as well as the complexity of that litigation – adding in turn to costs and delay, as outlined above. At the same time, the proposed amendments increase the risk that a population of seriously injured people will be denied benefits that are reasonable and necessary.

The Panel's approach to combining physical and psychiatric impairments is particularly problematic. The Panel has acknowledged that both can contribute to impairment, with psychiatric impairment superimposed on physical impairment to increase the level of impairment that would be attributed to physical impairment alone. Despite this recognition, the Panel has recommended that physical and psychiatric issues not be combined only because the Panel has been unable to agree on or identify a methodology for doing so. Clearly the work of the Panel is incomplete. As the Advocates' Society points out in their submission, combining physical and psychiatric impairments was recommended in the 2001 Advisory Panel on Catastrophic Impairment, which was supported by the Advocates' Society, the Ontario Trial Lawyers Association, Canadian Defence Lawyers, Metropolitan Lawyers Association and the Ontario Bar Association. The inability to combine physical and psychiatric impairments will leave extremely

vulnerable people, in many cases injured children, without the treatment and support they need to improve or to achieve their maximum potential.

Impact of the Recommendations

By adding unnecessarily to the complexity of the SABS process and by creating cracks through which injured people could fall, the Panel's recommendations run ***contrary*** to:

(i) the interests of Ontario consumers, particularly some of the most vulnerable who have suffered severe injuries;

(ii) the Government's Open for business strategy. The recommendations introduce added costs, complexity, inefficiency and instability into the insurance industry;

(iii) the government's focus on fiscal restraint. The recommendations would:

(a) introduce unnecessary complexities and attendant inefficiencies and increase the cost to government of administering the courts and the Financial Services Commission of Ontario; and
(b) increase the costs of publically-funded health care; and

(iv) the effective administration of justice and the government's policy of simplifying legal processes in order to maximize justice-sector resources and reduce delay. By adding unnecessary complexity to the SABS, the panel's recommendations would increase litigation and delay in both the courts and at FSCO.

Conclusion

It is submitted that there is insufficient data available, both medical and economic, to consider the proposed amendments at this time. Additional data with respect to the claims cost experience under the current definition is needed before changes can be reasonably considered.

It would be premature to consider any changes to the definition of catastrophic based on the incomplete work of the Panel. Moreover, given the important policy considerations, the impact of changes on the administration of justice, the effect of changes on the rights of vulnerable individuals and the repercussions for our insurance system generally, no reform ought to take place without a more complete review with participation from the groups that can meaningfully add to the analysis. Groups who are daily participants in the SABS process, including

consumers, those who represent the injured and those who represent insurance companies, need to be part of the process along with health care professionals.

As we are aware that other groups are addressing the Panel report in considerable detail, this submission has dealt with broad categories of concerns about the Report. Should further specific examples be required, we would be happy to assist. Thank you again for the opportunity to comment.