



Bill 171 - *Fighting Fraud and Reducing Automobile
Insurance Rates Act, 2014*

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Submitted to: The Standing Committee on
General Government

Submitted by: The Ontario Bar Association,
Insurance and Civil Litigation Law Sections



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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to provide comments to the Standing Committee on General Government (“the Committee”) in respect of Bill 171, *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014* (“Bill 171” or “the Bill”), which was referred to the Committee on April 14, 2014.

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents approximately 16,000 lawyers, judges, law professors and law students. The OBA is pleased to analyze and assist the Ontario Legislature with dozens of legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was jointly prepared by an OBA working group comprised of members of our Insurance Law Section and Civil Litigation Section. Members of the OBA Insurance Law Section represent both the insurance industry and injured claimants within the auto insurance system, while members of the OBA Civil Litigation Section practice in all areas of civil litigation including both plaintiff and defense, with extensive experience in the auto insurance system and the dispute resolution process.

Overview

As indicated in submissions made in the course of the review of the Auto Insurance Dispute Resolution system conducted by the Honourable Mr. Douglas Cunningham for the Minister of Finance, the OBA supports the objective of having a dispute resolution system in Ontario that addresses automobile insurance disputes fairly, quickly and as cost effectively as possible.

The OBA is pleased that many of the issues our members raised as part of that review were reflected in Mr. Cunningham’s recommendations, and we support many of the changes captured in Bill 171. However, the OBA would like to bring to the Committee’s attention concerns related to Section 280 of the proposed Bill, as described below.

Specific Comments

The Bill proposes repealing Section 280 of the *Insurance Act* as it now reads, and substituting the following:

Resolution of disputes



s. 280 (1) This section applies with respect to the resolution of disputes in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled.

Application to Tribunal

(2) The insured person or the insurer may apply to the Licence Appeal Tribunal to resolve a dispute described in subsection (1).

Limit on court proceedings

(3) No person may bring a proceeding in any court with respect to a dispute described in subsection (1), other than an appeal from a decision of the Licence Appeal Tribunal or an application for judicial review. [underlining added].

Resolution in accordance with Schedule

(4) The dispute shall be resolved in accordance with the Statutory Accident Benefits Schedule.

Orders, powers and duties

(5) The regulations may provide for and govern the orders and interim orders that the Licence Appeal Tribunal may make and may provide for and govern the powers and duties that the Licence Appeal Tribunal shall have for the purposes of conducting the proceeding.

Orders for costs, other amounts

(6) Without limiting what else the regulations may provide for and govern, the regulations may provide for and govern the following:

1. Orders, including interim orders, to pay costs, including orders requiring a person representing a party to pay costs personally.
2. Orders, including interim orders, to pay amounts even if those amounts are not costs or amounts to which a party is entitled under the Statutory Accident Benefits Schedule.

Bill 171 no longer leaves the Financial Services Commission ("FSCO") as the tribunal to determine statutory accident benefits ("SABS") disputes. The tribunal determining statutory accident benefits disputes will be the Licence Appeal Tribunal (the "Tribunal"). Importantly, it is mandatory that both parties – insurer and insured – adjudicate disputes at the Tribunal, removing the former statutory right of the insured to choose the forum as FSCO or the court system. The OBA is



concerned that the removal of the court system as an alternative to arbitration is an access to justice issue for the following reasons:

1. There will be a bifurcation of global claims for accident benefits and tort matters. The accident benefits dispute will be required to be heard in the Tribunal, while the tort disputes will be required to be heard by the Court. This results in an insured no longer being given the option to bring both their accident benefits and tort claims in the courts. The insured loses the ability to determine whether in that particular case, it is justified to minimize its legal costs by having both proceed through the court system given the circumstance of the case, as balanced against the consideration of the quicker access to the Tribunal.
2. It will increase, rather than streamline costs, as it may result in a multiplicity of proceedings whereby the parties in a tort dispute may call the same doctors, treatment providers and other evidence called in the dispute before the administrative tribunal.
3. By virtue of s. 267.8, the claims for SABS and tort are inextricably linked. A designation of catastrophic impairment in a claim for accident benefits is also binding in a tort action, as in *Liu v. 1226071 Ontario Inc. [Canadian Zhorong Trading Ltd., 97 O.R. (3d) 95 (Ont. C.A.)]*. These factors have often resulted in co-operation between counsel and recourse to private mediation and early resolution of both tort and accident benefit claims, which will now be taken away.
4. There has been no meaningful information available as to what percentage of failed mediations currently proceed through the court system as opposed to through the Financial Services Commission, and the impact, if any, of 100% of these claims going through a newly formed Tribunal. The current system which is admittedly problematic, with both routes available to claimants, saw an unprecedented level of delay via the administrative tribunal route (as opposed the judicial route).
5. In SABS claims involving minimal amounts in dispute, financial considerations may result in an insured being self-represented before the Tribunal, resulting in a concern as to access to justice.
6. Larger SABS disputes, for example catastrophic impairments that involve substantial tort deductions, are more efficiently tried together. Since the tort action must be tried in Court, there should be the option to the parties to have the accident benefits dispute tried in the same forum.
7. The courts are well aware of the local employability and labour market concerns in each of their regions. By having all SABS disputes mandatorily decided through, likely a Toronto centered Tribunal, the parties lose the local expertise of the Judiciary.



8. The Tribunal does not have the authority to award extra contractual damages and damages for mental distress.

9. Related issues would be tried in two forums. With respect to employability and income loss, the Tribunal would be considering the SABS test of a complete inability to engage in any alternative employment for which the insured was reasonably suited by education, experience and training while the Court would be considering income loss and future loss of income. It is more sensible for these issues to be decided once.

10. Finally, the present availability of disputes proceeding through the court system ensures that judges maintain and improve their own expertise in the area of statutory accident benefits. It is especially important as these same judges may be called upon to determine a SABS issue on an appeal.

Conclusion

In summation, the OBA maintains its support for the objective of having a dispute resolution system in Ontario that addresses automobile insurance disputes fairly, quickly and as cost effectively as possible. However, the OBA does not see the cost effectiveness of a bifurcation in the adjudication of statutory accident benefits disputes by granting Tribunal jurisdiction to the exclusion of the Courts.

The OBA appreciates the opportunity to provide this submission, and would be pleased to provide further assistance to the Committee in addressing this important issue.