The Voice of the Legal Profession

OBA Submission to the Licence Appeal Tribunal regarding Rules 8, 9, 10, 14 and 16 of the *Common Rules of Practice & Procedure*

Submitted to: Licence Appeal Tribunal

Submitted by: Ontario Bar Association

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BARREAU DE L'ONTARIO
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Introduction

The Ontario Bar Association (**"OBA"**) appreciates the opportunity to provide this proactive submission to the Licence Appeal Tribunal (the **"Tribunal"**) on Rules 8, 9, 10 14 and 16 of the *Common Rules of Practice & Procedure* (the **"Rule"** or **"Rules"**).

The OBA is the largest and most diverse volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to individuals and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public.

This submission was prepared by the Insurance Law Section of the OBA. The OBA's Insurance Law Section consists of over 200 lawyers practicing in Ontario in the areas of insurance and personal injury law. The Section's membership includes lawyers who represent persons injured in motor vehicle accidents, and those who represent defendants and automobile insurers. Much of their work involves claims before the Tribunal for Statutory Accident Benefits arising out of motor vehicle accidents, which are governed by the *Insurance Act*, and its applicable Regulations, the *Statutory Accident Benefits Schedule – Effective September 1, 2010* ("**SABS**"). We have also prepared this submission in consultation with members of the Administrative Law Section who represent both regulators as well as registrants that come before the Tribunal.

Overview

The comments and recommendations in respect of the Tribunal's Rules that follow are not meant to detract from the mandate of the Tribunal to allow for the fair and just adjudication

of disputes within a reasonable period of time. Instead, they are meant to assist in fulfilling that mandate.

A significant number of disputes before the Tribunal deal with relatively modest issues and amounts-in-dispute (though those can, of course, still be of considerable importance to the parties), and we appreciate that for those types of disputes, the more "summary" procedures used by the Tribunal, such as written hearings, are entirely appropriate (and indeed, we compliment the Tribunal in adopting those procedures for the appropriate types of disputes). However, it is also a fact that a significant number of other disputes before the Tribunal involve issues of extensive complexity and, potentially, considerable amounts are at stake – and the concerns outlined below often arise in the context of those sorts of disputes.

Comments & Recommendations

1. Rule 9: Productions

a. Timely and Predictable Exchanges of Documents between the Parties

The OBA is appreciative of the Tribunal's efforts in ensuring that all parties are carefully preparing Case Conference Summary Forms, particularly with regard to the section of the Form which allows a party to outline "***key documents required that have not yet been received***".

It has been our members' experience at recent Case Conferences that Adjudicators are routinely and carefully paying attention to what the parties have written down in that section in terms of what productions are required (but not yet received) and, where appropriate, Adjudicators are making Orders for productions at Case Conferences where disputes arise.

The OBA also appreciates that, if necessary, the parties themselves can bring motions for productions before or after Case Conferences to address productions, and the OBA is pleased that the Tribunal continues to receive and address those motions on a timely basis.

b. Obtaining "Third Party" Productions

Particularly (but not exclusively) in AABS proceedings at the Tribunal relating to claims for Statutory Accident Benefits (**"SABS"** or **"AB Disputes"**), either or both parties will ask the opposing party to obtain and produce records that are in the possession and control of third parties. Examples include (but are no means limited to) clinical notes and records of medical professionals who have treated or assessed a person claiming SABS, and the files of insurers from whom that person may have claimed "group health", disability, or other Benefits. Disputes over what is to be produced are dealt with at the Case Conference or (when necessary) by a motion. However, even when the parties agree on what is to be produced (or when the Tribunal makes an Order in that regard), the party who is obliged to produce those records is dependent on the cooperation of the custodians of those records ("third parties"). At present, the Rules do not provide for specific procedures by which third parties can be compelled to produce those records, and at times, despite the best efforts of the parties to an AB dispute, those third parties fail or refuse to respond to requests to produce those records.

Therefore, the OBA suggests that a process be incorporated into the Rules that would allow a party to a proceeding at the Tribunal to bring a motion, on notice to the other party/parties and the third party (or third parties) in question, for an Order compelling the third party to disclose the records in question.

In keeping with the Tribunal's practice of having such motions dealt with expeditiously (and often, in writing), the Notice of Motion form for such an order should contain a notice to the third party against whom the motion is brought that it has 10 business days (or such other amount of time as the Tribunal feels is more appropriate) to serve and file written

submissions as to whether the Tribunal should or should not make that "Third Party production" Order, and if so, what terms should apply to that Order. (The other party to the Tribunal proceeding would have the same amount of time to serve and file its own written submissions on those points as well), and the "moving party" would then have 5 business days (or such other time as the Tribunal feels would be more appropriate) to file brief Reply submissions. The exact form/format of those submissions can be the subject of further discussion with stakeholders as this Rule is being drafted.

2. Rules 8 and 10: Summons and Witness Lists

a. The Number of "Last Minute" Witnesses being Added to Witness Lists Need to be Addressed.

The OBA agrees with the Tribunal that parties should be discouraged from "last minute" additions to witness lists. Currently, the procedure of "identifying witnesses" at the Case Conference is working well for most disputes. However, the OBA is mindful of the fact that things change. For example, after the Case Conference, in an AB dispute, an insurer (or applicant) might commission a further expert report, and that report might not be available for several months.

Presently, the Tribunal is quite rightly directing parties at Case Conferences to make submissions on "when" a witness list should be submitted and both applicants and respondents are free to make those submissions, and the Adjudicator then makes a decision. Ordinarily, witness lists are ordered to be produced 30 or 45 days prior to the commencement of a hearing. The OBA believes that the Tribunal, with the assistance of counsel, is reasonably addressing the issue of identifying witnesses.

If there are further concerns with respect to parties "notifying" their experts of hearing dates, the Tribunal could consider, as part of Case Conference Orders, including a "term" that the

parties are obligated to notify those witnesses who have already been identified by a certain deadline (e.g., within 15 days of the Hearing being scheduled) so that the witnesses are put on notice promptly. This would have the beneficial effect that if it happens that an essential witness is not available for the hearing, the party intending on calling that witness would presumably know that many months (in most cases) before the hearing and could bring the appropriate motion to have the hearing rescheduled months in advance of the hearing, rather than at the "last minute". In considering adjournment requests for witness availability, the Tribunal could consider (among other things) whether the party complied with that obligation to put its witnesses on notice within that time-period.

Aside from that issue, the OBA's position is that the issue of the identification of witnesses has not been a major or pressing issue and can be dealt with by appropriate Orders at Case Conferences, and by setting reasonable deadlines by which parties must confirm their witnesses (as noted above, that is usually 30 or 45 days prior to the start of a hearing).

b. The "Lack of Availability" of Witnesses due to their own Scheduling Commitments Must be Recognized.

From time to time, despite the best efforts of counsel, and despite expert and other witnesses being properly put on notice of a hearing date well in advance (e.g. as soon as the hearing dates are confirmed via the LAT Scheduling Department, a process which we have suggested be "formalized" as set out above), expert witnesses (and other essential witnesses) may not be available strictly on the hearing dates set by the LAT, for a variety of valid reasons (e.g. prior commitments, other hearings, planned vacations, health reasons, etc.).

In these cases, the OBA submits that additional consideration should be given to "add on" days to a hearing, as appropriate, such that the party can properly adduce evidence from that witness. This would not necessarily require an "adjournment", so to speak, but rather would provide flexibility for the party to call the witness at a later, mutually available date reasonably soon after the original hearing dates.

c. The Process/Framework Regarding (a) Issuance of Summonses and (b) Summonses for Third Party Productions could be Clarified, Strengthened, and further Codified.

The issue of summonses functions similar to that of witnesses. The OBA agrees with the Tribunal that it is the parties' responsibility to (a) identify the subject of summonses promptly, and (b) to have the summonses issued by the Tribunal once the hearing dates have been issued, in order to avoid delay.

With respect to the issue of summonsing third party productions, the ordinary procedure for this is similar to that of Superior Court where a records custodian is obligated to attend the hearing and deposit the records with the Adjudicator who then decides to produce them to the requesting party, in whole or in part. As set out above, the OBA is proposing a process, via Third Party production Orders, that would address this problem in the majority of cases.

3. Rule 14: Case Conferences

a. Scheduling Case Conferences for Dates where neither Party is Reasonably Available

The OBA understands and appreciates that delay is an important concern that the Tribunal has been addressing over the past several years. The OBA has received clear and resounding commentary from its membership that less deference is being shown to counsel in circumstances where both the Applicant and the Respondent expressly consent to canvass Case Conference dates outside of the range provided by the Tribunal's Scheduling Unit.

Case Conferences are significant events where Orders are made that affect the substantive and procedural rights of the parties. The lawyers with carriage of the files need to be present at Case Conferences in order to make submissions on productions, formats of hearings, lengths of hearings, witnesses, and to explore settlement. The issue of "finding another

lawyer" to attend Case Conferences (or hearings, for that matter) is simply an inappropriate substitute.

The OBA has also received feedback from its members who have quite literally been scheduled for Case Conferences for different matters, on the same days, and at the same time. Other issues include scheduling Case Conferences during time periods where members already have pre-booked commitments.

The OBA therefore suggests that the range of potential Case Conferences dates provided by the Scheduling Unit be broadened. Ideally, if resources permit, an online scheduling calendar for Case Conferences should be provided, which will allow the parties to discuss and select an available and mutually convenient date and time; that method would also allow dates/times that are fully booked to be removed from the list of available/dates times on that online scheduling calendar. The Scheduling Unit would retain the ability to unilaterally schedule a date in cases where the parties fail to participate in that process within a <u>reasonable</u> period of time after being given notice by the Scheduling Unit.

b. Scheduling Department Allowing only a Narrow Range of Potential Case Conference and Hearing Dates

The second issue has arisen due to the actual scheduling of hearings being taken out of the hands of Adjudicators at Case Conferences, and placed into the hands of the Tribunal's Scheduling Unit.

Regardless of who schedules the hearing, the OBA submits that more consideration needs to be given to allowing the scheduling of hearings beyond 6 months after Case Conferences. Routinely, the Scheduling Unit will release a narrow range of dates and require the parties to agree to a date within that range. Reasonable responses by parties that those dates are not suitable have been, according to our members, been dismissed out of hand by the

Scheduling Unit, regardless of the reasons given by the parties, even when the request for dates beyond the range provided are made jointly or with the consent of all parties to a proceeding.

The OBA appreciates that the Tribunal has a mandate to ensure proceedings are dispensed with in an appropriate timeline, **but particularly when all parties to a proceeding consent to a hearing taking place outside of the dates provided**, the OBA respectfully submits that this be given considerably greater consideration by the Scheduling Unit.

Finding the time available to set aside 2, 3, 4, 5 or 10-day hearings within a 6-month time frame after Case Conferences is simply unfeasible having regard to the busy practices where discoveries, mediations, trials and other commitments are pre-booked months and sometimes years in advance. Accordingly, the OBA submits that the Tribunal should consider allowing additional flexibility when issuing a series of potential hearing dates, and that consideration be given to restoring the previous practice of setting hearing dates at Case Conferences collaboratively with due regard to availability of counsel, witnesses and the Tribunal.

4. Rule 16: Adjournments

a. The Tribunal Intends to Clarify the Process for Requesting Adjournments and is Considering Including in the Rules the Factors that an Adjudicator may Consider when Deciding to Grant or Refuse an Adjournment Request.

The OBA submits that the issue of adjournments (particularly as it relates to hearings) is the number one issue affecting its members who advocate for their clients before the Tribunal.

We are respectfully seeking an approach dealing with adjournments (as well as scheduling) that recognizes the needs and circumstances of each case, and the needs of the parties to each case. If counsel are permitted to pick dates that are beyond the narrow range of dates

that are currently being issued by the Scheduling Unit, then the issues of being double-booked and not available would be drastically reduced.

The OBA has received countless examples of counsel being double and sometimes triple booked with other commitments. Counsel are being forced into situations where they either have to be in two places at once or they need to find a colleague to stand in and assist in a file where that colleague is not familiar with the file. It is unreasonable to expect lawyers with carriage of files to conscript colleagues in to deal with hearings or other attendances in circumstances where a simple (and brief) adjournment would solve the problem.

It should also be noted that not every "*lawyer (or paralegal) of record*" practices in a firm where there is another lawyer/paralegal to whom the file can be "handed off", even if that was an appropriate solution. Indeed, it is quite common that persons injured in motor vehicle accidents are represented by sole practitioners, or by lawyers/paralegals practicing at smaller firms (though this is not a situation restricted to Applicants in AB disputes, by any means).

The examples provided by OBA members are too numerous to cite here, but the common thread is that if even brief adjournments were granted (especially when they are on consent) the issue of non-availability would be drastically reduced. Some examples provided by members include the following:

- Respondent's lawyer was scheduled to commence a multi-week civil, jury trial at the same time as a Tribunal hearing. Applicant's counsel consented to the date change. The adjournment was refused by the Tribunal.
- Applicant's counsel was scheduled for two Tribunal hearings at the exact same time and date. Consent to adjourn was provided by the Respondent. The adjournment was refused by the Tribunal.

- The Applicant was not available for a Case Conference because he was at a medical assessment. An adjournment was requested, on consent. The adjournment was refused by the Tribunal.
- Applicants have been being forced to withdraw their applications (only to re-file later) because adjournments are refused. This is an access to justice issue. Persons injured in accidents should not be forced to choose between finding another legal representative – assuming that is even possible – and having to withdraw/re-file (and wait months and possibly years) to have their dispute heard, assuming that they would not be statute-barred by operation of a limitation period, when a very brief adjournment would have resolved the issue, especially in circumstances where the other party consents. To address one comment made in response to these concerns that our members have heard at Case Conferences, it is not always possible for the parties to agree on a "tolling agreement" to suspend a limitation period, and even when one can be agreed to in principle, drafting, reviewing and approving a "tolling agreement" is <u>not</u> always a simple process, and only adds to the parties' costs – where a simple (and relatively brief) adjournment would avoid the problem entirely.

Ideally, hearing dates would return to being set by Adjudicators at the Case Conference. That would reduce, though not eliminate, the need for adjournments to be requested at a later date. However, in any case, adjournment requests should be addressed on a case-by-case basis, taking into account factors including (but not limited to):

- Whether the adjournment request is made on consent.
- The reasons given by the parties.
- The prejudice to the parties or to the administration of justice if an adjournment is granted – and just as serious a consideration of the prejudice that will arise if an adjournment is refused.
- In all but the most exceptional cases, legal representatives – who are "officers of the Court", regulated and governed by the Law Society of Ontario, with all of the duties

and obligations that are associated with the same – should not be required to prove their scheduling or personal conflicts with supporting evidence or full details.

Conclusion

The OBA appreciates the opportunity to make submissions on these important issues and appreciates that the Tribunal is statutorily obligated to provide expedient adjudication services to resolve disputes in a timely manner. The OBA is hopeful that these submissions provide the Tribunal with some additional perspective in which to address the issues. We look forward to opportunities to continue to engage with LAT and to provide the insights from both insurance defense and plaintiff-side personal injury representatives. We would welcome a meeting to discuss further and look forward to responding to any questions from LAT on our submission.