



50 YEARS
OF EXCELLENCE
IN ADVOCACY

The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

PRESIDENT: Peter J. Lukasiewicz

Tel: (416) 862-4328 • peter.lukasiewicz@gowlings.com

November 5, 2014

VIA EMAIL

Mr. Grant Crack,
Chair, Standing Committee on General Government
22nd Floor, Mowat Block
900 Bay Street
Toronto, ON M7A 1L2

Dear Mr. Crack:

RE: Bill 15 – *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*

The Advocates' 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 are litigators who practice in the area of personal injury and insurance law. As these members represent both plaintiffs and defendants in personal injury cases, the Society reflects diverse and considered views of the personal injury bar.

Thank you for the opportunity of presenting before the Standing Committee today.

In March 2014, the Society wrote to the government with regard to concerns with Bill 171, the predecessor to Bill 15. These same concerns remain in Bill 15.

The Society is concerned that this Bill, if passed:

- a) will create barriers to access to justice for injured parties who wish to bring a claim against an insurer under the *Statutory Accident Benefits Schedule* (the "SABS"); and
- b) will result in increased litigation costs to injured parties and insurers.

The Society's concerns arise out of the following provision of the Bill:

Resolution of disputes

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*.

This provision removes the right of an injured party to bring an action before the courts for statutory accident benefits under the SABS. The practical implication of this provision is that, where an injured party has a claim arising from an automobile accident, the party has no choice but to hive off that portion of his or her claim which arises under the SABS and bring it before the Licence Appeal Tribunal (the "Tribunal"). This would result in a bifurcation of the claim, with both the Tribunal and the courts hearing different aspects (and in some instances, such as in determining issues of causation, the same aspects) of the same claim (*i.e.* the Tribunal hearing the issue of statutory accident benefits entitlement, and the court hearing private law issues such as tort claims). Under the existing regime, a party may choose to bifurcate his or her claim between the Financial Services Commission of Ontario ("FSCO") and the courts, but such a choice can be informed by the understanding of the increased costs and associated challenges of proceeding in such a way. For example, where a claim under the SABS is for an amount which is minimal compared to a larger claim in tort, counsel may advise their clients to bring both claims jointly before the courts to maximize the efficiency of legal resources, or at least to balance this important consideration against the client's need for a quick resolution of the SABS claim.

The Society is concerned that the mandatory bifurcation of proceedings proposed by the Bill will require increased legal costs of both injured parties and insurers. Even worse, the removal of the option of combining a comparatively small SABS claim with a larger tort

claim before the courts may entice an injured party not to incur duplicative legal fees and bring the SABS claim before the Tribunal without legal representation. The Society is attuned to the growing problem of self-representation before adjudicators and is concerned that the Bill may exacerbate this serious issue of access to justice. In addition, as Tribunal adjudicators would likely be largely based in Toronto, they may not be as well-versed on local issues that are implicated by accident benefits claims (e.g. the strength of the local job market for an injured person's re-employability). Moreover, with the transfer of the adjudicative jurisdiction over SABS claims to the Tribunal, the proposed model risks losing the expertise of FSCO adjudicators. Finally, the mandatory bifurcation of a global claim could seriously prejudice the ability – and the willingness – of all of the parties to achieve a global settlement of the claim.

This last point cannot be over emphasized where the stated goal of this legislation is premium rate reduction. In serious injury claims, having the tort and accident benefit claims in one proceeding ensures that all interested parties are at the table at the same time. It means that only one proceeding needs to be commenced and prosecuted. It also avoids the possibility of conflicting results, duplication of effort and inconvenience and expense to witnesses. Where claims not paid by the accident benefit carrier immediately form part of the tort claim, having both insurers in the same proceeding is the only cost-effective way to proceed.

The focus of this Bill may be on a reduction in auto insurance rates for Ontarians. However, as we indicate above, a bifurcated dispute resolution system which would require bringing a claim under the SABS in one forum and a related claim (e.g. a tort action) in a different forum would result in higher costs for both an injured party and an insurer. In any event, we do not see any evidence that granting the Tribunal jurisdiction, to the exclusion of the courts, to resolve statutory accident benefits claims would result in any reduction in auto insurance premiums.

We have listened to the concerns voiced by the insurance industry respecting maintaining the right to sue. With respect, we say that sometimes insurers do not realize the implications of what they seek. This would be one such instance. In our oral presentation, I gave the example of insurers losing the right to sue for recovery of benefits paid due to fraud with the implementation of this Bill. The problem with the insurers' perspective (and to be clear, there are a great number of insurers who did not appear before this Committee who do not agree with the positions articulated before the Committee) is that they do not always measure that which they need to in order to determine if something will lead to premium reductions. There have been countless occasions where actuaries have predicted savings to the industry that were never realized. We contend that the additional payouts in both tort and accident benefits that will arise out of the segregation of the two systems from one another (in those limited instances where there is a viable tort claim) will be significant, yet not specifically measured by the industry. As counsel on both sides of these files, we know when something will end up costing more money. This undoubtedly will.

As a result of these concerns, the Society urges that exceptions be created to s. 280 (3) of the new Bill. These exceptions can and should extend to the following circumstances, which are divisible options, depending on how far the political will goes to extend the exemption from the bar to sue in court:

a) Subsection (3) does not apply to claims streamed by the Registrar into the complex stream, such that a claimant shall have the option to

opt out of arbitration and commence litigation within 20 days of being advised that they fall within the complex stream;

b) Subsection (3) does not apply to claimants who have commenced a court action in tort, and who wish to include their accident benefit issues in their litigation; [this provision can be optional or, indeed, could be mandatory, whereby claimants who have started a tort claim must not split their cases into two fora]

c) Subsection (3) does not apply where a claimant seeks to sue an insurer for extra contractual damages for bad faith. In such circumstances, the underlying benefits must be included in the court action in which they seek these damages and not adjudicated at the Licence Appeal Tribunal;

d) Subsection (3) does not apply where either a claimant or insurer seeks a determination of a pure question of law, pursuant to Rules 21 and 38 of the *Rules of Civil Procedure*;

e) Subsection (3) does not apply where an insurer seeks to assert a claim for repayment by reason of material misrepresentation or fraud.

The Society would be pleased to assist with any further drafting and answer any questions you have arising out of this letter. We would welcome the opportunity to speak with you about our concerns further.

Yours very truly,



Peter J. Lukasiewicz
President

cc The Hon. Charles Sousa, Minister of Finance
Jeff Yurek, MPP (PC)
Jagmeet Singh, MPP (NDP)
Mike Colle, MPP (Liberal)