OBA Submission
on the Final Report of David Marshall

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Submitted by: Ontario Bar Association

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BARREAU DE L'ONTARIO
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Introduction

The Ontario Bar Association ("the OBA") appreciates the opportunity to provide this submission to the Ministry of Finance in response to the Ministry's request for comments on the April 11, 2017 Final Report entitled *Fair Benefits Fairly Delivered: A Review of the Auto Insurance System in Ontario* ("the Report" or "the Marshall Report") by David Marshall.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,000 lawyers, judges, law professors, and students. OBA members are on the frontlines of our justice system in no fewer than 39 different sectors, and in every region of the province. In addition to providing legal education for its members, the OBA assists government with dozens of legislative and policy initiatives each year - in the interest of the public, the profession, and the administration of justice.

This submission has been prepared by an OBA Working Group established to address the issues presented in the Report and the real challenges facing the auto insurance industry. The Working Group membership is composed of senior insurance law practitioners representing both plaintiff and defence side clients, and whose clients include individuals and corporations whose rights and interests are affected by legislation relating to motor vehicle injuries: Gordon Good (McKenzie Lake Lawyers LLP), Richard Halpern (Thomson Rogers), Catherine Korte (McCague Borlack LLP), Josh Nisker (McLeish Orlando LLP), and Audrey Ramsay (Blouin Dunn LLP).

Background

The current challenges faced by the auto insurance industry can only be clearly understood by examining its history. The comments that follow in this submission rest upon three lessons that flow from the auto insurance system since the introduction of enhanced first-party accident benefits (no-fault benefits) in 1990:

1. The no-fault benefit system is structurally complex, overly expensive, and inherently adversarial.
2. Previous attempts at reform on the no-fault benefits side of the auto insurance system, ostensibly designed to simplify the system and reduce costs, have failed to achieve the stated objectives, consistently producing additional costs, uncertainty, and other unanticipated and undesirable consequences.
3. The two sides of the insurance system – no-fault benefits and tort – are intimately intertwined. Any proposals for reform to auto insurance must flow from a comprehensive review of both the no-fault benefits and tort sides, rather than from piecemeal measures affecting one side or the other.

Prior to the introduction of enhanced no-fault benefits in 1990, a motor vehicle accident victim had access to very modest no-fault benefits and an unfettered right to sue in tort. In 1986, the Ontario government appointed Justice Coulter A. Osborne to conduct a review of the automobile insurance system. In his 1988 *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario*, Justice Osborne recommended maintaining the tort system while pursuing other reforms, including enhancements to the no-fault benefit system.

Significantly enhanced no-fault benefits, enacted under Bill 68[1] and the Ontario Motorist Protection Plan ("OMPP"), came into force in 1990. In exchange for more generous no-fault benefits, however, an injured person's right to sue in tort for general damages (pain and suffering) and economic loss was restricted. The OMPP marked the introduction of the "verbal threshold," which restricted the right to sue for general damages and income loss to situations in which a plaintiff had died or had sustained injuries that were "permanent," "serious," and "physical" in nature (collectively known as the "verbal threshold"). When the OMPP was first introduced, it was assumed that the injured person would be able to navigate the no-fault system without the aid of a lawyer. It quickly became apparent, however, that the no-fault benefit system was too complex to navigate alone and that injured people needed legal counsel in order to properly assert their claims.

The passage of Bill 164[2] in January 1994 saw significant amendments to both tort and no-fault benefits. An injured person's right to sue in tort for economic loss, unless optional coverage was purchased, was eliminated while no-fault benefits were significantly enhanced. While the right to sue in tort for general damages and the verbal threshold remained in place, Bill 164 also introduced the monetary deductible, which deducted an amount from the injured person's general damages claim where the claim met the threshold. The claims of *Family Law Act* claimants were also made subject to a monetary deductible.[3] Importantly, the only rationale for the introduction of the monetary deductible was to reduce claim costs.

At the same time, the more generous no-fault benefits under Bill 164 were accompanied by substantially more complex regulations, making it far more difficult for consumers to both apply for entitlement to no-fault benefits and seek redress where their claims were denied. For all practical

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[1] Bill 68, *Insurance Statute Amendment Act* (S.O. 1990, c. 2).
[2] Bill 164, *Insurance Statute Law Amendment Act* (S.O. 1993, c. 10).
[3] In his report *Civil Justice Reform Project: Summary of Findings & Recommendations*, Justice Osborne remarked that the deductible had access to justice implications and may be a disincentive for individuals to make a claim (November 2007, online: http://www.civiljusticereform.jus.gov.on.ca). Justice Osborne suggested that the government consider whether reduce or abandon the deductible. In 2009, following the Five-Year Review of Automobile Insurance, the government eliminated the deductible in cases of fatalities for accidents that occurred after August 31, 2010. Currently, the deductible, which is indexed annually, is $37,385.17 for general damages claims below $124,616.21 and $18,692.59 for *Family Law Act* awards below $62,307.59.

purposes, it was impossible for the vast majority of people to obtain their full entitlement to no-fault benefits without legal assistance.

Bill 164 was short lived. With the enactment of Bill 59[4] (effective November 1, 1996), the government expanded tort rights to injured people by allowing restricted recovery of economic damages, but further restricted tort rights in other ways: the verbal threshold became more restrictive, limits were placed on the recovery of income loss, and the right to sue for health care expenses (the same definition as used for accident benefits) was restricted to individuals who sustained catastrophic impairment. At the same time, the quantum and duration of coverage for no-fault benefits were reduced for non-catastrophic cases. As with the previous versions of the mixed no-fault/tort system, the regulations remained too complex for consumers to navigate without legal representation.

Successive amendments to Bill 59 (Bill 198[5] and beyond) have maintained the limited right of injured individuals to sue in tort (subject to both the verbal threshold, the monetary deductible, and other limitations on the recovery of economic losses), while still preserving the right to pursue no-fault benefits, although the no-fault benefits have been gradually eroded. Each successive attempted reform to curb premiums and maintain stability of the system has led to further complexity and unanticipated consequences, including rising insurance costs.

The lesson from the above review is that three decades of reforms to automobile insurance have failed to achieve an outcome or product that works well for Ontario consumers. Moreover, each successive reform has created uncertainty for insurers and consumers, increased expense to all stakeholders, increased the need for dispute resolution (whether through the courts or elsewhere), and contributed to ongoing instability in premiums.

In an apparent further effort to curb costs and address fraud, in 2014 the government introduced the Minor Injury Guideline and has proposed, as part of a longer term strategy, evidence-based protocols for common types of injuries. The most recent regulatory changes to the no-fault system, for policies renewed as of June 1, 2016, saw significant reductions in coverage for medical and rehabilitation and attendant care benefits for individuals suffering catastrophic injuries.[6]

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[4] Bill 59, *Auto Insurance Rate Stability Act* (S.O. 1996, c. 21).
[5] Bill 198, *Automobile Rate Stabilization Act* (S.O. 2003, c. 9).
[6] Coverage was reduced from $1,000,000 for medical and rehabilitation and $1,000,000 for attendant care to a total of $1,000,000 combined for both. Coverage was also reduced for individuals sustaining non-catastrophic injuries to a total available coverage of $65,000 combined for both (reduced from $50,000 for medical and rehabilitation and $36,000 for attendant care). These changes could not make a meaningful contribution to addressing fraud, and some argue that they have merely reduced entitlement to injured people with legitimate claims to benefits. It is yet another example of piecemeal tinkering with the system, without any reasonable enhancement of stability.

As no-fault benefit coverage has been reduced, the injured person maintains tort rights with a complex rule for general damages, health care expenses, income loss, and interaction with the no-fault system, WSIB, and potentially other available collateral benefits. Importantly, the minimum coverage required in Ontario for third-party liability – which covers claims on behalf of the insured where a third-party is killed or injured, or where property is damaged – remains only $200,000. This amount has not seen a change in over a decade.

These recent changes have been no more effective in addressing the fundamental problems with automobile insurance than previous reforms. Further, the focus on evidence-based medicine and treatment protocols are in and of themselves problematic, as we describe further below.

The Current Context

Within this context, the Ministry of Finance engaged David Marshall to review Ontario's automobile insurance system and provide recommendations for improvement. Mr. Marshall delivered his final report dated April 11, 2017.

Citing the fact that Ontario has the most expensive automobile insurance of any jurisdiction in Canada, the focus of the Report is on:

1. Reducing claims costs;
2. Reducing uncertainty;
3. Improving efficiency of claims management; and
4. Improving effectiveness of case management.

In many respects the Marshall Report correctly identifies problems with the automobile insurance system. There are indeed enormous inefficiencies and too many disputes in the no-fault benefit system.[7] The system is truly flawed, as the Report suggests.[8] It is also the case that multiple reforms, as described above, have resulted in temporary costs savings only to have costs escalate once again, although the reasons for rising costs are far more nuanced than the Marshall Report recognizes. Our primary concern is that the recommendations in the Marshall Report do not offer viable or sustainable solutions to the problems identified.

To that end, the first part of our submission provides comments that are targeted to specific assumptions and premises made in the Report that we believe are unsupported by empirical evidence and are at odds with how the system has functioned in practice since the introduction of enhanced no-fault benefits in June 1990. The second part of our submission speaks to broader concerns with respect to the Report's major recommendations regarding the need to simplify the

[7] The Report, p. 8.
[8] The Report, p. 9.

system; the proposed programs of care; the proposed Independent Examination Centres; and advertising, referrals fee, and contingency fee issues.

Targeted Comments and Concerns

In this part of our submission, we have drawn out phrases from the Marshall Report, accompanied by our comments, in an effort to target particular assumptions and premises made in the Report.

The no-fault (accident benefits) part of the insurance system acts like a safety net collectively funded by the owners of motor vehicles, and the bodily injury part acts like a tort system where injured parties who are not at fault can sue the at-fault parties for additional compensation.[9]

First, the no-fault system is not a true safety net, as the Report describes, because the system cannot possibly provide that degree of protection for all accident victims. This is due in large part to temporal and monetary limits on recovery in the accident benefits system, the inherent conflict the regime creates between insureds and insurers, and the enormously inefficient way in which it delivers benefits. The safety net for all Ontarians is not auto insurance but rather the public health care system.

Second, the bodily injury part of the insurance system <u>is</u> a tort system, albeit with limitations that prevent injured people from being fully compensated for their losses. While the tort system has its flaws and critics, it is not arbitrary (as the no-fault system is), it is based on sound legal principles, and it offers a relatively efficient and fair system for the delivery of compensation to injured people.

Many of the recommendations made in the Marshall Report are premised on the assumptions that current levels of no-fault benefits must be maintained and that they can be delivered to consumers without the assistance of legal counsel. As the history of experience with enhanced no-fault benefits demonstrates, both premises are incorrect.

[The tort system] results in a significant leakage in the benefit [injured parties] actually receive since the award they get is reduced by the need to pay expert witnesses and large fees to lawyers.[10]

With respect, the payment of expert witnesses in a tort claim does not reduce the successful injured party's recovery because these expenses are generally paid as an assessable disbursement by the losing party. Moreover, the Report fails to take into account the significant leakage that occurs in the no-fault system. The no-fault system: does not compensate for pain and suffering at all; undercompensates for income loss in most cases (and in many cases, it significantly undercompensates for income loss); does not provide adequately for attendant care needs; does

[9] The Report, p. 15.
[10] The Report p. 15.

not fully compensate claims that exceed the accident benefit system's monetary or temporal limitations; and does not compensate for services, equipment, or therapies not specifically enumerated in the Statutory Accident Benefits Schedule. The amount of compensation an individual is entitled to from the no-fault system rarely equals their actual loss and, in many cases, seriously undercompensates for real losses.

For reasons we have discussed already and more that will follow, the tort system and legal representation are both critically important tools for access to justice for injured people. Due to the complexity of the insurance system, it is impossible for injured people to access justice without representation, as many would not have the means to assert their rights without the ability to retain lawyers on a contingency fee basis. This means that lawyers are not paid until the end of the case and, if the case is unsuccessful, they may not be paid at all.

We should also point out that injured people seeking no-fault damages require legal representation in many cases because of the complexity of the no-fault system, and that their means to pay for this representation is restricted because of the limitations on no-fault benefits and the way they are structured for periodic payments. Every version of no-fault benefits, since enhanced benefits were introduced almost three decades ago, has proven that injured people need representation in order to access their rights. The recommendations in the Marshall Report will not change this reality.

The no-fault portion of the system is intended … to provide most, if not all, essential needs of injured parties through a system that is more efficient, less costly and delivers more of the end benefit to the consumer than the tort system.[11]

With respect, no-fault benefits were never intended to provide "most, if not all" of the needs of an injured party, because they involve arbitrary temporal and monetary limits, as well as limitations with respect to the category of loss that will be paid. Indeed, the best that no-fault benefits can achieve is to provide a minimal level of compensation in order to allow the injured person to get past the acute phase of injury. This mistaken assumption about the function of the no-fault system undermines many of the recommendations made in the Marshall Report.

By definition, first-party benefits provide under-compensation for all. The system could not afford to provide for all the essential needs of all injured people – such a system would be completely unsustainable. Indeed, the limited no-fault benefits system that exists now has proven unsustainable; since the inception of enhanced no-fault benefits in June 1990, it has been shown repeatedly that generous no-fault benefits are unaffordable and result in inefficient benefit delivery.

[11] The Report, p. 16.

Nor does the solution, purely from a cost point of view, lie in changing from a private sector delivery to a public sector delivery system. Run properly, the premium cost for drivers under either system can be roughly the same.[12]

These comments in the Report are made in reference to first-party benefits. The Report later indicates that "there is no need to make a disruptive change from a private to a public system of delivery."[13] While we are not advocating for a public automobile insurance system, there is no justification for the assertion that the costs of a public and private system would be the same. Moreover, the Report fails to acknowledge that a private system has insurer profits as an added cost while a public system does not.

Incidentally, the Report indicates that there are 118 automobile insurers in Ontario,[14] but does not note the fact that only a half dozen insurers write the vast majority of all automobile insurance policies in Ontario. Certainly, automobile insurance in Ontario is not as competitive as one might think. The consolidation of the vast majority of policies in just a handful of companies over the last two decades has created problems not covered in the Report, though this reality highlights the conflict between insurers and their insureds.

The system allows participants to work at cross purposes to its original goals:

- ***Insurers do not aim to provide care to their customers rather they focus on controlling costs.***
- ***Accident victims may seek to maximize their entitlement rather than address their need.***
- ***Lawyers working on contingency fees work to boost the value of claims.***
- ***Providers are paid on volume of treatments, not results.***[15]

We have concerns respecting each of these statements, although we will touch on the issue of contingency fees further below.

First, the Report advocates for more active involvement of insurers in the provision of medical care at a number of junctures. The Report also argues that "insurance companies will have to change from managing cash to managing care."[16]

The notion that insurers should be involved in the provision of health care is problematic for a number of reasons. For one, it does not recognize the tension that exists between the insurers' duty

[12] The Report, p. 9.
[13] The Report, p. 12.
[14] The Report, p. 13.
[15] The Report, p. 10
[16] The Report, p. 12.

of utmost good faith in their relationship with their insured and their obligation to their shareholders to maximize profit. Deeper involvement of insurers in the provision of health care is likely to exacerbate disputes between insurers and insureds, resulting in additional bureaucracy and legal challenges in the future. As indicated further below, the Report's proposed programs of care, supported principles of evidence-based medicine, are likely to visit further problems on an already complex system.

The health care providers in the best position to care for injured people are the treatment providers under the public health care system, who are publicly paid and have no interest, financial or otherwise, in the outcome. To the extent that the Marshall Report promotes more active participation of insurers in the provision of health care to accident victims, the existing conflict between insurers and insured people inherent in a no-fault benefit system will intensify.

With respect to the second point above, there is no empirical support for the notion that accident victims are more interested in maximizing their entitlement to the detriment of their physical and mental health needs. Further, for the most part under the no-fault benefit system, the provision of care results in payments to third parties (i.e., to therapists) and not to the insured. In these cases, there is no financial incentive for the injured party to seek to maximize their entitlement.

Finally, the notion that health care providers are to be paid on "results" dramatically over-simplifies the provision of health care. The idea that one can measure "results" is to fail to recognize the inherently complex reality that each injured person enters the system with their own unique health history, predispositions, and ability to respond to treatment. These variables provide an almost infinite variety of – and therefore widely diverging – responses to both injury and attempts at rehabilitation. One size does not fit all, which partially explains why the evidence-based medicine proposal of fixed or pre-determined programs of care should be approached with extreme caution.

Hence it is likely true to say that the more generous no-fault systems treat all accident victims more fairly than those that require access to tort.[17]

The first point to be made from a fairness perspective is that no-fault benefits, by definition and necessity, under-compensate every claimant. Under the no-fault system, there are monetary caps on economic losses that have nothing to do with actual loss. There are temporal limits on all benefits, again bearing no relation to actual loss. There are categories of loss that do not qualify for compensation. No-fault systems are based on arbitrary rules about compensation, and not on any principled analysis of loss. The proposition that no-fault systems compensate individuals "more fairly" than tort systems is simply unsupportable.

[17] See Report p. 26.

The rules under the no-fault system must be contrasted with the important principles of tort compensation, which promote socially important objectives. One of the important principles of tort law is the notion that those who cause loss should bear the burden of that loss. The corollary is that the innocent victims of injury should not be burdened with the resulting losses. Related to this is the principle of tort law requiring damages to restore the injured person to the position they would have been in, to the extent that money can do so, had the harm not occurred. (Other important principles, like deterrence and modification of behaviour, are not discussed here.)

The Report points out that not all injured people have access to tort. This is as it should be. It is incongruous with any sensible principle of compensation that wrongdoers ought to be compensated for their own wrongdoing. At the same time, society can provide a more modest level of compensation for all through a no-fault system, but the no-fault system cannot and should not provide access to full compensation as a tort system should and does. For such a system to be sustainable, the no-fault benefits must be limited, easily understood, and easily accessible.

The Report asserts that tort claims result in injured people "walking away with a lot less compensation than they ought to get."[18] There is no evidence or support for this proposition. The matter of compensation is complex and influenced by competing evidence on both sides, as well as discounts for litigation risk. What is clear, however, is that virtually all no-fault claimants are under-compensated, leading to a significant discrepancy between actual losses and benefits under the no-fault regime. Without the right to pursue a tort claim, compensation would be dramatically lower.

Only tort claims can hope to bring claimants anywhere near the level of fair and equitable compensation. Generally speaking, tort compensation will bring an injured person substantially closer to full compensation that any no-fault claim, even accounting for professional fees, including fees for lawyers.

The Report goes on to say, "To the extent possible the no-fault system should satisfy the needs of the majority of injured parties without the need to resort to an expensive tort system."[19] With respect, not only does the no-fault system not achieve this objective, it is impossible to do so. Again, we note that history has proven that a no-fault system is incapable of satisfying the needs of a majority of accident victims. It is too expensive, too cumbersome, and too inefficient, while also being arbitrary and unprincipled. In order to really increase fairness and accessibility for injured people, the no-fault benefits need to be made simpler and cheaper, while tort rights for those who are the victims of another person's neglect should be enhanced.

[18] See Report p. 72.
[19] The Report, p. 39.

It seems that the generous benefits in the no-fault portion of the system are not having the effect of reducing the amounts awarded under tort claims, while the no-fault system has itself become fraught with legal disputes and delays.[20]

In our view this assertion is incorrect or, in the alternative, out of context. The notion that no-fault payments do not reduce tort claims is not borne out in law or practice. The legislation is very clear on this point and appropriate deductions are made in tort claims.[21]

Broader Comments Regarding Systemic Impact, Cost Controls, and Sustainability

The Report points out that none of the changes to automobile insurance in Ontario in the last 30 years have resulted in a sustained period of reduced costs.[22] While this is true, with respect, the reforms recommended in the Marshall Report will not result in a sustained reduction in costs. Moreover, there is reason to believe that the reforms would create additional barriers to recovery for injured people and will likely have other unwelcome repercussions, generating new and unanticipated costs. While the Report argues for lasting reforms that "push beyond the old methods of tinkering,"[23] it is our view that most of its recommendations will not have a meaningful or lasting impact. The recommendations amount to no more than additional tinkering.

The Need to Simplify the System

The Report generally identifies a need to simplify the no-fault accident benefits system, by reducing disputes and making the system easier to access without the need for legal representation. However, the Report does not propose practical or effective solutions for accomplishing these goals. In particular, the recommendations do nothing to address the need for legal representation in the first place: the no-fault system is inherently adversarial.

The OBA agrees that the complex, cumbersome, and document-heavy no-fault benefits process should be simplified for consumers. If the process were to be simplified then perhaps it could reduce the need for legal representation in many cases. However, so long as the no-fault benefits process remains adversarial, and so long as disputes over benefits arise between insurers and insured persons (of which there are thousands filed every year), then there will be a need for legal representation to ensure that the rights of insured persons are protected. Further involvement by insurers in the provision of health care, as proposed in the Report, will only increase costs and disputes between insurers and injured people.

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[20] The Report, p. 71.
[21] See *Insurance Act*, R.S.O. 1990, c. I.8, s. 267.
[22] The Report, p. 11.
[23] The Report, p. 12.

Simplifying no-fault benefits as proposed in the Report not only raises concerns respecting fairness and access to justice, but practicality as well. As indicated throughout this submission, the tort and no-fault benefits schemes are intertwined both in theory and practice. Any attempts to "simplify" the no-fault benefits scheme – and in particular any attempts to reduce or eliminate the need for legal representation – must consider the inevitable impact on the tort scheme. If injured people are left to navigate an adversarial system on their own against sophisticated insurance companies whose primary interest is in containing costs, the results will in many cases benefit the insurers at the expense of the consumer. This will again result in inadequate care and worse individual outcomes, thus driving up costs on the tort side of the equation.

While reducing complexity and the number of disputes are laudable goals, the Report does not offer a concrete path to achieve them while protecting the rights of insured people.

Proposed Programs of Care for Common Injuries

The Report proposes the development and implementation of a successor to the current Minor Injury Guideline (MIG) based on what is described as "the most recent medical evidence" presented in the Common Traffic Injury Guidelines.

The OBA agrees that medical and rehabilitation services should be delivered to accident victims in the most timely and efficient manner so as to encourage a return to health and, ultimately, reduce litigation costs. However, we have concerns regarding the Report's proposal to create "programs of care" based on the most common type of injuries. The first concern is practical. The second is systemic.

Practically, there is a concern regarding the delivery of services as proposed in the Report. Though "programs of care" purport to differentiate between different types of common traffic injuries, they essentially present a "one size fits all" approach to rehabilitation.[24] For instance, a standardized program of care would likely not provide adequate care for a whiplash injury victim who suffered from a pre-existing physical condition, thus leading to a worse outcome. It would likely not provide adequate care for individuals who develop entrenched, chronic conditions beyond the expected recovery time. It would likely fail to deal adequately with certain classes of injuries – such as mild traumatic brain injury – for which there is a tremendous range of outcomes. The unintended result of the "programs of care" approach is that many accident victims will not receive proper care.

Systemically, we raise important concerns about the misapplication of evidenced-based medicine in the auto insurance context. Before applying the concepts of evidenced-based medicine in this setting, an understanding about evidence-based medicine and its applicability is needed. Evidence-

[24] On this point we refer to our earlier submission to the Ministry regarding the Final Report of the Minor Injury Treatment Protocol Project: letter from the OBA to the Ministry of Finance, May 6, 2016, online: https://www.oba.org/CMSPages/GetFile.aspx?guid=297c0ec9-147b-4a0a-8978-a1c481373a30.

based medicine offers data based on large randomized controlled studies and meta-analyses, involving large cohorts of patients. The outcomes offer no adjustments for individual circumstances. The conclusions from these studies must not be used as a prescription for pre-determined treatment protocols for all injured people. If data from evidence-based medicine is not adapted to the individual's particular circumstances, there is a risk that the treatment will be ineffective. Evidence-based medicine was not intended to be used by those with vested interests in the outcome (including insurers and regulators). A particular therapy may appear to provide a statistically significant benefit based on evidence-based medicine principles, developed through the study of a large cohort of individuals, but it may be of little or no clinical benefit when applied to a specific patient. This is particularly so if there are multiple variables (i.e., co-morbidities) at play. All treatment protocols must leave room for adaptation and individualization based on clinical judgment. Otherwise, the treatment protocols, insofar as the individual is concerned, are substantially arbitrary with a main objective of cost control, not return to pre-accident function.

The OBA notes the Report's particular reliance on "Enabling Recovery from Common Traffic Injures: A Focus on the Injured Person," a report developed by a team of medical experts led by Dr. Pierre Côté ("the Côté Report"), in the proposal regarding the successor to the MIG. Importantly, the scope of the Côté Report was limited in a number of ways by the terms of the exclusion criteria. The exclusions included the significant number of persons actually injured in motor vehicle collisions who had prior neck pathology and/or injuries beyond a Grade II Whiplash Associated Disorder, including traumatic brain injury and psychological symptoms; individuals under the age of 18 and over the age of 65; and non-English speakers. Additional factors associated with recovery outside of biomechanics were not examined by the Côté Report. Using this data to establish treatment protocols for general application to motor vehicle injury cases is not justified or supported by the data. The result will be inflexible treatment algorithms that fail to adequately focus on injured individuals.

The broader concern is how a "programs of care" approach to statutory no-fault benefits will impact tort litigation, and thus auto insurance as a whole. As the Report acknowledges, the insurance premium reflects the total cost of both the "no-fault" accident benefits part of auto insurance and the "at fault" tort part. Just like the premium, these parts are intimately linked in practice and cannot be severed. For instance, tort insurers receive credits for accident benefits received pursuant to the *Insurance Act*. If fewer benefits are received under the "programs of care" model, it is anticipated that some additional care costs will be reallocated from no-fault benefits insurers to tort insurers for those claimants with both no-fault and tort claims.

The OBA firmly believes that any attempts to reform the no-fault accident benefits scheme must consider the impact on the tort scheme to ensure a fair, harmonious, and integrated auto insurance in Ontario. The Report does not consider the impact on the proposed reforms on the tort scheme, which not only has the potential to lead to systemic inefficiencies but injustice as well. Tort rights

should be substantially restored, subject to some principled limitations we will describe, while no-fault benefits simplified.

Proposed Independent Examinations Centres

The proposed implementation of Independent Examination Centres ("IECs") seeks to streamline the process of claims handling by removing the rights of injured people to seek the treatment they feel is most appropriate. It further deprives both the injured people and insurers from retaining the medical experts of their choosing and from seeking a second opinion (the IEC model would remove the right to challenge the medical opinions of the IEC assessor, except through another IEC assessor).

There is reason to believe that the IEC proposal will only add another bureaucratic layer and additional expense to the system, without achieving any meaningful benefit for the consumer. For one, moving assessments from the current model of private independent medical examination centres to hospital-based assessments will place the already strained resources of our single-payer health care system in further jeopardy. The worrisome and inescapable conclusion is that resources would be drawn from the public hospital system and placed into the private accident benefits regime.

In fact, it is explicitly stated in the Report that hospital oversight would be integral to the administration of the IECs:

> The IEC is hospital based and has access to a wide variety of medical and rehabilitation experts. In this role, the IEC is an extraordinary resource of first class expertise to aid in the treatment of the patient. IECs are also completely independent of either the insurer or the patient and <u>they come with the quality control of a major hospital organization</u> – their orientation and high level of competency is to provide the best possible medical advice.[25]

As a "hospital-based service," this system appears on its face to be cumbersome, facing institutional delay even in the short term, particularly as the resources of each hospital are squeezed to the detriment of the public system. Moreover, the IEC proposal unrealistically contemplates complete independence and objectivity, but as we have already seen from previous experience with the Designated Assessment Centres ("DACs"), this is likely not achievable. It is foreseeable that confidence in the IEC system will be undermined when decisions of the IECs inevitably conflict with the decisions of treating health care practitioners, which will also compromise the therapeutic relationship between consumers and their treating physicians. Consumers have the right to choose their treatment provider, as well as to accept or reject treatment based on informed consent. The

[25] The Report, p. 53 [emphasis added].

recommendations of the Marshall Report would foreseeably deprive Ontarians in car collisions of this fundamental right that every other Ontarian retains.

The Report also proposes that the IEC opinion be binding in any claim for no-fault benefits and be given deference in a tort claim.[26] This, too, is problematic for a number of reasons. A huge amount of work must be done to gather historical medical data in order for any medical assessment to be completed. Past experience with the DACs has shown that such a process results in inordinate delays and considerably increased costs. It is foreseeable that the binding nature of the IEC opinion would only exacerbate these concerns.

The Report recommends that IECs not be used in order to deny claims, but rather only for those injured people "who are not responding to the programs of care."[27] This raises questions about the practicality of the IEC model, as there will inevitably be disputes over whether the claimant has "benefitted" from treatment, how that benefit ought to be measured, and what circumstances will prompt the IEC's involvement – in other words, what will constitute an unsatisfactory recovery. This highlights the perils of this kind of tinkering with the system. It adds more uncertainty and therefore, by definition, more costs.

Finally, the Report also calls for the involvement of the auto insurance regulator ("the Regulator") in monitoring the quality and timeliness of advice given by the IECs.[28] We question whether the Regulator is equipped to be involved in individual health care decisions or with the recommendations of treating health care practitioners. On the contrary, the involvement of the Regulator should be streamlined in areas where it will truly serve the needs of consumers.

At its core, we are concerned that there is insufficient information provided in the Report as to why the IEC system would succeed where the DAC system has failed. From our perspective, the problems encountered with the DACs identified in the Report[29] are destined to plague the proposed IECs. Past experience has shown that this kind of piecemeal reform will be an expensive experience, the costs of which are passed on to the consumer in the way of increased premiums or, worse, reduced protection under their policies. Given that the IEC system would come at the cost of the rights afforded to the parties of an insurance contract to defend their rights and build their own case, it cannot put in place simply to fail at the expense of the most basic stakeholders.

Advertising, Referral Fees, and Contingency Fees

The Report makes a number of references and recommendations regarding advertising, referral fees, and contingency fees, in the context of the accident benefits system. In our view, the Report's recommendations are at odds with work currently underway by the body with regulatory

[26] The Report, p. 52.
[27] The Report, p. 53.
[28] The Report, p. 52.
[29] The Report, p. 53.

competency in these matters, the Law Society of Upper Canada ("LSUC"). Moreover, for the most part, the comments in the Marshall Report on these issues are entirely irrelevant to the issue of reducing costs in the automobile insurance system.

Many of these issues addressed in the Report have undergone careful review and study by the LSUC over the past two years. Most recently, new rules specifically designed to enhance the transparency of advertising and referral fees were approved by the LSUC Convocation in the spring of 2017. The OBA supports the LSUC as the proper regulatory authority for the legal profession on these issues, as well as the initiatives it has undertaken in the interest of the public.

Similarly, the Report's recommendation that claimants be informed of their right to assess their lawyers' fees ignores the fact that the LSUC already has such a requirement in place. Again, issues regarding the handling of accounts as between lawyers and their clients are properly regulated by the LSUC.

With respect to contingency fees, it is widely recognized that contingency fee agreements constitute an important means of facilitating access to justice for individuals who have legal claims and rights which they may otherwise be unable to advance.[30] The LSUC is currently considering a range of proposals respecting the operation of contingency fee agreements, including potential amendments to the *Solicitors Act*, designed to enhance transparency and strengthen public protection.

Importantly, contingency fees have no impact on costs in the automobile insurance system. On the contrary, in a claim for damages the injured party's damages are assessed by the courts without regard to the private fee arrangement between the injured party and his or her lawyer. The system itself incurs no costs by virtue of the form of that fee arrangement.

We have significant concern regarding the Report's specific proposal that contingency fee agreements be filed with the Regulator. This recommendation is extremely problematic, given that the specific agreement between a lawyer and client is subject to solicitor-client privilege. Furthermore, it is not clear what purpose the proposed filing of the agreements will serve or whether the Regulator will have any enforcement powers or remedies in the event of alleged non-compliance. This is of particular concern given the fact that these matters are properly within the jurisdiction of the LSUC and the courts.

Finally, the recommendation that settlement cheques be made payable jointly to the accident victim of the lawyer is not feasible, as all settlement cheques must be paid to the law firm, in trust for the client. This recommendation inappropriately interferes with the solicitor-client relationship and will result in increased costs and delay.

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[30] See e.g., Law Society of Upper Canada, Professional Regulation Committee Report, *Fifth Report of the Advertising and Fee Issues Working Group*, June 2017, Tab 4.6, para. 144.

Looking Ahead

In the final analysis, it is clear that the Report's recommendations will not achieve the objectives set out for lowering costs on a sustained or equitable basis. Our primary concern is that in the absence of a comprehensive understanding of the interplay between the no-fault benefits and tort law sides of the system, the recommendations constitute only minor adjustments that will not serve to address the existing problems inherent in the auto insurance regime.

Over successive reforms, no-fault benefits have been reduced, without any comprehensive modification of tort rights. The solution lies in a simplified and less costly no-fault system, balanced with a substantial enhancement of tort rights. This model will reduce the number of claims moving through dispute resolution, streamline the involvement by the Regulator, and reduce the regulatory burden overall. This balance can only be achieved without claims costs running to excessive levels by incorporating a mechanism designed to ensure that only more serious tort claims proceed, though those serious claims ought to be entitled to full compensation.

Under this model, the savings to the system could be substantial. Together with modest and easily accessible benefits, the need for lawyer involvement in no-fault claims would be drastically reduced, as would be the need for a costly dispute resolution process, a process that is currently funded by premium dollars paid by consumers. Moreover, with a drastically simplified no-fault system, the need for expensive health practitioner assessments would be largely eliminated, another huge saving for consumers. Finally, a simplified system would reduce the need for Regulator involvement – a return to the pre-1990 model, when the Regulator's involvement in the claims aspect of automobile insurance was minimal.

Changes in this respect could only be contemplated in concert with a comprehensive and thoughtful analysis of reform to the tort system as well. As noted at the outset of this submission, injured people face two obstacles in presenting their tort claim: the verbal threshold and the monetary deductible, both of which are designed to remove less serious claims from the system. We promote the elimination of both the verbal threshold and the monetary deductible. If the intent is to limit the less serious claims while preserving the rights of those with more serious claims, the Ministry should consider a monetary threshold instead. In our submission, a monetary threshold is a far more principled method of achieving the objective of keeping less serious cases from being pursued in tort.

In practice, a monetary threshold would set a monetary limit on damages under which a claim in tort would be prohibited from proceeding. The monetary threshold would weed out those smaller claims that ought not receive tort compensation. Claims that do meet the threshold – in other words, claims that are sufficiently serious – would be compensated in accordance with established tort principles In this way, claims that do not meet the monetary threshold would receive no compensation. Claims meeting the monetary threshold would be fully compensated.

No matter how the Ministry chooses to proceed, the OBA strongly recommends against any further piecemeal changes to the no-fault system in the manner proposed by the Marshall Report. Any further review of the insurance system must be comprehensive, encompassing both the first-party (no-fault) system and the third-party liability (tort) system. Previous reforms of automobile insurance have failed to control premiums or to bring stability to the automobile insurance product. These same reforms have led to further complexity, increased cost, and unanticipated consequences, adding degrees of uncertainty about the meaning and scope of the product. It is vital that further tinkering be avoided or we are destined to repeat history.

Meaningful reform will require a balanced approach, facilitated by cooperation amongst the important stakeholders in the system. We propose that a small Working Group be established by the Ministry of Finance composed of representatives on both sides of the debate. The Working Group should have senior membership from the plaintiffs' bar, the defence bar, and the insurance industry. If consumers are to be protected, the focus of the Working Group must be to offer reforms that achieve appropriate premium levels, fair and equitable protection for injured people, and adequate profitability for private insurers (premiums, protection, and profit). The strength of the Ontario Bar Association is that its members come from both sides of this issue, lending credibility to this submission and the future involvement of the OBA in achieving meaningful reform.

This is an issue of fundamental importance to Ontarians. The OBA would be pleased to offer any further input as might be appropriate.