OBA Submission on the Driver Care Plan Reforms of the:
1. Catastrophic Impairment Default Benefit Limit
2. Care, Not Cash Default

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Submitted to: Ministry of Finance, Financial Institutions Policy Branch

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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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to provide feedback to the Ministry of Finance in response to the Ministry's request for consultation regarding two key reforms to the Putting Drivers First blueprint's Driver Care Plan.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year, both in the interest of the profession and in the interest of the public.

This submission has been prepared on behalf of the OBA Insurance Law Section by a Working Group 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: Philippa G. Samworth, Patrick Brown, Lawrence A. Conmigo, Shane Katz, Jayashree Goswami, Catherine Korte, Marcus Knapp, and Audrey Ramsay.

Overview

The two key reforms to the Driver Care Plan are:

1. Introducing a return to the default benefit limit of $2 million for those who are catastrophically injured in an accident, after it was previously reduced to $1 million in 2016; and

2. A "Care, Not Cash" default clause so that a driver's auto insurance coverage will pay for treatment rather than cash settlements, which may not be directly linked to recovery, while still giving the driver the option to be eligible to negotiate a cash settlement.

The OBA supports the return to the default benefit limit of $2 million dollars for those who are catastrophically injured as it provides reasonable and necessary insurance benefits to the most seriously injured and disabled members of our society without significantly impacting the costs of the auto insurance industry.

The OBA does not support the "Care, Not Cash" default clause as eliminating lump sum cash settlements in non-catastrophic injury accident benefits claims will result in an increase in overall accident benefit claims costs. However, if the government decides to proceed with the Care, Not Cash reform, the OBA, at page 7 of its submissions, set out the circumstances in which the claimant may enter into a cash settlement.

Specific Comments

RETURN TO THE DEFAULT BENEFIT LIMIT OF $2 MILLION

The Ontario Bar Association supports reinstating the catastrophic impairment limit back to $2,000,000.00 for combined medical/rehabilitation and attendant care benefits for catastrophically injured individuals. The OBA also supports that the Motor Vehicle Accident Claims Fund should be subject to the $2,000,000.00 default benefit limit.

Catastrophic injuries include quadriplegia, paraplegia, amputations, and severe brain injuries, and represent only a small fraction of accident benefits claims. As a result, restoring the $2 million limit will only have a marginal impact on the overall cost of the system, and any additional costs that were transferred to taxpayers via the Ontario Health Insurance Plan will be restored.

In 2010, the provincial government, after broad consultation with stakeholders, reduced medical and rehabilitation benefits from a limit of $100,000.00 to $3,500.00 for minor injuries, which represent approximately 85 percent of accident benefits claims. The justification for the reduction given by the government at the time was that benefits needed to be cut for minor injuries so that benefits would be available for those who are catastrophically injured and in the most need.

The OBA believes that the $2 million reform be the default position and not an optional benefit that which must be purchased. The OBA submits, however, that there must be clear information provided to consumers (government mandated) to explain what they would be purchasing should they choose to reduce their catastrophic coverage by purchasing lower limits in order to reduce premiums.

The OBA also agrees with the government's proposal that there be no change to the present Regulation that the new limits of $2,000,000.00 be combined limits for medical/rehabilitation and attendant care. The OBA agrees that this amendment, which came into effect in June 2016, has provided accident victims with the flexibility to choose the type of care that they need most. However, the government must ensure that protocols are in place to ensure that accident victims fully understand what is being paid

out under the various categories. Presently, insurers are obliged to advise the insured claimant monthly of all new payments for medical and rehabilitation benefits and attendant care, and what the new available limits are. This is extremely important for individuals who are only able to access the $65,000.00 limits presently available for non-catastrophic injuries. The OBA therefore urges the government to consider increasing the standard benefit limits for non-catastrophic, non-MIG (Minor Injury Guideline) cases. While we applaud the government's proposal to return to the $2,000,000.00 catastrophic limit, this fails to address a significant shortfall for most accident victims with serious but not catastrophic cases who are now limited to $65,000.00.

It has been our experience that it is often difficult for an insured to know what is remaining in their limits (whether non-catastrophic or catastrophically impaired). This situation arises through the approval of the OCF-18 (treatment plans) through the HCAI process. As an example: If the insured had $65,000.00 limits and the insurance company had paid out $20,000.00, one would assume that there was $45,000.00 available for ongoing treatment or attendant care. However, that may not be true as the insurer might have approved submitted treatment plans that had not yet been paid out up to another $20,000.00. This would in fact mean that there may only be $25,000.00 available for further treatment or care in the event that those treatment plans were fully incurred at a later date. The present form that the insurance industry sends out should be amended to include (whether catastrophic or non-catastrophic injuries), not only information as to what has been paid, but it should also include information as to what has been approved so that the insured can be fully aware of what options he or she may have with respect to future med/rehab or attendant care.

Finally, any legislation altering the limits should be clear on the face as to when it takes effect. The legislation should specify the date that the new policy limits come into effect. (By way of an example, the Regulation could read: "For accidents that occur on or after October 1, 2019…). Alternatively, the Regulation could indicate that it is when the policy is renewed. Whichever the choice is, it should be clear. The OBA believes that the drivers of Ontario will find the change easier to understand if the date is fixed to a specific date as opposed to a policy renewal date.

On the issue of consumer choice and awareness, the OBA supports that more needs to be done by the insurance industry and the government to ensure that consumers are aware, and can make an informed decision. While there is available standardized literature that is sent out by the insurers to their customers, the fact is that insurers do not know who their customers are presently. With the proliferation of direct writers the

opportunity to understand your consumer's needs on a case by case basis is lost. The OBA supports a standardized question form that should be a mandatory portion of any application for insurance whether it be a direct writer, an agent or a broker. These questions should allow the insurer to understand who their customer is both with respect to their employment, availability of collateral benefits, income level, family dynamics and general economic circumstances. Further, this questionnaire should be mandatory not just on the application for the initial insurance policy, but each year with renewal as the facts and information can change, and the policy must be customized to meet the insurer's needs, and to ensure that they can make a full choice.

"CARE, NOT CASH"

Comments and Suggested Revisions

The OBA does not support a proposal that would by default prevent an insured and insurer from settling their accident benefit claim on a full and final basis, and to only permit that in the event that the consumer purchased the benefit that would make them eligible to negotiate a cash settlement. The present policy provides that there is no cash settlement prior to one year. The OBA recommends that the present policy remain in place and that there be no changes.

The proposed reform of "Care, Not Cash" would eliminate the ability of non-catastrophically injured accident benefits claimants to settle their claims for a cash settlement with the insurance company. This reform will also eliminate the insurance company's ability to close its file, which materializes after the cash settlement has been agreed to. The loss of file closure will increase costs for insurance companies, claimants and taxpayers, as insurance companies will need to continue to fund the ongoing administrative aspects of an open file. Claimants and insurance companies will continue to incur legal expenses to address additional disputes that will arise with an open file, and taxpayer costs will increase as claims that would have been closed will be submitted to the Licence Appeal Tribunal. As well, non-catastrophic claims make up most of the accident benefits claims that insurance companies receive.

The relationship between the claimant and insurer is often a difficult one. In most claims after a certain period of time, medical and rehabilitation treatment is denied and the issue becomes contentious. Further, insurers often do not find the treatment that the claimant is requesting to be reasonable and necessary in the context of the claim, thus preventing the claimant from pursuing preferred treatment. For example, the claimant may want to

receive acupuncture, but the insurer will only approve physiotherapy. This results in disputes, retaining lawyers and the loss of trust between the two parties. This loss of trust is particularly applicable to claims relating to medical and rehabilitation benefits and attendant care benefits.

Once an accident benefits claim has entered the dispute resolution phase, it is imperative that the claimant and the insurer have an opportunity to settle the claim on a full and final basis. As noted above, the relationship between the insured and insurer sours during the course of a claim even if there is no litigation. If the claimant has to apply to the Licencing Appeal Tribunal in order to advance a claim for a treatment plan and possibly retain a lawyer for that purpose, the relationship with the insurer ceases to exist. At the present time there is a provision under the *Insurance Act*/*Statutory Accident Benefit Schedule* (Settlements - Regulation 664, Section 9.2(10)) that permits an insured to enter into a lump sum settlement if the insured has applied to the Licence Appeal Tribunal under Subsection 280(2) of the *Act*. This provision recognizes the importance of allowing a cash settlement where there is a dispute between the claimant and insurance company.

The elimination of cash settlements for accident benefits claims will also increase costs in tort/negligence motor vehicle litigation. Many accident benefits claim settlements are completed in coordination with tort/negligence claims, as it allows insurance companies for both the accident benefits and tort claims to properly allocate risk when resolving disputes. The loss of the ability to settle both claims together will decrease the settlement potential of tort/negligence claims, which will increase legal fees and disbursements for claimants and insurance companies, and increase court expenses for taxpayers.

With respect to enabling consumers to purchase the option to settle their non-catastrophic accident benefits claims, it will be very difficult to explain to a consumer what they are purchasing when there is an offer to have their premium increased in order to buy a benefit that will allow them to enter into a cash settlement. When consumers purchase motor vehicle insurance policies they are not thinking that they are going to be injured and may at some point want to cash out their medical and rehabilitation or attendant care benefits. The consumer may not even understand what attendant care benefits are at that point. While more sophisticated individuals with better finances may purchase optional benefits, the reality is that optional benefits are not purchased by the majority of the driving public in Ontario. Further, it is the OBA's experience that brokers and agents do not provide appropriate explanations to ensure that their customers understand what

they are choosing to buy or not buy. In the case of direct writers, appropriate explanations are probably not provided at all.

Lastly, if accident benefit claim files were to remain open without the ability of insureds to pursue a cash settlement, this may encourage fraud and increase administration costs due to excessive treatment plans from "bad actors" in the medical rehabilitation system.

If the government decides to proceed with the Care, Not Cash reform, the OBA submits that the circumstances in which the claimant may still enter into a cash settlement should be clearly set out. The OBA submits these circumstances should include:

i. Any case where the insured person has been found to be catastrophically impaired;

ii. Accident benefits claims for specified benefits (income replacement benefits, non-earner benefit or caregiver benefits);

iii. The policyholder has purchased the optional benefit permitting cash settlements;

iv. The claimant has commenced an application at the LAT pursuant to the provisions of the *Insurance Act* and a case conference has been held;

v. The non-catastrophic, med/rehab and attendant care benefits have been exhausted and there is a pending application for catastrophic impairment; and

vi. The insured person will be moving out of the province on a permanent basis.

The OBA is concerned with respect to the proposed wording regarding a right to negotiate a cash settlement where there are "extenuating circumstances that require an exception". It is not clear what might qualify as extenuating circumstances and the OBA submits that this broad and ambiguous provision will result in more litigation and an increase in

applications to establish what factors constitute "extenuating circumstances", aside from those listed above.

The OBA does not agree that the "Care, Not Cash" reform will reduce costs. The reform would also only be codifying an option the claimant and insurance company can already pursue, as neither party is obligated to settle out a claim, and many insurance companies currently maintain policies of not settling out accident benefits claims in certain circumstances. The OBA submits that the current one year ban on cash settlements is sufficient to protect the need for care rather than cash. However, if the government intends to proceed with this proposal, an alternative to this default non-cash out provision would be to change the present legislation to simply provide that you cannot cash out until the two year mark rather than at the one year mark and/or eliminate cash settlements for claims that fall within the minor injury guideline only.

Conclusion

The OBA supports the reform increasing the default benefit limit to $2 million for those who are catastrophically injured.

The OBA does not support the "Care, Not Cash" reform due to concerns regarding increased costs to the system.

The OBA appreciates the opportunity to be involved in the stakeholder consultation process and looks forward to the opportunity to participate in continuing discussions regarding these reforms.