Input into the Licence Appeal Tribunal's *Commons Rules of Practice and Procedure*

Submitted to: Licence Appeal Tribunal

Submitted by: Ontario Bar Association

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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 this proactive submission to the Licence Appeal Tribunal (**"Tribunal"**) on Rules 8, 9, 10, 14, 16, 18, 20 and 24 of the *Common Rules of Practice & Procedure* (**"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 the Administrative Law Section who represent both regulators as well as registrants that come before the Tribunal.

Comments & Recommendations

Rule 8

The following is the proposed wording of Rule 8:

DRAFT - RULE 8

8. SUMMONS

8.1 ISSUING A SUMMONS

The Tribunal may issue a summons, on its own initiative or at the request of a party, requiring any person including a party:

(a) to give evidence at an electronic or in-person hearing; and/or
(b) to produce documents and things specified by the Tribunal at an electronic or in-person hearing.

The Tribunal will only issue a summons for witnesses, documents or things that are relevant to the issues in dispute and admissible at a hearing.

A specific individual must be named on the request for summons. Summons will not be issued for organizations, groups, or corporations.

8.2 FILING A REQUEST FOR SUMMONS

A request for summons must be filed with the Tribunal, on the form provided on the Tribunal's website, no later than 21 days before the hearing.

The requesting party must serve a copy of the request for summons on the other parties.

The other parties may make submissions only when invited to do so by the Tribunal.

8.3 WITNESS LIST & ASSESSING RELEVANCE

The requesting party must demonstrate the relevance of the request to the issues in dispute.

When assessing the relevance of a request to summons a person to give evidence, the Tribunal will consider whether the person is included on the witness lists exchanged between the parties and filed with the Tribunal.

8.4 SERVICE OF SUMMONS AND ATTENDANCE MONEY

Service of summons and payment of attendance money is the responsibility of the party requesting the summons. A party summonsing a person to attend before the Tribunal is required to pay that person the same fees or allowances as the person would be paid if attending before the Superior Court of Justice (Ontario). Fees and allowances are to be calculated in accordance with Tariff A of the *Rules of Civil Procedure.*

Under Rule 8.1, the requirement of "specifically identifying" a person could be problematic because the name of this person is not always known. This is particularly the case where a "complete file" is being requested. A party can "write" to an institution (government, medical clinic, facility, etc) for the "name" of the person to place on a summons, but the institution is often reluctant to provide such a name. Accordingly, the Rule should be loosened to allow a requesting party to simply list a "records librarian" or "records custodian" to attend the hearing and produce the file (preferably in a digital format). Obviously, if a specific person (such as an insurance adjuster or a expert physician) is being compelled to attend via summons, then it is entirely reasonable that this person be specifically named.

The wording of Rule 8.2 could be problematic because it may result in pre-hearing litigation that is not necessary. Firstly, the threshold for issuance of summonses should remain low. The Adjudicator is ultimately the trier of fact at the hearing and should have a high level of discretion to allow or exclude evidence once the summonsed witness presents the file at the hearing. This includes determining whether or not evidence is admissible. The OBA agrees that the low test of "relevant to the issues in dispute" should remain the way that it is but finds that the addition of an admissibility threshold to be inappropriate at this early stage, particularly since that determination will likely be made by administrative staff, rather than the hearing adjudicator. By limiting the criteria, the hearing Adjudicator maintains their gatekeeping function at the hearing itself.

The reason for a summons relating to documents is because one party has not produced the documents, but the other party believes that the documents should be produced for a full and fair hearing. Ultimately, the party requesting the documents is at a distinct disadvantage

because they have never seen the documents. A party requesting the documents needs to state the basis for the request, but this should not be overly onerous because they do not know what is contained in the "complete file".

Accordingly, the requirement under proposed Rule 8.2 (that the requesting party has to serve a copy of the 'request for summons' on the other parties) could be problematic as it may result in litigation over the summons before it is appropriate to do so.

Previously, there were "two types" of summonses, one for documents, one for witnesses. Presently there is only one form of summons that covers both scenarios.

Ordinarily, a summons is issued by the Court or Tribunal hearing the matter. The institution or person is served with the summons and attends (virtually) the hearing with a complete copy of the records. It is then up to responding party to take a position on whether the summons ought to be quashed, or not. That process should take place at the Hearing. That process should not take place in advance of the hearing. The wording of proposed Rule 8.2 that the parties "may make submissions only when invited to do so by the Tribunal" may result in further, unnecessary pre-hearing litigation, when the issue of quashing summonses and the appropriateness of summonses really should be reserved for the Hearing Adjudicator to decide. This would be consistent with the ordinary practices of the Superior Court of Justice where summonses are submitted, issued, served on the other lawyer, and served on the summons recipient and then issues arising from the same are dealt with at the hearing or trial.

With respect to the proposed wording of proposed Rule 8.2 (filing a request for summons), the OBA agrees that filing a request at least 21 calendar days before a hearing is reasonable.

With respect to Rule 8.3, the OBA would point out that there is a distinct difference between merely "listing" someone on a witness list and issuing a summons for that person's (or that institution's) appearance.

The OBA agrees that if a party wishes to summon someone (or a representative of an institution to provide a file or records) then it makes sense to specifically list that person on the witness list and then to issue a summons.

However, the mere fact that someone is listed on a witness list is not enough to secure their attendance. In most cases, a summons is still necessary, and the summons should be granted on that basis. Accordingly, whether or not a person is listed on a witness list should not be determinative in deciding to issue a summons. The bar for issuing a summons is, and should remain, low – the test is whether the person will be able to produce documents relevant to the issues in dispute. It is then for the trier of fact to determine whether the file gets produced or whether the witness can sit and give evidence. This is a judicial function; it is not an administrative function and should therefore rest with the ultimate trier of fact.

The OBA agrees with the contents of Rule 8.4 which will ensure consistency with the rules that presently exist relating to witnesses summoned to appear in Superior Court.

Rule 9

The proposed wording of Rule 9 is as follows:

9. DOCUMENT EXCHANGE, PRODUCTION ORDERS, WITNESS LISTS & HEARING BRIEFS

9.1 GENERAL

The parties shall exchange all documents, witness lists, and anything else they intend to rely on as evidence at the hearing.

The Tribunal may at any stage in a proceeding, order any party to provide such further particulars, disclosure, and production of documents and things that the Tribunal considers relevant to the issues in dispute in the proceeding.

9.2 PRODUCTION ORDERS BY THE TRIBUNAL

Before requesting a production order from the Tribunal, a party must make reasonable efforts to obtain the document or thing without a production order.

The OBA is generally in agreement with the proposed wording of Rule 9.2.

The OBA submits that it is reasonable to require a "requesting party" (for example, an insurer or insured) to make requests to the other side, or their lawyer, for documents before seeking a production order. This is easily accomplished by way of sending an e-mail or a letter requesting production of the document.

In order to successfully obtain a production order, the moving party would have to file (as part of its motion material) proof that it sent the requests, which is reasonable and proportionate. If the third party has submitted responses to those requests, then those responses should also be filed in the moving party's motion materials for the sake of completeness.

9.2.1 ORDERS FOR PRODUCTIONS BETWEEN THE PARTIES

A party may request an order from the Tribunal ordering another party to:

(a) Disclose the existence of all documents and things the other party intends to rely on at the hearing;
(b) Produce copies of all documents and things that a party intends to rely on at the hearing;
(c) Produce a list of witnesses the other party intends to call to give evidence at a hearing;
(d) Produce a summary of the evidence that each witness will give at the hearing;
(e) Make available for inspection any document or thing, subject to conditions established by the Tribunal, that a party intends to rely on at the hearing; and/or
(f) Disclose or produce any document or thing the Tribunal considers relevant to the issues in dispute in the proceeding.

The Tribunal will not make an order for the production of any document or thing that is not relevant to the issues in dispute in the proceeding, or that is unduly repetitious.

The OBA generally agrees with the proposed wording of Rule 9.2.1. The OBA submits that the wording "or that is unduly repetitious" should be removed from the language at the very end of the rule as it is not necessary.

9.2.2 ORDERS FOR NON-PARTY PRODUCTIONS

A party seeking production from a non-party may request an order from the Tribunal by filing a notice of motion and serving it on the other parties and the non-party. The notice of motion must provide contact information for the non-party.

The Tribunal may order a non-party to disclose or produce any document or thing that the Tribunal considers relevant to the issues in dispute in the proceeding.

The requesting party must demonstrate, to the satisfaction of the Tribunal, that reasonable efforts have been made to obtain the document or thing without a production order.

Before an order is granted by the Tribunal, the non-party will have an opportunity to make submissions as set out in the notice of motion hearing.

The OBA is in full agreement with the language of proposed Rule 9.2.2. Further, the request for "reasonable efforts to obtain the documents" by sending request letters, is reasonable.

9.3 FAILURE TO COMPLY WITH THE RULES

If a party fails to comply with any Rule, direction or order with respect to disclosure, exchange, production, or inspection of documents or things, that party may not rely on the document or thing as evidence without the permission of the Tribunal.

If a party fails to comply with any Rule, direction or order with respect to exchange or production of witness lists, the party may not call a witness who is not included on a witness list filed in compliance with the Rules, direction or order to give evidence without the permission of the Tribunal.

Parties will have an opportunity to make submissions before the Tribunal determines:

(a) if the documents or things can be used at the hearing;
(b) if the witness(es) may testify at the hearing; and/or
(c) whether the matter requires any other order.
When making its determination, the Tribunal may consider any relevant factor, including:
(a) the reasons for non-compliance;
(b) whether a party will be prejudiced by the admission or exclusion of the evidence and the extent to which that prejudice can be mitigated by any other order;
(c) the extent to which the substance of the information or testimony lies within the knowledge of the other party;
(d) whether the other party opposes the admission of the evidence or testimony; and
(e) the relevance of the document, thing, or testimony to an issue in dispute in the proceeding.

The OBA agrees with the proposed language of Rule 9.3 which seeks to establish a balance between hearing fairness and failure to produce documents. Specifically, having a "show cause" requirement in the Rule allows a party who breached a production order to "show cause" as to "why" the document should still be considered, notwithstanding the fact that they failed to produce the document in accordance with a timeline or order.

Similarly, if a party fails to exchange a witness list but then later attempts to add a witness, they will have to "show cause" as to why the witness ought to be allowed to testify. This provides the Tribunal with residual discretion to still allow a document into evidence if it was not served in time, but it puts the onus on the offending party to make an argument as to why it should be admitted. This is proper.

The Tribunal's "list of relevant factors" is comprehensive and reasonable.

9.4 RULES SPECIFIC TO GENERAL SERVICES MATTERS

9.4.1 CASE CONFERENCE SUMMARY

At least 10 days before a scheduled case conference, each party must file a case conference summary in such form as required by the Tribunal. The parties are required to verify in the case conference summary that the documents and things in the party's possession, which the party intends to rely on at the hearing, have been provided to the other parties.

The OBA submits that this rule should be strengthened. As stated in our original submission of February 17, 2023, case conferences are quite correctly functioning as significant events where hearings are set and where production issues are sorted out.

For instance, case conference adjudicators are routinely (and helpfully) making production orders on the spot at case conferences and this is significantly enhancing efficiency. Case conferences are important events not only because they allow for the scheduling of a hearing, but they are also an important opportunity to discuss resolution of the case. Accordingly, before proceeding to a case conference, both sides need to put their best foot forward by

ensuring that productions and production requests are in order before they file their "Case Conference Summary Forms."

Accordingly, the OBA recommends that the following language be considered with respect to this rule to strengthen the Rule:

9.4.1 CASE CONFERENCE SUMMARY

At least 30 calendar days ~~10 days~~ before a scheduled case conference, each party must file a "Case Conference Summary Form", the form of which is required by the Tribunal and published by the Tribunal on its Website ~~case conference summary in such form as required by the Tribunal.~~

Where any party requires production of a document from the other party, the requesting party must list the request for that document under the heading on the Case Conference Summary Form called: "Documents requested, but not received"
All parties are required to verify, on the Case Conference Summary Form, that the documents and things in that party's possession, and which the party intends to rely on at the hearing, have been provided to the other party. If the party has not provided those documents to the other party, then a reason must be given as to why the particular document has not been produced.
~~The parties are required to verify in the case conference summary that the documents and things in the party's possession, which the party intends to rely on at the hearing, have been provided to the other parties.~~

The proposed changes would strengthen, codify and reinforce the importance of the case conference as a central event in the AABS process and set the reasonable expectations of the parties in accordance with the Tribunal's goals of efficient and transparent adjudication of accident benefits disputes.

Scheduling Note Re: Case Conferences

The OBA suggests that the range of case conference dates and the range of hearing dates given by the scheduling team be broadened 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 reasonable period of time after being given notice by the scheduling unit.

The OBA fully acknowledges the **substantive and significant changes that the Tribunal has proposed below** as it relates to establishing a framework relating to adjournments and changing the dates of hearings.

9.4.2 DOCUMENT EXCHANGE BETWEEN THE PARTIES

A party shall, at least 10 days before the hearing, or at any other time ordered by the Tribunal or undertaken by the party:

(a) Disclose to the other parties the existence of every document and thing the party intends to rely on at the hearing;
(b) Provide to the other parties a list of witnesses whom the party may call upon to give evidence at the hearing, with a brief description of the anticipated testimony of each witness; and
(c) File with the Tribunal and serve on the other parties, a PDF copy of the evidence and authority brief containing only the evidence and authorities the party will rely on at the hearing. The brief must be indexed, tabbed and consecutively page numbered. The parties should file a single, joint brief with the Tribunal whenever possible.

9.5 RULES SPECIFIC TO AABS MATTERS

9.5.1 DOCUMENT EXCHANGE BETWEEN THE PARTIES

Documents and things exchanged between the parties pursuant to Rules 9.5.1 and 9.5.2 must not be filed with the Tribunal unless a party is ordered to do so.

Document Exchange Before the Case Conference

The requirement for document exchange between the parties begins as soon as the application is filed with the Tribunal.

Rule 20.4 provides that at least 10 days before a scheduled case conference, each party must file a case conference summary in such form as required by the Tribunal. The parties are required to verify on the case conference summary that the documents and things in the party's possession, which the party intends to rely on at the hearing, have been provided to the other parties.

At the case conference, the Tribunal may make orders for productions pursuant to Rule 14 and will set deadlines for any document exchange that has not yet taken place between the parties.

9.5.2 DEADLINE FOR DOCUMENT EXCHANGE - 45 DAYS BEFORE THE HEARING

If not otherwise ordered by the Tribunal, by no later than 45 calendar days before the hearing, the parties must exchange:

(a) all documents and things the parties intend to rely on as evidence at the hearing; and
(b) for electronic and in-person hearings, a list of witnesses each party intends to call to give evidence at the hearing, with a summary of the evidence each witness will give at the hearing.

9.5.3 FILING WITH THE TRIBUNAL – 21 DAY DEADLINE FOR ELECTRONIC AND IN-PERSON HEARINGS

No later than 21 days before an electronic or in-person hearing, each party must file with the Tribunal and serve on the other party:

(a) a list of witnesses the party will call to give evidence at the hearing;
(b) a summary of the evidence each witness will give at the hearing, along with the anticipated amount of time needed for each witness to testify;
(c) a PDF copy of the evidence and authority brief containing only the evidence and authorities the party intends to rely on at the hearing, which must be indexed, tabbed and consecutively page numbered; and
(d) a completed form for electronic and in-person hearings, if any, that is provided on the Tribunal's website.

The parties should file a single, joint brief with the Tribunal whenever possible.

9.5.4 FAILURE TO COMPLY WITH THE 21 DAY DEADLINE

The Tribunal considers materials that are filed and served less than 21 days before an electronic or in-person hearing to be filed late.

The Tribunal will consider late filed materials as a preliminary issue at the hearing. The parties will have an opportunity to make submissions before the Tribunal determines:
(a) if the documents and things can be used at the hearing;
(b) if the witness(es) may testify at the hearing; and/or
(c) whether the matter requires any other order.

In making this determination, the Tribunal may consider any relevant factor, including the factors set out in Rule 9.3.

The OBA agrees with the global wording of the Rule above but submits that the rule relating to case conferences and productions ought to be strengthened similar to the recommendations made above relating to draft Rule 9.4.1.

Also, there may be ambiguity and confusion between the "10 day" rule in 9.4.2 and the 45 day rule in 9.5.2. Situations where a party attempts to enter new evidence, for example, 11 days before the hearing, need to be avoided.

The OBA specifically agrees with the "45 day rule" (as contained in draft Rule 9.5.2.) prior to hearings, because this enables the other side time to receive, review and act upon any "new" documents (or reports).

The OBA suggests that a further paragraph be added to Rule 9.5.2. stating that "if a party attempts to disclose a document inside of the 45 day deadline, that party will only be permitted to do so with the permission of the Tribunal. The Tribunal may want to set out some kind of procedure or pathway as to how such permission might be obtained.

This will build in a "show cause" provision, allowing the offending party to put forward an argument as to "why" the late document or report should still be admitted.

For example, a medical practitioner may not have completed a report, despite best efforts, but the report is still relevant for the hearing and was requested by the party as soon as possible. Another example might be that a third party is late in producing records, but the records are still relevant.

Alternatively, the Tribunal may wish to draft a "failure to comply with the 45 day deadline", as it has done under Rule 9.5.4 with respect to "Failure to comply with the 21 day deadline".

The OBA agrees with the form and content of draft rules 9.5.3 and 9.5.4.

Proposed wording for Rule 9.5.5:

9.5.5 FILING WITH THE TRIBUNAL - DEADLINE FOR WRITTEN HEARINGS

The deadline for filing and serving submissions and hearing briefs for written hearings will be set by order of the Tribunal. Written hearing briefs must be filed with the Tribunal as an indexed,

tabbed and consecutively page numbered PDF, and only include the evidence and authorities a party intends to rely on at the hearing.

The OBA agrees with the proposed wording and does not suggest any changes.

Rule 10

DRAFT - RULE 10

10. EXPERT WITNESSES

10.1 GENERAL

For the purpose of these Rules, an expert witness is a person who is qualified to provide professional, scientific, or technical information and opinion based on special knowledge acquired through education, training or experience in respect of the matters on which they will testify.

10.2 IDENTIFICATION AND DISCLOSURE

A party who intends to rely on the evidence of an expert witness at an oral hearing shall provide every other party with the following information in writing:

(a) The name and contact information of the expert witness;
(b) A signed statement from the expert, using the Tribunal's required form, acknowledging their duty to:

i. Provide opinion evidence that is fair, objective, and non-partisan;
ii. Provide opinion evidence that is related to matters within their area of expertise; and
iii. Provide such additional assistance as the Tribunal may reasonably require to determine a matter in issue.

(c) The qualifications of that expert witness, referring specifically to the education, training and experience relied upon to qualify the expert;
(d) A signed report that sets out the instructions provided to the expert in relation to the proceeding, the expert's conclusions, and the basis for those conclusions on the issues to which the expert will provide evidence to the Tribunal; and
(e) A concise summary stating the facts and issues that are admitted and those that are in dispute, and the expert's findings and conclusions.

10.3 DISCLOSURE AND FILING TIMELINES

If not otherwise ordered by the Tribunal, the information required by Rule 10.2 must be:

(a) exchanged between the parties at least 45 days before the hearing; and
(b) filed with the Tribunal at least 21 days before the hearing as part of the hearing brief pursuant to Rule 9.

10.4 CHALLENGES TO QUALIFICATIONS, REPORTS, STATEMENTS

A party intending to challenge an expert witness' qualifications, report, or witness statement must:

(a) give notice, with reasons for the challenge, to the other parties no later than 21 days before the hearing; and
(b) file a copy of the notice with the Tribunal as part of the hearing brief filed by the party pursuant to Rule 9.

The OBA generally agrees with the proposed draft with some comments as follows:

The OBA submits that an additional "paragraph" be added to Rule 10.2 requiring the party presenting a report to also provide an up to date "Curriculum Vitae" of the expert they are presenting. This allows the other side to properly review and consider the expert and it enables the other side to (if necessary) challenge the expert's qualifications. This is almost always required in the context of a hearing at the Tribunal or in Court.

Oftentimes, the requirement that an expert list their credentials in the body of the report is not always sufficient to consider whether or not they are a properly qualified expert. It is routine and normal in personal injury cases for any expert to present their CV to the Court at the qualification stage and CVs are routinely exchanged as between counsel well before the hearing.

Rule 10.2(e) may not be necessary. The proposed wording may have the unintended effect of creating extra, and unnecessary, work for the parties. It should be sufficient that the party presenting the report has served the report and that the report itself (as they normally do) sets out a summary and presents findings, opinions and conclusions. Whether or not something is admitted or in dispute is a matter for the trier of fact.

With respect to Rule 10.3, consideration should be given to requiring parties to identify their experts even earlier, for example, at the case conference stage, but by no later than 45 calendar days prior to the hearing.

If a party has a report in its possession as of the date that an application is filed, the report ought to be produced immediately and certainly by no later than the case conference. If, however, a party is "obtaining" a report (e.g.: the applicant must attend a medical examination and then wait for the doctor to write a report) then it is reasonable that the report be produced later.

With respect to the proposed wording of Rule 10.4, the OBA agrees that 21 calendar days prior to a hearing is the appropriate amount of time required if a party is attempting to challenge the qualifications of a proposed expert.

The Rule should be strengthened with an additional paragraph stating, "If a party does not provide the notice referred to in paragraph (a) above, within the time prescribed, then that party is prohibited from arising any challenge to the expert's qualifications or ability to give evidence", or words to that effect. A situation should be avoided where a party, at the last minute, attempts to challenge qualifications when they did not comply with the Rule relating to this.

Rule 14

Proposed wording of Rule 14:

DRAFT - RULE 14

14. CASE CONFERENCES

14.1 DIRECTIONS AND ORDERS AT CASE CONFERENCES

The Tribunal may issue procedural and/or administrative directions as necessary for the conduct of the proceeding and may make such further orders as the Tribunal deems necessary.

14.2 SCOPE OF CASE CONFERENCES

The Tribunal may on its own initiative, or in response to a party's written request, direct the parties to participate in a case conference to consider:

a. The settlement of any or all of the issues;
b. Facts or evidence that may be agreed upon;
c. The identification, clarification, simplification and narrowing of the issues and whether further particulars are required;
d. The identification of parties and other interested persons, adding parties, and the scope of each party's or person's participation at the hearing;
e. The inspection and the exchange of documents and things, including witness statements and expert reports;
f. Requests for production orders;
g. The timeline for steps the parties must take leading up to the hearing;
h. The hearing format and, in the case of in-person and electronic hearings, the estimated length of the hearing;
i. Requirements for interpreters;
j. French-language or bilingual proceedings;
k. *Human Rights Code* or accessibility accommodation;
l. Motions, and
m. Any other matter that may assist in a fair and efficient resolution of the issues in the proceeding.

14.3 MEMBER NOT TO PARTICIPATE ON A HEARING PANEL

A member who presides at or otherwise takes part in a case conference shall not participate as a member of a panel at a subsequent hearing of the appeal except with the consent of the parties.

14.4 SETTLEMENT DISCUSSIONS

The case conference is an important opportunity to discuss settlement of the issues without the need for a hearing. The parties are expected to come to the case conference prepared to discuss settlement.

All settlement discussions in a case conference and the documents put forward solely for the purpose of settlement are confidential. Settlement discussions are held on a "without prejudice" basis. Settlement discussions shall not be communicated to the member that participates in the hearing or otherwise be relied on in a hearing before the Tribunal for any purpose unless the parties consent.

14.5 CASE CONFERENCES NOT PUBLIC

A case conference is not open to the public unless the Tribunal so directs.

14.6 PARTY ATTENDANCE AND AUTHORITY OF REPRESENTATIVES AT CASECONFERENCE TO SETTLE ISSUES

If a party is self-represented, the party must attend the case conference. If a party has a representative who has filed a declaration of representative with the Tribunal, the party is not required to attend the case conference.

If a party does not attend the case conference, their representative must attend with instructions on all matters set out in Rule 14.2 that will be considered at the case conference.

If a party does not attend, or if a representative attends on behalf of a party and does not have the necessary instructions, the Tribunal may issue procedural and/or administrative directions as necessary for the conduct of the proceeding and may make such further orders as the Tribunal deems necessary.

The OBA submits that the proposed wording of Rule 14 is consistent with the other changes proposed and the intended effect of increasing efficiency and transparency.

However, with respect to Rule 14.2, the "addition" of sometimes major issues to case conferences is an issue raised by some members. The Tribunal may wish to address the "addition" of major, substantive issues at, or immediately prior to, a case conference. This can be a problematic practice because it changes the scope of the application, productions, witnesses, documents and ultimately the format and length of a hearing.

An example is where a dispute is filed over medical benefits. Prior to the case conference, a major issue like income replacement benefits or catastrophic impairment or attendant care is added, or there is an attempt made to add it. This can have the effect of changing the entire landscape of the Application in ways that were not expected when the original application was filed. It also puts the responding party at a disadvantage. For example, the production requests alone associated with a medical benefits claim is entirely different than it would be for a more significant claim. By this point in time, the parties have already spent time and money preparing for what is in dispute, not what "might" be in dispute.

Accordingly, the Tribunal may wish to tighten, clarify, or specify the circumstances under which a party may "add issues" to an existing dispute.

Alternatively, the Tribunal may wish to adopt a "show cause" or a motion hearing requirement, compelling the party seeking the addition to make an argument as to why the issue should be added and the responding party should be given a full and fair chance to respond and oppose (if necessary) the addition or to seek terms including, but not limited to, the application being withdrawn and reconstituted.

Rule 16

DRAFT RULE 16

16 ADJOURNMENTS

16.1 REQUESTS FOR ADJOURNMENTS

A request for an adjournment of any adjudicative event at the Tribunal, including a case conference, motion hearing, settlement conference, or electronic, in-person, or written hearing must be made through the form for requesting an adjournment on the Tribunal's website.
The completed form must be served on the other parties prior to being filed with the Tribunal and must include all submissions and evidence in support of the request. Submissions must not exceed 5 double-spaced pages in length and must include:

(a) Details of the circumstances giving rise to the request;
(b) Other parties' position on the request, if known;
(c) The length of the adjournment being sought; and
(d) Whether a prior adjournment request has been denied for this same adjudicative event.

Failure to provide a completed form and supporting submissions and evidence will result in the request not being considered by the Tribunal.

16.2 ORAL ADJOURNMENT REQUESTS

Despite Rule 16.1, a request for an adjournment may be made orally before a member at the adjudicative event itself. Oral requests will only be allowed in compelling circumstances where the party did not and could not have known of the circumstances giving rise to the adjournment request prior to the event.

The Tribunal may also direct that the request for an adjournment be heard at the event.

16.3 FACTORS TO CONSIDER

When considering whether to grant an adjournment request, the Tribunal may consider any of the following factors:

(a) The age of the file;
(b) Whether any previous adjournments have been granted and, if so, whether they were granted on a peremptory basis;
(c) Prejudice to the parties;
(d) Whether the request is on consent;
(e) The type of event the adjournment is being requested for;
(f) The length of notice that the Tribunal has provided to the parties of the event;
(g) The timeliness of the request;
(h) Whether the parties were given the opportunity to canvass their availability;
(i) The specific reasons for being unable to proceed on the scheduled date;
(j) Whether the parties can proceed on an earlier date;
(k) Whether the reason for the adjournment was foreseeable and avoidable, and what efforts, if any, were made to avoid the reason for the adjournment;
(l) The length of the requested adjournment and whether it would unduly delay the proceedings;
(m) Broader institutional and public interests;
(n) Legislative requirements;
(o) The principles of natural justice and fairness;
(p) Operational considerations; and
(q) Any other factors considered relevant in deciding the request.

16.4 ADJOURNMENT REQUESTS FOLLOWING A DENIAL

Following the denial of an adjournment request, the Tribunal will not consider any further adjournment requests for the same event that are made for essentially the same reason(s) as the initial request. This prohibition applies to any party to the proceeding.

If there are new and exceptional circumstances, a party can submit a new form for requesting an adjournment with supporting submissions as set out in Rule 16.1 for the same event.

When applying the "new and exceptional circumstances" standard, the Tribunal will consider "new" to mean that the information was not known, and could not have been known, at the time of the first request, and "exceptional" to mean something extraordinary or beyond the parties' control.

The OBA agrees with the changes proposed to Rule 16 relating to adjournments. The proposed wording builds in a process, providing certainty and fairness to litigants who require an adjournment, by setting out a specific framework and by including a list of relevant factors or considerations.

However, the OBA continues to hold the view that greater flexibility be provided to the parties when booking a hearing at first instance. For the most part, lawyers can mutually and cooperatively work together to fix hearing dates that are agreeable based on evaluating their own work commitments, personal commitments, availability of witnesses and by ensuring that they are not double booked at other hearings or proceedings. If hearings can be scheduled with a higher level of flexibility, the rate of requests for adjournments may drop.

Rule 18

DRAFT RULE 18

18. RECONSIDERATION OF A TRIBUNAL DECISION

18.1 REQUESTS FOR RECONSIDERATION

The Tribunal may reconsider any decision of the Tribunal that finally disposes of an appeal if:

(a) The request is made within 21 days of the date of the decision;
(b) The request is served on all parties and filed with the Tribunal using the form for reconsideration requests on the Tribunal's website; and
(c) The reconsideration request includes the following:

> i. All submissions in support of the request, which must specify the applicable criteria under Rule 18.2. The submissions must not exceed 10 double-spaced pages in length, exclusive of evidence and case law;
> ii. Notification if the party is seeking judicial review or pursuing an appeal in relation to the decision; and
> iii. The remedy or relief sought.

The request for reconsideration will be heard by written submissions. It may be heard by the same member whose decision is the subject of the request, or by another member.

18.2. CRITERIA FOR GRANTING RECONSIDERATION

The Tribunal shall not make an order under 18.4(b) unless satisfied that one or more of the following criteria are met:

(a) The Tribunal acted outside its jurisdiction or committed a material breach of procedural fairness;
(b) The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made; or

(c) There is evidence that was not before the Tribunal when rendering its decision, could not have been obtained previously by the party now seeking to introduce it, and would likely have affected by the result.

18.3. OPPORTUNITY TO MAKE SUBMISSIONS

Responding parties will have an opportunity to make submissions before any order is made under Rule 18.4(b).

18.4 OUTCOME OF RECONSIDERATION

Upon reconsidering a decision, the Tribunal may:

(a) Dismiss the request; or
(b) After providing responding parties an opportunity to make submissions,
    i. Confirm, vary or cancel the decision or order; or
    ii. Order a rehearing on all or part of the matter.

If the Tribunal orders a rehearing of the matter, the Tribunal may issue procedural and administrative directions and any such further orders as necessary.

18.5 REVIEW ON OWN INITIATIVE

The Tribunal may, on its own initiative, review any decision of the Tribunal. The Tribunal's review shall take place within a reasonable time after the decision or order is made.

When conducting a review on its own initiative, the Tribunal shall not make an order under Rule 18.4(b) unless it is satisfied that one or more of the criteria in Rule 18.2 are met.

The Tribunal may wish to consider specifically (or more broadly) defining "finally disposes of an appeal". For example, if there is a preliminary issue occurring within the broader context of an application, and that preliminary issue decision finally disposes of that "particular issue" (e.g.: a limitation period defence, etc.), then the Rule may want to account for the fact that a party can (or cannot) file for reconsideration with respect to a legal issue or defence that has been finally disposed of by way of a decision, in a context where the rest of the application still exists and is ongoing and will make its way to a hearing.

Clarify that 21 days means "21 calendar (straight) days" and not 21 business days.

Specify 10 double spaced pages and use minimum 12 point font. This is a similar requirement to written hearing submissions as well.

The OBA agrees with the proposed changes and clarifications to Rule 18, particularly as it relates to the requirement that the moving party (a) use a form, (b) specifically identify the applicable 18.2 criteria, (c) that the party specifically advise as to whether an alternate form of appeal is being considered (e.g.: judicial review).

The OBA has concerns that a reconsideration (which is effectively a form of appeal) can be heard by the "same member" who issued the initial decision. Ordinarily, in a judicial or quasi-judicial context, a different adjudicator will hear a form of appeal. The OBA submits that consideration ought to be given to modifying the rule such that a different adjudicator must hear a reconsideration request with a fresh set of eyes.

Rule 18.3 should be more specific and it should set out that the Tribunal **shall** schedule a timetable for the responding party to make submissions.

The OBA seeks clarification with respect to Rule 18.5, noting that this is a "new" rule. The intended effect of Rule 18.5 is unclear. One of the core principles of the common law system and the rule of law is that decisions rendered by a court or administrative body may be appealed by a party in accordance with the applicable appeal procedure, **at the request of one of the parties**. Ordinary appeal procedures do not contemplate a court or Tribunal re-visiting a decision on its own initiative. One of the parties to the action has to make the request through the statutory appeal mechanism.

Accordingly, the OBA would like to better understand the impetus behind this rule before it makes comment.

Rule 20

Proposed wording of Rule 20:

DRAFT - RULE 20

20. AUTOMOBILE ACCIDENT BENEFIT SERVICE (AABS) CLAIMS

[No changes to Rules 20.1, 20.2 or 20.3.]

20.4 AABS CASE CONFERENCE SUMMARY

At least 10 days before a case conference, each party must file a case conference summary in such form as required by the Tribunal.

The case conference summary shall include:

a. Any preliminary issue(s) the party intends to raise;
b. Any issue(s) the party is seeking to add to the appeal and whether the responding parties agree to add the issue(s);
c. A list of documents and things in the party's possession which they intend to rely on at the hearing;
d. Verification that the documents and things listed in (c) have been provided to, or made available for inspection by, the other parties;
e. A list of documents and things that a party is seeking from other parties;
f. Any requests for production orders;
g. A list of documents and things the party is seeking from non-parties;
h. The party's preference of hearing format with reasons for the preference;
i. A list of anticipated witnesses, including expert witnesses, that the party intends to call at an electronic or in-person hearing and a brief
description of each witness' anticipated testimony; and
j. An explanation of the necessity of calling more than two expert witnesses if a party seeks to call more than two such experts.

20.5 SETTLEMENT AT CASE CONFERENCES

Parties should exchange settlement offers in advance of the case conference and be prepared to discuss settlement at the case conference.

Written offers for settlement must not be filed with the Tribunal.
[Changes to the numbering for Rules currently numbered 20.5 + 20.6.]

As noted above, the OBA submits that requiring a case conference summary 30 calendar days beforehand would serve the goals of efficiency and transparency in the process.

The OBA is otherwise largely supportive of what is codified in Rule 20.

Rule 24

24. REPRESENTATION

24.1 PARTY'S ABILITY TO HAVE A REPRESENTATIVE

This Rule applies to representatives as defined in Rule 2.20.
A party may be self-represented, or they may have a representative. In keeping with Rule 2.20, representatives are required to be authorized under the *Law Society Act* to represent a party in the proceeding and they must comply with the *Law Society Act,* applicable guidelines, and rules of professional conduct.

24.2 DECLARATION OF REPRESENTATIVE REQUIRED

If a party wishes to have a representative, the representative must:

a. file with the Tribunal the form for the declaration of a representative provided on the Tribunal's website, and
b. serve a copy of the form on all other parties.

The Tribunal will not recognize a representative unless a completed form has been filed and served.

If a party wants to change their representative, the new representative must file a form for the declaration of a representative with the Tribunal and serve a copy on all other parties.

24.3 PROCEEDING WITHOUT A REPRESENTATIVE

If, after having a representative, a party subsequently chooses to proceed without a representative, they must notify the Tribunal and the other parties in writing. No further steps are required.

24.4 REPRESENTATIVE WITHDRAWAL

A representative may remove themselves as a party's representative by filing a completed form for the removal of a representative with the Tribunal and serving a copy of the form on their client and the other parties. The withdrawing representative must confirm that:

a. the party they were representing has been advised of their withdrawal as representative; and
b. the representative has complied with the *Law Society Act* and applicable guidelines and codes of conduct when withdrawing as the party's representative.

No further steps are required if:

a. these requirements are completed 30 or more calendar days before the next adjudicative event, or
b. another representative is taking over as the party's representative and the new representative has filed and served a form for the declaration of a representative pursuant to Rule 24.2.

24.5 WITHDRAWAL LESS THAN 30 DAYS BEFORE NEXT ADJUDICATIVE EVENT

If a representative is seeking to remove themselves as a party's representative less than 30 calendar days before the next adjudicative event, the representative must receive an order from the Tribunal before being removed as the representative unless:

a. the party is choosing to proceed without a representative and has advised the Tribunal pursuant to Rule 24.3; or
b. another representative is taking over as the party's representative and the new representative has filed and served a form for the declaration of a representative pursuant to Rule 24.2.

If the representative is seeking an order from the Tribunal, they must file with the Tribunal and serve on their client:

a. a completed form for the removal of a representative;
b. a notice of motion; and
c. supporting material.

The representative seeking to withdraw must also serve the form and notice of motion on the other parties. The representative is not required to serve the supporting material on the other parties.

The Tribunal will set the format for hearing the motion.

The Tribunal may hear the motion as a preliminary issue at the start of the next adjudicative event.

If the Tribunal orders an in-person or electronic hearing of the motion, the representative must attend the hearing of the motion.

24.6 REQUIREMENTS RESPECTING PRIVILEGED, PREJUDICIAL INFORMATION

A representative bringing a motion under Rule 24.5 who files materials with the Tribunal that are subject to privilege or that could, if disclosed to another person, be prejudicial to the client, must notify the Tribunal that the materials contain privileged and/or prejudicial information.

The Tribunal may make a confidentiality order for any privileged and/or prejudicial information relating to the request for withdrawal. The order may be made at the request of a party or on the Tribunal's own initiative.

The representative must redact or omit the privileged and/or prejudicial information from the notice of motion and from the materials served on a party other than the client pursuant to Rule 24.5.

The Tribunal will use the information contained in the motion and supporting materials solely for the purpose of adjudicating the request for withdrawal.

A member who presides or otherwise takes part in a motion hearing for:
a. the confidentiality order, and/or
b. the removal of representative

must not participate at the hearing of the appeal.

24.7 OUTCOME OF TRIBUNAL REVIEW

Upon review of a request for removal under Rule 24.5, the Tribunal may:

a. allow the request for removal;
b. refuse the request for removal; and/or
c. make any other order the Tribunal considers appropriate in the circumstances.

The Tribunal may consider any relevant factor, including but not limited to:

a. the reason for the request to withdraw;
b. whether the representative confirms they have complied with the *Law Society Act* and applicable codes of conduct and guidelines;
c. the conduct of the representative leading up to the request, such as whether the representative gave reasonable notice to allow the party to seek other means of representation, or if the representative filed a motion with the Tribunal to withdraw at the earliest possible time;
d. the history of the proceeding, including whether the represented party has repeatedly changed representatives;
e. the impact of the withdrawal on the representative's client;
f. any resulting prejudice to the other parties, and
g. the impact of the withdrawal on the proceeding and the Tribunal's ability to fulfill its mandate.

24.8 REQUESTS FOR ADJOURNMENT DUE TO WITHDRAWAL OF REPRESENTATIVE

For clarity, Rule 16 and any related Practice Direction apply to requests for adjournment arising from the withdrawal of a representative.

The OBA recognizes that these are new additions to the rules in order to set out a framework involving withdrawal from representation, among other things, and appreciates that the Tribunal wishes to establish a framework in this regard.

This rule change will have more of an impact on insured/plaintiff side practitioners than it will with defence side practitioners. Concurrently, it will almost exclusively affect the defence in regulatory proceedings. The requirement for a party's lawyer to "obtain an order" if they are within 30 days of an event may be onerous, particularly if the "request for an order" is not dealt with quickly. Having said that, if these requests can be dealt with very quickly and confidentially, then the concern may be addressed.

The draft rule does account for the fact that the reason "why" a lawyer needs to stop acting is a matter that is protected from disclosure because it is lawyer and client privileged.

Conclusion

The OBA is a partner in this matter and appreciates presenting submissions on these important issues. We look forward to continuing this dialogue with the Tribunal and applying important insights from our membership, which includes both experienced plaintiff-side and defence counsel. A further meeting or touch point to discuss this matter further would be welcomed.