



Submission to the Superintendent of Financial Services and CEO of the Financial Services Commission of Ontario (FSCO), Mr. Bob Christie

Ontario Auto Insurance Five Year Review

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This submission is on behalf of The Canadian Association of Direct Response Insurers (CADRI) in regard to the consultation on Part VI of the *Insurance Act* - the review of Ontario's automobile insurance legislation.

About CADRI and Direct Marketing

CADRI is an organization of insurers selling and servicing property and casualty insurance products through direct response marketing and distribution. Our members offer both home and auto insurance products across Canada primarily through call centers and the Internet. Call centers are staffed by well-trained licensed insurance professionals. Buying direct from the insurance company offers consumers an important alternative to the use of the broker channel. Customers get extended hours of service, fast, cost-effective, technology-enabled sales and services, and professional advice with no commission costs or fees. The customer advantages are significant and the utilization of direct insurance channels by consumers is growing as consumers seek ways of increasing the convenience of their auto insurance purchase while keeping costs down.

Overview of CADRI submission

Objectives

CADRI recommends that changes to auto legislation be focused on keeping costs down and premiums stable while providing full and fair coverage for auto accident victims. CADRI believes it is important for regulators to recognize that affordability of auto insurance premiums is critical for the Ontario market. The average auto insurance premium is not now affordable for a large number of consumers and cost pressures continue to grow. Ontario residents pay higher premiums than most other provinces.

We would also like Ontario to make changes which will ensure that a greater proportion of claims dollars are paid to accident victims. It is our view that a significant percentage of funds paid are for assessments, tests, clinics, unnecessary treatments and lawyers. We believe that the system will be more efficient if it is structured such that funds end up directly benefitting those parties injured in auto accidents. Our comments relate largely to achieving these objectives.

Summary of CADRI recommendations

- 1) Strengthen the threshold definition such that only the more severely injured claimants have access to the right to sue.
- 2) Control Accident Benefits costs by
 - Tightening the definitions of which claimants are entitled to benefits
 - Strengthening the definition of catastrophic impairment to ensure only those severely injured receive the higher benefit levels

- Control caregiver, housekeeping and attendant care benefits by ensuring that benefits are paid for actual indemnification of expenses, reducing the level of benefits which are currently higher than other plans, and limiting the entitlement to benefits to those whose injuries are serious, while not necessarily permanent.
 - Future care costs analyses – Insurers should not be required to pay for speculative claims for expenses that have not, and may never be incurred. We recommend that Ontario change the legislation to prohibit declaratory relief for future medical, rehabilitation and attendant care based on a Future Care Cost Analysis.
 - Limiting assessments - Measures are needed to ensure appropriate monetary maximum limits are in place to limit the overall number and cost of assessments associated with a Determination of Catastrophic Impairment.
- 3) Reduce Administrative Burden by
- Simplified Rate Filings -CADRI recommends that insurers be permitted to make more wide use of simplified filings rather than the full filing process, and that such filings should be on a “file and use” basis.
 - Increase timelines for insurers to respond to treatment plans and requests for approval of assessments under the SABS
 - Reduce the SABS mandated 2% interest rate
 - Enforce auto insurers position as last payors of benefits
 - Increase communication between FSCO and claimants using the dispute resolution process
- 4) Punitive Damages- A section should be added to the *Insurance Act* to make it clear that no policy of automobile insurance should cover awards for punitive damages.
- 5) Restrictions on Rating and Underwriting Variables – CADRI recommends that there should be fewer restrictions on rating and underwriting variables to allow companies to price risk more accurately.
- 6) Downloading of Health Care Costs – CADRI recommends reviewing and decreasing the health levy which is paid by automobile insurers.
- 7) Electronic Documents and Communication – The *Insurance Act* should remove terminology that requires communication to be paper-based or “in writing”. In particular, the liability card should not be required to be delivered as a paper document.

Specific Recommendations for Change

Outlined in this section are CADRI’s specific recommendations for Ontario’s consideration in reviewing auto insurance legislation.

Threshold

CADRI recommends that the government strengthen the threshold definition to prevent tort for less seriously injured claimants.

Ontario has a blended system of generous no fault accident benefits and limited access to tort. The *Insurance Act* provides for the right to sue if claimants have died or sustained,

- (a) permanent serious disfigurement; or
- (b) permanent serious impairment of an important physical, mental or psychological function. This has come to be known as the “verbal threshold.”

CADRI and the automobile insurance industry in Ontario had believed that the addition of the threshold definition to O. Reg. 664 (at the time of Bill 198) would provide for a more stringent test for entitlement to general damages, and would require the application of a more objective element to the threshold analysis. The first decision by the courts to consider the Bill 198 threshold (*Nissan v. McNamee*) suggests that the definition only codified the existing common law which has developed since *Meyer v. Bright*, and which for the most part has tended to weaken the verbal threshold.

CADRI believes that government must act to enforce the threshold definition and prevent less seriously injured claimants from suing in tort. If the threshold is removed or weakened, Ontario would be in the position of having both generous no fault coverage and open access to tort. The number and size of successful tort claims would be unaffordable to the system. This would drive insurance costs to very high levels, which would be reflected in higher premiums, making automobile insurance prohibitively expensive for a greater number of Ontarians.

Accident Benefits (AB)

Increasingly, first party AB claims costs are putting upward pressure on rates. The key to keeping insurance affordable for all drivers is controlling costs. Specific comments follow:

Entitlement to Accident Benefits

CADRI recommends that Ontario review and tighten the definitions that give rise to the test of entitlement to benefits. CADRI is concerned that insurers are being required to pay Accident Benefits for claims which should not be eligible. The eligibility criteria state that an insurer shall pay an insured person who has sustained impairment as a result of an accident. However, the causation standard is broadly applied to permit claims against auto insurance coverage for auto accidents that are equivocally connected. For example, *Seale v. Belair* continues to be cited by arbitrators in defining the chain of events leading to an accident and thereby concluding as meeting the definition of an accident. In addition, the causation standard is liberally applied to the interpretation of entitlement concerning the exacerbation of pre-existing health conditions (eg *McMichael*.)

PAF (Pre-approved framework) to include Psychological Impact

CADRI recommends that Ontario include a provision for psychological assessment and treatment within the PAF guidelines. PAF was introduced to limit industry's exposure to medical, rehabilitation, income replacement benefit, and attendant care benefit for minor injuries, particularly Whiplash Associated Disorder (WAD). Many claims that should be covered by the PAF for WAD are circumventing the PAF. Psychological diagnoses remove claimants from PAF, even though the psychological impairment may not be disabling from either an employment or self-care perspective.

Definition of Catastrophic Injury

CADRI recommends that Ontario review and tighten the definition of catastrophic impairment in light of the way in which courts have been interpreting the existing rules. CADRI supports having full benefits for those people who really need them – the persons who suffer life-changing catastrophic injury. We are concerned, however, that recent court decisions are eroding the definition of catastrophic injury, and less seriously injured people are able to access the higher benefit levels. For example, (*Desbiens* 2004) court cases have been taking a combination of physical and psychological impairment to reach the 55% level of impairment that would trigger catastrophic benefit levels. Catastrophic injury claims continue to pay out over many years and companies must take reserves to meet these obligations. Such broadening of the definition of catastrophic injury undermines the stability of the system.

We understand that AMA Guides were developed for assessing impairment in the context of workers' compensation injuries in the United States of America. Authors of the Guides have cautioned against their use in other contexts, and have specifically refuted the situation we now have in Ontario where judges and arbitrators are assessing a percentage of Whole Person Impairment for psychological impairments not resulting from frontal lobe brain injuries. CADRI is concerned that the AMA Guides are not workable in practice. In particular there are only a small number of medical professionals in Ontario who are trained, or have experience in the use of the AMA Guides. The fact that there are so few medical persons in Ontario with knowledge of, and experience in using the AMA Guides, means that an assessment as to whether an individual has sustained a 55% impairment of the whole person routinely costs \$30,000.00. CADRI supports a definition of catastrophic impairment that is easier to use and more specific than a 55% impairment of the whole person based on the AMA Guides. In particular CADRI supports that part of the definition for catastrophic impairment in s. 2(1.1) (a)-(e) of the SABS. The only caveat to this is that the "reasonable period" of time after the accident within which to administer the Glasgow Coma Scale needs to be defined. We see persons who are rendered unconscious at the scene of an accident, assessed by ambulance personal with a GCS of 9 or less, and are 15/15 by the time they arrive at hospital, who are nonetheless found to be catastrophically impaired based on the current wording.

Caregiver, Housekeeping, Attendant Care Benefits

Auto insurers are experiencing increasing exposure to Ancillary Accident Benefits – Caregiver Benefits, Housekeeping or Home Maintenance Benefits, and Attendant Care Benefits claims. Controlling of costs can be accomplished in 3 ways.

1) Limit Benefits to Indemnification

Caregiver Benefits, Housekeeping or Home Maintenance Benefits, and Attendant Care Benefits should be limited to indemnification of actual expenses. Due to recent court decisions, companies may be required to pay caregiver expenses which were not incurred. The word “incurred” as used in the SABS should be clarified to mean only actual expenses which the claimant has paid.

2) Limit Level of Benefits

Caregiver Benefits, Housekeeping or Home Maintenance Benefits, and Attendant Care Benefits costs should be controlled by reviewing and reducing the level of benefits provided. Where caregiver, housekeeping or home maintenance or attendant care services are provided by immediate family members, coverage for these expenses should be reduced or limited to the minimum wage hourly rate. This category of benefits is very rich and an area where industry has been experiencing escalation in claims, as minor injury claims result in abnormally high claims for housekeeping and attendant care services. We believe the overall level of benefits is excessive as compared to the WSIB system, Ontario's public health system and other Canadian auto insurance jurisdictions.

3) Limit Entitlement to Benefits

We recommend that the entitlement to attendant care benefits should be restricted to those injuries that are serious, while not necessarily permanent. We further recommend that housekeeping and home maintenance benefits, as well as caregiver benefits should be treated as with Income Replacement Benefits. If an impairment comes within the WAD Guidelines, the maximum amount of time for which housekeeping and home maintenance benefits, and caregiver benefits should be limited to either 12 or 16 weeks from the date of the accident, depending on whether the impairment is a WAD I or WAD II, respectively.

Future Care Cost Analyses

Insurers should only be required to pay for actual expenses. We further recommend that Ontario change the legislation to prohibit declaratory relief for future medical, rehabilitation and attendant care based on a Future Care Cost Analysis. Future Care Cost Analyses demonstrate the extensive use of attendant care, 24-hour supervisory services and inflated future housing needs. In *Monk v. ING*, declaratory relief was granted for future medical, rehabilitation and attendant care benefits based on a Future Care Cost Analysis submitted at trial but

not permitted to be challenged by the defence. The SABS is not the equivalent of tort law, and there is no place in the SABS for assessing and paying speculative claims for expenses that have not, and may never be incurred.

Limiting Assessments

CADRI recommends that there should be a limit imposed on the number of assessments that injured parties can request and the overall cost of assessments associated with a Determination of Catastrophic Impairment. Over the various SABS regimes, the focus of accident benefits coverage has changed from treating the claimant to assessing the claimant. Indeed, a whole industry geared solely towards assessing motor vehicle accident victims has emerged. Under the current provisions, an insurer may receive a request in excess of \$10,000 for the approval of the cost of an assessment under s.24 for the purpose of completing an Application for Determination of Catastrophic Impairment (OCF-19). Expense in the area of \$30,000 may also be incurred with the cost of an examination under s.42 if required to assist the insurer with its determination. A third assessment under s.42.1 could further escalate the overall cost of a catastrophic determination. Unlike the s.24 assessment, there is no provision for an insurer to question the cost nor if the assessment is reasonably required. Therefore, it seems appropriate to establish a monetary limit on the s.42.1 assessment where it involves a catastrophic impairment. This is especially true where a costly s.24 assessment has precipitated this cycle of assessments. Consideration should be given to establishing controls on s.24 assessments to reduce the duplicity of assessments, costs and inconvenience to claimants. Such controls could include limiting the number of assessments by injury type as well as setting a limit on costs.

Expanding the PAF protocol to include assessments following the initial stage of the PAF could benefit consumers and insurers. PAF extensions should be more generous. Future assessments would then have greater value since they will have more of a baseline to establish the success of past treatment and an appropriate treatment protocol for the future.

As a further note, many of the assessments that proceed today under s. 24 of the SABS are really not for SABS purposes (i.e. to assess entitlement to a benefit under the SABS), and should properly be in the OHIP system. Unfortunately, there is no effective mechanism for denying an OCF-22 that does not involve incurring expenses which would be many times in excess of the cost of the proposed assessment. This means that insurers routinely pay \$2,500 for an assessment of a claimant by, for example an orthopaedic surgeon, where the assessment should have properly been covered as an insured service by OHIP at a far lesser cost.

Administrative Burden

There are processes required of insurance companies that add cost to the system. We have made 5 recommendations of changes to administration that could lessen the burden on industry.

Simplified Rate Filings

CADRI recommends that insurers be permitted to make more wide use of simplified filings rather than the full filing process, and that such filings should be on a “file and use” basis. Ontario permits the use of simplified filing in very limited circumstances (e.g. rate decreases). CADRI has calculated that in Ontario it takes an actuary roughly 20 days longer for completion of a full filing than a simplified filing. Once the full filing is complete and delivered to the regulator, the amount of time for approval ranges from 60 to 90 days (versus 2 weeks for a simplified filing). Due to the great expense and time delay, insurers do not tend to file more than once per year. This means that it is difficult for industry to be able to react in a timely manner to changes in the marketplace.

There is now strong momentum in a number of jurisdictions to modernize the regulation of auto insurance rates to promote competition and reduce regulatory burden. For example, New York State recently put in place legislation that will enable auto insurers to adjust rates up to twice annually within a 5 percent band without obtaining regulatory approval. We believe that this kind of approach increases the dynamics of the market and promotes competition. In a dynamic, competitive market, insurers who do not adjust prices on a regular basis, risk losing market share. Over the past 5 years, 20 states have adopted some form of regulatory modernization, moving away from strict prior approval.

Regulators in all provinces have decided to adopt risk-based market conduct regulation principles. In the absence of any particular concern about a company's operations, there is no need to impose the burden of full filings on all rate increases.

Timelines

The timelines for responding to treatment plans and requests for approval of assessments under the SABS, as well as timelines for conducting insurer examinations and receiving those reports need to be increased. These timelines are unrealistic and have led to an increase in “deemed” approvals of treatment and assessments. If there is not sufficient time to review the facts and propose amendments, companies are forced to accept the claim. Insurers are unable to make considered decisions with respect to the reasonableness and necessity of a treatment plan or assessment approval request in the allotted time under the SABS.

Interest Rate

The applicable interest rate should be that set out in the *Courts of Justice Act*. The SABS mandated interest rate of 2% per month is unfairly punitive and provides an unreasonable windfall to claimants and service providers.

Last Payor

CADRI recommends that the government enforce the policy of auto insurance as last payor of benefits. The industry has had to deal with judicial dilution of the principle that a claimant's available collateral benefits must pay first, with the SABS coverage being that of last resort. Case law such as the recent Monk vs. ING case has suggested that a claimant's entitlement to medical and rehabilitation coverage for an accident is not subject to reduction on account of benefits paid for the claimant's injuries sustained in another accident. Similarly, case law has held that accident benefits coverage must respond first to expenses incurred following a motor vehicle accident outside Canada where the claimant enjoys travel health care insurance coverage.

Dispute Resolution (DR) Process

CADRI recommends that FSCO increase communication with claimants using the dispute resolution process. More rigor is required in communication with claimants. It is the experience of our members that there has been some misuse of the DR system. Many insureds have paralegal or legal representatives who do not fully disclose the DR process to the insured. In some cases, the insured may sign blank paper work and may not be aware of when the paperwork enters the DR system. They therefore do not show up to assist with dispute resolution, which wastes time and resources. We recommend that FSCO send out an information piece to claimants when they receive a request for Mediation or Arbitration explaining what the process is all about, including the costs, to make sure that claimants are consistently and clearly advised of the process.

Punitive Damages – Third party Bodily Injury Claims

CADRI recommends that a section be added to the *Insurance Act* to make it clear that no policy of automobile insurance should cover awards for punitive damages. Punitive damages are not intended to compensate the injured party for their loss, but rather to meet the objectives of punishment and deterrence for irresponsible driving, such as impaired driving. Punitive damages do not meet the primary objectives of punishment and deterrence if the insurer pays the penalty. Punitive damages are above and beyond the normal compensatory damages for the plaintiff. Having punitive damages excluded from policy coverage keeps costs down for all drivers. We recommend that Ontario adopt British Columbia's approach to the issue and include a clause similar to *The British Columbia Revised Regulation (1984) of the Insurance (Motor Vehicle) Act*, which states as follows:

56 (1) The corporation is not liable (c) under section 20 or 24 of the Act or section 49, 49.3 (1) (b), Part 6, section 109 or Part 10 in respect of punitive or exemplary damages or other similar non-compensatory damages.

Restrictions on Rating and Underwriting Variables

Ontario has put in place a large number of restrictions on permissible rating and underwriting variables. This practice prevents fine tuning pricing so that customers can benefit from risk segmentation. Some factors such as history of not-at-fault accidents are very indicative of a person's likelihood to be in an accident, and by not allowing the industry to apply these variables, lower risk drivers end up cross-subsidizing higher risk drivers. We believe it is appropriate social policy to allow companies to price risk as accurately as possible.

Downloading of Health Care Costs to Automobile Insurers

Consideration should be given to reviewing and decreasing the health levy which is paid by automobile insurers. With the delisting of many healthcare-related services that used to be funded by the Ontario Health Insurance Plan (assessments, treatments), the costs associated with this delisting have been passed on to accident benefits insurers which have paid for these services through medical and rehabilitation benefits and costs of examination coverages under the SABS. For example, assessments by specialists that used to be made by family physicians and which were funded through OHIP are now being funded through Section 24 of the SABS. Notwithstanding this increased accident benefits exposure, the health levy has not changed in terms of its calculation.

Electronic Documents and Communication

CADRI recommends that Ontario review the content of Part VI of the Insurance Act to remove requirements for “in writing” or similar paper-based terminology which adversely affects channels which offer insurance over the telephone and Internet. As an example, section 233 relating to misrepresentation on the part of an applicant, provides that companies must provide the written application or prove that the applicant made the statement attributed to the applicant in the purported application. Within the direct call center environment, we utilize call recording to validate transactions and therefore “prove” what transpired during a call. Insurers should be allowed to determine the most appropriate method to prove statements made by insured in telephone applications.

Of concern also is the requirement to provide a paper copy of the liability card. Companies should be able to provide the liability card along with all the other documentation in electronic form if the customer approves. We understand that the requirement for a paper liability card is for fraud purposes but we do not think that this is a significant deterrent to false production of cards. Of greater value would be to have law enforcement officers check the liability card to a policy database to ensure its validity. This would require that

the Ministry of Transport have the ability to access the insurance policy database. The technology exists and we would encourage the government to pursue this.

In Conclusion

CADRI appreciates the opportunity to provide input to Ontario as part of its five year review of auto insurance legislation. As we have noted in our submission, we believe cost control is the key to controlling upward pressure on driver premiums. We look forward to continuing to work with Ontario as you proceed with the review. If you have any questions on this submission we would be pleased to answer them.