

Committee Transcripts: Standing Committee on Finance and Economic Affairs - March 22, 2013 - Pre-budget consultations

ONTARIO TRIAL LAWYERS ASSOCIATION

The Chair (Mr. Kevin Daniel Flynn): Okay, ladies and gentlemen, if we can call back to order now, our first delegation for the afternoon is the Ontario Trial Lawyers Association, John Karapita, director of public affairs. If you would introduce your colleague as well, John. You've got 15 minutes; use that any way you see fit. The questions will come from the Conservatives.

Mr. John Karapita: Thank you, Mr. Chair. My name is John Karapita, and I'm the director of public affairs with the Ontario Trial Lawyers Association. I'm here with Andrew Murray, who is the president of the Ontario Trial Lawyers Association. I'll turn it over to Andrew to make some remarks.

Mr. Andrew Murray: I'm a lawyer with approximately 20 years of professional experience dealing with auto accident victims. I act for the plaintiffs. I don't do defence work. I'm the president of the Ontario Trial Lawyers Association at this moment, often referred to by the acronym OTLA.

The area where our group thinks that we can add some value to this process is in discussion about certain auto insurance issues that affect every motorist in this province because we have a system of mandatory insurance requiring all motorists to purchase a statutory product.

The recommendations that we want to make today aren't really things that should cost money, which we think makes them attractive recommendations. We're not coming here asking anyone to really spend a lot of money. We have some short-term recommendations and a mid-term recommendation that we can offer, and I hope to leave some time for some questions.

In terms of short-term recommendations, we encourage all parties to work towards progress—and some progress has been made, but we need continued progress—with the mediation backlog at the Financial Services Commission. It is a fundamental access-to-justice issue when the gate that lets people in or out of the dispute resolution process is closed for 12 months or more and they're not allowed to pass through to the next stage in resolving their dispute.

When the no-fault insurance scheme first came into play, it was noted that this was going to be a simple way of getting people to talk. That's a very laudable goal, but if people cannot talk because system issues prevent them from talking, then the system is broken. There has been progress made in the last year—I need to say that—but we can't take our foot off the gas on that issue. So I raise that as a short-term goal that's within reach, and we must all work together to continue to fix it.

A second short-term goal is the implementation of the recommendations that came forth from the anti-fraud task force, a group that OTLA consulted with—myself in particular at some length with that task force. I think it's fair to say that there has been significant consensus with the recommendations that were made by the task force. It's actually quite remarkable that there has been as much consensus as there has been. If we assume that there's unanimity on something like 80% of the recommendations, let's hope that there's a timely unfolding of implementation of those recommendations.

If we accept what the insurance industry has said about the extent of fraud in the system—and unfortunately, there's not adequate data to really give us a clear insight on it, even from the perspective of the accountants who've looked at it to date. But if we accept the kind of numbers that are being bandied about by the insurance industry itself, there are considerable savings to be made there. We would be remiss as a society if we did not do what we could do to ensure that it's not fraudsters getting these benefits and that, instead, it's the truly injured accident victims who are getting these benefits.

We have a system in place right now that is a combination of a tort system, where you sue somebody who has caused you harm, and a no-fault system, so that if a deer runs out in front of you and you swerve to avoid it, crash into an embankment and fracture your pelvis, you're able to get the rehab that you need, get the income support that you require and get, hopefully, back to work. That's an important societal goal, because those people are taxpaying individuals, so when they get back to work, they continue paying taxes. When they're not

working and they need to receive benefits from the public purse, they're a drain on our society. So I think we all have an interest in ensuring that accident benefits are flowing to the accident victims.

I note with some interest that from 1990 to now, there have been various iterations of this tort and no-fault system that all three parties have tinkered with. On one level or another, all parties have had their hand in this pie, and it hasn't lent itself to an absolute solution, but we all want to work together to find the right solution.

The third point that I would make—this one is short-term, but it bleeds into more of a mid-term goal—is ensuring that there are adequate data, statistical information and facts and figures available to make informed decisions about the auto insurance package. When I refer to data, I talk about the number of claims of catastrophic individuals in our system, which are pegged at something like 1% of the overall number of claims. How much is that really costing our system? How long are those files being kept open? How many files are being determined to be catastrophic only after there has been a hearing, as opposed to after some kind of a negotiated resolution? There hasn't been a very transparent disgorgement of those types of facts so far. If that could be made available, it would help everyone to come to the right decision on certain issues that have currently been looked at over the last 24 months.

If facts, figures and statistical analysis were made more transparent on the issue of insurer profitability, that would really help us all in figuring out whether we have a problem that needs to be tackled. Are premiums too high relative to the coverage that we're getting? Should premiums be lowered within the province of Ontario? We would encourage a thorough investigation of the return on equity which was mentioned by the Auditor General last year, and there has been some discussion about that again. Further, the return on equity that was set at 12% was mandated at a time when we had a much higher inflation rate.

We're living in historic times, and it looks like there's no particular end in sight to the historically low level of interest rates that we're facing. It would be a very good cause to revisit an analysis of whether the 12% return on equity makes sense under the current environment, and that's something, quite frankly, that's best done by an independent individual. It's probably not well done by OTLA or by politicians of any stripe, because we probably lack the knowledge and the in-depth data to do it properly. If an independent individual makes those recommendations, it's something that all stakeholders—the insurance industry, the public, the politicians and trial lawyers alike—can probably buy into and accept more readily.

In any work that is done with the auto insurance package, my organization would urge this group and any other group to be mindful of what we call the three Ps. I'm sorry that some of you may have heard me talk about this before, but some of you may not have heard me talk about this before. We refer to the three Ps as an analysis of profits, premiums and protection. You can think of it like three legs on a stool: If one of those legs is too long, or if one of those legs is too short, the stool is all askew.

1310

There's been a lot of discussion lately about profitability and what that means for premiums. There's been a call for premium reduction, which—quite frankly, we probably were one of the first groups suggesting that there ought to be premium reduction. But we would urge everyone not to look at one leg of the stool in isolation. By lopping off one of the legs of the stool—reducing premiums—what might that do to one of the other legs, which should be protection?

We would call for a holistic analysis so that if premiums are reduced or profits are analyzed, it's only done in conjunction with an analysis of whether the protection in the system is adequate. If we lower premiums—if we cut them in half—but it's at the expense of ensuring that our injured accident victims have the coverage that they need, we're not doing anyone a good service.

If we lower premiums to the point where the insurance companies cannot maintain a profitable business in Ontario, we've not done a good service, because under our current system we need to have a competitive system of multiple insurance companies competing for business.

If we don't have protection, we don't have the system. We have to look at the three legs on the stool. If you think of it in that sense, the statistical data that I've called for, that my organization seeks, has to be a very important

aspect of that analysis because you can't truly know what you're dealing with until you have all of that data in front of you.

I had the opportunity, the privilege, of speaking before the standing committee hearings that were looking into auto insurance. I appeared at Queen's Park back in May and again in Windsor in July of last year. It seemed to me—I read the transcripts from Hansard and I listened to a number of the speakers orally—that there were a lot of good ideas that were coming forward.

The final recommendation that I would have—which, again, I don't think costs very much money, and I don't know what process this takes politically. But if that process can be resuscitated—because it was put into suspended animation when the previous government was prorogued—so that all of those comments and all of that information doesn't just die, we would certainly recommend that that would be a good thing as well.

I'm going to stop my formal submissions there so that there can be time allowed for any questions.

The Chair (Mr. Kevin Daniel Flynn): Okay. The questions are coming from the Conservative Party, and you've got four minutes. Monte?

Mr. Monte McNaughton: Thank you very much. Excellent presentation.

When it comes to the mediation backlog at the Financial Services Commission of Ontario regarding auto insurance claims, can you estimate how much the backlog contributes in extra costs to the insurance system—a dollar figure?

Mr. Andrew Murray: I'm not in a position to do that because of the exact point that I made earlier with respect to the lack of data flowing.

A number of us were gratified to see the ability to fail a mediation on consent for those issues where it was absolutely crystal clear that the parties were so diametrically opposed, either in law or on fact, that the mediation was just a barrier. But to the extent that that is costing money—I'm in a difficult position to make that comment.

Mr. Monte McNaughton: Okay. Can you explain why the Financial Services Commission of Ontario was the only provider for disputes?

Mr. Andrew Murray: Well, it's actually not fair to say at this moment that it's the only provider, because they did have an outsourced request for proposal that landed at the feet of something called ADR Chambers. They are now doing a private service as an adjunct to what the FSCO mediators are doing. I can talk from my own file cabinet that I've been having a very timely response from some of the ADR Chamber folks. The addition of individuals added to the roster is certainly making a dent in the mediation backlog, so I would see that as a positive thing.

Something to look forward to—and if you can think of this—you hear people in Manitoba worrying about the Red River, and you know that if there's a flood upstream and it crests, you can know that two days down or three days later, the crest is going to reach another town. What I do worry about is that as we pass people through the mediation backlog, if it's just letting them loose by failed mediations or mediations that did not occur, I do worry that now we're going to have a bottleneck when it comes to arbitrations and litigation because now those people will have a barrier but it's at a later point in time. So in terms of a mid-term strategy and being proactive rather than reactive, we should be looking at where we're headed with those disputes.

Mr. Monte McNaughton: Okay. Can you describe a typical mediation session? What's the goal of the mediator and what are the typical outcomes?

Mr. Andrew Murray: The typical mediation session is completely driven by the insurance industry's goals because if they come there with no money, nothing happens whatsoever. I had one where I waited 14 months and I invited them at the six-month mark, "Why don't we fail this mediation on consent?" They said, "No, we want to hold out for the mediation." I said okay. We got to the mediation and the mediator was pleading with the insurance industry rep because they said, "Actually we have no money today to offer of any kind, and we have to fail this mediation," which I said we could have done eight months ago.

Usually what happens is, if the insurance company is interested in talking, they want to wrap the whole file up, not the isolated issue in dispute that brought the case to the mediation. They want to lump out the file so that

they clear the file off the deck in its entirety. But that's completely driven by my opponent's agenda. I have no control over them doing that. As with any negotiation, if the other side refuses to negotiate, you can't do anything, essentially.

The Chair (Mr. Kevin Daniel Flynn): You're down to 40 seconds.

Mr. Monte McNaughton: Does the Upper Canada law society provide accreditation for its members who wish to be mediators?

Mr. Andrew Murray: I'm not aware that the law society provides accreditation for mediation, but there are many, many other groups that do. One can take mediation courses from any number of groups.

Mr. Monte McNaughton: Okay. That's good.

The Chair (Mr. Kevin Daniel Flynn): Thank you, and thank you for being here today.