Submission to the Standing Committee on General Government on Bill 15, *The Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*

Wednesday, November 5, 2014

The Ontario Trial Lawyers Association (OTLA) welcomes the opportunity to comment on Bill 15, *The Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*.

OTLA was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

Our organization has more than 1,500 members who are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

OTLA wholeheartedly supports initiatives to combat and deter fraud in the auto insurance system. Any resources that are taken out of the system because of fraud are not available for the legitimate treatment needs of victims.

OTLA also supports many of the initiatives in the proposed legislation aimed at streamlining the adjudication of accident benefits claims,

There remain, however, two areas where OTLA has serious concerns about the efficiency and functionality of the proposed legislative amendments, namely:

1. removing the right to sue from the DRS
2. reducing the Prejudgment Interest Rate

Removing the Right to Sue Will Lead to Extra Costs and Inefficiency in the System

Currently, following a failed mediation, an injured person has the option under the *Insurance Act* of choosing between bringing a case to court or going to an arbitrator in the dispute resolution system. Bill 15 would remove the option of taking insurance disputes to a court to be adjudicated. OTLA strongly objects to the proposed amendment, particularly for injured people who have both accident benefits claims against their own insurance companies and tort claims against at-fault drivers. Since that tort claim will eventually be dealt with in court, OTLA urges MPPs to amend the bill to allow the option to combine accident benefits disputes and litigation against the at fault driver in one single court action**.**

- Consider this example: An auto insurance company doctor reports that an injured person can return to work following an accident. The injured person's own doctors feel that the injured person is not yet medically ready to return to work. If the insurer

discontinues the injured person's income benefits, the injured person must go through the LAT to dispute the terminated benefit. The LAT process will involve a full hearing, where all the injured person's doctors will testify. In addition, the insurer may have medical witnesses testifying at the hearing. Eventually a verdict will be rendered by the LAT. But the injured person's legal issues won't be over yet, because the injured person will still have a lawsuit going on against the at-fault driver, and the very same doctors will be required to testify a second time at the Superior Court trial, regarding the identical issues. In addition to two sets of testimony, forcing accident benefits disputes to go through the LAT will involve two sets of lawyers' fees and disbursements for both the injured person and the insurer involved in the dispute.

- As the above example illustrates, the accident benefits system and the tort system work together. There are areas of overlap. The accident benefits insurance company is statutorily required to pay the injured person first before the tort insurer has to make any payments to the injured person. The tort insurer will be asked to pay whatever losses are in excess of the injured person's recovery through the accident benefits system. It makes economic sense, therefore, that the option should be available to an injured person to have the two disputes litigated together at the same time.

- Forcing all insurance disputes to go through the LAT will actually hinder settlements and delay the resolution of claims, as the injured person will be reluctant to settle his/her claims with his/her own insurance company, before the tort litigation is concluded. All accident benefit payments must be deducted from the amount owed to the injured person by the insurer for the at fault driver. The amount of the accident benefits settlement directly impacts the lawsuit against the at-fault driver, and therefore, both disputes are effectively and efficiently handled together in one combined Superior Court action.

- To force injured people and insurance companies to hire lawyers twice and bring in expert witnesses such as doctors for two separate hearings on the same issues makes no economic sense, and will cause unnecessary financial hardship.

- To avoid this unnecessary duplication of legal expenses and fees for doctors to give evidence in two proceedings, an exception should be created in the proposed amendment to section 280 of the Insurance Act, whereby an injured person will be able to sue his or her insurance company in situations where there is already litigation in place for the tort action.

- It has been suggested that "adding a court option" to accident benefits disputes would contribute to an already heavy court caseload. We disagree. In fact, we contend that there would be no impact on court resources. The reality is that the courts will already be dealing with tort cases. Allowing injured people the option of combining their accident benefits disputes with *already existing* litigation against at-fault drivers covering the *identical issues* would not create additional stress on the court system.

- The final report on the DRS Review noted that "there are many administrative tribunals where no such option [of taking a dispute to court] exists." However, one cannot compare the auto insurance dispute resolution system to other tribunals such as the WSIB, as all the other administrative tribunals have jurisdiction to deal with all disputes and issues relating to the tribunal. Automobile insurance is different from all other administrative functions, since there will always be an interrelationship between the tort lawsuit and the payment of accident benefits. The tort cases will always be dealt with separately in the courts. The amount and type of benefits paid out in the accident benefits system will always be considered by the defendant in the tort lawsuit.

- There is already a verbal threshold and monetary deductible ($30,000 per claim for any general damages claims below $100,000), so the vast majority of smaller tort claims have already been removed from the system. It is therefore anticipated that cases involving lower levels of injury will all be dealt with through the LAT, and that, as now, the Superior Court system will be left for the cases where the injured person has suffered a "threshold" injury, which is a permanent, serious, impairment of an important physical or psychological function.

Prejudgment Interest Rates Should Not Be Reduced:

Presently, injured people receive interest on their awards for general damages at a rate of 5% per annum. The data from the Office of the Superintendent of Financial Institutions (OSFI) demonstrates that in 2012, the rate of return on investment for the insurance industry in Ontario was 4%. In 2013, the rate of return was 3%. The proposed legislation seeks to reduce the prejudgment interest rate to the rate established in the Courts of Justice Act, which is presently 1.3%.

- It is profoundly unfair to injured people to allow the insurance companies of the drivers who injured them to receive 3% return on their investments, but only pass on 1.3% interest to the injured person. If the insurance industry is only paying out 1.3% on all claims, but is receiving 3% investment interest on all investments, then there is absolutely no incentive for any insurance company to want to resolve the claims brought by injured people in a timely way.

- It should also be noted that when an injured person can no longer work because of his or her injuries from the car crash, injured people are often forced to rely upon credit cards or other loans that carry high interest rates, just to cover daily living expenses. If the government moves forward with this proposal to reduce prejudgment interest rates, Ontarians who are injured and cannot work will not receive adequate compensation for prejudgment interest if only the Court of Justice Act level of prejudgment interest is applied to their damages. In addition, with the present interest rate at 5%, there is an

incentive for insurers to deal fairly and expediently with injured people. If the prejudgment interest rate drops, so too will the level of interest the insurers have in settling claims with injured people in a timely fashion. The insurance industry will make more money *not* settling claims and keeping its financial investments in place, to take advantage of the higher rate of return it has seen in the past two years at 4% and 3% respectively. Delaying the resolution of litigation is not in anyone's best interests.

Where to Find Savings in the Auto Insurance Product For a 15% Premium Reduction

OTLA understands that the government is searching for areas where it can create some savings for the insurance industry, so that premiums for auto insurance can ultimately be reduced by 15%. The proposed legislation seeks to save the insurance industry money on the backs of Ontarians who are innocent accident victims. OTLA suggests that rather than drastically reducing the prejudgment interest rate to 1.3%, that the government scrutinize the claims handling practices of the insurance industry.

The data from Health Claims for Auto Insurance (HCAI) establishes that for every dollar the insurance industry spends in accident benefits payments, it spends sixty cents on medical assessment costs to determine if the benefit should be paid! That is a shocking statistic. If the insurance industry used more discipline and common sense by reducing the exorbitant number of medical assessments it expects its insureds to attend, dramatic savings would be available to the industry as a whole.