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Submission to: Review of Family and Civil Legislation, Regulations, and Processes

FAIR Association of Victims for Accident Insurance Reform is a not-for-profit grass-roots organization of Ontario's car accident survivors and their supporters. We seek to have better access to recovery resources and to improve the quality of insurance coverage. Thank you for the opportunity to speak about how the civil justice system is adversely affecting Ontario's vulnerable and injured car accident survivors.

As you are aware there are so many unsatisfied auto insurance consumers in the province that a quasi court system was introduced to handle the volume of unpaid injured Ontarians. The present LAT AABS was created when the previous Financial Services Commission of Ontario arbitration hearings system was unable to handle over 36,000 mediation requests on their docket. The LAT AABS hearings system is already viewed by Ontario's MVA victims as unconstitutional and it displays significant bias to favor insurers.

The LAT has failed tens of thousands of MVA victims whose complaints about their insurer's abusive claims handling practices have been ignored. The LAT has stated that it was not within their mandate to apply sanctions to insurers who behave badly during the claims process. Now we find that according to a recent Court of Appeal decision, Stegenga v. Economical Mutual Insurance Company, 2019 ONCA 615 (CanLII), <http://canlii.ca/t/j1l93 "If the dispute relates to the insurer's compliance with obligations to the insured concerning SABs, the timeliness of performance of those obligations and/or the manner in which they were administered, it falls within the broad reach of the dispute resolution provisions, and within the jurisdiction of the LAT." So this is not just the appearance of bias - it is a system that has deliberately failed victims.

From a consumer perspective we have a LAT AABS hearings system that is 'under the influence' of management that the Ontario Court of Appeal has found to be lacking in good policy and that there is a "a reasonable apprehension of a lack of independence" in their decision processes. See: Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals), 2019 ONCA 518, http://canlii.ca/t/j140m .

It gets worse.

We've arrived at a place where MVA victims are routinely denied coverage based on flawed medical evidence. See: http://www.fairassociation.ca/wp-content/uploads/2017/09/Letter-to-Civil-Rules-Committee-September-5-2017.pdf). Ontario's justice systems seem unable or unwilling to reign in 'medical

experts' hired by Ontario insurers who are using our court systems (both LAT and civil justice) as a way to delay and deny legitimate claimants. And they are doing it with impunity. In fact, because there are no longer any dis-incentives in our system to deter the bad actors, the LAT is overrun with claims in just a couple of years and our Civil courts (who now operate as de facto quality control and consumer protection) have had in excess of 56,000 auto insurance claims on the docket every year for almost a decade. See: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510011401&pickMembers%5B0%5D=1.4&pickMembers%5B1%5D=3.2&pickMembers%5B2%5D=2.1 .

The government needs to put back disincentives for insurers who behave badly. Have insurers pay the real court costs of hearings. In the LAT AABS one insurer with only 16% of market share routinely has just under half of all the cases listed on Canlii. It suggests overuse and that the LAT is a tool used routinely to thwart claims by insurers with deep pockets against claimants who are not being awarded even minimal legal costs when they are successful.

In our civil courts the deductible of $38,000 ($ that insurers get to keep out of a jury awarded settlement) when thresholds aren't met should be abolished. It is way out of line and the fact that judges must actually lie or omit the evidence of the 'deductible' to juries tells us how unacceptable this practice is of rewarding insurers who fight their own customers. Essentially insurers are shamelessly, and with the court's assistance, pilfering recovery money from the already meager settlements of seriously injured Ontarians.

All of this, the unpaid legal costs at LAT, the $38,000 'deductible' on civil tort claim thresholds, the utter lack of accountability or sanctions on insurers who overuse and abuse the court system, add up to an access to justice issue. And it means considerable taxpayer dollars are used to beef up insurer profits because a court system that favors one party over another means that more unpaid and seriously injured victims are downloaded onto taxpayer funded supports such as welfare and ODSP.

If it sounds too complicated it's because it is and insurers have had more than two decades to unravel our justice system in order to maximize profits. It can't all be put into a few pages. FAIR would be more than happy to meet with you to discuss the problems and a plan of action to put more accountability into a system that is broken and now undermines access to justice.

We recommend:

- Create a significant user fee for insurers who use the LAT. FSCO Arbitration unit had insurers pay $3000.00 when a victim had to take them to a hearing. At present the LAT AABS charges victims $100.00 if they apply for a hearing and insurers $0. This has incentivized insurers to overuse the system with impunity and a new user fee would have to be significant to encourage insurers to better their claims handling practices and deter their overuse of our courts.
- Investigate why the 'Special Award' system that existed at FSCO Arbitration Unit has not been applied at the LAT AABS as this was another disincentive for insurers who behave badly.
- Award claimants, who are successful at LAT AABS, their legal costs as is done in every other Canadian court as far as we know. A justice system that deliberately enriches insurers while impoverishing and creating an access to justice issue by targeting injured and disabled individuals for 'special treatment' appears to be in violation of the Canadian Charter. https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art15.html

- Increase the pre-judgment interest (PJI) on overdue payments owed by insurers to their customers. A low interest rate has incentivized insurers who can make more money on an investment than they would ever have to pay as a penalty on overdue payments to MVA victims.
- Review management at the LAT AABS based on the comments of Ontario's judges about the demonstrated lack of integrity at the LAT and the "potential danger the chair's control over reappointments poses to the independence of individual adjudicators". The LAT AABS Executive Chair is now the head of SLASTO and that is a serious concern to the public who reasonably expect that there should be no apparent or suggestion of bias in our court system. See: Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals), 2019 ONCA 518 (CanLII), <http://canlii.ca/t/j140m
- Look to provide duty counsel for self-represented claimants at the LAT AABS. Not only are claimants expected to navigate the LAT system without recovering legal expenses, it seems that when self-represented they are not given any assistance at all. As the courts in Ontario seek to educate Self-Represent Litigants (SLRs) there appears a failure to educate at both ends, not just the plaintiffs but also the triers-of-fact who must now deal with the overburdened system and SLRs. If expectations are not articulated and paths not defined, any system would fail.

Thank you for the opportunity to have our concerns heard. We hope your office will be in touch to discuss these issues in a more detailed way.

Sincerely,

Rhona DesRoches
FAIR, Chair

A 'startling turn of events': Judge rules case points to improper influence in Ontario auto insurance disputes https://nationalpost.com/news/a-startling-turn-of-events-judge-rules-case-points-to-improper-influence-in-ontario-auto-insurance-disputes

Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals), 2019 ONCA 518 (CanLII), <http://canlii.ca/t/j140m

[54] The Divisional Court's finding of a reasonable apprehension of a lack of independence was supported by the facts of this case. The Divisional Court found, based on the emails, that the adjudicator did make changes following the executive chair's comments: at para. 57. The Divisional Court further found that those changes were significant, as the executive chair believed they were important enough to justify further delay: at para. 61.

[55] In addition, the executive chair became involved without the adjudicator's consent. The Divisional Court appropriately gave weight to the fact that the executive chair imposed the review and the adjudicator was only informed of it after it took place. It considered this evidence cumulatively with the lack of a formal written policy to protect the adjudicator's right to decline to participate and the lack of evidence as to the nature of the changes stemming from the review.

[56] In summary, there is no basis for appellate interference with the Divisional Court's analysis of the issue of a reasonable apprehension of a lack of independence. In my view, that analysis is correct.

Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790 (CanLII), <http://canlii.ca/t/hsm3q