OTLA Ontario Trial Lawyers Association

OTLA Submission to the Licence Appeal Tribunal

Proposed Solutions for Discussion at the September 24, 2020 Stakeholder Consultation

September 18, 2020

ONTARIO TRIAL LAWYERS ASSOCIATION
1190 Blair Road - Burlington - Ontario • L7M 1K9
905 639 6852 - www.otla.com

The Ontario Trial Lawyers Association ("OTLA") looks forward to attending the upcoming Licence Appeal Tribunal ("LAT") stakeholder consultation on September 24, 2020. In preparation for same, OTLA provides these submissions, which detail our members concerns with current LAT procedures, as well as OTLA's proposed solutions. OTLA would be pleased to further discuss this submission should there be any questions or if OTLA can be of any further assistance.

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.

OTLA's members 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.

A. Background

In its March 4, 2014 News Release, the Ontario Government made clear its intent in transferring disputes under the *Statutory Accident Benefits Schedule*[1] ("SABs") to the LAT, stating that it was:

> "Transforming the Dispute Resolution System to help injured Ontario drivers settle disputed claims faster. Moving administration of the system from the Financial Services Commission of Ontario (FSCO) to the Ministry of the Attorney General's Licence Appeal Tribunal would help cut down on consumer frustration as well as curb financial and administrative stress on the system, which can increase costs and cause rates to go up."[2]

The LAT was to be faster and more cost effective than FSCO. The overall expected timeline for resolution of disputes was expected to be six months.

It has now been more than four years since the LAT assumed jurisdiction of SABs disputes. In our member's experience, the LAT has unfortunately not proven to be faster or more cost-effective. Our members have experienced widespread delay, increased red-tape, increased costs, and a concerning lack of transparency. Consumer frustration is at an all-time high.

We have outlined our members concerns and experiences, as well as OTLA's recommended solutions, below. The upcoming stakeholder consultation is in OTLA's view a positive first step in curbing consumer frustrations and ensuring the LAT's administration of the SABs dispute resolution system is what the Ontario Government promoted it to be – fast and cost-effective.

[1] *Statutory Accident Benefits Schedule - Effective September 1, 2010*, O. Reg. 34/10
[2] https://news.ontario.ca/mof/en/2014/03/ontario-taking-further-action-to-reduce-auto-insurance-rates.html

B. Summary of OTLA's Recommended Solutions

The following is a summary of OTLA's recommended solutions to our members concerns, all of which are further detailed below:

1. Return to a "loser pays" system whereby costs and disbursements are awarded to the successful party;
2. Increase the complement of Adjudicators;
3. Create an expedited procedure for simple matters (i.e. treatment plans worth less than $2,500);
4. Eliminate the need for a case conference in cases in which the parties consent;
5. Set a time limit for adjudicators to deliver decisions, including reconsiderations;
6. Avoid Case Conference Orders unless requested by the parties and address motions at the case conference;
7. Publish all LAT policies and procedures;
8. Maintain a public calendar of available hearing dates;
9. Hold quarterly stakeholder consultation meetings;
10. Increase the availability of special awards;
11. Ensure reconsiderations are heard by a new adjudicator;
12. Implement an improved document filing system;
13. Utilize a central filing system or alternatively limit filing of documents until the hearing;
14. Implement an improved scheduling system;
15. Publish practice directions setting out standard productions that should be made by the parties to reduce the number of production disputes and motions;
16. Publish full case names; and
17. Provide additional and balanced SABs training for adjudicators.

C. Losers Should Pay

The unavailability of costs is a significant concern amongst our members and their clients. The LAT dispute resolution process is a "David and Goliath" situation that favours the well-resourced insurer. Disbursements are not ordered and costs are very rare. Even when costs are awarded, the quantum is so low it has no deterrent value.

With the extreme reluctance of adjudicators to order costs, the present design and application of the system economically incentivizes insurers to deny legitimate claims, leaving accident victims (many of whom are unable to work and have limited resources) to personally fund their disputes, or go without.

Because of the expense associated with such disputes, many meritorious claims are not pursued. This was highlighted by the court on a recent class action jurisdiction motion, wherein Mr. Justice Belobaba determined the LAT had sole jurisdiction over the issues in dispute and noted that as a result, "individual claims will not be pursued and the impugned insurers will arguably be enriched in the millions of dollars. Such is the consequence of the jurisdiction design decision."[3]

[3] Dorman v. Economical Mutual Insurance Company 2020 ONSC 4004 at 23

In order to pursue these disputes, accident victims must do so at their own expense. This expense is not insignificant. For example, the expert reports required for catastrophic determination alone can cost in excess of $20,000. Many accident victims do not have the resources to fund these disputes and in order to advance the dispute, must leverage their other benefits or tort awards, leaving them inadequately compensated for their losses.

The SABS are clearly and explicitly designed to protect consumers. It seems absurd that a dispute resolution system primarily intended to enforce consumer's rights, can be used by insurers to increase profits (by denying meritorious claims) at the expense of the consumers that are supposed to be protected. As has been stated and repeated by the courts "legal structures that make enforcement of the law practically impossible will leave weaker members of society open to exploitation…"[4]

OTLA Recommendation 1: Return to "loser pays" system

OTLA strongly recommends the LAT return to a "loser pays" system, similar to what exists under the *Rules of Civil Procedure* in the Province of Ontario (and what previously existed when SABs disputes were handled by FSCO). Costs should follow the event. Making the unsuccessful party contribute towards the legal costs of the successful party promotes access to justice and fairness in the system. Without it, access to justice is lost, and with it personal responsibility and accountability.

The restoration of access to justice through the availability of costs is a solution that is shared by those representing insurers and injured victims alike. As elaborated by Stephen Ross, past President of the Insurance Law section of the Ontario Bar Association and Chair of the special Joint Insurance Committee established to provide advice on legislative reform to the Ontario government:

> As it presently stands, there is a disparity in economic resources to fund litigation. If the dispute is on the issue of a catastrophic designation or post-104 IRB's, the amounts at issue can be very significant. An insurer presumably has the resources to retain appropriate experts and hire counsel to engage in the litigation process. If there is no ability to achieve cost indemnity for amounts spent on experts or legal counsel, few applicants will have the resources to fund the litigation and certainly not in a manner congruent with the insurer's anticipated approach. This presents as the potential for a vastly unequal playing field and represents a significant barrier to justice for the very group whose interests the LAT was designed to protect.[5]

The availability of costs and disbursements "will allow for applicants to properly fund the dispute and concerns about adverse costs awards can be addressed by various considerations, including offers to settle."[6] It will also reduce the number of disputes at the LAT by deterring unmeritorious denials and encouraging parties to resolve disputes or face cost consequences.

---

[4] Uber Technologist Inc. v. Heller, 2020 SCC 16 at 112.
[5] Stephen Ross and Alon Barda, "LAT – 2 Years Later: Where We Were, Where We Are, and Where We Are Headed", Rogers Partners LLP (January 26, 2018), Tricks of the Trade 2018 at 20.
[6] *Ibid*. at 20-21.

D. Delays in the system

Another fundamental concern of our membership is delay. Justice delayed is justice denied.

The LAT's administration of SABs disputes has not proven to be faster or more-streamlined. In fact, data received from the LAT through Freedom of Information ("FOI") requests evidences a system that even before COVID-19 was becoming slower and slower.

Before COVID-19, the average LAT process (from Application to Decision) took more than one year. The FOI data, which is set out in tables 1 to 3 below[7], depict a steady increase in the:

1. number of Applications received with 3719 having been received in quarter 3 and 2653 having been received as of March 8, 2019 of quarter 4 of the fiscal year 2018-2019 (see Table 1 below);
2. days between Application and Case Conference with the average being 148 days (nearly 5 months) in quarter 4 of the fiscal year 2018-2019 (see Table 2 below);
3. days between Case Conference and Hearing with the average being 130 days (more than 4 months) in quarter 4 of the fiscal year 2018-2019 (see Table 2 below);
4. days between Hearing and Decision with the average being 136 days (more than 4.5 months) in quarter 4 of the fiscal year 2018-2019 (see Table 2 below); and
5. days between Application and Decision with the average being 381 days (more than a year) in quarter 4 of the fiscal year 2018-2019 (see Table 3 below).

Table 1: Number of applications received by quarter

Fiscal Year	Quarter	Applications Received
2018 - 2019	Q4*	2653
2018 - 2019	Q3	3719
2018 - 2019	Q2	3233
2018 - 2019	Q1	3317
2017 - 2018	Q4	2928

[7] Fiscal Year 2018-2019 Q4 Data is as of March 8, 2019. Not the full quarter data.

Table 2: Average length of time by quarter

Fiscal Year	Quarter	Average # of days between application and case conference (for files that proceeded to case conference)[1]	Average # of days between case conference and hearing (for files that proceeded to hearing)[2]	Average # of days between hearing and decision (for files that proceeded to a decision)[3]
2018 - 2019	Q4	148	130	136
2018 - 2019	Q3	135	114	121
2018 - 2019	Q2	122	97	93
2018 - 2019	Q1	124	86	110
2017 - 2018	Q4	128	93	126

Table 3: Increasing Delays Between Application and Decision

Fiscal Year	Quarter	Average # of days between application and decision (for files that proceeded to a decision)[3]
2018 - 2019	Q4	381
2018 - 2019	Q3	365
2018 - 2019	Q2	327
2018 - 2019	Q1	306
2017 - 2018	Q4	323

1. Applications are included in the quarter in which the case conference occurred
2. Applications are included in the quarter in which the hearing occurred
3. Applications are included in the quarter in which the decision was released

Our members report that hearings scheduled between at least April and August 2020 were cancelled as a result of COVID-19. We expect these cancellations will further exacerbate the current delays. In preparation for the September 24, 2020 meeting, OTLA has requested that the LAT provide updated statistics regarding the current delay and impact COVID-19 has had on LAT operations. These statistics are imperative for transparency and efficiency and should form part of the LAT's regular communications with stakeholders.

Injured accident victims cannot afford to wait more than year to resolve disputes and access their benefits. Many require treatment and rehabilitation services to reduce pain and maintain functionality. When much needed treatment is denied and then delayed because of a backlogged dispute resolution system, the accident victim's recovery and potentially the rest of his or her life

can be negatively affected. Similarly, many injured accident victims are unable to work or support their families. Delays of more than a year while they fight with their insurer over entitlement to income benefits can be devastating for an injured person's ability to survive and mental health.

The struggles many accident victims face in this respect are highlighted in a recent article published in the Toronto Star entitled, "*First came the car crash. Now insurance delays over COVID-19 have left mother and daughter facing homelessness*".[8] Although the two accident victims noted in the article were entitled to catastrophic benefits, disputes with their insurer and delays inherent at the LAT required them to live in deplorable conditions or face homelessness, leading one of the victims to contemplate suicide. With their only recourse being the LAT and at least a year of delay, their very survival is at risk.

OTLA strongly recommends that these delays be reduced. As the Honourable Mr. Justice Cunningham aptly noted in his 2013 review of the dispute resolution system,

> "the insurance system should be able to quickly respond to the legitimate needs of accident victims. Not only is it clear that accident victims are worse off if medical care is difficult to obtain and extended over a long period, but it is also evident that insurers can limit costs by supporting appropriate care in a timely basis." [9]

In order to address the current delays in the system, OTLA recommends the following:

OTLA Recommendation 2: Increase the Complement of Adjudicators

The LAT has been operating at less than a full complement for quite some time. Per the most recent posting on the Ontario Government's website[10], the LAT remains short a total of 11 members, specifically:

- 1 full-time Associate Chair
- 1 part-time Vice-Chair
- 4 full-time Members
- 5 Part-time Members

There are also 7 Members whose contracts are set to expire in the next 6 months. This includes the newly appointed Executive Chair.

There is no doubt that the lack of a full complement has contributed to the delays inherent in the system. However, even with a full complement the LAT cannot manage the ever increasing volume of cases and the current backlog which most recently increased as a result of COVID-19.

OTLA recommends additional adjudicators be appointed immediately to bring the LAT to a full complement.

OTLA further recommends that additional adjudicators be appointed to address the backlog of cases that has existed for some time and which has more recently increased as a result of

[8] First came the car crash. Now insurance delays over COVID-19 have left mother and daughter facing homelessness, Toronto Star, Sept 2, 2020.
[9] Ontario Automobile Insurance Dispute Resolution System Review Final Report, February 2014, https://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.html#s12 ["Cunningham Report"].
[10] https://www.pas.gov.on.ca/Home/Agency/455

COVID-19. Unless this backlog is significantly reduced, the system will continue to involve excess delay.

OTLA Recommendation 3: Create Expedited Procedure for Simple Matters

Currently, all disputes proceed through the same process regardless of the quantum in dispute. This too contributes to the delay.

OTLA recommends the LAT implement expedited procedures for simple matters, such as disputed Treatment Plans that involve less than $2,500. This would enable insured's to access treatment in a timely manner and remove much of the "red-tape" that creates excess costs for the parties.

This expedited procedure could be triggered on request of the Applicant with the matter being heard in writing as follows:

1. The Applicant to file all materials for hearing with the Application;
2. The Respondent to file all materials for hearing 60 days thereafter;
3. The Applicant to file any reply materials 30 days thereafter; and
4. The LAT to render its decision within 60-90 days of the reply materials being filed.

No case conference would be held and there would be no delay in productions. This would enable simple matters to be addressed much more promptly and claimants to access treatment in a timely manner.[11] It would also reduce the burden on adjudicator time by eliminating the need for a case conference.

OTLA Recommendation 4: Eliminate the need for Case Conference if Both Parties Consent

Currently, a case conference is required in every case. Depending on the positions of the parties or the status of the file, case conferences are not always useful. Our members advise and the FOI data supports that there is also an approximately 5 to 6 month wait from the filing of the initial application for the case conference. This further delays resolution of disputes, particularly given that the hearing date will not be assigned until the case conference.

OTLA recommends that on the consent of the parties, the case conference be vacated and the hearing be scheduled immediately. This would alleviate some of the burden on adjudicator schedules and significantly reduce the delay in those matters that require a full hearing. Hearings could be scheduled via completion of a form similar to that which is currently used for case conference adjournments.

OTLA Recommendation 5: Set Time Limit for Decisions, including Reconsiderations

Our members have noted significant delay for adjudicator decisions. This is supported by the FOI data which as noted above depicts an average wait of more than 4.5 months from

[11]According to the LAT's website, they have an expedited process for vehicle impounds and license suspensions https://slasto-tsapno.gov.on.ca/lat-tamp/en/general-service/case-conferences-hearings/. "Case conferences for expedited matters, such as vehicle impoundments and driver's license suspensions, take place within 15 to 30 days from the date the completed appeal is filed with LAT."

the date of hearing. OTLA recommends the LAT set time limits for adjudicators to release decisions, including reconsiderations. This will prevent further delay and enable the parties to move past the dispute. OTLA further recommends that adjudicators be required to provide reasons for any delayed decisions outside the set timeline.

OTLA Recommendation 6: Avoid Case Conference Orders Unless Requested by the Parties and address Motions at the Case Conference

In our member's experience, most Case Conference Adjudicators have been issuing Orders that lock in the identity of witnesses and set timelines outside those imposed by the *Common Rules of Practice and Procedure* ("*Rules*"). This creates difficulties as it necessitates formal motions to amend the witnesses to be called or to deviate from the timelines set out in the Order (even if those deviations still fall within the *Rules*). These motions add to the Adjudicators already busy schedule and increase the red-tape of and costs incurred by the parties.

OTLA recommends that Case Conference Adjudicator's avoid creating Orders that deviate from the *Rules* unless specifically requested by the parties. The *Rules* set out all necessary timelines. In most cases, additional orders are not required and if made, will simply create more red-tape and restrictions for the parties. By avoiding such Orders, case conferences will be shorter, the need for subsequent motions will be significantly reduced and the parties will have greater flexibility (while still complying with the *Rules*) to prepare and present their case.

OTLA further recommends that if a party requests that a motion be addressed at the case conference, that the Case Conference Adjudicator resolve the motion without the need for the parties to file formal materials or bring a formal motion separate from the case conference. The Case Conference Adjudicator has the authority per the *Rules* to make Orders on most procedural matters. It is more expeditious and cost-effective for all motion requests to be addressed at the case conference. Requiring the parties to bring formal production (or other) motions outside of the case conference creates more process and delay and increases costs.

E. Lack of Transparency

Another concern amongst our membership is transparency. Until recently, there has been a freeze on stakeholder consultations and many LAT policies and procedures have not been made public. This lack transparency was brought to the forefront in 2018 when the independence of the LAT's Adjudicator decision-making process was called into question by the Divisional Court in *Shuttleworth.*[12]

The Divisional Court held that while some outside influence on reason writing is permissible, there ought to be an institutional consultation procedure in place to safeguard the independence of the

[12] *Mary Shuttleworth v Ontario (Safety, Licencing Appeals and Standards Tribunals)*, 2018 ONSC 3790 (Div. Ct.), aff'g 2019 ONCA 518 (CanLII) [*Shuttleworth*].

decision-maker. The Ontario Court of Appeal affirmed the Divisional Court's finding holding that the LAT's review process lacked the appropriate procedural safeguards.

The facts and decisions in *Shuttleworth r*aise significant concerns amongst our members. Of even greater concern, however, is the fact that despite the Divisional Court and Court of Appeal's clear rulings, the LAT has to date failed to publicly amend its procedures to address those rulings and give stakeholders reassurances that there are in fact appropriate procedural safeguards in place.

The Adjudicative Tribunals Accountability, Governance and Appointments Act, which governs the Safety, Licensing Appeals and Standards Tribunals Ontario ("SLASTO"), contains formal processes to ensure the accountability of tribunal members and officers both internally and to the public, and requires not only that there be a written policy, but also that tribunals make all such documents available to the public.

On the heels of the *Shuttleworth* decision, the internal review process was supposed to change. It has been over a year since the Court of Appeal upheld the Divisional Court's findings and we have yet to be provided with any update as to whether it has changed and if so, what changes were made. At a recent OBA Conference, Executive Chair Sean Weir advised that the LAT has created a formal process and/or is in the process of doing so, but it is unclear if this process has been finalized and same has yet to be released to the public.

In addition, Case Conference Adjudicators have referenced to our members LAT processes and procedures that are not publicly available. For example, policies related to the booking of hearings which include:

- Restrictions on the days for hearings outside of Toronto. Some of our members have been told by Case Conference Adjudicators that the LAT does not book out-of-town hearings to start on a Monday.
- Restrictions on the total number of days that can be booked for hearing. Some members have been advised that the LAT limits the length of hearing to a set number of days. This number seems to fluctuate depending on the particular adjudicator and issues in dispute. Some members have been told the adjudicator cannot schedule more than 3 days for a hearing, while others have been allowed to schedule additional days.
- Restrictions on the mode of hearing. Most recently, some members have been advised that the LAT no longer does in-person hearings and that the only booking options are now video conference via Microsoft Teams, teleconference or written. It is unclear if this is a temporary COVID-19 restriction or if this is a permanent change.

None of these policies have been made public or shared with stakeholders. The lack of a clear direction on these issues creates confusion, frustration, and uncertainty for our members and their clients when preparing for case conferences and hearings.

Another example is the LAT's availability to conduct hearings. As of August 2020, a number of our members reported the earliest hearing dates available to be in August 2021, a full year after the case conference. Then, within the past week, at least one member has reported that the LAT has availability to book hearings on any day. This member was also advised that the LAT has certain "black-out" dates for which hearings cannot be booked. The LAT's availability to book hearings and their black-out dates are not publicly available. While OTLA is pleased to see that the LAT may

now have greater availability, the change without notice and the potential of there being "black-out" dates makes it difficult for parties to prepare for case conferences and schedule hearings. More transparency is needed.

Rule 3.2 of the *Rules* allows the LAT to issue public practice directions:

> *PRACTICE DIRECTIONS The Tribunal may issue public Practice Directions or similar types of documents to provide further information about the Tribunal's practices or procedures*

To date, no practice directions or similar types of documents have been issued regarding any procedural processes or policies. Without transparency, accountability is not possible. Without accountability, there is no justice. Not only must justice be done; it must be seen to be done.

OTLA strongly recommends the LAT be transparent with stakeholders to ensure expectations and requirements are clear and to give stakeholders confidence in the LAT's decision making processes. More specifically, OTLA recommends the following:

OTLA Recommendation 7: Publish All Policies & Procedures

OTLA recommends that the LAT make all internal policies and procedures that affect any matter before it publicly available in accordance with Rule 3.2 of the *Rules*. This includes publishing any internal review policies and procedures, as well as any policies regarding the scheduling or conduct of hearings.

OTLA Recommendation 8: Maintain a Public Calendar of Available Hearing Dates

OTLA recommends that the LAT maintain a public calendar of available hearing dates. This calendar should include all "black-out" dates, as well as all dates that are available for bookings. This would enable parties to better prepare for case conferences and ensure expert availability when booking hearings. Many mediators maintain similar calendars, which has proven to streamline and simplify the booking process. Further, the Superior Court of Justice routinely advises stakeholders of dates on which Judges are not available to similarly streamline the booking process.

OTLA Recommendation 9: Hold Quarterly Stakeholder Consultation Meetings

OTLA welcomes the directive to re-engage with stakeholders and looks forward to the upcoming meeting.

As noted in SLASTO's own Public Consultation Policy,

> "Consultation can play an important role in the mandate of SLASTO to protect the public interest, particularly when considering changes to rules or policies. For the purpose of this Policy, consultation is defined as a genuine exchange of information and points of view concerning policies or rules of practice of the constituent tribunals, between the tribunals and stakeholders, prior to a policy or rule being adopted or amended."[13]

[13] SLASTO Public Consultation Policy

Stakeholder consultations are vital to ensure the smooth operation of the dispute resolution system. To date, the LAT has unfortunately not been forthcoming with information or willing to consult with stakeholders, including public organizations that represent accident victims such as FAIR. These public organizations bring to the table the experiences of accident victims and self-represented litigants, whose experiences given the consumer protection purpose of SABs legislation should be of the utmost importance.

While OTLA appreciates that the previous freeze on stakeholder meetings has been lifted (at least for the time-being), OTLA strongly recommends that stakeholder meetings, which should include all interested stakeholders, be held at least quarterly. These meetings should include updated statistics as to the LAT's operations and the resolution of disputes, as well as open discussion amongst all stakeholders and the LAT as to how operations could be improved or modified.

F. No Deterrence for Bad Actors

Our members are also concerned by the lack of deterrence for bad actors.

The FOI data demonstrates that certain insurance companies are involved in a disproportionate number of LAT disputes. For example, in 2018-2019, Aviva averaged more than 600 LAT Applications per quarter. Despite Aviva having only approximately 8.9% of the market-share, it was involved in 17 to 23% of the LAT applications filed.

In addition, certain insurance companies were involved in a disproportionate number of disputes that went to decision, thus taking up an inordinately high percentage of the time, money and resources spent on disputes. At the time of writing this submission, there were approximately 711 2020 LAT decisions posted on CanLii. Of this number, approximately 109 were non-automobile insurance cases, leaving approximately 602 remaining as automobile insurance decisions. With a basic "control F" search, Aviva shows up as a party in 258 of the remaining 602 decisions. That is a staggering 43% (and it does not include related companies like RBC).

There is also an issue with repeat disputes being brought before the LAT. Many insurers seem to lack respect for the LAT's decisions, both at first instance and upon reconsideration. One good example is the numerous disputes the LAT has been required to resolve regarding whether or not HST should be deducted from benefit limits.[14] One decision on this issue should have been sufficient. Instead and despite the LAT's clear direction, a number of insurers continued to thumb their nose at the LAT and deduct HST from accident victim's limits. Many even wrote to their insureds indicating it "intends to maintain its position that any applicable HST is inclusive of the benefit limit". Insurers know there are no longer any consequences if they take an unmeritorious position and are brought before the LAT. The consequences are all incurred by the under-resourced accident victim.

The reluctance of adjudicators to order special awards, like the reluctance to order costs, incentivizes insurers to deny legitimate claims and increases the number of disputes brought before the LAT. OTLA strongly recommends that the LAT level the playing field and deter abuse.

[14] JVDA v Aviva General Insurance, 2020 CanLII 40345 (ON LAT); A.B. v Aviva Insurance Canada, 2019 CanLII 130375 (ON LAT); and Applicant vs. Dominion of Canada General Insurance Company (Travelers), 2020 CanLII 12760 (ON LAT)

OTLA Recommendation 10: Increase the Availability of Special Awards

Special Awards should be used more frequently to deter insurer misconduct, especially in situations where certain insurers are repeat offenders or bad actors. The Honourable Mr. Justice Cunningham highlighted the need for specific deterrence in his 2013 review of the dispute resolution system wherein His Honour wrote:

> …there is a significant imbalance in terms of the resources and familiarity with the system between claimants and insurer. It has been pointed out to me that in the early days of no-fault insurance, when a benefit denial was disputed, benefits would continue to be paid in certain circumstances pending the resolution of the dispute. Those provisions were removed from the SABs long ago. If disincentives are needed, they should be directed at those who abuse the system rather than affecting the majority of claimants.[15]

A true deterrent would reduce the number of claims before the LAT and in turn reduce the burden on adjudicator time and delays in the system.

G. LAT Reconsiderations

Rule 18 of the *Rules* was amended last year to allow reconsiderations to be heard by any member of the tribunal, not just the Executive Chair. While OTLA understands it may not be efficient for the Executive Chair to hear all reconsiderations, OTLA has great concerns with the Adjudicator who made the decision under reconsideration being the one to hear the reconsideration.

OTLA Recommendation 11: Reconsiderations be heard by a New Adjudicator

OTLA recommends that Rule 18 be amended and/or a Practice Direction be created to ensure that all reconsiderations are heard by an adjudicator other than the adjudicator who made the original decision. This is necessary to ensure fairness and transparency. Allowing the initial adjudicator to hear his or her own reconsideration certainly creates a reasonable apprehension of bias and adds to the lack of confidence stakeholders have in the system. It is akin to having the original Judge also hear the appeal.

H. Procedural Challenges

The current filing and scheduling systems are unduly burdensome and add unnecessary red-tape. OTLA recommends that the following be implemented to reduce costs and ensure the system runs more efficiently:

OTLA Recommendation 12: Implement an Improved Document Filing System

A number of our members have experienced difficulties filing documents through the EATs system. It appears that EATs is not working well with limits on the size of documents that can be filed and other issues. At times the system can be unavailable for filing entirely, leading to late filing or missed limitation periods.

[15] Cunningham Report, p 19.

OTLA recommends that the LAT consider an improved filing system to simplify the filing process for the parties.

OTLA Recommendation 13: Utilize Centralized Filing System or alternatively, Streamline Documents to be filed

At present, all parties file their supporting documents at least three times; once with application/response, once with the case conference summary and then finally before the hearing. This is unduly burdensome. An improved filing system is necessary.

OTLA recommends the LAT utilize a central filing system so that the Adjudicators have access to the documents at the case conference and then later at the hearing. Alternatively, OTLA recommends that parties only file indices of their documents with their Application and Case Conference Form and then file a complete brief of documents at the time of hearing. This would significantly reduce the amount of documentation the LAT receives. It would also simplify the filing process for the parties and be much more cost effective and efficient. The parties can and should of course continue to exchange documents as between themselves throughout the proceeding.

OTLA Recommendation 14: Implement an Improved Scheduling System

At present all case conferences are unilaterally scheduled by the LAT. This typically results in adjournment requests given parties schedules and/or the status of the case (i.e. if reports are outstanding). Further, the LAT imposes restrictions on how far out a case conference or hearing may be adjourned, even when on consent. Our members report that matters may only be adjourned on consent for 60 days. This often creates the need for multiple adjournment requests or case conferences being held when the parties are not yet ready.

For example, a number of our members have had issues where they were required to file their client's Application to Dispute because of a pending limitation period, but the parties were unable to move forward because they were awaiting reports dealing with catastrophic determination. Because of the LAT's restrictions on adjournments, they were required to attend a case conference to request a further adjournment and/or set a date for hearing far off into the future in hopes that the reports will be received in time. The system would run more efficiently if the parties were allowed to schedule these matters based on the needs of the particular case.

OTLA recommends that the LAT implement a scheduling system similar to that which existed at FSCO whereby the parties may independently schedule and agree upon dates for case conference. OTLA further recommends that the LAT remove the 60 day time limit for adjournments when the adjournment request is made on consent. This would prevent the need for multiple adjournment requests, unnecessary case conferences, and reduce costs incurred by the parties.

OTLA Recommendation 15: Publish Practice Directions regarding Standard Productions

There are currently too many production disputes and motions. OTLA recommends that the LAT publish a practice direction per Rule 3.2 of the *Rules* that sets out the standard

productions that should be exchanged. This direction should be similar to that which was previously found in the Dispute Resolution Practice Code when FSCO handled SABs disputes. It should, amongst other items, include:

Insured to produce:

- clinical notes and records of all relevant medical and rehabilitation providers from one-year pre-accident to present.

Insurer to produce:

- complete log notes from the date of the accident to at least the date of the LAT Application (or such later date ordered by the Adjudicator);
- all OCF-21 and other invoices (including invoices for all IE assessments); and
- all clinical, notes and records and communications with the insurer's IE assessors and assessment company pertaining to the assessment.

The Direction should also indicate that the party requesting the records must pay the cost of the records plus any applicable HST.

If clear guidelines are made as to what should be produced and who should pay for the productions, there would be fewer disputes and motions. Further, adjudicators would no longer be burdened with many of these types of issues.

OTLA Recommendation 16: Publish Full Case Names

The LAT's current practice of publishing case names by initials only creates difficulties for stakeholders to track and conduct legal research. Such research is important for the parties to determine how to resolve their disputes, and particularly for the parties to understand their chances of success should their case proceed to hearing. OTLA recommends that the LAT publish full case names. OTLA understands the LAT is concerned with privacy but notes that full names are published by our courts, and were previously published by FSCO. The LAT is similarly entitled to publish such names.

I. Adjudicator Training

Another concern amongst our membership is the knowledge and experience adjudicators have with the SABs. While many adjudicators appear well-versed in the dispute resolution process, many do not appear to have a strong grasp of the SABs, how day-to-day claims are handled, and particularly the consumer protection nature of the SABs system.

OTLA Recommendation 17: Provide additional SABs training for Adjudicators

OTLA recommends that adjudicators be provided with additional and ongoing training regarding the SABs. It is imperative that adjudicators have a fulsome understanding of the law, how the system works and how it was intended to work in order for them to effectively adjudicate SABs disputes. This training could be provided by stakeholders and should be balanced with representation from all involved.

J. Conclusion

Change is needed. The LAT's administration of the dispute resolution system is not operating in the way it was intended by the Ontario government. The system is not meetings its primary goals of being fair, efficient and transparent.

OTLA's recommended solutions will not only address the systemic delays and the overwhelming backlog within the system, but will also even the playing field for both Applicants and Respondents alike by deterring unmeritorious claims and encouraging early resolution to avoid increased costs to all.

OTLA looks forward to further discussing our members concerns and OTLA's proposed solutions at the upcoming stakeholder consultation meeting on September 24, 2020. OTLA would also welcome the opportunity to further discuss these submissions should there be questions or further clarification be required. By working together, we can improve on the current system and ensure it operates in a much more cost-effective, timely and transparent way.