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FOLA'S RESPONSE TO THE MINISTRY OF FINANCE CONSULTATION PAPERS ON CATASTROPHIC IMPAIRMENT LIMITS AND CARE, NOT CASH DEFAULT

Submitted to: Ministry of Finance, Financial Institutions Policy Branch
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Thank you for providing this opportunity to FOLA to provide comment regarding the Ministry of Finance consultation papers on catastrophic impairment limits and care, not cash default.

The Federation of Ontario Law Associations (FOLA), is an organization that represents the associations and members of the 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, we represent approximately 12,000 lawyers, most of who are in private practice in firms across the province. These lawyers are on the front lines of the justice system and see its triumphs and shortcomings every day.

This Report serves as FOLA's suggestions and comments regarding the proposed changes to Auto Insurance.



INTRODUCTION

In response to the Ministry of Finance Consultation Papers on Catastrophic Limits and the Care, Not Cash Default proposal, FOLA has convened a committee of four of its executive members: Mike Winward (Chair), Jaye Hooper (Past Chair), Bill Woodward (First Vice-Chair) and Kristin Muszynski (East Region Chair). Mr. Winward and Ms. Hooper practice in the area of plaintiff personal injury. Mr. Woodward and Ms. Muszynski practice insurance defence. In combination, these committee members have over 98 years' experience in their respective areas of practice. We believe that this committee has the combination of experience, expertise and balance to make meaningful observations and submissions on both consultation papers.

GENERAL OBSERVATIONS

We understand that the government's Putting Drivers First blueprint for auto insurance sets five specific goals to auto insurance reform:

1. Putting drivers first,
2. Putting money back in people's pockets by lowering costs,
3. Increasing consumer choice,
4. Making the auto insurance market more competitive and,
5. Providing faster access to treatment and care.

While FOLA supports the five goals in the government's blueprint, we fail to see how increasing catastrophic limits to \$2M or putting forward a Care, Not Cash default system will address any of those goals. If anything, these two proposals are inconsistent with the government's goals, particularly to put money back in people's pockets by lowering costs.

Since 1990, successive governments in Ontario have tried to come up with an auto insurance system that resulted in fair insurance coverage for consumers while simultaneously reducing insurance premiums. All have failed. The Liberal government of Mr. Peterson implemented the Ontario Motorist Protection Plan (OMPP) in June, 1990. The OMPP significantly restricted third party claims while also enhancing first party entitlements.

In 1994, the NDP government of Mr. Rae enacted Bill 164, further restricting third party claims but greatly expanding first party rights.

In 1996, the Conservative government of Mr. Harris, while his successor Mr. Eves was Finance Minister, enacted Bill 59, which expanded third party rights but scaled



back first party claims and, for the first time, introduced the concept of catastrophic impairment in accident benefit claims.

The Liberal governments of Mr. McGuinty and Ms. Wynne consistently chipped away third party rights and first party benefits. Some of the changes include:

- Reduction in the prejudgment interest rate on general damages.
- Reduction in the interest rates on disputes under the Statutory Accident Benefits Schedule.
- Indexing the deductible on general damages.
- Increasing the monetary threshold at which no deductible on general damages will apply.
- Narrowing the definition for catastrophic impairment.
- Reducing catastrophic coverage to \$1M.
- Putting first party disputes to the Licence Appeal Tribunal and virtually eliminating the entitlement for costs.

Notwithstanding all of these changes over the past 30 years, with perhaps the exception of British Columbia, Ontario has had the highest auto insurance premiums in the country. FOLA appreciates that auto insurance premiums are a difficult issue in provincial politics. FOLA is mindful of the experience in New Brunswick, when Premier Lord went from a majority of 44/55 seats in the Legislature in 1999 to a bare majority in 2003, mostly due to rising car insurance premiums. Rising auto insurance premiums can pose a major headache for a government. That is no doubt why, over the past 30 years, successive governments in Ontario have tried to find the solution between balancing fair insurance protection for the public while controlling insurance costs and premiums.

With respect, FOLA would argue that if the two consultation papers relative to catastrophic insurance limits and Care, Not Cash default are an indication of this government’s approach to car insurance, this government will have no more success in reducing insurance costs and premiums than did its predecessors. Quite bluntly, if all of the changes previous governments have implemented have not controlled insurance premiums, we do not understand how this government could think its blueprint is going to be any more successful.

Like the governments of Mr. McGuinty and Ms. Wynne, this government is proposing to tinker with the existing auto insurance regime in Ontario. This type of tinkering will not meet any of the five goals in the Putting Driver’s First blueprint. In our experience, if the government wants to, as both consultation papers state, “fix the



broken auto insurance system”, the government must start from scratch and not simply make minor adjustments to the existing system.

By “starting from scratch”, we mean that the government must first determine what values it wants in place for the people of Ontario in constructing an automobile insurance regime. For example, does the government want a generous system of first party benefits, regardless of who is at fault for the accident, or does it want a more fault based system of insurance coverage? Does the government prefer a system of totally optional first party benefits and if so, how is it going to protect and educate the consumer to ensure that informed insurance coverages are chosen? How is the government going to protect those vulnerable road users, such as pedestrians and cyclists, who do not have car insurance?

Once the government defines the type of insurance system it wants for the people of Ontario, the government can then build its insurance model and, in doing so, determine the costs associated with that model.

If the government is not prepared to effectively start from these first principles, it is going to follow the same road as previous governments and the same outcome will occur; specifically, auto insurance premiums will remain higher in Ontario than in the rest of the country and this government will join its predecessors in failure.

Relative to the \$2M catastrophic default limit, increasing insurance limits obviously is not going to lower insurance costs, nor will increasing catastrophic insurance limits lead to faster access to treatment and care.

Relative to the Care, Not Cash default proposal, this is an idea that came out of the Marshall Report, commissioned by the previous Liberal government. When the Marshall Report came out, FOLA delivered a submission. To us, the Care, Not Cash model had no merit when it was first proposed and it has no merit now. We do not understand the problem that is sought to be addressed by the Care, Not Cash default proposal. That proposal will not address any of the five goals behind the government’s auto insurance blueprint. It will not lower costs, does not increase consumer choice, does not make auto insurance more competitive and does not result in faster access to care or treatment.

In considering the Care, Not Cash default proposal, it is important to keep in mind that, currently, an insured person cannot settle an accident benefit claim before the first anniversary of the accident. That being the law, we question how the Care, Not Cash default proposal could result in faster access to treatment and care. An insured person in Ontario receives fast access to treatment and care under the current



system. How prohibiting settlement with an insurance company could result in even faster access to care and treatment is lost on us.

Both consultation papers seek answers to specific questions. With respect, in our opinion, the Ministry is not asking the correct question of the stakeholders. In our view, the first question that should be asked is: "Do you believe this proposal will result in the achievement of any of the five goals in the Putting Drivers First blueprint?" If that question were asked relative to the current two proposals, FOLA's answer would be a definitive "no".

We will address some of the specific questions that were posed in the respective consultation papers.

PUTTING DRIVERS FIRST: CARE, NOT CASH DEFAULT

Question 1: What do you believe are the main reasons injured persons and insurers engage in cash settlements for auto insurance claims?

The Care, Not Cash proposal applies to two types of first party claims: claims under the Minor Injury Guideline (MIG), which have a medical/rehabilitation limit of \$3,500.00 and non-catastrophic claims with a total limit of \$65,000.00. In our experience, these claims typically settle when there is a dispute between the insurer and the insured. Most commonly, the dispute concerns the denial of a Treatment Plan(s). Under the current system, the claim, including the claim for medical/rehabilitation benefits, cannot be settled with a cash payout within the first year of the accident.

When there is a dispute over a Treatment Plan(s), under the current system, the insured person has three choices:

- They can take the dispute to the Licence Appeal Tribunal (LAT). The primary problem with the LAT is that the insured person has to bear his/her costs incurred, even if successful in the dispute. The costs of the LAT process often exceed the amount in dispute. Therefore, the insured person is faced with a serious access to justice issue, as he/she does not have the financial means to take the dispute to the LAT.
- The insured person can effectively give up and not fight the denial of the Treatment Plan(s). They can then either fund the treatment out of their own pocket and hope to recover the costs in the tort claim or they



can go without the treatment. The problems with this option are obvious: the insured may not be able to afford the treatment or the insured may have been at fault for the accident and therefore not have a tort claim.

- The insured person can try to negotiate a settlement of the claim with his/her insurance company, so as to get some money, be in control of the cost of their own treatment and not have to worry about their insurance company sending them to doctors or denying further Treatment Plans.

From the insurer perspective, it may well be advantageous to settle the accident benefit claim, as it saves costs in keeping the file open, which costs may include an attendance at the LAT or paying for further insurance examinations.

From the perspective of the insured person and the insurer, cash settlements are reached because it is the most sensible and practical way to resolve a dispute. A cash settlement is a compromise and compromise is the very essence of any settlement, whether it be a car insurance dispute or any other civil dispute.

Eliminating the ability to have a cash settlement without re-instating cost recovery of the LAT, could have the unintended result of less treatment for individuals. An insurer, faced with a questionable treatment plan, could deny that plan and force the insured to either give up or attend the LAT at the insured's own expense to attempt to recover benefits for which that individual has paid a premium to receive.

Question 3: What could be done to facilitate earlier resolution of disputes regarding the delivery of care (including benefit entitlement, treatment decisions and assessments/insurer examinations)?

If the government is interested in putting drivers first and expediting access to treatment and care, it could consider a monetary threshold before which an insurer can deny a Treatment Plan. For example, just like prohibiting a settlement of an accident benefit claim before the first anniversary of the accident, the government could consider a regulation prohibiting an insurer from rejecting a Treatment Plan before the first, \$1,500.00, \$2,000.00 or \$2,500.00 in treatment has been exhausted. Whatever the monetary amount



the government chooses, the insured person will be guaranteed an immediate minimal monetary coverage for treatment.

Question 6: In implementing Care, Not Cash, what are the concerns, challenges, and mitigation considerations that must be contemplated?

FOLA is against the Care, Not Cash proposal. One of the big concerns relates to access to justice for an insured person. As referenced, if a Treatment Plan(s) is denied, currently, the insured has three options. If the settlement option is taken off the table, the insured person is down to two options: apply to the LAT or walk away from the dispute. As referenced, the problem with a LAT application is that the insured person will have to bear the costs of the dispute, which could exceed the amount that is in dispute. This puts the insured person at a huge disadvantage. If the government is going to consider a Care, Not Cash default, the government should change the LAT system to provide for costs incurred by an insured person.

A further consideration would be to increase the current one year prohibition against settlement to two years. However, doing so would raise another concern, specifically, where an insurer denies a Treatment Plan well prior to the two year post-accident period, it effectively postpones the insured's settlement option for an overly lengthy period of time.

Question 7: What terms, conditions, limits or other factors should the Government consider in designing a cash settlement optional benefit?

FOLA finds the whole notion of an insured person having to pay a premium for the right to settle a dispute with their insurance company to be completely without merit. An insurance policy is a contract between an insurer and insured person. As with any contract, if one party alleges a breach, they should have a civil remedy and that remedy includes the right to settle the dispute. The concept of having to pay a premium for the right to settle a contractual dispute is unprecedented. Further, the suggestion that an insured person would have the option to pay for the right to settle a dispute is inconsistent with the government's goals of putting drivers first and putting money back in people's pockets. Under no circumstances should anyone have to pay for the right to settle a contractual dispute.



Question 9: What other opportunities exist to ensure consumer awareness/education?

Consumer awareness, education and protection are a significant problem. Consumers are typically driven by the price of insurance, not by the coverage. Consumer choice has already been limited to a very small handful of primary insurance companies. Under the current system, consumers can purchase optional benefits, but the data is overwhelming that optional benefits are rarely purchased because the consumer is not made aware that those benefits are available.

Whatever system of insurance this government is going to implement, to the extent that options are made available, consumer protection and awareness is going to be a very significant hurdle to overcome. To properly educate the public and to ensure that informed insurance decisions are made, the government must be prepared to work with the insurance industry to develop an extensive public awareness campaign through all aspects of media. The government must also ensure that the insurance industry, including independent brokers, meet a reasonable standard to ensure that their policy holders are making informed choices in deciding on their insurance needs and coverages.

PUTTING DRIVERS FIRST: \$2M Catastrophic Impairment Default Benefit Limit

FOLA is not opposed to a \$2M catastrophic default. Given the current definition of catastrophic impairment, these individuals have suffered extreme injury and \$2M in medical, rehabilitation and attendant care benefits is easily supportable. While increasing the catastrophic limits to \$2M will not address any of the government's five goals in its Putting Drivers First blueprint, it will provide more appropriate coverage for the most seriously injured in Ontario. For that reason alone, FOLA can support the increase in the catastrophic coverage.

That said, FOLA will address some of the questions posed to all stakeholders.

Question 4: What potential benefits or implementation challenges should the Government consider regarding the proposed approach?



Our concern relates to the proposal that consumers be permitted to reduce their catastrophic coverage to a minimum of \$1M. This is not to say that every person in Ontario should have \$2M in catastrophic coverage. An 85-year-old driver may not require \$2M in catastrophic coverage. Our concern relates to consumer education and awareness and whether a consumer, in doing everything possible to get the lowest insurance premium, will make an uninformed choice and will try to save a relative few dollars to opt out of the \$2M default limit. This again raises the challenge of devising the system with optional benefits that at the same time properly educates and informs the consumer.

Question 7: Should MVACF claims be subject to the \$2M default benefit limit?

Unreservedly, FOLA states that the \$2M default limit must apply to MVACF claims. To do otherwise would leave a vulnerable segment of the Ontario population under protected. If an innocent pedestrian or cyclist is catastrophically injured by an unidentified or uninsured motorist, under the current legislation, the maximum third party coverage available to the injured party is only \$200,000.00. If the catastrophic benefits for that injured party are left at \$1M, they are left in an extremely vulnerable and underinsured position. If the \$2M catastrophic limit is going to apply to anyone, it should definitely apply to claimants under the MVACF.

FOLA very much appreciates the government's openness in consulting with stakeholders in this ongoing challenge with automobile insurance. We would be more than happy to engage in further discussions on any of the matters raised in this submission.