

OTLA Submission to Financial Services Regulatory Authority (FSRA)

Proposed FY2021-2022 Statement of Priorities

November 3, 2020

The Ontario Trial Lawyers Association (OTLA) is pleased to provide input to the Financial Services Regulatory Authority of Ontario (FSRA) regarding its proposed FY2021-2022 Statement of Priorities and corresponding budget.

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.

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.

Introduction

OTLA welcomes the opportunity to submit comment on FSRA's priorities and budget. As OTLA stated in its 2020 Pre-Budget submission to the Ontario government, available [here](#), Ontario's auto insurance system is fundamentally broken. It is out of balance and no longer meets the needs or expectations of Ontario's drivers and accident victims. We reiterate here that the basic principles and goals underlying an effective automobile insurance system must include transparency, simplicity and certainty for the consumer.

At the outset, OTLA notes that we agree with the need to balance ongoing consumer expectation for increased choice and value for money with protection of the public interest. OTLA applauds the recent establishment of a Consumer Office in support of the FSRA Consumer Advisory Panel. As lawyers who represent the end-user consumers of insurance products, particularly automobile insurance products, our core interest in providing this submission is in the protection of the public interest. We agree with the following statement contained in FSRA's proposed Statement of Priorities:

“Consumer protection leads to public confidence and trust in well-functioning financial services markets. That promotes financial stability, growth, efficiency and innovation.”

OTLA's submissions will focus on sections 5 and 7 of the proposed Statement of Priorities.

Section 5: Property and Casualty (Auto) Priorities

5.1 Empower and Protect P&C and Auto Insurance Consumers

FSRA states that it aims to enhance consumer choice, promote innovation and foster a more competitive and stable auto insurance marketplace. OTLA agrees with all of the deliverables proposed to achieve these goals, but particularly endorses the goals of ensuring reasonable auto insurance rates, enhanced accountability for insurers in rating and underwriting compliance, and the improvement of consumer awareness by enhancing transparency, quality and comprehensibility.

Consumer choice must be accompanied by clear, straightforward education. Automobile insurance in Ontario is a compulsory product. It is also an expensive product. For many consumers, at the time

they are purchasing or renewing their automobile insurance, their primary concern is the cost of the premium. They assume they are protected and that they will be covered in the case of an accident. This is particularly so given that auto insurance is compulsory, as mandated by legislation. Citizens trust the government to ensure that the insurance offers adequate protection and coverage. When an accident happens, many are surprised to find out that is not the case.

Ontario already has consumer choice in automobile insurance, in the sense that all drivers must have a base, standard policy and then there are optional benefits beyond the base policy. Consumers are often not told about the optional benefits available to them or, if they are told, the explanation is long and complicated and pricing is not provided. Long, written explanations included in standard packages to consumers are often ignored by the consumer. The consumer assumes that they would have been provided all necessary advice during any conversation they had with a representative of the insurer. Consumers are not told about the risks of not purchasing additional coverages.

Consumers cannot make an educated choice unless they are provided with all the necessary information, including pricing, in a clear and simple manner. This is true for both the liability policy they purchase, and the optional accident benefits coverages.

If even more consumer choice is to be offered, two critical things must happen:

1. Consumers must be provided with clear, easy-to-understand information about optional coverages and that information should include pricing. Currently, when consumers are informed about optional benefits, they are often provided with long, detailed letters about those additional coverages, with no pricing and no examples of the types of risks they may be facing in the event of an accident. Both oral and written advice which draws the consumer's attention to the risks involved in failing to purchase options, should be required for every sale of auto insurance. Any advice provided by an insurer or an agent, either oral or written, should be easy to understand and consumer friendly. FSRA already has on its website what is supposed to be a summary description for consumers on optional accident benefits coverage.¹ OTLA recommends that FSRA prepare a simple to understand consumer friendly brochure on optional accident benefits and increased third party liability coverage which insurers would be required to provide to all consumers at time of purchase or renewal of their insurance policy. In this manner, there can be confidence that all consumers in Ontario are receiving proper advice on the coverages available to them regardless of who their insurer or agent is.

In September 2019, Desjardins Insurance wrote a response to a request for comment on the \$2 Million Catastrophic Impairment Default Benefit Limit consultation, which can be found [here](#) for ease of reference. We disagree with the position taken by Desjardins Insurance under question #11 that it is not appropriate for a licensed agent to recommend a specific coverage to a client. That is, in fact, exactly their role and consumers rely on agents to make recommendations to them.

¹ See http://www.fscs.gov.on.ca/en/auto/brochures/Pages/brochure_autoins.aspx#a6

In *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, the Supreme Court of Canada reviewed agent and broker obligations in the context of auto insurance under both a public system and a private insurance system. Regarding private insurers' agents and brokers, the Supreme Court of Canada has stated unequivocally that a duty to advise and recommend exists:

In my view, it is entirely appropriate to hold private insurance agents and brokers to a stringent duty to provide both information and advice to their customers. They are, after all, licensed professionals who specialize in helping clients with risk assessment and in tailoring insurance policies to fit the particular needs of their customers. Their service is highly personalized, concentrating on the specific circumstances of each client. Subtle differences in the forms of coverage available are frequently difficult for the average person to understand. Agents and brokers are trained to understand these differences and to provide individualized insurance advice. It is both reasonable and appropriate to impose upon them a duty not only to convey information but also to provide counsel and advice.

Although Wilson J., went on to conclude that a public broker or agent's obligations were not as stringent as the obligations of a private agent, he noted that at minimum the obligation was as follows:

*What then is the scope of MPIC's duty? Is it, as the appellant submits, as onerous as that imposed on private agents and brokers? I think not. I think it is a duty to inform customers of the available range of coverage. Given that automobile accidents often produce tragic consequences that may be irreversible and virtually incapable of compensation in monetary terms, customers must have all the information they need in order to make an informed choice about the level of coverage appropriate for them. Where an additional optional form of coverage such as UMC is offered precisely because it is foreseeable to the insurer that there may be instances where the standard coverage is inadequate, it is right and proper that the insurer be under a duty to make the existence of such optional coverage known to the customer. Selling insurance is not, as the respondent suggests, like selling groceries, and the law should not treat them alike. The purchase of insurance is predicated on decisions made about assessing and bearing risks. **Members of the public need to have all relevant information available to them in an explicit and readily comprehensible manner if they are to make intelligent decisions about how much risk they are prepared to bear.** The public insurer has the responsibility of seeing to it that that information is provided to them in a reasonably intelligible fashion [emphasis added].*

2. It is vital, in the protection of the public interest, that the base or standard policy be sufficient to provide adequate protection and coverage to all Ontario drivers as well as potential non-driving victims, including pedestrians and cyclists. The experience of our lawyers, who deal with Ontarians who have been injured in car accidents, is that optional benefits have not been purchased in the majority of cases.

At page 2 of the above-noted Desjardins' submission, in response to question #1, Desjardins notes that only 2.5% of all insured drivers select the optional \$2 million catastrophic

impairment coverage even though the average cost to the consumer is only \$50 per year (as noted in response to question #2).

Enhanced consumer choice must factor in that, many individuals, even with improved education, will choose the lower premium over enhanced coverage. Many of these consumers may be amongst the most vulnerable citizens – those least likely to be able to afford increased premiums for increased coverage and protection will also be the ones least likely to be able to withstand the financial consequences of a car accident.

For example, an individual earning \$35,000 per year (the equivalent of approximately \$18 per hour), would be earning slightly more than minimum wage but would still likely be struggling to make ends meet with a net income of approximately \$2,400 per month. That person is unlikely to purchase optional benefits because of the increased premium cost. If that person is involved in a car accident, he/she will then be limited to \$400 per week in income replacement benefits (the current maximum under the base policy), now earning just over \$1,700 per month. The reduction in income of \$700 per month is significant to this individual who, in all likelihood, has no additional disability benefits through work.

An individual earning \$50,000 per year, bringing home a net pay of approximately \$3,250 per month, would see a drop in income of approximately \$1,500 per month, if optional benefits have not been purchased.

Gaps in coverage create additional burdens on publicly funded health care systems and other social safety net systems, transferring the responsibility from the insurance company to the taxpayer.

Insufficient base policy coverage also has the potential to disproportionately impact children. It is our membership's experience that most adults purchasing insurance have no knowledge of how the policy will impact their children if injured. They assume the base policy will be sufficient to protect their children when in fact, it often is not. Children have longer life expectancies and, when seriously injured, require treatment and attendant care for a much longer period of time (which results in more significant costs over their lifetime), than their adult counterparts. Without optional benefits, many seriously injured children will exhaust the base coverage and either be left without needed treatment and care and/or be left to rely on our limited publicly funded services.

When Ontarians purchase auto insurance their choices impact their children both for liability coverage, OPCF 44R coverage and accident benefits. Clear advice needs to be provided to adults with children on how refusing optional benefits or choosing minimal liability limits will impact their children if they are injured.

It is imperative that the base policy be sufficient to offer protection to all Ontarians, and especially those who are most vulnerable to financial consequences in the case of a car accident.

5.2 Support and Implement Government's Auto Insurance Priorities

OTLA supports the government's priorities of deterring fraud and abuse, improving regulatory effectiveness, enabling electronic communication, removing barriers to innovation, and enhancing consumer choice. However, transparency, as in all things, is key. OTLA supports the detection, deterrence and elimination of fraud in automobile insurance; however, it is entirely unclear how much fraud actually exists in the system since insurers have not made this information publicly available. Up-to-date data on fraud should be made public on an ongoing basis, with a clear definition of fraud being utilized by insurers in their reporting.

Insurers cite fraud as the primary reason for increases in premiums. It is a convenient argument to make but is not currently backed by clear, up-to-date information on the true extent of fraud in the system. Transparency is vital on this issue.

Consumers should be provided with explanations of how FSRA and the insurance industry is detecting fraud, tracking fraud, and preventing fraud. The consumer expects that with current technology and the use of various tools to track all insurance transactions, fraudulent transactions can be tracked and prevented. The consumer should be made aware of what steps are being taken to eradicate fraud and be provided with an explanation as to why fraud has yet to be eradicated in the system, if there is evidence that it still exists.

5.3 Implement Auto Insurance Data and Analytics Strategy

OTLA agrees that there is a need to leverage collected data to support rate and underwriting regulation and auto insurance reform. Again, transparency is key.

Consumers should be able to easily obtain data related to auto insurance rate approvals and, with this information, compare rate increases throughout the year and from previous years. The new reporting structure, through the Auto Insurance Consumer Hub, altered the way auto insurance rate approvals are reported. Previously, through the Financial Services Commission of Ontario (FSCO), auto insurance rate approvals were released quarterly allowing for interested stakeholders to track the approvals. While attempting to be more transparent and consumer-friendly, in fact, the change in reporting structure makes it impossible for consumers to compare rates.

Consumers should be provided with clear data regarding insurer profits and profit increases. Transparency regarding how insurance rates are approved is essential since insurance coverage is mandatory. The factors being considered, including profitability, and the data submitted by insurers should be made public and available to all consumers. The consumer should be provided with information so that he or she can clearly understand why premiums may increase generally.

On an individual basis, currently premium increases occur with no explanation required to the consumer to justify the increased rate. A clear explanation should be required to justify the individual increase in rate from year to year for any consumer. These should not be generic

explanations but rather detailed explanations as to why that particular consumer's premium has increased.

Section 7: Life and Health Insurance

7.1 *Enhance Market Conduct Oversight to Protect Consumers*

OTLA applauds FSRA's initiatives to understand and oversee how insurers, agents and managing general agents (MGAs) interact with the public. We support the development of a Code of Conduct in the furtherance of Fair Treatment of Customers (FTC) principles, as well as the development of a supervisory framework as a priority. OTLA agrees that consumer protection and the consequent maintenance of public trust are enhanced with the development of a Code of Conduct and the establishment of a supervisory plan and team.

Conclusion

OTLA supports many of FSRA's proposed initiatives, including their initiative to empower and protect property and casualty and auto insurance consumers.

The protection of the public interest must be front and centre in any movement to include greater choice in the auto insurance regime. Given that most consumers tend not to purchase optional coverages and tend not to fully comprehend the current product and available options, it is imperative that the base or standard policy provide adequate coverage for all Ontarians. It is further imperative that consumers be provided with clear, easy to understand information about any available optional coverages and their associated costs. Finally, it is imperative that the system be transparent. Insurers who continue to allege fraud should be put to the task of proving it exists. Insurers who desire rate increases should similarly be put to the task of proving there is in fact a need for such increases by providing detailed financial data to the public. Consumers can only be empowered if they are provided with detailed explanations, costing and information regarding the product they are mandated by law to purchase.

OTLA appreciates the opportunity to provide feedback with respect to FSRA's proposed Statement of Principles and Budget and looks forward to continuing to work together to protect and empower consumers in the public interest. OTLA would be pleased to discuss these submissions if there be any questions, or if OTLA can be of any further assistance.