

# **OTLA Submission to Financial Services Regulatory Authority (FSRA)**

## *Proposed FY2024-2025 Statement of Priorities*

November 13, 2023

The Ontario Trial Lawyers Association (OTLA) is pleased to provide input to the Financial Services Regulatory Authority of Ontario (FSRA) regarding its proposed FY2024-2025 Statement of Priorities.

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 comment on FSRA's proposed priorities. As OTLA stated in its 2023 Pre-Budget submission to the Ontario government<sup>1</sup>, 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. The basic principles and goals underlying an effective automobile insurance system must include transparency, simplicity and certainty for the consumer. OTLA strongly recommends that FSRA focus its efforts on consumer education and on transparency on insurer profits and insurance rates. This is the only way to adequately protect consumers.

At the outset, OTLA notes that it agrees with FSRA's core strategic priorities of advancing the consumer interest, enabling innovation, modernizing systems and processes. The 2023-2024 priority of "enhancing FSRA's talent management framework and strategy" is not included in the 2024-2025 Proposed Statement of Priorities. While the pillar to "attract talent and evolve our culture to achieve the mission and vision of the organization" remains one of the four pillars within the Strategic Framework and includes a subpoint on promoting a culture of accountability, it is not included as one of the nine strategic priorities. OTLA also notes that the 2024-2025 four pillars within the Strategic Framework are not listed in any particular order and as such, the protection of the public interest is no longer listed as a Pillar #1. However, OTLA does acknowledge that the advancement of the consumer interest is listed as the #1 cross sectorial priority and OTLA applauds this move.

OTLA's submissions will first focus on FSRA's mandate to contribute to public confidence by promoting transparency and disclosure of information. Secondly, while OTLA supports many of FSRA's proposed initiatives, the proposed 2023-2024 Statement of Priorities fails to address current, important matters that are threatening public interest and confidence in the automobile insurance sector. Most significantly, the proposed Statement of Priorities fails to address the current risk of adjudicator bias at the License Appeal Tribunal (LAT). Potential adjudicator bias at the LAT is a significant emerging risk that requires immediate action by FSRA. Identifying this risk directly relates to FSRA's goal of promoting a culture of accountability. OTLA submits that the Licence Appeal Tribunal ("LAT") should provide a predictable and reliable forum for disputes that consumers can rely on to achieve fair and consistent adjudication regarding their entitlement to auto insurance benefits. Lastly, OTLA's submissions will focus on complaints the organization has

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<sup>1</sup> OTLA, 2023 Pre-Budget Submission, <https://www.otla.com/docDownload/2210016>

received from its members in relation to the failure of insurers to pay the full Attendant Care amounts listed on Form 1, contrary to FSRA's Bulletin No. A-03-18 which expressly mandates that the Attendant Care benefit is payable pursuant to the Form 1 totals, not based on an hourly rate on the Form 1 or minimum wage. OTLA's submissions on this issue include tangible steps to be taken by FSRA in a meaningful effort to address misinterpretation and the current lack of enforcement and disciplinary sanctions.

## **Environmental Scan**

### ***Transparency and LAT Data***

OTLA agrees with FSRA's Strategic Priorities pertaining to automobile Insurance, specifically the objective of reforming the supervisory framework and enhancing transparency to increase consumer confidence and fair treatment of the consumer. OTLA also supports FSRA's goal of creating consumer awareness and its support of informed decision-making to hold regulated entities more accountable. These objectives are consistent with the pillars of FSRA's Strategic Framework, namely, to protect the public interest and enhance trust and confidence in the sectors it regulates. OTLA's recommendations are predicated on an evidence-based approach with a focus on transparency and consumer education.

The regulator should be informed by data and implement reforms accordingly, in line with its mandate. OTLA submits that the Licence Appeal Tribunal ("LAT") should provide a predictable and reliable forum for disputes that consumers can rely upon to achieve fair and consistent access to auto insurance benefits. The LAT's objectives should mirror that of the regulator / stakeholders and place an emphasis on consumer fairness and the protection of the consumer's right to benefits.

FSRA's mandate includes contributing to public confidence, promoting transparency and the disclosure of information. We submit that this must begin with an analysis of the data provided directly by the LAT pertaining to their decisions as this provides insight into the experience of the insurance consumer when they bring their disputes to the LAT. It also provides objective data that is accessible to the public and can help to inform consumer expectations.

Data obtained through In-Health, an independent third-party that reviews Accident Benefit decisions, provides insight into the decisions of the LAT and their adjudicators for the period from January 2017 to July 31, 2023. The data reveals concerning trends that are disheartening for the auto insurance consumer and the protection and / or fairness they might expect to be provided at the Tribunal. For example, a glance at the Overall Decision Outcome of the LAT reveals:

...trending decision success rates from 2017 based on 372 decisions, show the injured party was fully successful 33% of the time whereas the insurers were fully successful 56% of the time with a further 11% resulting in a split decision.

For the current year, through to July 31, 2023, based on 615 decisions, the injured parties were only fully successful 11 % of the time whereas the insurers were successful 68% of the time with a further 22 % resulting in a split decision.

There was also an overall increase in the number of disputes that were escalated to the LAT each year. The volume of decisions is attributed, at least partially, to one insurer representing 40.6% of

the total decisions (lifetime) with over half of the lifetime disputes being attributed to just two insurers.

This data reveals concerning emergent trends that appear to be inconsistent with FSRA's Strategic Priorities as well as the pillars of OTLA's Strategic Framework. Reform to the regulatory system should be evidence-based and with consumer fairness, transparency, accountability, and public confidence as primary considerations.

## **Strategic priorities: Advance the consumer interest**

### ***Adjudicator Bias at the License Appeal Tribunal***

While OTLA supports many of FSRA's proposed initiatives, the proposed 2023-2024 Statement of Priorities fails to address current, important matters that are threatening public interest and confidence in the automobile insurance sector.

Most significantly, the proposed Statement of Priorities fails to address the current risk of adjudicator bias at the LAT.

The stated focus of FSRA's Statement of Priorities is to "protect the public interest, foster competition, innovation and effectively address emerging risks in Ontario's financial services sector." Specifically, FSRA aims to "contribute to public confidence" and to "deter deceptive or fraudulent conduct, practises and activities" by the regulated sectors.

Potential adjudicator bias at the LAT is a significant emerging risk that requires immediate action by FSRA.

It has recently been revealed that an insurance company – namely, Aviva – hired an individual, who was an active adjudicator at the LAT at the time of hire, and who continued to hear cases and render LAT decisions for 5 months after she had accepted employment with Aviva. There are at least 3 other adjudicators that OTLA is aware of who were hired by insurance companies. OTLA has requested details of their applications and acceptances of employment and confirmation as to whether they continued to hear cases and render decisions after confirmation of employment, but the LAT has thus far failed to provide this information. All of this has given rise to serious questions about conflicts of interest and impartiality at the LAT. It also raises serious questions with respect to the LAT's process for hiring adjudicators and ensuring adjudicators' qualifications and impartiality on an ongoing basis, including at the end of the employment relationship. OTLA has called on the LAT to institute a mandatory "cooling off period" for all LAT adjudicators, which would help to alleviate some of the concerns about bias, but there has been no response to this request from the LAT.

In addition to communicating with the LAT regarding the bias issue, OTLA has filed a formal complaint against Aviva with FSRA, which remains ongoing.

Maintaining public confidence in the adjudication of insurance disputes is fundamental. Allowing insurers to engage in deceptive practices has a chilling effect and will continue to erode public trust in the regulated sectors. It is at direct odds with FSRA's stated objectives to deter deceptive conduct and protect public interest. Even the appearance of bias should be concerning to FSRA.

OTLA encourages FSRA to make this issue a top priority by including it as a “notable trend” that FSRA is monitoring in the “Emerging Issues and Trends” section. OTLA has drafted the following as a recommended addition:

**Potential Bias in Insurance Dispute Adjudication** – It has come to light that there may be weaknesses in the adjudication processes available for insurance claim disputes, specifically with the Licence Appeal Tribunal (LAT). Of particular note, weaknesses in the hiring and termination practices for adjudicators at the LAT have been identified. FSRA will continue to investigate this matter to ensure that insured persons have access to a fair and impartial dispute resolution process.

Additionally, OTLA encourages FSRA to address this issue under Section 4.2 “Support reforms of the Auto Insurance system”. A potential outcome that could be added is as follows:

- iii. Improved dispute resolution process to better serve consumers.

A potential key activity to achieve this outcome under Section 4.2 could include:

- c. Developing and implementing initiatives to reduce bias and abuse in the dispute resolution process, including the development of better practises and procedures at the Licence Appeal Tribunal.

Finally, OTLA encourages FSRA to address this issue under Section 4.3 “Ensure the fair treatment of customers of Property and Casualty Insurance”. A potential outcome to be included is as follows:

- ii. Fair treatment of customers in the P&C sector through access to a fair and impartial dispute resolution process.

The currently drafted key activity under Section 4.3 should be amended as follows:

- a. Building on FSRA’s current supervision activities to develop and implement a market conduct framework for P&C insurance to address priority areas for supervision, including insurance distribution, claims management *and dispute resolution*.

### ***Insurers’ conduct regarding Attendant Care***

OTLA has received complaints from its members regarding the failure of some insurers to pay the full attendant care Form 1 amounts to insureds, contrary to FSRA’s Bulletins. Insurers have been doing this in several ways:

- Limiting payment to the Form 1 rates rather than the total of the Form 1;
- Failing to pay attendant care provider’s accounts even when based on the Form 1 totals; and
- Insisting that attendant care providers detail each task per the Form 1 document and refusing to pay for anything further other than the exact minutes on the Form 1 at the Form 1 rates.

Some insurers are indebting their insureds to attendant care providers, causing significant financial hardship and clearly acting outside of their duty of good faith to their insureds. Insurers are approving Form 1’s and then only after services are provided do they suggest that they will not be

paying anything greater than rates in the Form 1 for the task performed per the Form 1. This leaves insureds indebted to attendant care providers for services received, when the expectation had been that the insurer would be paying the attendant care cost per the Form 1 approved total monthly amount.

Insurers are also interpreting the SABS to suggest that they can limit payment of attendant care to the Form 1 hourly rates, which are below minimum wage, and pay only for the exact number of minutes for each task listed on the Form 1. Care providers such as PSWs are not paid per task but rather on an hourly rate. There is no requirement under the SABS for PSWs or treatment providers to detail tasks performed per the Form 1 for payment. Insurers are well aware that insureds cannot find attendant care providers willing to work below minimum wage, at minimum wage, or for anything less than market rates. Attendant care provider companies cannot pay their PSW's on this basis, at or below minimum wage, or per task on the Form 1 at the Form 1 hourly rates. Insurers who engage in this conduct are essentially eliminating the attendant care benefit by refusing to pay.

The failure to pay the Form 1 total is leaving insureds without access to appropriate care. As an example, we refer you to a recent CBC article involving two seriously injured claimants in Windsor, Ontario who have been left without appropriate care.<sup>2</sup> Attendant care has been approved, indicating that these are individuals with significant injuries that require immediate assistance with activities of daily living and in some cases basic care impacting safety and hygiene.

The conduct of insurers needs to be addressed by FSRA and steps need to be taken in order to eliminate these inappropriate practices. OTLA calls on FSRA to address the ongoing misinterpretation of s. 19(2) of the Statutory Accident Benefit Schedule (SABS) by certain auto insurers. Specifically, where insurers incorrectly limit amounts payable for attendant care to the hourly rates prescribed on the Form 1, contrary to FSRA's Bulletin No. A-03-18.

The Bulletin expressly mandates that the attendant care benefit is payable pursuant to the Form 1 **totals**, not based on an hourly rate on the Form 1 or minimum wage. It is the total on the Form 1 document that is payable monthly by the insurer for accidents that occurred after April 14, 2018. The language in the Bulletin is mandatory ("**shall**").

The License Appeal Tribunal confirmed the effect of the Bulletin in its decision in *S.K. vs. Aviva Insurance Canada*, 2019 ONLAT 19-001127/AABS where it states:

Effective for accidents after April 14, 2018, the Bulletin clarifies that the maximum hourly rates are used to calculate the monthly benefit, and not strictly apply the maximum hourly rates as the maximum payable for attendant care services.

Nevertheless, and contrary to both the Bulletin and the finding of the LAT, the non-compliant insurers persist in their refusal to pay more than the hourly rates set out on the Form 1. They have done so without consequence.

Although FSRA has publicly stated to the media that these insurers are "incorrectly interpreting" the SABS, OTLA is not aware of any enforcement measure undertaken by FSRA. To date, individual

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<sup>2</sup> CBC Windsor, *Windsor lawyer pushing to get insurance companies to boost caregiver pay*, <https://www.cbc.ca/news/canada/windsor/windsor-insurance-lawsuits-1.6945175>

claimants have been left to fight this issue on their own. OTLA calls on FSRA to address this systemic problem on an urgent basis.

OTLA is concerned that unrepresented claimants needing attendant care are unaware that their insurer may be misinterpreting their entitlement to attendant care and underfunding the benefit. Unrepresented claimants may be unaware of FSRA's role, the right to file a complaint, or the LAT decisions that may assist them in obtaining proper funding of their benefit. FSRA should not wait for individual complaints to address this concern.

OTLA is equally concerned that claimants who are represented are obligated to dispute these insurers' incorrect interpretation of their attendant care obligations on a case-by-case basis before the LAT, adding volume and cost to an already-strained tribunal system.

To resolve this concern, OTLA proposes the following:

- That FSRA re-issue its Bulletin No. A-03-18 to include a preamble that explicitly addresses and denounces the ongoing problem of misinterpretation;
- That the wording of the Form 1 itself be updated to reflect the correct use to which the hourly rates may be put, and which incorporates the method of calculation prescribed in the Bulletin;
- That non-compliant insurers be subject to enforcement and disciplinary sanctions, including those prescribed by the UDAP; and
- That FSRA address this concern with any insurer engaging in this practice to eliminate the attendant care benefit without the need for an individual complaint.

## **Section 4: Property and Casualty (Auto) Properties**

### ***4.1 Execute strategy for reforming the regulation of auto insurance rates and underwriting***

FSRA's mandate includes contributing to public confidence and promoting transparency and disclosure of information. OTLA is of the view that public confidence has been eroded due to shrinking coverage, drastically reduced benefits and excessive premium increases.

The realized profit provision for Ontario auto insurers in 2020 has been reported to be 27% (return on premiums) and 2021 is reported at 23%.<sup>3</sup> This is more than five times the target of 5%, and as noted in our submission regarding FSRA's Statement of Priorities for 2022-23<sup>4</sup>, profits continue to be significantly higher than the regulated amount. OTLA strongly urges FSRA to take action as the regulator to require insurers to reduce their rates and return these excessive profits to consumers by way of significant reductions in premiums, bringing insurer profits back in line with the target of 5%. Consumers should not be paying increased rates while insurers collect profits that far exceed the target.

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<sup>3</sup> Oliver Wyman, *Draft Ontario Private Passenger Vehicles Annual Review – Based on Industry Data Through December 31, 2021 (July 6, 2021) [Oliver Wyman Review]* at page 18 - <https://www.fsrao.ca/media/11591/download>

<sup>4</sup> OTLA, *Submission to FSRA regarding the proposed FY2022-23 Statement of Priorities*, <http://www.otla.com/docDownload/2054143>

There is a need to enhance the ability of consumers to make informed decisions. The consumer must be confident that FSRA is indeed operating within a principles-based approach to regulation and supervision of the insurance industry. 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, 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.

On an individual basis, premium increases occur with no explanation required to justify to the consumer the increased rate. A clear and detailed explanation should be required to justify the increase in rate from year to year for individual consumers.

#### ***4.2 Support reforms of the Auto Insurance system***

OTLA supports the detection, deterrence and elimination of fraud in automobile insurance. However, as noted in OTLA's July 2021 submission to the Ministry of Finance (MOF) and FSRA on the Proposed Fraud and Abuse Strategy for the Auto Insurance Sector<sup>5</sup>, as stated by the MOF in its Consultation Paper, "'insurance fraud and abuse' is neither defined in legislation nor regulation, nor is there an accurate quantification of the size and scope of fraud and abuse". While the development and implementation of initiatives to reduce fraud and abuse is a laudable goal, it is entirely unclear how fraud is being defined and how much fraud actually exists in the system. Insurers have failed to make 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 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 are detecting, tracking 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.

OTLA agrees with the proposal to improve the system to allow for efficiency of billing and data practices to enhance consumer outcomes and the proposal to consult with all stakeholders to improve consumer outcomes.

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<sup>5</sup> OTLA, *Submission to the Ministry of Finance and Financial Service Regulatory Authority of Ontario regarding the proposed fraud and Abuse Strategy for the Auto Insurance Sector*, <https://www.otla.com/docDownload/1844501>



### ***4.3 Ensure the fair treatment of customers of Property and Casualty Insurance***

OTLA applauds FSRA's initiatives to ensure the fair treatment of P&C/auto consumers. It supports this goal through efficient and effective regulation that protects the rights and interests of consumers.

The legislation of auto insurance in Ontario should have as its primary focus, consumer protection. Throughout this submission, OTLA has taken a consumer protection focus and it encourage FSRA to do so as well in all aspects of regulation of the insurance industry.

### ***4.4 Promote resilience, stability, and public confidence in the Ontario incorporated insurance companies and reciprocals sector***

OTLA is encouraged by FSRA's multi-year initiative to transform its supervisory approach and, in particular, applauds the planned outcome of "a strong, stable, and resilient sector in which policyholders and consumers are protected and have confidence in the sector."

As noted above, OTLA strongly recommends that FSRA work to ensure that insurance companies are transparent with regard to profits, insurance rates and fraud. Without this transparency, FSRA is working in a void and cannot achieve its goal of consumer protection.

## **Conclusion**

OTLA supports many of FSRA's proposed initiatives, particularly those that recognize consumer vulnerability and enhance consumer focus and consumer protection. The protection of the public interest must be front and centre in all initiatives undertaken with respect to compulsory automobile insurance. In order to accomplish the stated goal of protection of the public interest, it is imperative that there be transparency with regard to insurer profits and rates.

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