

September 16, 2019

The Honourable Rod Phillips, MPP
Minister of Finance
Financial Institutions Policy Branch
95 Grosvenor Street
Frost Building (North), 4th Floor
Toronto, ON M7A 1Z1

Via Email: autoinsurance@ontario.ca

Dear Minister Phillips,

Re: Response to “Putting Drivers First: Care, Not Cash” Consultation Paper

I am writing to you on behalf of the Toronto Lawyers Association (“TLA”).

The TLA has had an opportunity to review and consider the Ontario Ministry of Finance’s “Putting Drivers First: Care, Not Cash” Consultation Paper and provides the Ministry with the following feedback.

The Consultation Paper in question suggests that the Care, Not Cash Default system aims to “put drivers first and put money back in people’s pockets by lowering costs, increasing consumer choice and making the auto insurance market more competitive”. It is unclear whether the legislative changes as laid out in the Consultation Paper will successfully achieve those results.

Expected Outcomes

Encouraging Faster Treatment and Care

The Consultation Paper’s suggestion that a Care, Not Cash Default system will result in faster care for consumers may not prove to be accurate. Under the current auto insurance regime, individuals injured in auto accidents are able to seek medical treatment and retain legal representation immediately following a collision. Medical and legal representatives are also in a position to advocate for consumers’ need for treatment during the life of their accident benefits claims should their medical needs change. Accordingly, consumers are already in a position to receive required medical treatment in a timely fashion with the assistance of their medical and/or legal advisors. Under the Care, Not Cash Default system, disputes may arise between consumers and their insurers regarding initial and/or ongoing medical care. These disputes may include disagreements over claimants’ medical diagnoses and appropriate forms of treatment. In the

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event of a dispute between a consumer and their insurer, there may be a delay in treatment while the consumer pursues a claim with the License Appeal Tribunal. Such a delay would not achieve the Ontario government's stated goal of facilitating faster care for consumers following an auto collision.

Discouraging Fraud and Abuse of Accident Benefits

It is questionable whether the implementation of a Care, Not Cash Default system is an appropriate method by which insurers should combat fraud. Although fraud does exist in the accident benefits regime and although it is a serious problem, the elimination of cash settlements in the accident benefits system (in cases not falling within any of the stated exceptions) may only be successful in deterring a small percentage of fraudsters at the expense of the vast majority of legitimate claimants. Other methods of preventing fraud in the accident benefits system should be explored before implementing sweeping reforms such as the Care, Not Cash Default in addition to the robust systems that insurers already have in place. Such fraud prevention measures could include greater oversight of health care and attendant care providers in the accident benefits system and greater vigilance on the part of legal representatives.

Reducing Overall Accident Benefits Claim Costs

The proposed Care, Not Cash Default system would result in all accident benefits claims remaining "open" for either five years or until the applicable accident benefits coverage limits are paid out on a given claim, whichever occurs first. Open claims will require insurers to monitor and respond to claims on an ongoing basis, which represents ongoing adjusting costs to be borne by insurers (and ultimately funded by consumers through higher insurance premiums). Claims which remain open for lengthy periods of time also present an opportunity for more disputes between consumers and their insurers and could encourage spurious late claims by insureds. In addition, running the cost of all care through the insurer rather than permitting the insured to manage their own payments will drive up the insurers' administrative costs. Accordingly, it is questionable whether the Care, Not Cash Default model would actually result in a reduction in accident benefits claim costs.

Greater Clarity Required Regarding Exceptions to the Care, Not Cash Default Model

The proposed Care, Not Cash Default system contemplates that consumers may enter into cash settlements with their insurers where "extenuating circumstances apply that require an exception". One such example provided in the Consultation Paper is when a consumer moves out of the country. In order to avoid increased litigation over the definition of "extenuating circumstances", these exceptions to the Care, Not Cash Default model must be clearer. The government also proposes to allow cash settlements for consumers who have suffered a catastrophic impairment as a result of an auto collision. Many accident benefits claims are currently settled on the basis that an injured party may have suffered a catastrophic impairment yet the consumer and insurer do not wish to proceed with lengthy litigation in order to receive formal adjudication on that point. In such situations, the insurer agrees to settle a claim for a sum of money somewhere between the benefits limits for non-catastrophically injured claimants

and the benefits limits for those claimants who have been deemed catastrophically impaired. If, under the Care, Not Cash Default system, a catastrophic impairment designation is required in order to enter into a cash settlement, this will result in increased litigation and further strain on the Licence Appeal Tribunal (“LAT”) and it will further complicate the access to justice issue created by the limitations on cash settlements.

Important Adverse Consequences of a Care, Not Cash Default System

The proposed Care, Not Cash Default model poses a serious access to justice issue for Ontarians. The current accident benefits regime permits consumers and their legal representatives to enter into contingency fee agreements, allowing consumers to pay for legal services using funds received in their cash settlements. The current system provides consumers with access to legal representation where they cannot otherwise afford same. The elimination of cash settlements in the vast majority of accident benefits claims would effectively remove the incentive of legal representatives to represent victims of auto collisions where such victims cannot afford to pay for legal services out of pocket. A serious access to justice issue would then result, with claimants either attempting to represent themselves, opting not to pursue claims due to an inability to navigate the system or receiving fewer benefits than they are entitled to receive.

The risk that Ontarians may effectively abandon legitimate claims for treatment would represent a serious failure in the administration of justice in Ontario. Should Ontarians opt to represent themselves in the course of their accident benefits claims, there is a serious risk that the LAT will become overwhelmed with self-represented claimants. The increase in self-represented claimants at the LAT would undoubtedly reduce its efficiency and increase the overall costs of adjudicating accident benefits claims, not only for the LAT but also for insurers. Such increased costs could then result in increased premiums for Ontario drivers.

There is a significant risk of bias in an accident benefits system whereby injured claimants are required to receive treatment from health care providers of their insurers’ choice. Consumers must be confident that they are receiving legitimate medical diagnoses and appropriate treatment from their own health care providers following an auto accident. Where insurers effectively control claimants’ choice of health care providers following an accident, there is a risk that such health care providers may provide recommendations that are more in line with insurers’ interests as opposed to claimants’ needs. This risk is not illusory and has been regularly borne out of litigation of claims in the past.

If the Care, Not Cash Default system is unsuccessful in adequately meeting injured claimants’ health care needs, there is a risk that Ontario’s health care system will face increased pressure from injured claimants seeking medical care. One such example is where injured claimants attend at emergency departments of their local hospitals for care when experiencing acute symptoms such as severe headaches or back pain. Claimants receiving adequate care will use appropriate resources to address their immediate medical needs as opposed to relying on ER doctors’ assistance. As indicated above, the Care, Not Cash Default system presents serious access to justice concerns. Injured claimants whose needs are not adequately addressed via their

accident benefits claims will represent an increased burden on Ontario's public health system as well as our social welfare programs.

Risk of Consumers Selecting Coverage Based Solely on Cheaper Premium

The successful implementation of the proposed Care, Not Cash Default system would require significant transparent communication by insurers and insurance brokers to ensure that consumers understand their options when purchasing auto insurance in Ontario. The proposed legislative changes would allow consumers to purchase the option to enter into cash settlements with their insurers. Many consumers believe that auto insurance premiums are already too high. Accordingly, there is a risk that consumers will opt for lower premiums by foregoing the option of purchasing the cash settlement option. For the reasons outlined above, however, the inability to enter into cash settlements following an auto accident presents various practical and access to justice issues. If consumers are to make a meaningful choice as to whether they would like to purchase the option of entering into a cash settlement with their insurer, consumers must fully understand the benefits and drawbacks of doing so. More importantly, it is unseemly and appears to be a form of the government assisting insurers in profiting from their insureds to require an insured to *pay* for the "privilege" of receiving the very benefits to which they are entitled under the policy in the form of cash equivalent for the services for which they are entitled to receive.

Thank you for considering these comments. Our Advocacy Committee would be pleased to discuss these comments with your team at your convenience, should you find additional consultation beneficial.

Yours very truly,



Margaret L. Waddell
President
Toronto Lawyers Association