TORONTO LAWYERS ASSOCIATION

March 26, 2014

The Honourable Charles Sousa
Minister of Finance
7th Floor, Frost Building South
7 Queen's Park Crescent
Toronto, ON M7A 1Y7

Dear Minister Sousa:

Re: Bill 171 – Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014 ("Bill 171")

The Toronto Lawyers Association ("**TLA**") is comprised of over 3,000 lawyers practicing in Toronto. It represents its members to the Ontario bench and bar, to all levels of government and to the public at large. On behalf of the TLA, we write to you regarding Bill 171, which was introduced into the House of Commons on March 4, 2014 and which underwent a Second Reading on March 17, 2014.

Bill 171's stated focus is to fight fraud in automobile insurance claims and to reduce the backlog of claims awaiting an assigned arbitrator –thereby reducing automobile insurance rates.

While the TLA generally agrees that an overhaul of the current automobile insurance system is warranted to reduce auto insurance premiums for Ontarians, the TLA does not believe Bill 171 will achieve that objective. Indeed, the passing of Bill 171 may, in fact, increase litigation costs for both injured persons and insurance companies alike, causing an *increase* in auto insurance premiums for Ontarians. The TLA is also concerned that Bill 171 interferes with basic democratic rights.

The TLA arrives at these conclusions on the basis of subsection 280(3) of Bill 171, which provides:

> **Limit on Court Proceedings**
> [280] (3) No person may bring a proceeding in any court with respect to a dispute described in subsection (1), other than an appeal from a decision of the License Appeal Tribunal or an application for Judicial Review.

By removing the right to bring an action in court regarding a statutory accident benefits dispute under the *Statutory Accident Benefits Schedule* ("**SABS**"), Bill 171 purports to streamline the process by which these claims are adjudicated. However, there was significant concern over this provision during the Second Reading of Bill 171 expressed by members of legislature. The TLA echoes the following concerns raised by elected members, regarding subsection 280(3):

1. removing the right to sue in court strips away a fundamental democratic benefit – access to the courts – from Ontarians injured in automobile accidents;

2. forcing claimants and insurers to adjudicate matters in two separate proceedings will increase rather than decrease costs.

In addition, the TLA independently raises the following concerns:

3. the bifurcated process created by Bill 171 will create unnecessary procedural issues causing additional further barriers to justice; and

4. removing the Court's jurisdiction to consider these disputes offends the *Constitution Act, 1867*, in such a way that Bill 171 is not within the purview of the Ontario Legislature.

Compounding the TLA's concerns is the speed with which Bill 171 has moved through the legislative process. Mr. Norm Miller, speaking during the Second Reading of Bill 171 on March 17, addressed that point when he stated:

> I should also point out that this Bill is something that we have yet to caucus. That is a normal process for us, to look in detail at a Bill and look at all the nooks and crannies and decide if it's something that we can support. That has yet to happen.

These are legitimate concerns for stakeholders across Ontario. The removal of the right to sue alone should be approached with caution, not haste. The full impact of Bill 171 should be reviewed in detail before Bill 171 is even considered for enactment.

The specific concerns of the TLA as they relate to subsection 280(3) are discussed in further detail below.

1. Bill 171 takes away Ontarians basic, democratic right to sue in court

In his report *Ontario Automobile Insurance Dispute Resolution System Review Final Report* (the "**Cunningham Report**") dated February, 2014, Justice Cunningham anticipated resistance to his recommendation that the right to sue in Court for SABS benefits be removed. This issue is addressed on page 13 of the Cunningham Report where Justice Cunningham states that: "Proponents suggest that [the option of taking a dispute to court or the DRS arbitration system] is a fundamental democratic right. However, there are many administrative tribunals where no such option exists."

Prior to Bill 171, injured persons currently have access to: (i) the courts, (ii) the *Financial Services Commission of Ontario* ("**FSCO**") arbitration process, and a private arbitration process. While this system is not without its problems, it is a more fair, democratic system than the one proposed by Bill 171. It should not be overhauled, even with the goals of a more flexible, transparent and efficient system, if the trade-off is to deny natural justice, fairness and democracy.

The TLA suggests that the framework of the current system was designed to provide Ontarians access to either the FSCO arbitration or the court. By denying litigants the right to sue in an Ontario court, unforeseen consequences may result that cannot be fully appreciated at this time.

The TLA does not advocate for massive reform of an unpredictable system without adequate time, planning, and review of any proposed changes.

2. Bill 171 would impose significant, additional litigation costs on injured persons and insurers alike, which could ultimately burden Ontarian drivers

Bill 171 will create a two-pronged system, whereby the *License Appeal Tribunal* (the "**Tribunal**") would hear the SABS claim while the courts hear the private law tort or contract claims. While the current system allows a potential plaintiff to do just that – bifurcate the claim by bringing the SABS claim before the FSCO, and to bring the private law claim before the courts – the decision to do so is predicated on an understanding of the risks, costs, and potential rewards of adopting such a strategy. Mandating that the SABS claim be brought before the Tribunal removes individual choice. It also results in two separate adjudicating bodies hearing two different claims arising from the same events.

Injured parties would be faced with the costs of not one but two separate claims for recovery, on two different fronts. For some injured parties these increased costs would all but constructively bar these would-be plaintiffs from advancing their claims. The alternative to dropping one or both of the claims due to financial considerations would be self-representation against insurance companies. The financial impositions created by Bill 171's removal of the right to advance the entirety of these claims in the Ontario Court presents a significant barrier to justice.

3. Bill 171's mandatory, bifurcated system will cause significant procedural problems

Bill 171's bar to raising a lawsuit in Court will exacerbate the problem currently faced by insurers of having to simultaneously defend claims brought in separate forums, notwithstanding the increased associated costs. Different procedural rules in the Tribunal could result in the production of different evidence, lead to different issues, and ultimately lead to different determinations from those held in the "companion" court proceedings. One could imagine a scenario where an arbitrator's ruling in the SABS portion is ignored or found inadmissible in the private law proceeding because of differences in the evidence available before the arbitrator. These inconsistencies should be avoided at all costs. Yet subsection 280(3) of Bill 171 builds these possibilities directly into the new proposed system.

4. Bill 171 offends section 96 of Constitution Act 1867 by supplanting jurisdiction of the court with the Tribunal

Notably, the fundamental principle underlying arbitration is that it is based on contract and what is known as "party autonomy" – that is, the parties have freely chosen arbitration over litigation. A statutorily imposed arbitration is not arbitration. Rather, the proposed process would effectively replace a section 96 court with a decision maker that is not invested with the same duties and obligations as a section 96 judge.

In this way, it could be argued that what the Legislature plans to do under Bill 171 may not pass jud icial scrutiny in accordance with the test in *Re Residential Tenancies Act, 1979,* [1981] 1 SCR 44, and more recently in *MacMillan Bloedel Ltd. v. Simpson,* [1995] 3 SCR 725. In the latter decision, a majority of the Supreme Court of Canada held that the essential nature and powers of the superior courts are constitutionally protected by section 96 of *Constitution Act*, 1867, stating at para 15 that the "core or

inherent jurisdiction which is integral to their operations…cannot be removed from the superior courts by either level of government, without amending the Constitution."

The first step in any such analysis is to identify the jurisdiction being taken from the courts. If this legislation was challenged, and that step identified the jurisdiction as being the right of Ontarians to sue in contract or tort, it is unlikely to be upheld on a Constitutional challenge.

Summary of TLA's position

To summarize, the TLA is concerned that Bill 171, if passed, would:

1. **Deny Ontarians their basic democratic right to justice and safeguards** provided by the right to sue in Ontario courts;

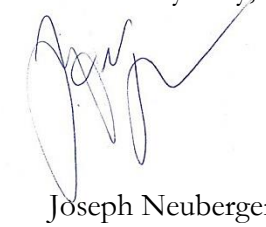
2. **Impose significant costs** upon injured persons and insurers alike;

3. **Create a bifurcated process** resulting in procedural and substantive challenges, and ultimately creating barriers to justice; and

4. **Arguably, offend the Constitution Act, 1867** by taking a core jurisdiction from s. 96 courts and granting it to the Tribunal.

The TLA would be pleased to answer any questions you have, and would welcome an opportunity to speak with you regarding the contents of this letter.

Yours very truly,



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