

OTLA Submission to the Financial Services Regulatory Authority of Ontario (FSRA)

Proposed Guidance: Automobile Insurance Rating and Underwriting Supervision Guidance

November 15, 2024

The Ontario Trial Lawyers Association (OTLA) is pleased to provide input to the Financial Services Regulatory Authority of Ontario (FSRA) regarding public consultation for automobile insurance rating and underwriting supervision. OTLA is focused on representing plaintiffs injured as a result of wrongdoings by others. As such, OTLA is focused on consumer stakeholders.

OTLA and FSRA's mandates align. FSRA's mandate is to protect the rights of consumers in Ontario by promoting high standards of business conduct and transparency within the financial services that it regulates.

As per our prior submissions, OTLA has always been focused on the importance of consumer protection. As noted almost 20 years ago by the Supreme Court of Canada in *Smith v. Cooperators*, consumer protection is "one of the main objectives of insurance law."

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

Keeping transparency at the forefront of all considerations and aspects of insurance ratings and underwriting supervision will help ensure that consumers are protected and insurers are held accountable when unfair or deceptive acts or practices (UDAP) are identified.

To properly protect consumers, the automobile insurance rating and underwriting supervision must include clear definitions of UDAP as well as a clear and straightforward enforcement mechanism, with clearly defined timelines and consequences.

The automobile insurance rating and underwriting supervision is extremely important for consumer protection. Consumers tend to be unsophisticated in matters of insurance and often, if not always, at the mercy of their insurers. For these reasons, OTLA continues to assert the need for revisions to include:

1. a clear enforcement system;
2. clear definitions with specific examples of unfair and deceptive acts and practices; and
3. data collection transparency.

CHAPTER 1: Fair Consumer Outcomes

Consumers deserve transparency. The protection of the consumer demands transparency. Without transparency, consumers are at risk of being taken advantage of by large institutional organizations.

Consumers are often confused and find insurance rates arbitrary, subjective and bearing no relationship to risk. Those injured in motor vehicle crashes are worried about whether their insurance premiums will be increased even if they are not at fault.

OTLA supports and agrees with the examples provided of 'prohibited outcomes' under UDAP at 1.3.1. By delineating examples of 'prohibited outcomes' in a non-exhaustive list allows the consumer to understand and appreciate the types of conduct that FSRA will hold insurers accountable for. Accountability will be key and while a list is instructive, it is imperative that FSRA set out a list of sanctions and governance measures to discourage insurers from engaging in the prohibited outcomes.

OTLA submits that further examples should be provided for insurers of conduct that does not align with Fair Consumer Outcomes. For example:

- Cost mitigation – insurers should prevent unnecessary and excessive costs from being passed onto consumers such as:
 - requiring independent medical examinations to determine if an examination or assessment is necessary
 - requiring in-person medical examinations where no physical exam is needed or conducted (such as a psychological assessment)
 - requiring insureds to provide s.25 medical reports to support applications for catastrophic impairment determination
 - requiring statutory declarations in cases where coverage is being denied

OTLA's full UDAP submission is available [here](#).

Given recent changes to the auto insurance policy and the SABS, set to come into force July 1, 2026, OTLA again raises concerns about transparency and education for the public. FSRA should be monitoring what education insurers provide regarding optional benefits and should set clear expectations of how the public is to be informed of the benefits being rejected. Clear advice from brokers and agents should be required specifically setting out the financial consequences of failing to purchase Income Replacement Benefits (IRBs).

OTLA submits that the failure to clearly advise of the financial consequences of not purchasing IRBs should fall under UDAP. Failing to advise of the cost of optional benefits and what benefits are available should also fall under UDAP. This would hopefully ensure that brokers and agents at least specifically draw the issue to the attention of consumers and provide them with information to help them try to make an informed decision. OTLA fears that options may not be discussed at all at the time of purchase and, even if it is, it will be too easy to choose not to opt-in. This would in turn leave Ontarians less protected in the event they are injured in a car collision. Insurers should be held accountable should they fail to provide sufficient or appropriate advice to the public regarding options. Clear consequences should be set out to deter insurers, agents and brokers from failing to provide appropriate advice.

Insurers, agents and brokers have not done a good job to date of educating consumers, with most consumers having little to no understanding of their auto insurance policy or the available options.

In fact, consumers are rarely told about the options and, if they are told, the explanation is long and complicated and pricing is not provided. These long, complicated explanations are often ignored by the consumer. OTLA's members see this in practice everyday. It is rare to meet an injured person or a member of their family who has purchased the optional benefits currently available. Most are surprised that there were additional optional benefits available to them.

This becomes even more apparent with the option for consumers to purchase auto insurance online, where little to no explanation will be provided or, if provided, it will be too complicated for many consumers to fully comprehend. OTLA is very concerned about consumer education.

A Clear Enforcement System is Needed

OTLA submits that FSRA should have an enforcement mechanism in place for conduct that results in a *Prohibited Outcome*. There is currently no recourse for consumers where an insurer has failed to act in good faith or for treating consumers in an arbitrary, capricious or malicious manner. The dispute resolution process at the License Appeal Tribunal (LAT) eliminated any claims for insurers acting in bad faith. It is imperative that FSRA create and implement a robust enforcement process.

You cannot have deterrence without a clear enforcement system. And, you cannot have consumer protection without deterrence for bad actors. It is like having a criminal law system without a *Criminal Code* or a system of penalties.

As we previously submitted, consumers must be provided with clear, easy-to-understand information about FSRA's enforcement of UDAP, including:

1. Clear and accessible enforcement process
 - When consumers wish to bring a complaint under UDAP, the enforcement process should be available, easy to find, and simple to access.
2. Certainty in response to complaint
 - If a consumer brings a complaint through the easily accessible enforcement process, they should be assured the certainty of a meaningful response from the regulator.
3. Clarity of process in investigation
 - In the response to the consumer complaint, the process of investigation and the documentation and information required, as well as the decision-making process, and timelines, should be clearly outlined to the complainant.
4. Clear and expected punitive measures
 - If undesirable conduct is identified, the consumer ought to be assured of the punitive measures available through the enforcement mechanism.

A clear enforcement mechanism will help deter undesirable conduct.

Without an effective enforcement mechanism that provides certainty of response including expected sanctions, the proposed changes would be ineffective in deterring undesirable conduct and consumer and customer confidence would be undermined.

CHAPTER 2: Automobile Insurance Rating and Underwriting Operations, Controls and Governance Guidance 'OCG'

Data transparency is paramount. A revised auto policy in Ontario must be based on complete data transparency and accountability from the auto insurance sector.

The government along with FSRA ought to undertake a thorough, transparent and independent review of auto insurer rating and financial data to hold insurers to account for rate increases, while respecting the need for reasonable profit. The government must be prepared to disclose **ALL** of this financial data to the public to allow for informed decisions. If insurer profits are part of the consideration for our auto insurance system, and they certainly have been for almost three decades now, why then should there be any question about what those profits are and how they are determined?

Notably, in 2020, on average, insurers far exceeded the 5% profit target set by FSRA, ultimately realizing a staggering 27% profit provision in 2021 and 23% in 2022. This is based on the information provided in the *Ontario Private Passenger Vehicles Annual Report - Based on Industry Data Through December 31, 2021*, available [here](#).

While insurer profits continued to soar throughout the pandemic, injured accident victims had to delay, or completely stop treatment for months, all while the time limit of five years for medical and rehabilitation benefits, which applies to a large number of claims, was continuing to run. A letter outlining this issue along with recommendations to address the concern was sent to the Minister of Finance. The letter is available [here](#).

This drastic increase in insurer profit has not been passed on to consumers by way of reduced premiums, and, in fact, premiums have been increasing.

According to FSRA, the average premium to the end of June 2020 had increased \$30 since December 2019. If each of the approximate 6.6 million drivers in Ontario experienced a \$30 increase in premiums, this would result in an increase of revenue for insurers of \$198,000,000.

Again in 2021 most insurers applied for and received rate increases through FSRA, and many policyholders saw their premiums increase at renewal yet again. Indeed, on average, auto insurance premiums have increased by almost 14% to \$1,642 between 2017 and 2021, double the rate of inflation. According to the latest GISA data available [here](#), when compared to 2023, the increase is closer to 22% as the averaged earned premium is \$1,742.

Automobile insurance is a compulsory financial services product. Consumers are required to purchase insurance to protect their families in the event of auto crashes and should be assured that the price they are made to pay for their insurance is both fair and reasonable. Insurers continue to realize staggering profits far in excess of the stated target of 5% set by FSRA, all to the detriment of the Ontario consumer.

CHAPTER 3: Accreditation, Proactive Supervision and Assessment Approach Guidance

OTLA suggests that FSRA institute proactive supervision for accredited insurers that includes evaluation of involvement in the LAT dispute resolution process and / or actions before the Ontario Superior Court of Justice. This information can be obtained by third parties such as inHEALTH. The full inHEALTH statistical analysis is available [here](#).

OTLA has called for an immediate review of the LAT, as set out in our press release [here](#). A recent statistical analysis from inHEALTH reveals several disturbing trends at the LAT, with the most serious being the alarming trend of how self-represented claimants fare when they bring a dispute over their injury claim. This report was commissioned after it was revealed that Aviva Insurance (Aviva) hired government adjudicator Thérèse Reilly while she was still employed with the Tribunal. Reilly accepted a position with Aviva in June 2022 but continued working at the LAT until November 2022. During this period, she rendered over ten decisions, all favoring insurance companies, including Aviva. Additional information and a timeline regarding this issue is available [here](#). There has been no sanction for this behaviour to date. In fact, the cost has been borne by the consumer who was offered a reconsideration of the decision and a brand-new hearing was ordered all at the consumer's expense.

The LAT has issued nearly 4,500 decisions regarding disputes between injured accident victims and their insurance companies. Despite the LAT's goal of empowering individuals to challenge their insurance companies, only 217 decisions have involved self-represented individuals. And, in those cases, LAT adjudicators have ruled in favor of insurance companies more than four times more often than they have for self-represented individuals. The idea of "self-representation" for claimants at the LAT has proven to be a hollow promise.

The insurance system is overly complex, and laypeople - especially those who are seriously injured - struggle to navigate their policies and advocate for the care and treatment they've already paid for through their premiums. These injured individuals are up against insurance companies that are well-represented by legal counsel and can pass their legal costs on to policyholders.

Insurers should not be supervised only by their self-declared 'areas of higher risk' or 'size and complexity'. The frequency with which they engage in disputes with their own insureds should be considered as well. A 'small insurer' that has instituted a discriminatory policy will not be reporting that to FSRA. That conduct may however be revealed if there are a large number of LAT disputes regarding that policy.

Insurers that refuse to comply with the *Insurance Act* are failing in their fiduciary duties to their own insureds. For example, if an insurer has consistently refused to pay medical benefits in accordance with FSRA guidance - this is a failure to act in good faith. That is a prohibited outcome according to this guidance.

CONCLUSION

OTLA appreciates the opportunity to make submissions to FSRA on its consultation posted regarding public consultation for automobile insurance rating and underwriting supervision.

OTLA has a unique perspective in that it sees firsthand the impact of the auto insurance system, including the application of the Statutory Accident Benefits Schedule, and how the shortfalls of this system impact Ontario citizens. OTLA encourages FSRA to create robust sanctions when prohibited outcomes are identified and to ensure transparency is provided for the consumer. Without sanctions and transparency, insurers will continue to reap the benefits and pass on the cost to the consumer through increased premiums.

OTLA is highly concerned that without robust sanctions and transparency for consumers these changes will do little to protect consumers.

OTLA would be pleased to discuss these submissions if questions arise, if clarification is required or if OTLA can be of any further assistance.