ARBITRATION
THE HEARING & POST-HEARING MATTERS

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Introduction

Where a dispute cannot be successfully settled by way of mediation, an insured person may apply to have the matters remaining in dispute adjudicated by an arbitrator or may litigate the dispute before the Superior Court.

Just as mediations at the Financial Services Commission of Ontario (FSCO) are governed by the *Dispute Resolution Practice Code*[1] (*DRPC*), so too is the arbitration process. The *DRPC* acts as the framework within which arbitrations at FSCO proceed. Its general rules and practice directions are then subject to interpretation by FSCO arbitrators and Appeals Officers. As such, the practice of arbitration before FSCO is constantly evolving.

Evidence & Witnesses

Rules of practice pertaining to the admissibility of evidence and the role of witnesses have long been established within our court system. The jurisprudence is rich and the exceptions plentiful.

At FSCO however, the rules of evidence are typically more relaxed, and many of those well-entrenched judicial principles are mirrored but not strictly applied. Where the *Rules of Civil Procedure*[2] provide a virtually complete code of practice for the courts, the *Dispute Resolution Practice Code*, which applies to arbitration, is not as comprehensive.[3] Because there is less structure at FSCO there is greater likelihood that arbitral discretion will be applied and result in a wide range of decisions. The case of *T.S. and Allstate*[4] is an example of an unusual exercise of arbitral discretion that warrants mention in the context of evidence and witnesses.

Expert Reports

Superior court practice relies upon the general principle that evidence and argument should be presented orally in open court. It generally follows that a party wishing to adduce evidence must produce a witness to present those facts through *viva voce* evidence at trial. The *Rules of Civil Procedure* explicitly address the process regarding the use of and reliance upon expert reports at trial. Rule 53.03 of the *Rules* states the following:

> 53.03 Experts' Reports
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> (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-

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[1] *Dispute Resolution Practice Code*, 4th edition – Updated September 2010 [*DRPC*].

[2] *Rules of Civil Procedure*, RRO 1990, Reg 194 [*Rules of Civil Procedure*].

[3] *Shaikh and Aviva,* (FSCO Motion, A09-000013, December 30, 2009) [*Shaikh*].

[4] *T.S. and Allstate,* (FSCO A07-001223, November 15, 2011) [*T.S.*].

> trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).[5]

This principle requires a party relying on the evidence of an expert to make that expert witness available for cross-examination.

This procedure is similar but notably less stringent at a FSCO arbitration as is contemplated under the *Dispute Resolution Practice Code* is Rule 42.1:

> 42. Expert Witnesses
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> 42.1 If a party intends to introduce a report by an expert, the full name and qualifications of the expert who prepared the report must accompany the report.
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> 42.2 If a party intends to call an expert witness to present evidence at a hearing, that party must serve and file a document setting out the following:
> (a) the full name, address and qualifications of the expert witness;
> (b) the subject matter of the testimony to be presented; and,
> (c) the substance of the facts and opinion which the witness will present.[6]

FSCO does not require a party relying on an expert report to call that expert as a witness (though, Rule 42.2 of the *DRPC* does address that scenario). The *DRPC* only mandates that the witness' contact information be available so that any other party may call that expert if they so choose. In practice, FSCO procedure encourages the filing of expert reports without demanding that the expert be made available for their evidence to be tested through cross-examination. It follows then that a party wishing to challenge a report that is introduced, must take it upon themselves to summons the expert as a witness. Thus, the onus of calling a witness is effectively reversed from Superior Court practice.

Documents to be Considered/Joint Brief of Documents

The *Dispute Resolution Practice Code* mirrors civil practice by allowing for the submission of a document brief, which serves a similar purpose to an Affidavit of Documents. There is an expectation that the parties will work collaboratively and efficiently to prepare a joint brief of documents to put before the arbitrator. Given that FSCO arbitrators tend to take a more relaxed approach to evidentiary submissions, problems can arise with regards to the propriety of documentary evidence included in a joint brief.

Inclusion of documents into evidence in the case of a joint brief became an issue in *T.S.* v. *Allstate,* which, as mentioned above, is noteworthy for being a unique exercise of arbitral discretion.

T.S. was an unrepresented claimant, and the hearing Arbitrator overtly made accommodations to

[5] *Rules of Civil Procedure*, *supra* note 2, Rule 53.03.
[6] *DRPC*, *supra* note 1, Rule 42.

the hearing process in that respect. He noted that, while every litigant has the right to proceed with arbitration without representation by counsel, it is difficult for them to put forward materials to support their case.[7] In *T.S.*, counsel for Allstate submitted a joint book of documents which included all of the documents produced in the life of the claim. It was not meant to be entered into evidence as a complete list of exhibits to be considered by the arbitrator, but instead, was intended to efficiently provide all potentially relevant documents in one spot for the hearing arbitrator to access. When the claimant was unable to put her best case forward, for lack of experience and expertise, the arbitrator chose to rely on documents not specifically referenced by the claimant to be entered into evidence simply because they were submitted in the joint brief by Allstate. Despite Allstate's objections, the arbitrator read documents into evidence where the self-represented claimant neglected to refer to them during her case or in her submissions before the Commission.

Just as discussed above with regards to the submission of expert reports without summonsing them for cross-examination, evidence, including expert reports, were admitted into evidence without explicit reference by the claimant. It may be safer for an insurer in a case such as this, not to elect to submit a joint brief, but to err on the side of caution and produce to the arbitrator only the documents to be relied upon in their submissions in a single document brief.

While it must be stressed that *T.S.* is a decision which departs from normal FSCO practice, *T.S.* illustrates the level of claimant accommodation that can occur within the arbitration process where an inexperienced litigant proceeds with a claim in the absence of counsel. It further demonstrates how in the absence of strict rules of evidence there is little predictability regarding evidentiary rulings that may be made during the course of a proceeding.

Propriety and Civility at the Hearing – "Assertive, aggressive and beyond aggressive"

While the *Dispute Resolution Practice Code* is silent with regards to propriety and civility specifically within the FSCO arbitration context, one need not look far to find guiding principles.

All counsel are bound as advocates, and within their relationship with the administration of justice, to abide by the *Rules of Professional Conduct*[8]. This applies to advocacy before all courts and tribunals, such as FSCO, and includes the Rules of Advocacy as set out in Rule 4,

> 4.01 The Lawyer as Advocate
>
> (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.
>
> (2) When acting as an advocate, a lawyer shall not
> …
> (k) needlessly abuse, hector, or harass a witness,[9]

[7] *T.S.*, *supra* note 4 at 6.
[8] Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2012) [*Rules of Professional Conduct*].
[9] *Rules of Professional Conduct*, Rule 4.01.

To act so otherwise would not be well received by the Commission. *Mr. C and Coachman,*[10] is a decision dealing with catastrophic impairment as a preliminary issue. Arbitrator Miller noted that the claimant underwent a very aggressive and inappropriate cross-examination wherein counsel for the insurer screamed questions at the claimant as an intimidation tactic. Arbitrator Miller noted that counsel glared at the claimant while "firing off questions at a very rapid pace" and additionally repeated questions unnecessarily and redundantly where they had already been answered. This approach clearly did not have the desired effect in undermining the claimant's credibility and indeed, the arbitrator accepted the claimant as a credible witness and found him to be catastrophically impaired. While there were no penalties against Coachman for counsel's assertive and aggressive behaviour, it is not always the case that such behaviour will go overlooked.

In some cases, the insurer's conduct during the arbitration process has been considered unreasonable enough to warrant a Special Award. In *Whitney and Co-operators*[11], the insurer had taken "an adversarial and confrontational approach" to the arbitration proceedings in failing to provide copies of reports and failing to ensure the recommendations were followed. Arbitrator Naylor was of the opinion that such actions could constitute a finding that the insurer had acted unreasonably within the purpose of the section 282(1) of the *Insurance Act*[12], though for other reasons, a Special Award was not ordered.

Special Awards

The Special Award is unique to the arbitration system and was established in the context of the adjudication of statutory accident benefits claims. It is meant to fill the gap where aggravated and punitive damages cannot form part of the relief sought as they do in the court system.[13] The law is clear, however, that they are not meant to be an analogous creation.[14] Where an arbitrator lacks inherent jurisdiction to grant extra-contractual damages, the *Insurance Act* grants them a similar statutory power by way of the Special Award.

The statutory basis for the Special Award is found in the *Insurance Act* section 282(10),

> Special Award
>
> (10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month,

[10] *Mr. C. and Coachman*, (FSCO Decision on a Preliminary Issue, A09-000167, October 21, 2011) at 2.
[11] *Whitney and Co-operators*, (FSCO A-001005, March 31, 1993) at 18 [*Whitney*].
[12] *Insurance Act*, RSO 1990, Chapter I8 [*Insurance Act*].
[13] *Shaikh, supra* note 3 at 7.
[14] *Graper and Liberty Mutual*, (FSCO, A00-000133, July 20, 2001) at 12 [*Graper*].

compounded monthly, from the time the benefits first became payable under the Schedule.[15]

While the Special Award acts as a punishment and a deterrent, it is not meant to be compensatory. The Special Award recognizes the undesirability of failure to ensure prompt payment of benefits.[16] It should also be noted however, that the Special Award cannot be expected to fully reimburse an applicant for his or her expenses or losses.[17]

> "The purposes of s. 282(10) is to punish insurers that unreasonably fail to pay accident benefits promptly as required by the SABS and to deter that company and others from acting similarly in the future. The size of a Special Award should be aimed at that purpose. While I am not prepared to say that Special Awards must be "modest", whatever that means, it is not obvious that they should not exceed amounts typically awarded in bad faith claims involving more serious misconduct".[18]

Entitlement to the Special Award is based on the unreasonableness of the insurer's behaviour. The definition of "unreasonable" has been shaped via the case law over the years. In *Erickson and Guarantee,* the Oxford English Dictionary definition of "unreasonable" was relied on. The arbitrator found that "unreasonable" required "1. Going beyond the limits of what is reasonable or equitable; 2. not guided by or listening to reason".[19]

This definition was applied in the first case where a Special Award was ordered: the arbitrator found there to have been unreasonable withholding of payments and concluded that an award was payable. An insurer's actions could be determined to have been unreasonable without having been egregious or performed in bad faith.[20]

Moreover, in *Plowright and Wellington,* Arbitrator Palmer went on to describe unreasonable behaviour in the withholding of payments as "behaviour which was excessive, imprudent, stubborn, inflexible, unyielding or immoderate".[21]

An unreasonable denial is not the same as an incorrect denial of benefits. It is not enough for the insurer to be wrong. As, Arbitrator Rotter stated in *Erickson*, it was not sufficient that the insurer's decision on benefits be erroneous to justify a Special Award.[22] The standard "is not perfection" and the insurer's decisions will not be judged with the advantage of hindsight.[23]

Furthermore, there is no requirement for a claimant to prove damages where section 282(10) of the *Insurance Act* has been breached. The legislation recognizes that there are implicit consequences to an insured arising from delays and refusals to pay benefits under the contract of

[15] *Insurance Act, supra* note 13, s 282(10).
[16] *Shaikh, supra* note 3 at 9.
[17] *Erickson and The Guarantee,* (FSCO Decision on Special Award, A-000560, July 16, 1992) at 7[*Erickson*].
[18] *Persofsky and Liberty Mutual,* (FSCO Appeal P00-00041, January 31, 2003) at 31 [*Persofsky*].
[19] *Erickson and The Guarantee,* (FSCO A-000560, June 2, 1992) at 8[*Erickson*].
[20] *Erickson, supra* note 17 at 6.
[21] *Plowright and Wellington,* (FSCO A-003985, October 29, 1993) at 17 [*Plowright*].
[22] *Erickson, supra* note 19 at 8.
[23] *Cripps and AXA,* (OIC A-013360, February, 1997) at 17.

insurance.[24]

The threshold for awarding the Special Award is not as high as it would be for that of aggravated or punitive damages. It requires no proof of ill intent on behalf of an insurer, no demonstration of malice, and no willful misconduct; only that the withholding of benefits was unreasonable.[25]

The arbitrator has inherent jurisdiction to grant such an award regardless of whether it was raised in the Application for Arbitration, pre-hearing conference or otherwise.[26] The award, however, is not a stand-alone claim.[27] Case law demonstrates that the Special Award should not be treated as a separate claim to be advanced like a claim for the benefits themselves,[28] but rather reflects a power given to an arbitrator to make an award in the case where benefits are unreasonably withheld.[29] As such, though conditions warranted it, a Special Award was not ordered in *Whitney and Co-operators*[30] as the benefits in dispute had resolved.

Even where the benefits in dispute are resolved, it is established that an arbitrator retains jurisdiction to consider a Special Award despite payment of outstanding benefits paid on the eve of the hearing.[31] The unilateral action of an insurer in agreeing to pay the benefits at issue does not necessarily dispose of the question of a Special Award.[32] To do so would allow a delayed payment, as contemplated by section 282(10), to be made so as to end a proceeding and strip an arbitrator of the jurisdiction to make an award.[33] A stand-alone claim for a Special Award will not succeed, however a claim can proceed despite benefits being paid on the eve of hearing.[34]

Arbitrators have discretion to determine the amount of the Special Award once unreasonable behaviour has been found. Several factors are weighted in this determination.

The Special Award should reflect the seriousness of the insurer's misconduct considering aggravating and mitigating circumstances.[35] Although the insurer's conduct need not be deliberate or egregious, such bad faith conduct would be a factor that an arbitrator would consider in determining the extent of the insurer's unreasonable behaviour.

Examples of aggravating behaviour warranting a Special Award include the selective reading of

[24] *Shaikh*, *supra* note 3 at 8.
[25] *Plowright*, *supra* note 21 at 21.
[26] *Anizor and Royal Insurance*, (OIC A-0003702, January 24,1995) [*Anizor*]; *Leitgeb and Allstate*, (FSCO P-012407, November 16, 1995) [*Leitgeb*].
[27] *Al-Obaidi and Allstate*, (FSCO, Appeal P99-00009, May 2, 2000).
[28] *Anizor*, *supra* note 26.
[29] *Leitgeb*, *supra* note 26.
[30] *Whitney*, *supra* note 11.
[31] *Graper*, *supra* note 14 at 6.
[32] *Jensen* v. *GAN*, (FSCO, Appeal, P96-00079, March 31, 1999) [*Jensen*].
[33] *Ibid* at 23.
[34] *Rocca and AXA*, (FSCO, A97–000903, March 10, 1999) at 24.
[35] *Graper*, *supra* note 14 at 46.

the insurer's own expert reports,[36] or turning a blind eye to significant medical evidence supporting disability and failing to adjust amounts payable once notice that collaterals were exhausted.[37]

Just as a Special Award can be awarded where counsel takes an adversarial approach at arbitration, as discussed above, the taking of such an approach in the adjusting of a claim can also result in a Special Award. For example, terminating benefits knowing the claimant is likely to succeed at arbitration was an "adversarial, tactical approach to Mr. Graper's claim has no place in an accident benefits scheme premised on early resolution of disputes between insured persons and first-party insurers".[38]

To this end, an insurer's behaviour to mitigate unreasonableness will also be taken into consideration in ordering a Special Award. Conceding of benefits payable after the applicant's evidence was heard at arbitration shortened the hearing, spared having to decide the matter on the merits and mitigated the original unreasonableness.[39] Reinstating benefits prior to the hearing was not a mitigating factor in *Singh*, given benefits were withheld for three years and the family suffered tremendous hardship thoughout.[40]

Another factor that is considered in determining the quantum of the Special Award is the deterrent effect it ought to have on unreasonable insurer conduct.[41] It has been said that the Special Award ought not be nominal so as to act as a license to act unreasonably.[42] It should take into consideration time and resources expended by the insured person in asserting and securing his or her own rights,[43] the length of time for which the unreasonable conduct occurred, and the amount in dispute, and the seriousness of the breach.[44]

The claimant's behaviour is also a consideration as was the case in *MacDonald*, where the claimant initially withheld appropriate financial documentation.[45] The claimant had contributed to the insurer's reaction, and while it did not bar the granting of a Special Award or justify unreasonable rejection of valid data, it was taken into consideration in determining the amount.[46]

Reasons must be given for concluding that the Special Award is payable, and for the amount of the award. [47] Where it is feasible, without compromising their neutrality, an arbitrator should

[36] *Graper*, *supra* note 14.
[37] *Singh and Commercial Union*, (FSCO, P01-00042, September 11, 2001) [*Singh*].
[38] *Graper*, *supra* note 14 at 47.
[39] *Erickson*, *supra* note 17.
[40] *Singh*, *supra* note 37 at 44.
[41] *MacDonald and Pilot*, (FSCO A-008372, March 3, 1995) [*MacDonald*].
[42] *Erickson*, *supra* note 17 at 6.
[43] *Ibid*.
[44] *Graper*, *supra* note 14; *MacDonald*, *supra* note 41.
[45] *MacDonald*, *supra* note 41.
[46] *Ibid*.
[47] *Persofsky*, *supra* note 18.

provide sufficient particulars as to why a Special Award is being considered.[48] "It is important that the parties are given an explanation both of the basis of a finding that benefits were unreasonably withheld and the factors taken into account in fixing the amount of the award".[49]

Finally, the Special Award should be expressed as a specific, lump sum. Interest is not payable on the Special Award, except as part of the enforcement process.[50] "[T]he Special Award bears interest like any other order which is enforceable under the *Courts of Justice Act*, R.S.O. 1990".[51]

Assessment/Awards of Expenses

Generally, the civil law trend that costs follow the cause does not necessarily apply to disputes in arbitration. Instead, ordering expenses will reflect the goal of the dispute resolution process: the inexpensive, speedy and informal adjudication of disputes regarding no-fault benefits.[52]

Director's Delegate Naylor in *Allison and Markel* discusses the principle that "legitimate claims, conducted reasonably, can expect to recover their allowable expenses, win or lose" and further, that this trend was adopted as a basic ground rule.[53] The decision goes on to report that the general rule has been departed from in cases of unmeritorious claims,[54] claimant fraud,[55] claimant dishonesty,[56] or where documentation was fabricated.[57]

Since this time, however, the legislation was overhauled in 1996, and the specific factors that ought to be weighed in the determination of an Award of Expenses were crystallized in statute.

a) Regulations

The basis for making an Award of Expenses, like the Special Award, stems from section 282 of the *Insurance Act*. Subsection (11) reads:

> Expenses
>
> (11) The arbitrator may award, according to criteria prescribed by the regulations, to the insured person or the insurer, all or part of such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations, to the maximum set out in the regulations.[58]

[48] *Rumak and Personal Insurance*, (FSCO A01 B 000065, November 5, 2003) [*Rumak*].
[49] *Rocca and AXA*, (FSCO, Appeal P99-00020, August 1, 2000) at 13.
[50] *Beiler and Alpina*, (FSCO, Supplementary Decision, A-003051, August 9, 1994) [*Beiler*].
[51] *Ibid.*
[52] *McCormick and Economical*, (FSCO A-000139, October 2, 1991).
[53] *Allison and Markel*, (FSCO, Appeal P-001231, August 21, 1996) at 5 [*Allison*].
[54] *Boateng and CUMIS*, (FSCO, Appeal, P-006279, July 22, 1996).
[55] *Richardson and Royal*, (OIC A-001141, November 3, 1992).
[56] *Tagiran and Simcoe & Erie*, (FSCO A-004660, August 15, 1994) [*Tagiran*].
[57] *Ferrari and Royal*, (FSCO A-007313, September 8, 1994).
[58] *Insurance Act*, *supra* note 12, s 282(11).

The relevant Regulations in effect are RRO 1990, Reg 664, section 12, which (together with Rule 75 of the *DRPC* and Schedule F to the *DRPC*) direct and arbitrator to address expenses as follows:

> 75. Award of expenses
>
> 75.1 An adjudicator may award expenses to a party if the adjudicator is satisfied that the award is justified having regard to the criteria set out in Rule 75.2. The items and amounts which may be awarded are found in Rule 78 and the Schedule to the Expense Regulation found in Section F of the Code.
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> 75.2 The adjudicator will consider only the criteria referred to in the Expense Regulation found in Section F of the Code. These criteria are:
>
> (a) each party's degree of success in the outcome of the proceeding;
> (b) any written offers to settle made in accordance with Rule 76;
> (c) whether novel issues are raised in the proceeding;
> (d) the conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders;
> (e) whether any aspect of the proceeding was improper, vexatious or unnecessary.
> (f) whether the insured person refused or failed to submit to an examination as required under section 42 of Ontario Regulation 403/96 (Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996) made under the Act or refused or failed to provide any material required to be provided by subsection 42 (10) of that regulation; and
> (g) whether the insured person refused or failed to submit to an examination as required under section 44 of Ontario Regulation 34/10 (Statutory Accident Benefits Schedule — Effective September 1, 2010), made under the Act, or refused or failed to provide any material required to be provided under subsection 44 (9) of that regulation.[59]

Prior to the 1996 amendments to the regulation, arbitrators were not entitled to award Expenses to insurers.[60] The change in legislation added the criteria as listed above in section 12 and obliged arbitrators to apply them to both parties in ordering expenses.[61] In *Gray and Zurich*, Delegate Draper outlines that success is but one criterion in determining the issue of costs.[62] The criteria are not to be applied in a results-based fashion as is done in the courts where costs follow the success of the party. He placed special emphasis on criterion 6 where room ought to be left for insureds to access the dispute resolution system on novel issues.[63]

b) Timelines

Parties who cannot agree on the amount of or entitlement to expenses to be paid under an Award for Expenses may seek the assistance of an arbitrator in doing so via a request made pursuant to section 79 of the *DRPC*, "Assessment of Expenses". This request must be made within 30 days

[59] *DRPC*, *supra* note 1, Rule 75.
[60] *Allison*, *supra* note 53.
[61] *Gray and Zurich*, (FSCO Appeal P98-00047, June 11, 1999).
[62] *Ibid*.
[63] *Ibid*.

of the issuance of the decision or the order awarding expenses pursuant to Rules 79.1 and 79.2 respectively.

> 79. Assessment of expenses
>
> 79.1 Where an adjudicator has issued an order determining all issues in dispute except expenses, and the parties cannot agree on the entitlement to or amount of the expenses of the proceeding, either party may request, in writing, an appointment before an adjudicator to determine expenses provided that the request is made within 30 days from the date the decision on all other issues in dispute was issued.
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> 79.2 Where an adjudicator has issued an order of expenses to be paid and the parties cannot agree on the amounts to be paid under that order, either party may request, in writing, an appointment before an adjudicator provided that:
>
> (a) within 30 days from the date of the order awarding expenses, the party awarded expenses provides the other party with an account describing each of the expenses claimed, services received and the costs;
> (b) the party ordered to pay expenses must promptly provide the other party with a written response to the account, identifying the items in dispute and the reasons for the dispute;
> (c) the party awarded expenses must promptly provide the other party with copies of supporting documentation, such as invoices, receipts, computerized dockets or cancelled cheques in respect of the disputed items;
> (d) if a dispute remains, the parties shall serve and file the above materials, together with a written request for an assessment of expenses upon all parties to the proceeding and legal counsel or representatives whose time and disbursements are reflected in the expenses sought;
> (e) the Dispute Resolution Group shall notify the parties and their present and/or former legal counsel or representatives whether the assessment will be conducted by way of written submissions, or by an oral or electronic hearing, the date, time and if necessary, the location of the assessment hearing.[64]

c) Legal Fees

The general rules regarding payment of legal fees at FSCO can be found in Schedule F (reproduced as an appendix to this paper) as well as in section 78 of the *DRPC*. Both the insurer and the claimant are eligible to have these fees paid.

> 78. Expenses of representatives
>
> 78.1 The maximum amount that may be awarded to an insured person or an insurer for legal fees, is an amount calculated using:
>
> (a) the hourly rates established under the Legal Aid Services Act, 1998 for professional services in civil matters before the Ontario Superior Court of Justice; or
> (b) the hourly rate referred to in Rule 78.1(a) adjusted to include, where appropriate, the experience allowance established under the Legal Aid Services Act, 1998

[64] *DRPC, supra* note 1, Rule 79.

> Where an adjudicator is satisfied that a higher amount for legal fees to an insured person is justified, an hourly rate of up to $150 may be awarded.
>
> 78.2 The maximum amount that may be awarded to an insured person or an insurer for agent's fees is an amount calculated using the hourly rates established under the Legal Aid Services Act, 1998 for law clerks, articling students and investigators.[65]

Arbitrators may exercise their discretion to award fees up to the hourly rate of $150 and will base an award on factors such as the nature and complexity of the case as well as the competency of counsel.[66]

Same is addressed under section 3(1) of the Schedule to the Regulation[67] which can be found in Schedule F to the *DRPC* (see appendix).

> 3. (1) The legal fees payable by the insured person or the insurer for the following matters may be awarded:
>
> 1. For all services performed before an arbitration, appeal, variation or revocation hearing.
> 2. For the preparation for an arbitration, appeal, variation or revocation hearing.
> 3. For attendance at an arbitration, appeal, variation or revocation hearing.
> 4. For services subsequent to an arbitration, appeal, variation or revocation hearing.[68]

"Rather than a line-by-line analysis of dockets, arbitrators have preferred a "global" approach to assessing expenses, expressed through the somewhat approximate method of assigning a ratio of preparation time to hearing time, expressed either in terms of hours or days".[69] The general rule of thumb is the amount of time awarded for preparation is calculated by multiplying the amount of time required for attendance by a factor of 2 – 3. Arbitrators have found reasonable ratios to range from 1:1 to 4:1 of preparation time to hearing time.[70] The criteria with which to determine what amount of legal fees is reasonable in a given case are the same used to determine entitlement to expenses in section 12(2) in the Regulation above.[71]

It is long settled that mediation expenses are not recoverable in arbitration.[72]

Disbursements are addressed under section 4 of the Schedule to the Regulation as follows,

> 4. The amount of the following disbursements made by or on behalf of the insured person or the insurer may be awarded:
>
> 1. For long distance telephone, facsimile and other telecommunication charges.

[65] *DRPC, supra* note 1, Rule 78.
[66] *Olszynko and Dominion of Canada,* (FSCO Decision on Expenses, A97-001495, August 27, 1999).
[67] *Automobile Insurance*, RRO 1990, Reg 664 [*Regulation*].
[68] *Ibid, s 3(1).*
[69] *Amoa-Williams and Allstate,* (FSCO Assessment of Expenses, October 24, 2001) at 4 [*Amoa-Williams*].
[70] *Henri and Allstate,* (OIC A-007954, August 8, 1997).
[71] *Amoa, supra* note 69.
[72] *Ajzenstadt and CAA Insurance,* (OIC Appeal P-000185, July 13, 1992).

2. For typing, printing and reproducing copies of documents.
3. For the delivery, by mail or courier, of items relating to the arbitration, appeal, variation or revocation hearing.
4. For other out-of-pocket expenses incurred in furtherance of the arbitration, appeal, variation or revocation hearing.
5. Any applicable taxes paid in respect of the expenses referred to in this section.[73]

Unlike the courts, which have inherent jurisdiction to grant disbursements, arbitrators are bound by their statutory powers. They do however, have some discretion to award disbursements within the range set out in the fee schedule.

Reopening the Hearing

The *DRPC* allows for the reopening of the hearing in Rule 43,

> 43. REOPENING OF HEARING
>
> 43.1 The arbitrator may reopen a hearing at any time before he or she makes a final order disposing of the arbitration. [74]

The reopening of the hearing is based entirely on arbitrator discretion so long as a final order has not yet been made. Given the brevity of the Rule, this is another area that has been shaped by FSCO jurisprudence.

The arbitrator has full control of the post-hearing and it is within their discretion to accept further evidence prior to the issuance of the arbitration order.[75] Arbitrator Manji stated that the exercise of this discretion ought only be used in exceptional or extraordinary cases so as not to delay or jeopardize the arbitration process and the requirements of finality.[76] There is a need for counsel to show that the proposed evidence could not have been produced with due diligence,[77] and "[i]f the evidence was available to or within the control of the party before the case is closed, it should not be admitted".[78]

The jurisprudence reflects that hearings are rarely reopened once the parties have concluded their cases, although in cases where the hearing has been reopened, the decision to do so was made by using criteria borrowed from the criminal law.[79] The test is outlined in *R.* v. *Palmer*,

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases...

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[73] *Regulation*, *supra* note 67.
[74] *DRPC*, *supra* note 1, Rule 43.
[75] *Tran and Pilot*, (FSCO A-005207, August 16, 1995) [*Tran*].
[76] *Ibid* at 17.
[77] *Panasy and Commercial Union*, (OIC A96-000314, September 9, 1997).
[78] *Tran*, *supra* note 75 at 17.
[79] *Howden and Pembridge* (FSCO preliminary issue motion, A01 B 000333, September 23, 2002).

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
(3) The evidence must be relevant in the sense that it is reasonably capable of belief, and,
(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[80]

Examples of cases which found there to be no extraordinary circumstances to warrant the reopening of the hearing include the following: where assessments were conducted after the hearing but before the decision was rendered, the hearing was not reopened to allow for the admission of expert reports;[81] where reasons for Judgment of an Ontario Small Claims Court decision were not found to be relevant to any issue in dispute;[82] and, where a report was authored after the hearing but did not provide new evidence beyond the medical opinions already expressed.[83]

Extraordinary circumstances were found and hearings were reopened where: the claimant, due to her accident-related injuries, suffered a fall after the hearing but before the decision such that she sought benefits past the 104 mark;[84] the unrepresented claimant lacked ability to understand when the hearing was to close;[85] and, the claimant was unable to attend the hearing and prove damages.[86]

Variations vs. Appeals

a) Legislative Authority to Vary an Order

The legislative authority to vary an order is rooted in section 284, specifically subsections (3) and (4), of the *Insurance Act* and is repeated under Rule 61 of the *DRPC*. This rule sets out the grounds upon which an arbitrator's order may be varied,

> 61. Application for Variation/Revocation
>
> 61.1 Either the insured person or the insurer may apply to the Director to vary or revoke an arbitration order or an appeal order if:
>
> (a) there has been a material change in the circumstances of the insured;
> (b) evidence not available on the arbitration or appeal has become available; or
> (c) there is an error in the order.
>
> 61.2 A party may not apply to vary or revoke a preliminary or interim order of an adjudicator until all of the issues in dispute in the proceeding have been finally decided, unless the Director orders otherwise.

[80] *R.* v. *Palmer* [1980] 1 SCR 759 at 13.
[81] *Rumak and Personal Insurance,* (FSCO A01 B 000065, November 5, 2003) [*Rumak*].
[82] *Tran, supra* note 75.
[83] *Thangarasa and Gore Mutual,* (FSCO Decision on a Motion A02 B 001360, February 1, 2005).
[84] *Paunova and Allstate,* (FSCO Decision on a Motion A02 B001087, March 10, 2004).
[85] *D'Amato and State Farm,* (FSCO A99-000601, June 30, 2000).
[86] *Wupori and Western Assurance,* (FSCO A97-002200, January 25, 1999).

61.4 The Application for Variation/Revocation may be rejected if:

(a) it is from a preliminary or interim order that does not finally decide the issues in dispute;
(b) it is incomplete or lacks sufficient details to allow the other party to respond;
(c) it is in respect of an order that has been appealed, and the appeal is pending; or
(d) the applicant does not pay the required application filing fee.[87]

Rule 61 sets out three grounds for varying an order; material change, newly available evidence, and error in the order.

Material change is perhaps the widest of the pre-conditions to variations.[88] It is often alleged by an insurer who believes the claimant is no longer entitled to the benefits as ordered by an arbitrator. In cases such as this, the insurer is bound by section 287 of the *Act* which precludes the varying of an order directing payment of benefits unless it is varied by under section 283 or 284, Appeal or Variation, such as was done in *Riley and Pilot*.[89]

Director Sachs stated in *Sittler*, "the words "material change" in s.284(3) refer generally to the particular circumstances of an insured person, for example a change in his or her ability to perform the essential tasks of his or her occupation or employment. This aspect is highlighted where an order already exists for payment of benefits to an insured person, and an insurer must continue to pay under s.287 of the *Act*".[90]

The second ground: evidence not available, has been held to be different than the test that must be met for the submission of fresh evidence on appeal. It must be shown that the evidence could not have been obtained earlier by due diligence and further, if previously available, likely would have influenced the outcome of the hearing.[91] "The variation/revocation process is not meant to remedy sloppy preparation. It is intended to deal with situations where information becomes available that casts significant doubt on the result".[92] As such, it is accepted that variation can only be used in this context where information was not in existence at the time of the hearing.[93]

Likewise, the third section 61 precursor, error in the order, is not meant to duplicate the appeal process. In *Hart and Allstate* Director's Delegate Naylor concluded that the scope of the term "error in an order" must be construed in context and that the power to vary under section 284 of

[87] *DRPC, supra* note 1, Rule 61.
[88] *Olszewski and Citadel General,* (FSCO Decision on a Preliminary Issue A03 B000765, December 16, 2004) [*Olszewski*].
[89] *Riley and Pilot,* (FSCO Variation P99-0009V, February 29, 2000).
[90] *Sittler and Canadian General and Pilot,* (FSCO Appeal and Variation P-000951 & V-000951, P004495 & V004495, August 11, 1995) at 8 [*Sittler*].
[91] *Ready and Progressive Casualty and Zurich,* (FSCO Appeal and Variation P004768/P-005403 & V-004768/V-005403, June 25, 1997.
[92] *Osbourne and Allstate and York,* (FSCO Appeal P97-000676, June 23, 1998) at 7.
[93] *Lanctot and Zurich,* (FSCO Variation/Revocation P02-00033, October 30, 2003) [*Lanctot*].

the *Act* was not intended to duplicate the appeals process set out in section 283.[94] The purpose of the variation order is not to re-argue the appeal.[95] "It is not an endless postscript to a completed hearing" or a "carte blanche to re-litigate".[96]

Errors of law are to be caught by the appeal provisions of section 283, whereas an error in an order could include mistakes needing correcting, mathematical or calculation errors, discrepancies between form and reasons, general inadvertence, or deviation from what was intended.[97]

Delegate Naylor also held, as suggested in *Caringi*, that "an error in the order may arise where an arbitrator has overlooked or has not dealt with a matter which, explicitly or implicitly, should have been addressed, or where the adjudicator has misunderstood the submissions made in a material respect".[98]

b) Limitation Periods

The *DRPC* and the *Act* are both silent as to any limitation periods that apply to requests to vary an order.

In *Lanctot*, four years had passed between the release of the decision and the claimant's application for variation.[99] The information which was claimed not to be available at the time of the hearing were medical reports dated more than seven years post the date of loss. The arbitrator noted two things. First, that allowing the submission of medical reports authored long after the loss would create a difficulty for assessors. Second, that applications seeking to submit evidence not available are unlikely to succeed unless the new evidence was so strong that it undermined the arbitrator's factual findings in a fundamental manner. The evidence was not found to considerably question the arbitrator's conclusions, however the reasoning in *Lanctot* implies that evidence with the requisite level of strength could warrant the variation of an order even several years after the loss and the release of the decision.

c) Appeals to the Director's Delegate

The appeal process at FSCO is similar to the process of variation. It too is dictated by section 283 of the *Insurance Act* and Rule 50 of the *DRPC*, and while there is overlap, they must be read together to appreciate the appeal process.

> 283. Appeal against arbitration order
>
> (1) A party to an arbitration under section 282 may appeal the order of the arbitrator to the

[94] *Hart and Allstate*, (FSCO Variation/Revocation P99-00045, November 7, 2000) [*Hart*].
[95] *Lukachko and Allianz*, (FSCO Variation/Revocation P02-00034, April 9, 2003).
[96] *Olszewski*, *supra* note 88 at 9.
[97] *Sittler*, *supra* note 90; *Hart*, *supra* note 94.
[98] *Hart*, *supra* note 94 at 10; *Caringi and Wawanesa* (FSCO, V-000860, November 4, 1996).
[99] *Lanctot*, *supra* note 93.

Director on a question of law.

Notice of appeal
(2) A notice of appeal shall be in writing and shall be delivered to the Commission within thirty days after the date of the arbitrator's order and the appellant shall serve the notice on the respondent.

Extension of time for appeal
(2) The Director may extend the time for requesting an appeal, before or after the time for requesting the appeal has expired, if the Director is satisfied that there are reasonable grounds for granting the extension, and the Director may give such directions as he or she considers proper as a condition of granting the extension.

Nature of appeal
(3) The Director may determine the appeal on the record or in such other manner as the Director may decide, with or without a hearing.

Power of the Director
(4) The Director may confirm, vary or rescind the order appealed from or substitute his or her order for that of the arbitrator.

Order not stayed
(5) An appeal does not stay the order of the arbitrator unless the Director decides otherwise.[100]

50. Appeals

50.1 A party to an arbitration may appeal an order of an arbitrator to the Director only on a question of law.

50.2 A party may not appeal a preliminary or interim order of an arbitrator until all of the issues in dispute in the arbitration have been finally decided, unless the Director orders otherwise.

50.3 An appeal does not stop an arbitration order from taking effect, unless the Director orders otherwise.[101]

51. Starting an Appeal

51.2 An appeal may be rejected if:

(a) It is out of time;
(b) It does not raise a question of law;
(c) It is from a preliminary or interim order that does not finally decide the issues in dispute;
(d) The Notice of Appeal in incomplete or lacks sufficient details to allow the other party to respond; or
(e) The appellant does not pay the required application filing fee.[102]

[100] *Insurance Act*, *supra* note 12, s 283.
[101] *DRPC*, *supra* note 1, Rule 50.
[102] *DRPC*, *supra* note 1, Rule 51.

Together, section 283(1) and Rule 50.1 and 51.2(b) are clear that an appeal must be grounded in a question of law as is the case when a matter proceeds before the Superior Court. Delegate Naylor explained in *Kasap and Allstate* that the Delegate's role on appeal is not to second guess the arbitrator's evaluation of the evidence as he or she has the advantage of hearing and observing the witnesses in person.[103] As such, factual findings, specifically those reliant upon credibility, will not be disturbed unless there is a serious error. Where there is no evidence pointing to an error of law or a misapplication of principles, there is no justification for interference.[104]

It is well established that appeals are limited to the benefits that were in issue before the arbitrator.[105]

Pursuant to section 283(1) and Rule 50.1, only parties to the application have standing to appeal an order of an arbitrator. The *Statutory Powers Procedure Act*[106] *(SPPA)* has been read in some cases to expand this definition of standing.

> 5. Parties
>
> The parties to a proceeding shall be the persons specified as parties by or under the statute under which the proceeding arises, or, if not so specified, persons entitled by law to be parties to the proceeding.[107]

Non-parties have been granted standing to appeal an arbitration order as *amicus curiae* where they were subject to the order so that they had to opportunity to appeal a question of law.[108] Treatment providers have been found to be unable to initiate arbitration proceedings and therefore unable to commence an appeal,[109] as have experts whose views were rejected in a decision.[110] Claimant's counsel, however, have standing to be party to an appeal proceeding pursuant to the *SPPA* where an award of expenses was made against him personally.[111] In any event, section 283(8) allows for non-party submissions on issues of law in an appeal.[112]

The general rule, as outlined in Rule 50.2 is that preliminary or interim orders cannot be appealed until all issues in dispute have been finally decided. The Rule does have an exception, wherein the Director has jurisdiction to order otherwise. Jurisprudence has surfaced to clarify when the Director may use his discretion to allow an interim order to be appealed. In *Allstate and Torok*, Delegate Makepeace noted that the purpose of this section, the facilitation of cost-

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[103] *Kasap and Allstate*, (FSCO Appeal P96-00071, March 13, 1998) at 3.
[104] *Calogero and The Co-operators*, (FSCO Appeal P-000251, February 13, 1992).
[105] *Tagiran*, *supra* note 56.
[106] *Statutory Powers Procedure Act*, RSO 1990, c S.22 [*SPPA*].
[107] *Ibid*, section 5.
[108] *Alamin Royal & SunAlliance and TTC*, (FSCO Decision on a Motion A B008445 and A B 008446, December 13, 2002).
[109] *Volfson, Shuster and Royal*, (FSCO Appeal P02-00028, August 7, 2003) [*Volfson*].
[110] *Elkaim and State Farm*, (FSCO Appeal P-98-00006, November 5, 1998).
[111] *Luskin and Personal and Mazin*, (FSCO Appeal P07-00028, April 25, 2008).
[112] *Insurance Act*, *supra* note 12, s 283(8).

effective resolutions, is a guiding principle that ought to underlie the decision to hear an appeal of a preliminary order. She states criteria to be considered are the strength of the appeal, importance or novelty of the issue and any potential prejudice. [113] Appeals however, have been allowed where it makes sense to do so before the parties incur the expense of a full arbitration.[114] Additional considerations are whether the decision departs from prior law, economy of time and expense, as well as streamlining the process.[115]

Furthermore, Rule 50.2 distinguishes between a preliminary or interim order and issues in dispute that are finally decided.[116] An order finally determining a preliminary issue is still technically a preliminary order the appeal from which would require the exercise of arbitral discretion.[117] This barrier to appeal has been addressed such that appeals were allowed to proceed in cases where there was a disposition of a preliminary issue, such as priority of insurer,[118] or existence of an accident.[119]

Noteworthy is that the appeal does not stay the arbitration order from taking effect per section 283(6).[120] This is considerably different from Rule 63.01 of the *Rules of Civil Procedure* where a notice of appeal from an interlocutory or final order automatically stays any provision of the order for payment of money until the disposition of the appeal.[121] The explicit difference between the *Rules of Civil Procedure* and the *DRPC* reflect that the legislature intended the decisions of arbitrators to be binding pending an appeal.[122] "The fact that a stay is the exception rather than the rule, suggests to me that the drafters of the legislation recognized that the insurer is in a much better position than the insured person to bear the risks inherent in not staying the arbitrator's order".[123]

d) Strategic Considerations, Timelines

Appeal timelines are dictated by section 283(2) of the *Insurance Act* wherein an appellant must serve a notice of appeal on the Commission and the Respondent within 30 days of the order from which the appeal is being launched.[124] "Time limits on appeal exist in order to bring some closure to the adjudication process. Providing a discretion to extend them injects fairness and flexibility into the system. Whether the time should be extended is a discretionary decision which depends on the facts of each case".[125]

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[113] *Allstate and Torok,* (FSCO Appeal P01-00021, Mary 29, 2001) at 3.
[114] *Allstate and Al-Obaidi,* (FSCO Appeal P99-00009, May 2, 2000).
[115] *Ibid.*
[116] *DRPC*, *supra* note 1, Rule 50.2.
[117] *Blakely and State Farm,* (FSCO Appeal P12-0005, April 27, 2012) [*Blakely*].
[118] *Danilov and Unifund,* (FSCO Appeal P09-00023, October 6, 2009).
[119] *Blakely*, *supra* note 117.
[120] *Insurance Act*, *supra* note 12, s 283(6).
[121] *Rules of Civil Procedure*, *supra* note 2, s 63.01.
[122] *Scavuzzo and Canadian Home Assurance*, (FSCO Appeal P-000626, May 18, 1992).
[123] *Guardian Insurance and Armstrong,* (FSCO Appeal P00-00037, July 20, 2000) at 6.
[124] *Insurance Act*, *supra* note 12, s 283(2).
[125] *Gouliaeff and Commercial Union,* (FSCO Appeal P96-000011, July 18, 1996).

Section 283(3) allows for discretion to be exercised in the granting of an extension to file the notice of appeal. It requires that there be reasonable grounds for applying for an extension.[126] Director Sachs set out factors to consider in granting an extension to file a notice of appeal under section 283(3) of the *Insurance Act*: the existence of a *bona fide* intention to appeal, the length of the delay, the merits of the proposed appeal, and, any prejudice to the other party and whether it is compensable.[127] As such, appeals have proceeded where a delay in serving the notice has been very minor,[128] and intent has been clear.[129]

Judicial Review of FSCO Appeal Decisions

Judicial review of FSCO decisions are governed by the *Judicial Review Procedures Act*[130] *(JRPA),* and are carried out by a three judge panel of the Divisional Court branch of the Ontario Superior Court. One of the inherent roles of the court system is its ability to police the lower tribunals. "Provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction".[131]

The Application for judicial review is set out in section 2(1) of the JRPA,

> 2. Applications for judicial review
>
> (1) On an application by way of originating notice, which may be styled "Notice of Application for judicial review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:
>
> 1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
> 2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.[132]

It must be noted, however, that despite the above, an applicant with a right to administrative remedies must exercise recourse to those statutory remedies prior to making an application for judicial review.[133] This is now known as the doctrine of "adequate alternative remedy". The appeal to the Director under Rule 50 of the *Dispute Resolution Practice Code* is one such

[126] *Insurance Act, supra* note 12, s 283(3).
[127] *Sittler, supra* note 90 at 6.
[128] *Christo and Royal,* (FSCO Appeal P-96-00049, September 11, 1996); *Hunt and Royal,* (FSOC APPEAL P-000370, February 24, 1993).
[129] *Jadavji and Security National,* (FSCO Appeal P08-00033, February 6, 2009).
[130] *Judicial review Procedure Act*, RSO 1990, c J.1 [*JRPA*].
[131] *Crevier* v. *Quebec*, [1981] 2 SCR 220.
[132] *JRPA, supra* note 130, s 2.
[133] *Harelkin* v. *University of Regina* [1979] 2 SCR 561 affirmed in *Merchant* v. *Law Society of Alberta* [2008] ABCA 363.

statutory right of appeal that ought to be exhausted prior to applying to the Divisional Court for judicial review.[134]

Parties to and standing at judicial review is governed by section 9 subsections (2) and (4) of the *JRPA*, though they do not address the subject definitively,

> 9. Sufficiency of application
>
> (1) It is sufficient in an application for judicial review if an applicant sets out in the notice the grounds upon which he is seeking relief and the nature of the relief that he seeks…
> Exerciser of power may be a party
>
> (2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power ma be a party to the application
>
> …
> Notice to Attorney General
>
> (4) Notice of an application for judicial review shall be served upon the Attorney General who is entitled as of right to be heard in person or by counsel on the application.[135]

FSCO is obliged to be a party to judicial review. Jurisprudence suggests that FSCO should not defend their decisions but instead, present the facts understood and explain the record or affidavit material and provide any context as may be required to support the basis for the decision. Furthermore, section 10 of the JRPA outlines FSCO's obligation to compile the record to be put before for the Divisional Court upon judicial review:

> 10. Record to be filed in court
>
> When notice of an application for judicial review of a decision made in the exercise or purposed exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.[136]

Beyond the Attorney General and FSCO, as a general principle, for other persons to have standing, at judicial review the interests of that person must have been "prejudicially affected" by the decision.[137]

Pursuant to section 9(1) of the *JRPA* the grounds upon which judicial review is sought must be set out in the notice of application.[138] judicial review can be sought on substantive and/or procedural errors such as violations of procedural fairness, abuse of discretion and errors of law and fact.

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[134] *DRPC*, *supra* note 1, Rule 50.
[135] *JRPA*, *supra* note 130, s 9.
[136] *Ibid*, s 10.
[137] *Re Liverpol Taxi Owners' Ass'n*, [1972] 2 All ER 589 at p. 595.
[138] *JRPA*, *supra* note 130, s 9(1).

Section 9(1) of the *JRPA* also requires the nature of the relief be specified in the application. Remedies upon judicial review can be found within the *JRPA* itself, or can be awarded from the common law ie: prerogative writs (*Certiorari, Prohibition, Mandamus*) or ordinary remedies (declaration/injunction) as contemplated in section 2(1) of the *JRPA*.[139]

Of importance, and similar to the above with regards to appeals, section 20(3) of the *Insurance Act* states that judicial review does not stay the decision which is being reviewed.[140] This is in keeping with the prompt resolution of disputes over statutory benefits and the goal of prompt payment for necessary services.[141] Similar to appeals under section 283(6) of the *Act*,[142] section 20(4) allows for judicial discretion to grant a stay.

> 20. Decisions, etc., not stayed
>
> (3) An application for judicial review and any appeal from an order of the court on the application does not stay the decisions made under this *Act*.
>
> Court may grant stay
>
> (4) Despite subsection (3), a judge of the court to which the application is made or a subsequent appeal is taken may grant a stay until the disposition of the judicial review of appeal.[143]

While the *JRPA* consolidates the mechanics for placing an administrative decision before the courts, it does not specify a timeline or limitation periods for doing so. It does however provide for an extension of time for bringing an application in section 5,

> 5. Extension of time for bringing an application[144]
>
> Despite any limitation of time for the bringing of an application for judicial review fixed by or under any Act, the court may extend the time for making the application, either before or after the expiration of that time so limited, on such terms as it considers proper, where it is satisfied that there are apparent grounds for relief and that no substantial prejudice o hardship will result to any person affected by reason of the delay.

Given that the *DRPC* is silent on the timing of bringing judicial review, there are no timelines under any *Act* with regards to the judicial review of any FSCO arbitration decision, subject to the legal principal of *laches*.

The general rule is that with very few exceptions, the Court will not substitute its own decision for that of an arbitrator. Courts tend to intervene only when the jurisdiction of the arbitrator, or

[139] *JRPA, supra* note 130, s 2(1) and s 9(1).
[140] *Insurance Act, supra* note 12, s 20(3).
[141] *Kennelly* v. *Wawanesa* [2007] OJ No 1972.
[142] *Insurance Act, supra* note 12, s 283(6).
[143] *Ibid*, s 20.
[144] *JRPA, supra* note 130, s 5.

the appeals officer thereafter is breached. "No administrative decision-maker is left free to act outside the provisions of the legislation that provides its authority".[145]

The law regarding the approach which ought to be applied in analyzing arbitral decisions has undergone significant transformation over the years. The current approach was defined by the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, which applies the standard of review test.[146] The question to be determined by the courts is how much deference should be given to the decision of an arbitrator. *Dunsmuir* outlines two distinct standards of review: reasonableness and correctness. Depending on the decision and the jurisdiction of the arbitrator to make that decision, a different standard of review will be applied.

The Supreme Court defines reasonableness as,

> "…a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[147]

Correctness is discussed as follows,

> "When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct."[148]

In determining the standard of review, *Dunsmuir* sets out four factors to be considered in a contextual approach, at paragraph 64,

> (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal.[149]

[145] *Pastore* v. *Aviva* 2011 ONSC 2164 (CanLII) at 23 [*Pastore*].
[146] *Dunsmuir* v. *New Brunswick*, [2008] 1 SCR 190 [*Dunsmuir*].
[147] *Ibid* at para 47.
[148] *Ibid* at para 50.
[149] *Dunsmuir*, *supra* note 146 at para 64.

Pastore v. *Aviva* 2011 ONSC 2164 (CanLII) is one of the most important accident benefits cases released in the past year. It is relevant to a discussion on standard of review as it was Judicially reviewed by the Divisional Court in 2011.[150] *Pastore* is significant for its decision which shapes the law on catastrophic entitlement, but also gives a thorough overview of the application of *Dunsmuir* to judicial review of FSCO decisions.

Generally, the FSCO Delegate's authority to interpret the SABS and *Insurance Act* and to grant or deny benefits has been recognized in previous jurisprudence as reviewable on a standard of reasonableness.[151] This takes into consideration the privative clause contained in section 20(1) and (2) of the *Insurance Act*, which weighs strongly towards the standard of reasonableness.

> 20. Exclusive jurisdiction
>
> (1) This section applies with respect to proceedings under this *Act* before the Tribunal, the Superintendent and the Director and before an arbitrator.
>
> (2) A person referred to in subsection (1) has exclusive jurisdiction to exercise the power conferred upon him or her under this *Act* and to determine all questions of fact or law that arise in any proceeding before him or her and, unless an appeal is provided under this Act, his or her decision thereon is final and conclusive for all purposes.[152]

It is worthwhile to note that while the *SABS* does not contain a privative clause, the Divisional Court in *Pastore* states deference ought be given to the arbitrator applying the *SABS,*

> *"SABS* is part of the legislative scheme which bears directly on the decision taken by the Director's Delegate. There is no privative clause, but this is a discrete and special administrative regime. While there appears to be no qualification, in the *Insurance Act* or *SABS*, as to who the Director may delegate to consider an appeal from an arbitrator, for the purpose of this decision, there is no reason to assume that the Director's Delegate was anything other than experienced in these matters. In such circumstances, the standard of review is reasonableness. Deference would be owed. Deference does not require the court to show blind reverence to the interpretation found in or represented by the decision under review".[153]

As seen above, in determining the standard of review to be that of reasonableness, the Court of Appeal also based their decision in *Pastore* upon *Dunsmuir* factor (4), the expertise of the tribunal. "The specialized adjudicative scheme for deciding issues of entitlement to SABS benefits, which includes interpreting legislation, recognizes the expertise and experience of the director (and the delegates) and gives the director the authority to make the final determination, to which deference is typically afforded.[154]

Given the Court of Appeal's statement regarding the deference owing to the FSCO adjudicative process, the question arises as to whether this creates an opportunity for claimants to "forum

[150] *Pastore*, *supra* note 145.
[151] *Pastore* v. *Aviva* 2012 ONCA 642 (CanLII) at 9 [*Pastore*].
[152] *Insurance Act*, *supra* note 12, s 20.
[153] *Pastore*, *supra* note 145 at 23 - 24.
[154] *Pastore* v. *Aviva supra* note 151at 11.

shop". This would allow a claimant to chose to litigate, free from the precedential reach of arbitrators, or to arbitrate at FSCO, where deference would be given to the arbitrator even upon judicially review. *Pastore* is not clear as to whether the outcome of *Pastore* would have been the same if it were litigated and no deference given to the trial judge upon appeal. There is room for strategy where the decisions of a judge and an arbitrator may be very different.

Conclusion

Much has changed over the 22 years since the creation of FSCO (and its predecessor the Ontario Insurance Commission). Arbitrations were heard in the course of one to two days, with the rarest of cases consuming three or four consecutive hearing days. From the earliest decisions, as codified by section 1.1 of the *DRPC* the proper approach to conducting a FSCO arbitration hearing is to apply the most just, quickest and least expensive means of resolving this dispute.[155] Where arbitration hearings now routinely do not finish in the four hearing days allotted, where multiple witnesses are called in a manner not unlike a civil trial, it seems like the tenets of FSCO arbitration process are not being met.

There is a body of authority approaching if not exceeding 2,000 decisions, plus appeals, judicial reviews, court and appellate court decisions, including a handful that have made their way to the Supreme Court of Canada. The process to be followed in preparing for an arbitration hearing is now very much like preparing for a trial. There are typically hundreds if not thousands of documents to review in each case, along with hundreds of prior decisions of relevance to the issues in dispute. Those appearing before FSCO must know their file, the *DRPC* and the case law for purposes of analyzing how the claim might be concluded, not only by reason of substantive determinations, but also by reason of the hundreds of decisions which address process in one way or the other.

It is not entirely clear that the developments from 1990 to date have all been for the better. The thought in 1990 was that unrepresented claimants could act for themselves easily at FSCO, not unlike proceeding to Small Claims Court. That clearly is not a viable option for most claimants, where it is often daunting even for experienced counsel to prepare for an arbitration and marshal the evidence. It may be that an examination of where we are and how we got to this point is in order. Clearly, where pre-hearing dates are being booked 6 to 9 months after a Response of Insurer is generated, and hearing dates 8 to 15 months thereafter, the system is getting bogged down. There are a number of other provincial tribunals that seem to be faring better in keeping their processes and hearings streamlined. It may be time to look at the Workplace Safety Insurance Appeals Tribunal, and the Human Rights Tribunal to name but two, to see how it is that they have not fallen into the same traps as FSCO.

[155] *DRPC*, *supra* note 1, Rule 1.1.

APPENDIX

Section F - Expense Regulation[156]
Excerpt from Regulation 664, R.R.O. 1990, Made Under the *Insurance Act*, as amended.

12.

1. The expenses set out in the Schedule are prescribed for the purpose of subsection 282(11) of the Act.

2. An arbitrator shall, under subsection 282 (11) of the Act, consider only the following criteria for the purposes of awarding all or part of the expenses incurred in respect of an arbitration proceeding:

    1. Each party's degree of success in the outcome of the proceeding.
    2. Any written offers to settle made in accordance with subsection (3).
    3. Whether novel issues are raised in the proceeding.
    4. The conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders.
    5. Whether any aspect of the proceeding was improper, vexatious or unnecessary.
    6. Whether the insured person refused or failed to submit to an examination as required under section 42 of Ontario Regulation 403/96 (Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996) made under the Act or refused or failed to provide any material required to be provided by subsection 42 (10) of that regulation.
    7. Whether the insured person refused or failed to submit to an examination as required under section 44 of Ontario Regulation 34/10 (Statutory Accident Benefits Schedule — Effective September 1, 2010), made under the Act, or refused or failed to provide any material required to be provided under subsection 44 (9) of that regulation.

3. Upon the request of the insurer or the insured person, the arbitrator shall, for the purposes of awarding expenses, take into account all written offers to settle, if any,
    (a) that were made after the conclusion of mediation and before the conclusion of the arbitration; and
    (b) that were made in accordance with the rules of practice and procedure applicable to the proceeding.

4. If the arbitrator is requested to take into account a written offer under subsection (3), the arbitrator shall have regard to the terms of the offer, the timing of the offer, the response to the offer and the result of the proceeding.

[156] *DRPC*, *supra* note 1, Schedule F.

SCHEDULE
DISPUTE RESOLUTION EXPENSES (Subsection 282 (11) of the Act)

1. The filing fees paid by the insured person when applying for arbitration may be awarded to the insured person.

2. The filing fees paid by the insured person or the insurer when appealing the order of an arbitrator or applying to vary or revoke an order may be awarded.

3. (1) The legal fees payable by the insured person or the insurer for the following matters may be awarded:

    1. For all services performed before an arbitration, appeal, variation or revocation hearing.
    2. For the preparation for an arbitration, appeal, variation or revocation hearing.
    3. For attendance at an arbitration, appeal, variation or revocation hearing.
    4. For services subsequent to an arbitration, appeal, variation or revocation hearing.

    (2) The number of hours for which legal fees may be awarded shall be determined by the arbitrator, having regard to the criteria set out in subsection 12 (2) of this Regulation.

    (3) The maximum amount that may be awarded for legal fees is the amount calculated using the hourly rates set out in the Dispute Resolution Practice Code published by the Ontario Insurance Commission or Financial Services Commission of Ontario, as it may be amended from time to time.

3.1. (1) The agent's fees payable by the insured person or the insurer for the following matters may be awarded:

    1. For the preparation for an arbitration, appeal, variation or revocation hearing.
    2. For attendance at an arbitration, appeal, variation or revocation hearing.
    3. For services subsequent to an arbitration, appeal, variation or revocation hearing.

    (2) The maximum amount that may be awarded for agent’s fees is the amount calculated using the hourly rates set out in the Dispute Resolution Practice Code published by the Ontario Insurance Commission or Financial Services Commission of Ontario, as it may be amended from time to time.

4. The amount of the following disbursements made by or on behalf of the insured person or the insurer may be awarded:

    1. For long distance telephone, facsimile and other telecommunication charges.
    2. For typing, printing and reproducing copies of documents.
    3. For the delivery, by mail or courier, of items relating to the arbitration, appeal, variation or revocation hearing.
    4. For other out-of-pocket expenses incurred in furtherance of the arbitration, appeal, variation or revocation hearing.
    5. Any applicable taxes paid in respect of the expenses referred to in this section.

5. (1) The amount of the following witness fees paid by or on behalf of the insured person or the insurer may be awarded:

    1. For the attendance of witnesses, in accordance with subsection (2).
    2. For the attendance of an expert witness who gives opinion evidence at the arbitration or hearing or whose attendance is necessary, in accordance with subsection (3).
    3. For a report prepared by an expert, provided to the other parties to the arbitration or hearing and necessary for the conduct of the arbitration or hearing, in accordance with subsection (4).

(2) The maximum amount that may be awarded for the attendance of a witness is the amount of the attendance allowance for the witness that may be allowed under Rule 58.05 of the rules of court as a disbursement.

(3) The maximum amount that may be awarded for the attendance of an expert witness is $200 per hour of attendance, up to a maximum of $1,600 per day.

(4) The amount of the expenses paid by or on behalf of the insured person or the insurer to an expert witness for preparation for a hearing at which the witness testifies may be awarded, to a maximum of $500.

(5) The amount of the expenses paid by or on behalf of the insured person or the insurer to an expert for the preparation of a report may be awarded, to a maximum of $1,500.

(6) Despite subsection (5), the maximum amount that may be awarded in respect of expenses paid by or on behalf of the insured person or the insurer to a member of a designated body within the meaning of the Public Accounting Act, 2004 for the preparation of a report in connection with a claim for income replacement benefits is $2,500.

6. (1) The amount of the following expenses paid by or on behalf of the insured person, the insured person's lawyer or agent, the insured person's attendant, if one is required, or the insurer's lawyer or agent may be awarded:

1. For travelling expenses, in accordance with subsection (2).
2. For overnight accommodation and meals, in accordance with subsection (3).

(2) The maximum amount of travelling expenses that may be awarded for a person,

(a) for an arbitration or a hearing that takes place in the municipality in which the person resides is the amount incurred by the person for each day of his or her necessary attendance at the arbitration or hearing;
(b) for an arbitration or a hearing that takes place outside the municipality in which the person resides and within 300 kilometres of his or her residence is the lesser of,
  (i) 30 cents per kilometre for one return trip between the person's residence and the place in which the arbitration or hearing takes place, or
  (ii) the amount incurred by the person;
(c) for an arbitration or a hearing that takes place 300 or more kilometres from the person's residence is the lesser of,
  (i) the amount of the return economy airfare for the person plus 30 cents per kilometre for one return trip between his or her residence and the airport and for one return trip between the airport and the place of the arbitration or hearing, or
  (ii) the amount incurred by the person.

(3) The maximum amount that may be awarded for overnight expenses and meals is $150 per night for each overnight stay required for the person.