The dispute resolution mechanism for resolving claims-related disputes in jurisdictions like Alberta, British Columbia and Manitoba replaces the appraisal process still in other Canadian jurisdictions. The DR process reflects the growing trend of encouraging parties to use non-judicial mechanisms for fast and cost efficient resolution of disputes. While the DR process can improve access to justice, the current system is premised on formal equality and not sufficiently attentive to the inherently unequal insurer-insured relationship. The informal, privatized system also reflects the growing culture of delegalization of disputes in commercial relationships, and undermines the consumer protection rationale of insurance regulation.

1. Introduction

It is a function of the neo-liberal state that individuals are expected to be financially self-reliant and minimally dependent on the state in managing risk, and hence for assistance following unfortunate events. Specifically,
individuals are expected to secure their financial well-being through private ordering relying on mechanisms in the private market. Private insurance is one such mechanism within the market fundamentalism typology for managing risk and providing financial security for individuals, families, and organizations with minimal reliance on the state. Therefore, private insurance is viewed as prudent conduct and responsible self-reliance in governing oneself and managing risk.

2 This view is reflected in, among other things, the division between the Canada Pension Plan (CPP) and Registered Retirement Savings Plan (RRSP) limits. A larger percentage of retirement savings is expected to be effected through RRSPs that are mostly invested in the private market by individuals and/or through employer pension plans (EPP). Although the CPP contribution limits have increased over the years, the increase is modest in comparison with RRSP contribution limit increases. For instance, the maximum pensionable earnings under CPP in 2015 is $53,600, (increased from $52,500 in 2014) with a contribution limit of $2,479.95 (up from $2,425.50 in 2014) representing an increase of about 2% over 2014 limits. See “Canada Revenue Agency Announces Maximum Pensionable Earnings”, online: <http://news.gc.ca/web/article-en.do?nid=899339>. Meanwhile, RRSP contribution limits have been steadily increasing at a much higher rate, going, for example, from $16,500 in 2005 to $25,370 in 2016. See Canada Revenue Agency, “Rates for Money Purchase Limits, RRSP limits, YMPE, DPSP Limits, and Defined Benefits Limits”, online: <http://www.cra-arc.gc.ca/limits/>. This leaves individuals with the responsibility to plan for their retirement or to look to their employers to do so through EPPs if they happen to have standard employment with such benefits. The trend reflects classic neo-liberalism. Membership in registered pension plans (RPPs) in Canada amounted to 6,185,000 in 2012, an increase of 70,300 or 1.2% from 2011. See Statistics Canada, “Pension Plans in Canada, as of January 1, 2013” August 28, 2014, online: <http://www.statcan.gc.ca/daily-quotidien/140828/dq140828d-eng.htm>.

The pervasiveness and importance of private insurance in modern society can hardly be overstated. Indeed, “… the insurance sector is almost as indispensable to the functioning of a modern society as is the legal system that protects individuals and companies from wrongdoings and crimes.”

Although the need for insurance to minimize the financial consequences of unfortunate events may be more of a perception than reality, the purchase of insurance as a form of responsible self-governance is very much a part of the social and political culture in modern western society. The perception of increasing need for insurance creates a moral opportunity for the insurance industry. This in turn exacerbates the false sense of security and hence the vulnerability of insureds in an inherently unequal relationship. An effective private insurance system is therefore essential to protect the reasonable expectations of consumers and, to some extent, prevent or minimize reliance on the state for financial security.

Notwithstanding the desirability of minimum state regulation of the private market, government oversight is not completely absent in a free market economy. In the insurance industry context, it is important to have in place regimes that promote consumer protection and guard against the inequalities in power between insurers and insureds. Governments must establish structures not only for the efficient functioning of private market systems but also to ensure consumers are protected in their efforts to provide for their own financial security. This includes putting meaningful systems in place that can protect the reasonable expectations of members of the public.

security through the private market because of the unequal distribution of wealth and lack of access to resources necessary to allow effective financial planning.

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5 Governments have not shied away from enacting legislation and creating regulatory agencies to regulate private market institutions. Examples include the Bank Act, SC 1991, c 46; Canada Corporations Act, RSC 1970, c C-32; Office of the Superintendent of Financial Institutions Act, RSC 1985, c 18 (3rd Supp); Bankruptcy and Insolvency Act, RSC 1985, c B-3; Business Practices and Consumer Protection Act, (2004) SBC, c 2. In recent years, both the federal and provincial governments have stepped into the non-traditional lending industry to regulate payday loans. For examples, see Payday Loan Regulation, BC Reg 57/2009; Payday Loans Act, SO 2008, c 8; Payday Loans Regulation, Alta Reg 157/2009. Regulatory agencies charged with protecting consumers include the Superintendent of Financial Institutions that regulates financial services including insurance.

6 The insurer-insured relationship is an inherently unequal one with insureds often being most vulnerable. Thus, the goals of insurance legislation include consumer protection and ensuring the reliability of the private insurance system as a mechanism for managing the insured risks.
Recent insurance legislation reflects these regulatory goals, particularly consumer protection, which has been a major goal of insurance regulation since the late 1800s. Consumer protection was cited as a principal rationale for the amendments to insurance legislation that culminated in the enactment of the British Columbia Insurance Act, amendments to the Alberta and Manitoba insurance acts, and proposed legislative changes to the Saskatchewan insurance legislation. The need for strong consumer protection stems from, among other things, the vulnerability of consumers of insurance products vis-à-vis insurers. Most insureds are average consumers seeking peace of mind and financial security, or they are required to obtain insurance as a condition for accessing other social goods, such as a mortgage, line of credit, or car loan. The average insured is not necessarily well versed in the niceties of the insurance system or even aware of their vulnerabilities in a relationship that is ostensibly intended to protect them. This inequality between insurers and their consumers has the potential to undermine reliance on the private insurance system and the private market generally to provide financial security, and can frustrate consumers’ and the state’s reasonable expectations of financial self-reliance in the neo-liberal state.

Commendably, recent changes to the insurance legislation in jurisdictions such as British Columbia, Alberta and Manitoba are attentive to promoting the interests of vulnerable consumers. For instance, the legislation in these provinces protects survivors of domestic violence, who

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7 Insurance Act, RSBC 2012, c 1 [BC Insurance Act]; British Columbia, Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard), 38th Leg, 4th Sess, Vol 31, No 8 (30 April 2008) at 1172 (Hon C Taylor); Insurance Act, RSA 2000, c I-3 [Alberta Insurance Act]; Alberta, Legislative Assembly, Hansard, 27th Leg, 1st Sess, No 11a (30 April 2008) at 349 (Hon Iris Evans) (“Mr. Speaker, this bill makes better for consumers. There’s enormous opportunity here for consumers...It’s a modernized framework for legislation for insurance contracts in strengthening the consumer protection as well as providing more flexibility for innovation in the insurance industry.”); Manitoba Insurance Act, CCSM, c 140 [Manitoba Insurance Act]; Legislative Assembly of Manitoba, Debates and Proceedings Official Report (Hansard), 40th Leg, 1st Sess, Vol LXIV, No 44 (4 June 2012) at 2089 (Mrs Stefanson) (“Consumer protection enhancements include better access for claimants to documents and information about life insurance and accident and sickness insurance contracts ... enhancements to dispute resolution ... protection for innocent persons from loss of coverage for intentional acts of co-insured and other persons.”); Bill 177, An Act respecting Insurance and Insurers and making consequential amendments to other Acts and regulations, 4th Sess, 27th Leg, Saskatchewan, 2014 (Crown Recomm 8 December 2014) [Saskatchewan Bill 177, Insurance Act]; Legislative Assembly of Saskatchewan, Debates and Proceedings (Hansard), 27th Leg, 4th Sess, NS Vol 57, No 25A (8 December 2014) at 6301 (Hon Mr Wyant)(“Mr. Speaker, part VII of the Act is a particularly important initiative. It provides for a new stand-alone part to address essential consumer protection requirements and provide for specific market conduct rules for insurers.”)
are mostly women and children, along with innocent co-insureds, usually partners, through two avenues: 1) promoting notions of personal responsibility for wrongdoing through mechanisms which protect the interests of innocent co-insureds; and 2) providing opportunities to seek termination or variation of life, accident and sickness insurance contracts upon cessation of insurable interest or where continuation of the policy reasonably endangers the insured’s life and well-being. The proposed legislation in Saskatchewan, and amendments in Ontario, if enacted, will provide similar protections.

One of the defining features of the new insurance regime is its emphasis on non-judicial dispute resolution. The paper examines the mechanism of non-judicial dispute resolution through the lens of consumer protection. I argue that while the movement towards non-judicial dispute settlement is perceived as supporting timely, effective and cheaper means of resolving disputes, thereby promoting access to justice, it may also have the unintended consequence of privatizing dispute resolution in the insurance context. This has the potential to exacerbate the inequalities in power and resources between insurers and consumers and thereby provide an advantage for insurance companies. Specifically, a private dispute resolution process that can be triggered by either the insured or insurer is premised on the unrealistic ideal of formal equality which is not sufficiently attentive to the inherently unequal relationship between insurers and

8 The prevalence of domestic violence against women was highlighted in a 2013 World Health Organization report. According to the report, over 30% of women experience violence at the hands of an intimate partner, making it the most common type of abuse affecting women. As well, the report notes that 38% of all women murdered died at the hands of their partners. While there are regional variations in the prevalence of violence against women, the rate of abuse in high-income countries including Canada is 23.2%. WHO, Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and non-Partner Sexual Violence (Geneva, 2013), online: <http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf>.

9 See BC Insurance Act, supra note 7, s 35; see also Alberta Insurance Act, supra note 7, s 541; Manitoba Insurance Act, supra note 7, s 136.5. For a discussion of this provision, see Elizabeth Adjin-Tettey, “Personal Responsibility for Intentional Conduct: Protecting the Interests of Innocent Co-Insured under Insurance Contracts” (2013) 50 Alta L Rev 615.

10 See BC Insurance Act, ibid, ss 47 and 109; Alberta Insurance Act, ibid, ss 648 and 717, Manitoba Insurance Act, ibid, ss 155(4), 155.1, 217.1, and 217.2. For a discussion of these provisions, see Elizabeth Adjin-Tettey, “Protecting Survivors of Domestic Violence within the Insurance Regime: opportunities to Seek Termination or Variation of Insurance Contracts” (2015) 29:1 Cdn J Fam L 211.

11 See Saskatchewan Bill 177, Insurance Act, supra note 7, ss 8-29, 8-109 and 8-172.

insureds and the potential for abuse to the detriment of insured persons. There is concern that abuse of this process may lead to some consumers being forced to settle or abandon their claims when an insurer demands the use of the dispute resolution process during the claims process. This undermines the consumer protection rationale for the new insurance regime. The result is that there continues to be areas of vulnerability for consumers within the new regime, as well as concerns that the current system reflects neo-liberal values more than consumer protection goals, and thereby exacerbates inequalities between insurers and consumers.

2. Non-Judicial Dispute Resolution Process

Current dispute resolution provisions in the insurance legislation replace the appraisal provisions in the previous regime. The appraisal provision applied to specific types of insurance contracts, property damage or loss, as well as contracts containing statutory or contractual conditions that required an appraisal in order to settle specific disagreements between the insurer and insured. Consistent with the move to consolidate the regulation of all general insurance contracts by the same provisions, the dispute resolution process is applicable to all disputes that may arise between an insurer and insured relating to matters in the claims process under the general parts. Specifically, the dispute resolution process may be applicable to valuation of the insured property and salvage property; the nature and extent of repairs required after loss; whether property should be repaired or replaced; the adequacy of repairs or replacement; or the amount of the loss or damage. In addition, the dispute resolution process is applicable to matters that are set out in a contractual condition and that contemplate the use of the process for disagreements. Other notable differences between the former and current legislation are the use of

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13 BC Insurance Act, s 12; Alberta Insurance Act, s 519; Manitoba Insurance Act, s 121; Saskatchewan Bill 177, Insurance Act, s 8-11.
14 See BC Insurance Act, Part 2; Alberta Insurance Act, Part 5; Manitoba Insurance Act, Part 3; Saskatchewan Bill 177, Insurance Act, Part VIII Division 2.
15 See BC Insurance Act, s 8; see also Alberta Insurance Act, s 513; Manitoba Insurance Act, s 115; Saskatchewan Bill 177, Insurance Act, s 8-6.
16 BC Insurance Act, s 29 statutory condition 11:
In the event of disagreement as to the value of the insured property, the value of the property saved, the nature and extent of the repairs or replacements required or, if made, their adequacy, or the amount of the loss or damage, those questions must be determined using the applicable dispute resolution process set out in the Insurance Act, whether or not the insured’s right to recover under the contract is disputed, and independently of all other questions.
See also Alberta Insurance Act, s 540, statutory condition 11; Manitoba Insurance Act, Schedule B, statutory condition 11; Saskatchewan Bill 177, Insurance Act, s 8-28, statutory condition 11.
representatives in the dispute resolution process instead of appraisers and that an insured, insurer, or their employees may not be appointed as representatives for the dispute resolution process. The previous regime only required that the insured and insurer appoint an appraiser without specifically stating that it may not be the parties themselves or their employees. The change reflects the broader scope for dispute resolution under the new regime.

A) The Proxy Process in the Private Dispute Resolution Provision

The insured and insurer must each appoint a representative for the dispute resolution process at their own expense within seven days after receiving or giving notice for participation in the dispute resolution process. The representatives must then appoint an umpire within 15 days after their appointment. The insured and insurer are responsible for the expense of the dispute resolution process and the umpire in equal proportion. Where a party fails to appoint a representative, or the appointed representative is incapable or refuses to act, the other party may apply to a court for the appointment of a representative. The court may also award special costs against the party whose representative was appointed by the court. This proxy process appears to reflect a hierarchical and professionalized way of resolving disputes objectively and dispassionately by individuals with no personal stakes in the outcome.

It is expected that the representatives for the insured and insurer will attempt to resolve the disputed matter by way of agreement. In the event that the representatives are unable to reach an agreement, they will have to submit their differences to the umpire, though the umpire does not have binding authority to determine the outcome of the dispute. As a reflection of formal equality, a written determination by any two of the proxies – one representative and the umpire or both representatives – resolves the matter in dispute. In this way, the authority to make decisions appears to be decentralized and each party’s representative should have equal influence. However, there are a number of concerns with this private proxy system that I discuss in greater detail in the following sections.

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17 BC Insurance Act, s 12(4); Alberta Insurance Act, s 519(5); Manitoba Insurance Act, s 121(5); Saskatchewan Bill 177, Insurance Act, s 8-11(5).
18 BC Insurance Act, s 12(7); Alberta Insurance Act, s 519(8); Manitoba Insurance Act, s 121(8); Saskatchewan Bill 177, Insurance Act, s 8-11(10).
19 BC Insurance Act, s 12(8); Alberta Insurance Act, s 519(9); Manitoba Insurance Act, s 121(10); Saskatchewan Bill 177, Insurance Act, s 8-11(11).
20 BC Insurance Act, s 12(6); Alberta Insurance Act, s 519(7); Manitoba Insurance Act, s 121(7); Saskatchewan Bill 177, Insurance Act, s 8-11(7).
B) The Benefits of Non-Judicial Dispute Resolution

An important goal of a non-judicial or alternative dispute resolution process is to eliminate barriers to and promote access to justice. The need for a non-judicial dispute resolution process stems from, among other things, the cost and delay in obtaining justice in the civil justice system. As Abella J noted in Sable Offshore Energy Inc v Ameron International Corp, “The justice system is on a constant quest for ameliorative strategies that reduce litigation’s stubbornly endemic delays, expense and stress.”

Similarly, Karakatsanis J commented that the full trial has become “largely illusory” to ordinary Canadians because of the costs and delays entailed.

Indeed, Karakatsanis J stressed the importance of accessibility in endorsing alternative means of addressing disputes, noting the “developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted.”

She explained that the test of whether an adjudicative process is “fair and just” will be based on the ‘principle of proportionality; whether the procedure is appropriate given its cost and impact on the litigation, its timeliness, and the nature and complexity of the litigation.

She further observed that the present situation often results in people abandoning their claims or choosing to represent themselves despite their unfamiliarity with the law, both of which pose problems.

The status quo thus has the potential to produce anti-therapeutic outcomes for insureds who have suffered losses and who may have to wait for a long time and incur substantial expense for the resolution of a relatively small issue. In the meantime, an insured that is unable to respond to the consequences of an unfortunate event with non-insured resources may be dependent on the state or others for assistance. This is contrary to the expectations of individuals who have planned to manage risks through private market mechanisms, such as insurance, within the neo-liberal state. The potential of the dispute resolution process to provide sustainable justice or timely resolution supports a view of private insurance as a peace of mind contract. If such a process could deliver on its promises, it would be commendable for three main reasons: the promotion of fair outcomes quickly and efficiently; the improvement of the insured-insurer relationship;
and a more tailored dispute resolution process for the specific insurance dispute.

1) Promotion of Fair Outcomes

An effective and efficient dispute resolution process would promote therapeutic outcomes. The well-being of the insured and getting them back on their feet as quickly as possible would be prioritized.\(^26\) Oftentimes, the average insured is unable to cope with the financial consequences of their loss. This is why they take out insurance as a form of savings that is meant to provide some sense of financial security should they experience the insured risk. The insured is also coming to the claims process at a very vulnerable time. They have often suffered great hardship or misfortune, such as losing a home, a business, etc. They often need to resolve disputes over their claims quickly and in a cost-effective manner. Therefore, incurring additional and substantial costs or delays in resolving disputes related to their insurance claim has the potential to further deplete an insured’s financial resources and to weaken their resolve to challenge an insurer’s unfavourable position regarding the claim. This distressing scenario is not uncommon for many insurance disputes that go through the civil justice system.\(^27\) Undoubtedly, a system that could ensure timely resolution of insurance disputes with a corresponding possibility of cost savings, compared to the litigation process, is to be welcomed.

2) Improvement of Insurer-Insured Relationship

A well-designed dispute resolution process would also have the opportunity to improve the insurer-insured relationship. While disputes may not always result in a decision that is favourable to the insured, a fair and efficient process has the potential to minimize feelings of disappointment even if the insured’s claim is unsuccessful. Thus, such a regime could improve perceptions of the insurer-insured relationship as one based on the sales vision of insurance wherein parties are not alienated as adversaries.\(^28\)

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\(^{26}\) There is evidence in the personal injury context of the correlation between delay in resolving claims and the detrimental effect on the physical and psychological well-being of victims, whether consciously or unconsciously; see Daniel W Shuman, “When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases” (2000) 6:4 Psych, Public Pol’y & Law 880.


\(^{28}\) The sales vision is premised on a promise of the insurer being there for the insured in the event of misfortune. This narrative is not always reflected in the experiences of insureds when they experience loss; see Tom Baker and Jonathan Simon,
3) Particularization for the Insurance Context

A non-judicial and anti-formalistic dispute resolution process may provide opportunities for a more holistic approach to resolving disputes that can be attentive to the emotional context of the insured. In this sense, the dispute resolution process takes on the role of a therapeutic agent. The representatives and umpire appointed will likely be experts on the issues in dispute and can bring that expertise to bear in providing a satisfactory resolution for both parties. Specialized methods of resolving disputes in the claims process may not always be possible within a formal judicial system. Meanwhile, avoiding the formalities of legal procedures and instead focusing on the particular issue and/or parties and their particular circumstances can result in an expeditious resolution of disputes that is also better adapted to the particular context. There can also be opportunities for compromises in informal processes as a way of resolving conflicting interests in ways that may not be possible in formal judicial processes. However, as discussed below, it is questionable whether the commercial nature of the insurer-insured relationship, in which each party is interested in maximizing their own self-interests, readily lends itself to the required compromises of an informal private dispute resolution process.

3. Triggering the Dispute Resolution Process

It is noteworthy that the dispute resolution provision continues to use the word “demand,” rather than “request,” in outlining the trigger for the dispute resolution process. While there is discretion in whether to use the dispute resolution process or not, effectively, an insured would be bound to participate in the dispute resolution process if demanded by the insurer to do so. Conversely, an insured could also demand that an insurer participate in the dispute resolution process. There does not appear to be room for negotiation between the insured and insurer as to whether the matter should be submitted to the dispute resolution process once one party demands participation. In giving each party the right to demand participation, the provision adopts a formal equality approach that treats the insurer and insured as similarly situated and ignores the inequalities in power and resources that is often inherent in that relationship.

There is also a concern about unequal access to resources that has the potential to further exacerbate an insured’s vulnerability vis-à-vis the insurer at the claims stage. An insured is much more likely to be concerned

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29 See BC Insurance Act, s 12(3); Alberta Insurance Act, s 519(4); Manitoba Insurance Act, s 121(4); Saskatchewan Bill 177, Insurance Act, s 8-11(4).
about, and vulnerable to, the financial liability in such a process than an insurer. As well, a formal demand to submit to the dispute resolution process at their own expense has the potential to engender feelings of anger and frustration in an insured, especially when they already face obstacles and uncertainties regarding indemnification for their loss. This has the potential to cause disillusionment in the insurance system along with anti-therapeutic effects for insureds who are already feeling vulnerable when an insured risk has materialized.

4. Appropriateness and Cost of the Dispute Resolution Process

In addition to questions about the appropriateness of an informal dispute resolution mechanism in the insurance context, the claims of cost-effectiveness of that system may also be doubtful and can raise issues of access to justice. Parties not only have to pay their own representatives but they also have to equally share in the cost of the umpire. This system also raises concerns about access to justice as parties are expected to bear the expenses of getting justice rather than looking to the state to provide the appropriate mechanisms for doing so. There have been similar concerns raised with alternative dispute resolution generally and, in particular, the practice of “renting a judge” to resolve disputes. The reality may well be that financial means actually determine whether a person gets justice or not, as well as the quality of that justice. Further, there is also the concern that the broader scope for private dispute resolution contemplated in the provision, which appears to provide cheap and fast justice, could actually mask an increase in social control. Indeed, such a closed-door process, backed by the coercive power of the state, could readily favour insurers who already wield social and economic power. Such a system reflects neoliberal values rather than the lauded consumer protection rationale that was supposed to be paramount under the new regime.

Arguably, power inequalities between an insurer and insured may be mediated through the use of representatives in the dispute resolution process. However, a party’s financial means and the availability of other resources at their disposal will likely determine their choice of representatives. On the one hand, insurance companies are seasoned, repeat users of the dispute resolution process. They will likely have a pool of professionals with expertise in dealing with the issues at stake to represent them in recurrent disputes with insureds, and for negotiated fees based on carefully calculated economies of scale. On the other hand, the average insured may be a one-time player without the same advantages regarding the choice and cost of appointing a representative compared to the insurer. The result is that the insured could end up appointing a representative who may not be able to effectively represent their interests.
As well, the extent to which an inexperienced representative could adequately neutralize the unequal power relations between the insured and insurer may be minimal. Studies have shown that a client’s success in dispute resolution processes often turns on their available resources and on their representative’s experience in dealing with such issues (more so than any formal training). 30 Experienced clients and representatives are more likely to be assertive throughout the whole dispute resolution process; such a pairing can greatly influence the outcome in a match-up against an inexperienced client and/or less resourced representative. 31 Thus, the insured could end up incurring a much higher cost within the dispute resolution process compared to the insurer. The insured’s interest will also likely be short-term; their focus being on the particular claim at hand and how they might obtain indemnification for their specific loss. Insurers, on the other hand, can afford to focus on their long-term interests. This allows them to adopt strategies aimed at maximizing their gains over the long-term, even if they have to sacrifice short-term interests in order to favourably influence the outcome of future cases.

Another issue related to the costs of private dispute resolution is that the insured may be prevented from representing themselves, by choice or out of necessity. This is exacerbated by the fact that the process can be unilaterally demanded. The phenomenon of self-represented litigants is on the rise, as many litigants cannot afford the cost of hiring lawyers. 32 While there are initiatives to create self-help programs and to provide resources for self-represented litigants, 33 self-representation is not ideal for the administration of justice. Many litigants underestimate the complexity of their cases and the investment of time and resources necessary to properly proceed with the case. This tends to be a source of disillusionment and frustration for self-represented litigants, with a corresponding negative effect on the administration of justice. Despite the potential disadvantages of self-representation, no party is compelled or should be compelled to retain counsel if they are unable to afford the financial resources to do so.

31 ibid at 288 (Hy5).
33 See BC Supreme Court Self-Help and Information Services, Final Evaluation Report, (August 2006), the Justice Access Centre, Self-Help and Information Services, online: <http://www.supremecourtselphelp.bc.ca>.
if they are dissatisfied with legal services they have received previously; if they feel representation is unnecessary given the nature of the claim; or if they feel that they are capable of representing themselves. Under the current regime, however, there may not be the possibility of self-representation even if the cost of hiring a representative and an umpire proves unfeasible for the insured.

It is also possible that insurers may take control of the claims process by demanding private dispute resolution as a strategy to foreclose the insured from initiating an action over a disputed issue. Again, the unequal power relations between the insured and the insurer would be further exacerbated as insureds would be financially penalized regardless of

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34 The most commonly-cited reason for self-representation is the inability of the party to afford to hire or continue to retain counsel. Observations from Macfarlane’s study indicates that 57% of self-represented litigants in her sample reported income of less than $50,000 and 40% reported income of less than $30,000 per annum. As well, a significant number of self-represented litigants report having been dissatisfied with services provided by their legal counsel and choose to self-represent. See Macfarlane, supra note 32 at 8-9.

35 There tend to be higher numbers of self-represented litigants in small claims courts. The small claims court is specifically designed to be a do-it-yourself system where ordinary people can deal with their own cases whether as plaintiffs or defendants where the value of the claim does not exceed $25,000. A detailed guide is provided to help parties navigate that system; see Ministry of Justice, online: <http://www.ag.gov.bc.ca/courts/small_claims/info/what_is.htm>. Farrow et al, supra note 32 note that one of the reasons for self-representation is in relation to cases where representation is perceived to be unnecessary. See also Menninga v Lloyd’s Underwriters, 2012 BCPC 267 at para 33, [2012] ILR I-5324, where the Court noted that it is not cost effective for an insured to retain counsel for smaller claims such as was in the case at bar.

36 The legislation states that an insured or insurer may not be appointed as their own representative and by implication may preclude an insured from self-representing. See BC Insurance Act, s 12(5)(a); Alberta Insurance Act, s 519(6); Manitoba Insurance Act, s 121(6); Saskatchewan Bill 177, Insurance Act, s 8-11(6)(a). This may be contrasted with the duty to mediate under the automobile insurance regime in BC where a party to a motor vehicle action may initiate mediation by serving a notice to mediate on the other party. The parties are expected to attend mediation themselves and are required to self-represent; a party may be represented by another person only where that party is under a legal disability, is not a natural person, is unable to effectively participate in mediation due to mental or physical injury, or is not resident in British Columbia; see Notice to Mediate Regulation, BC Reg 127/98, s 3. It is worth noting that while the insured is not required to be represented by another person, the regulation may exacerbate the inequality between the insurer and the insured as the former is likely to be represented by counsel given its non-natural status while the latter is forced to self-represent. The dispute resolution provision appears to eliminate the inequality concern by having both parties appoint representatives. However, as is discussed below in Part 5, that model also creates potential unfairness due to inequality in power and resources between the insurer and insured.
whether they “choose” to go through the dispute resolution process or not. Such a situation would also do little to help the public perception of the asymmetry between the sales and claims visions of insurance while failing to produce therapeutic outcomes for the insured that can be expected in a system focused on consumer protection.

5. Privatization of Justice

The privatization of dispute resolution shifts the cost of dispute resolution from the state to the insured and insurer. Unfortunately, as has been previously discussed, the cost could disproportionately affect the insured, thereby conferring an advantage on insurers who are able to treat such expenses as the cost of doing business. Such costs can also be easily passed on to the customers in determining the appropriate premiums for coverage.

A) Lack of Review/Appeal

Given the private nature of the process there is no guarantee that the quality of the process and outcome would be consistent with fundamental principles of justice or consistent with insurance and contract law principles generally. Umpires, and presumably representatives making decisions under the dispute resolution provisions, may be considered expert administrative tribunals and their decisions will be subject to judicial review. The scope of review may be limited, however, and courts are likely to treat an umpire’s decision with deference. In Vandale v Wawanesa Mutual Insurance Co, the Court held that the dispute

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37 See Elizabeth Adjin-Tettey, “Potential for Genetic Discrimination in Access to Insurance: Is there a Dark Side to Increased Availability of Genetic Information?” (2013) 50 Alta LR 577 at 585 [Adjin-Tettey, “Potential for Genetic Discrimination”]. Notwithstanding the myriad contributions of the insurance industry to the well-being of individuals and society as a whole in modern society, public perception about the insurance industry tends to be negative, among other things, due to misrepresentations, misleading advertising and aggressive sales practices that do not reflect the customer’s insurance needs, lack of transparency and use of technical language in insurance policies, etc. See de Bettignies, Lépineux and Tan, supra note 4 at 4.

38 It is noteworthy that the Alberta, Manitoba, as well as the proposed Saskatchewan provisions specifically state that an umpire is bound by the rules of procedural fairness in performing their duty in the dispute resolution process: Alberta Insurance Act, s 519(16); Manitoba Insurance Act, s 121(17); Saskatchewan Bill 177, Insurance Act, s 8-11(12). However, there is no specific mention of a review process in the BC legislation. The expectation of procedural fairness in all jurisdictions, including BC opens the door for an insured to seek judicial review of an umpire’s decision but the scope of review may be limited; see Vandale v Wawanesa Mutual Insurance Co. 2015 BCSC 766, [2015] BCJ No 942 (QL) [Vandale].

39 Vandale, ibid.
resolution provision in the *Insurance Act* is a privative clause that gives exclusive jurisdiction to a particular administrative tribunal, in this case, the umpire. The Court noted that the umpire is considered an expert one-member administrative tribunal under the *Administrative Tribunals Act*. The umpire’s decision is subject to judicial review in accordance with the terms of the Act. However, there is limited scope of review of decisions under privative clause in section 58 of the *Administrative Tribunals Act*. As well, the Court noted that an umpire’s decision is treated with deference. Appraisers and umpires have a professional duty to be impartial; an umpire is expected to make their decision without bias. The onus is on the party alleging bias to prove on balance of probabilities that the umpire’s opinion is subject to bias, interest or lack of impartiality. Given the view that umpires are experts on the issues submitted to the dispute resolution process, there may not be an effective review process absent evidence of bias or that the umpire acted ultra vires.

Insured persons could be left with unsatisfactory outcomes from the dispute resolution process and with no means of challenging that outcome if they cannot afford the cost of a judicial process or otherwise lack the will and determination to pursue the claim further. This situation is likely to result in what ADR critics have referred to as the delegalization of disputes and the norms for resolving those disputes. This may in turn result in pluralism and decentralization of dispute resolution mechanisms, without necessarily producing satisfactory and therapeutic outcomes for those who engage that system. Indeed, as noted by Karakatsanis J, “without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.”

The Supreme Court of Canada recently tackled the issue of arbitration clauses in utilities contracts that purport to bar consumers from access to the courts in *Seidel v Telus Communications Inc.* In *Seidel*, the utility company was attempting to force the consumer into private arbitration,
much like an insurer could force an insured into private dispute resolution. The Court weighed the arguments for and against private arbitration:

The underlying issue in this appeal is access to justice. Each of the disputants claims to be its supporter. Mediation and arbitration, TELUS says, reflect the values of freedom of contract and the autonomy of individuals to order their affairs as they see fit. A consumer can press an individual complaint which would not be worthwhile to pursue under the more costly proceedings of a court.

... Nevertheless, from the perspective of the BPCPA, “private, confidential and binding arbitration” will almost certainly inhibit rather than promote wide publicity (and thus deterrence) of deceptive and/or unconscionable commercial conduct. It is clearly open to a legislature to utilize private consumers as effective enforcement partners operating independently of the formal enforcement bureaucracy and to conclude that the most effective form is not a “private and confidential” alternative dispute resolution behind closed doors, but very public and well-publicized proceedings in a court of law.

The Court went on to hold that enforcing a private arbitration clause in a utilities contract was inconsistent with consumer protection legislation because the utility company may utilize the process to ensure “confidentiality, lack of precedential value and avoiding ‘the dispute getting into the public domain.’”45 The dispute resolution process in the insurance legislation carries with it the same policy concerns, discussed in detail below. While this led the Court in Seidel to refuse to enforce the private arbitration clause in a contract, it is unclear whether consumer protection legislation could be used to override the legislated mandatory private dispute resolution process once a party invokes it.

A) Decentralization

The availability of multiple forums for resolving disputes is likely to have little impact on an insured who lacks resources or the determination to challenge the insurer’s decision, or if the uncertainty of an outcome is sufficiently discouraging. Therefore, such decentralization has the potential to undermine confidence in the insurance system and the processes of law. It may also engender feelings that the coercive power of the state is being deployed on behalf of those with social and economic power rather than in protecting vulnerable consumers.46

45 *Ibid* at para 38.

46 Similar concerns have been expressed about alternative dispute resolution generally; see Peter L Murray, “Privatization of Civil Justice” (2007) Willamette J Int’l L & Dispute Res.
Thus, it would have been preferable for the locus of binding decision-making authority to have been centrally located somewhere, such as an independent ombudservice that could provide consistent and transparent resolution of disputes and would be bound by the rule of law and procedural fairness, and contract principles.

**B) Potential for Abuse by Insurers**

The closed-door nature of the alternate dispute resolution process raises concerns of potentially abusive practices and strategies by the insurer to resist claims. Such behaviour (which may include foot-dragging, name-calling, or false accusations) could force financially and emotionally vulnerable insureds to settle for less than the true value of their claims or to abandon the claims altogether.\(^{47}\) It is entirely possible that an insurer may utilize the dispute resolution process unscrupulously as a means to further these goals; there is no stated threshold for the value of claims or any restrictions regarding the particular items that can be submitted to the dispute resolution process. An insured forced into the dispute resolution process by the insurer would therefore run both the risk of not being indemnified for their loss as well as the additional expenses from that process.

In contrast, it is unlikely that the cost of the process would be a deterrent for an insurer, unless an element of bad faith was involved that could leave it open to liability for breach of the duty of good faith and the possibility of punitive damages. The threshold for a finding of such a breach is high, however, and may not provide sufficient deterrence for insurers who are intent on manipulating the claims process to frustrate the insured.\(^{48}\) Even if an action for breach of the duty of good faith could be

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brought, an insured would still have to be aware of such a possibility and must also be willing to initiate a claim against the insurer. This would not be likely in most cases, especially where the value of the claim is small or the insured risks further liability by way of legal costs should they lose. Meanwhile, the insurer as a repeat player can be strategic in their demands to resort to the dispute resolution process, using it as a form of social control backed by the power of the state. They can demand to have issues resolved through the process where their chances of success are low and they would like to avoid the unfavourable precedent and potential negative publicity that may be generated by a public process and the record created by such decisions. Furthermore, insurers may decide to forego the dispute resolution process when they perceive their chances of success as high and where there is a possibility that a case may generate a favourable precedent.

As has already been noted, insurers are also likely to appoint representatives from a pool of professionals with expertise in the matter in dispute. This is also, presumably, the basis for appointing an umpire. However, an imbalance is potentially created if the insured appoints a less experienced representative. More importantly, the representatives and the umpire are private economic actors and are likely subject to economic considerations. They are not necessarily acting dispassionately in the public interest or in pursuit of public justice. These actors tend to be dependent on insurance companies for their ongoing business and may not want to jeopardize their relationship with a continuing client who, in some cases, could be a major client, and a means for future referrals.

It is, therefore, conceivable that representatives and/or umpires will be sympathetic to the insurer’s position, whether consciously or unconsciously, rather than viewing the dispute in an impartial and objective way as would be expected of independent public agencies. In fact, insurers as repeat

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49 See BC Insurance Act s 12 (10)-(12). An application to court for the appointment of an umpire must be accompanied by three names of persons who the applicant believes are capable of performing the functions in question and the application must be accompanied by their credentials.

50 While the insured and insurer may not appoint their employees as representatives, nothing precludes the appointment of the same representative or umpire repeatedly provided they are independent contractors. Concerns about the possibility of representatives and umpires being loyal to insurers and protecting their interests also arises in other contexts as for example where an insurer has a strategic alliance agreement (SAA) with particular counsel or their firm. SAAs restrict counsel’s ability to represent an insured in third party liability claims. In the event of a conflict of interest, counsel is expected to withdraw from representing the insured without providing reasons for the withdrawal. The practice raises questions about counsel’s ethical obligations of undivided loyalty in joint representations. Yet, this practice is permissible by regulation as well as lawyers codes of conduct. See Insurance (Vehicle) Regulation, BC Reg. 447/83, ss. 74.1, 75; Federation of Law Societies
players in the dispute resolution process may be the only entity to monitor performances by representatives or umpires. Their report cards will no doubt influence the actors that they will engage in subsequent dispute resolution processes. A privatized system in which the decision makers’ economic interests are likely to influence the outcome of disputes has the potential to undermine the integrity of the dispute resolution process and erode public justice. Thus, an insured, as a one-time player, is more likely to lose out in the dispute resolution process compared to the insurer. Meanwhile, as already noted, there may be limited scope for review and challenges based on alleged bias. This gives insurers an unfair advantage to the detriment of the insured.

6. Mitigating the Costs of Dispute Resolution: The Ombudservice That Could Have Been

As we have seen, an insured could end up incurring unanticipated expenses in the dispute resolution process, with their outcomes largely dependent on resources they (do not) have available. The system appears to entail significant risks for insureds and is inconsistent with the consumer protection rationale for insurance regulation and as stated in the Hansard as the reason for the adoption of the new regime. In introducing the changes in the British Columbia legislature, then Finance Minister Colin Hansen seemed to have contemplated a system that mandated insurers to offer consumers access to ombudsperson-type services. This type of service would have avoided concerns about unequal access to resources and the potential for the outcome of the dispute resolution process to be influenced by the quality of the insurer’s and insured’s representatives. However, it is also clear from the legislative debate leading up to the enactment of the 2012 BC Insurance Act that the legislature was not interested in prescribing such a dispute resolution body, noting that this should be done by way of regulation. The Minister noted that leaving the issue to regulation allows “flexibility to make sure that we pick the best organization or organizations to ensure that those objectives can be met,”

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51 See Murray, supra note 46.
52 See Gallanter, supra note 42; Murray, ibid.
brushing past concerns that not settling the issue ignores the need for more immediate action given public concerns and consumer interest in such a service.\textsuperscript{53} The Minister further stated his hope that this regulation would be enacted within a year.\textsuperscript{54} So far, no such regulation has been enacted. Thus, insurers and insureds are expected to navigate the dispute resolution process on their own. While insurers are more likely to have knowledge of the process, the average insured may be at a disadvantage, for the claim in question may be their first and only one against an insurer. It would have been preferable for the legislation or the accompanying regulations to date to have addressed the dispute resolution process in greater detail and to provide a more comprehensive framework for its implementations.\textsuperscript{55}

Based on debates in the British Columbia Legislature, it appears there was an assumption that insureds would be able to resort to the General Insurance Ombudservice (GIO) for handling of the dispute resolution process.\textsuperscript{56} According to the GIO website, it is an independent organization that provides timely, cost-free, and impartial services to insureds to help them “resolve disputes or concerns with their home, auto or business insurers.”\textsuperscript{57} However, the final dispute resolution provisions adopted did not include the prospect of insureds resorting to the GIO to resolve claims-related issues with their insurers. In fact, it would appear that the dispute resolution mechanism prescribed by the legislation precludes insureds from resorting to the GIO for disputes contemplated by that section. The GIO website states that it does not provide certain services, including “Dispute settlement procedures as required by law or designated regulatory authorities.”\textsuperscript{58} While insurers and insureds have discretion in demanding the dispute resolution process, once the demand is made, the process that is triggered can be characterized as required by law and so may not be within the scope of services that the GIO provides.

Furthermore, the process set out in the British Columbia, Alberta and Manitoba insurance legislation is inconsistent with the GIO process in a

\begin{itemize}
\item \textsuperscript{54} \textit{Ibid}.
\item \textsuperscript{55} The \textit{Insurance Regulation [Revised Regulation], 403/2012, BC Reg 403/2012, March 19, 2013 s 3 mandates insurers to provide written notice of the dispute resolution process to the insured within 10 days after the insurer determines there is a dispute to which the dispute resolution process outlined in s. 12 of the \textit{Insurance Act} applies or within 70 days after the insured submits proof of loss if the insurer has not yet made a decision regarding the claim.
\item \textsuperscript{56} \textit{Official Reports of Debates, supra}, note 53 at 993.
\item \textsuperscript{57} Online: General Insurance Ombudservice <http://www.giocanada.org/whosgio.html>.
\item \textsuperscript{58} \textit{Ibid}.
\end{itemize}
number of significant ways. The initial step in the GIO process is for a GIO-appointed Consumer Service Officer (CSO) to work with the insured/complainant to resolve the complaint through the insurance company’s formal internal complaint handling process. Where the insured’s complaint is not satisfactorily resolved, the process may move to the second stage where the CSO engages in informal conciliation. Here, the CSO works with the insurer’s Complaint Liaison Officer or other officials to discuss unresolved issues. The insurer’s official representative then issues a Final Position Letter setting out how they propose to resolve any outstanding matters. Where the insured is not satisfied with the proposed solution outlined in the letter, they may proceed to mediation as the third and final step in the GIO process. The CSO helps the insured to identify an appropriate mediator who acts as a neutral third party to help the parties work through the outstanding issues. If the insured and insurer continue to have unresolved issues at the end of the mediation session, the GIO Manager of Complaints may determine if it is appropriate to proceed to Senior Adjudication. The insured and insurer do not make representations before the Senior Adjudication Officer (SAO), although the SAO might contact the parties for any clarifications. The SAO independently reviews the file and provides a non-binding recommendation on the outstanding issues.

Thus, under the GIO process, the CSO is not acting as the insured’s representative as is required under the dispute resolution process. Also, as already noted, the insured, insurer or their employees may not act as their representatives or umpire in the dispute resolution process under the Insurance Act.\footnote{BC Insurance Act, s 12(5); Alberta Insurance Act, s 519(6); Manitoba Insurance Act, s 121(6); Saskatchewan Bill 177, Insurance Act, s 8-11(6).} This also would preclude the possibility of an insurance company’s employees involved with the GIO-initiated internal complaint process qualifying as “representatives” under the legislation. Ultimately, while the dispute resolution process contemplated under the GIO tries to bring parties together to resolve the issues, the statutory dispute resolution provision requires parties to submit their differences to third parties for resolution. Thus, it is unlikely the GIO process may be resorted to under the dispute resolution provisions. As well, it is unlikely that an insured can resort to the GIO process once an insurer triggers the statutory dispute resolution process. This has the potential to undermine the consumer protection rationale of the new insurance regime.
7. Lessons from the United Kingdom Financial Ombudsman Services

The United Kingdom has also considered the issue of how to resolve insurance claims in a timely and cost-efficient manner. This has led to the establishment of an independent statutory agency to handle such claims known as the UK Financial Ombudsman Service (FOS). The FOS was established under the Financial Services and Markets Act 2000 to provide an avenue for consumers to resolve disputes with financial institutions, including insurance companies. It has jurisdiction over insurance disputes where the claim against the insurer does not exceed £100,000, and it now decides most consumer insurance disputes in the UK.

Under the FOS process, complaints are first submitted to the insurer’s internal complaint mechanisms. An insured that is unsatisfied with the outcome of the internal procedures has the option of submitting the complaint to the FOS which functions as an inquisitorial system. Adjudicators gather the information necessary for determination of the complaint rather than relying on the strength of the evidence presented by the parties. The inquisitorial approach has the benefit of neutralizing inequalities in resources, knowledge, presentation and evidence between the insurer and insured. It also makes it unnecessary to use professional representatives during the process with the possibility that they could influence the outcomes to the detriment of the insured. Instead, the FOS prefers to hear directly from complainants and finds it obstructive to have complainants represented by professionals. In deciding disputes, the FOS follows its own rules and is guided by what it believes to be fair and reasonable in the circumstances. To be binding, both parties must accept an adjudicator’s decision. Parties may seek a review of the adjudicator’s decision by an ombudsperson or choose to re-initiate their claims in the civil justice system. In practice, complainants rarely choose the civil justice option due to both the cost and burden of proof associated with the process. As well, most cases do not even proceed to an ombudsperson review.

Complainants do not bear the cost of using the FOS regardless of the outcome of the complaint. Financial service firms, through a combination

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62 See Gilad, supra note 30 at 291.
63 Ibid at 290.
64 Ibid.
of annual fees and case fees, fund the service. Although the jurisdiction of the FOS is limited to claims not exceeding £100,000, it still considers claims in excess of that amount. However, the FOS’s decisions in relation to claims over £100,000 are non-binding although many insurers voluntarily follow the non-binding FOS decisions and pay those claims.65

The establishment of an independent agency similar to the UK FOS might better facilitate resolving insurance disputes in a timely and cost effective manner. The agency could be funded by contributions from insurers, with a financial limit to the claims that may be submitted to that body, thereby creating an independent, viable and inexpensive dispute resolution mechanism. Such a system could be designed to provide effective protection to the insured as the weaker party and to neutralize the advantages that insurers enjoy as repeat players in the system. In fact, there are similar mechanisms for resolving automobile insurance disputes in some Canadian jurisdictions. For example, in Alberta, an insured that is not satisfied with the resolution of her or his complaint first by the insurer and then through the GIO process, may apply to the Automobile Insurance Dispute Resolution Committee (AIDRC), which may refer the dispute to arbitration.66 Although each party to the dispute pays the costs of their representatives, witnesses, and case preparation, which may be prohibitive, the Alberta Government normally pays the costs associated with the arbitration process such as the arbitrator’s fees, room rental, administrative costs, etc.67 As well, the Ombudsman for Banking Services and Investment (OBSI) is an independent and impartial agency that reviews and resolves unresolved complaints between participating banking services and investment firms and their customers at no cost to consumers.68 The OBSI

67 Arbitration Proceedings Rules, Alta Reg 71/2005, s 16. See also the dispute resolution services provided by the Financial Services Commission of Ontario (FSCO) for resolving disputes relating to statutory accident benefits under the automobile insurance regime. The FSCO is funded through a combination of assessments and fees imposed on organizations in the regulated sectors similar to the FOS model proposed in this paper. However, individuals seeking arbitration pay a filing fee and also bear their own cost of preparing and presenting their case at arbitration. As well, an arbitrator may order costs against either party, thereby making it possible for an insured to be liable for the insurer’s arbitration expenses: Insurance Act, RSO 1990, c I.8, ss 280, 282, Financial Services Commission of Ontario: <http://www.fsco.gov.on.ca/en/about/annual_reports/Pages/2014-reg-framework.aspx>.
68 For more information about the Ombudsman for Banking Services and Investment, see: <https://www.obsi.ca/home>.
does not resolve insurance disputes but can be a model for the dispute resolution process under the insurance legislation. This paper proposes an independent and impartial system that is fully funded by insurers similar to the UK FOS and OBSI to make it accessible for insureds, particularly those who may not be able to afford the costs of putting their case before the dispute resolution body. Such a system would align with the consumer protection goal of insurance legislation. However, in order to protect the integrity of that system, the body charged with resolving insurance disputes should have discretion to award costs against the moving party in limited circumstances such as where the claim is frivolous and vexatious, the party refuses to cooperate during the process, or otherwise behaves unreasonably vis-à-vis the other party.

8. Conclusion

Notwithstanding the “sales vision” of insurance companies as aid institutions or mechanisms within the private market system to assist victims of misfortune and promote financial security, insurance companies are often negatively portrayed in society based on the “claims vision” of insurance. Indeed, the practice of insurance institutions no longer reflects the welfare model of insurance but rather a highly scientific system in which risk predictability is carefully correlated with premiums and benefits.69 Insurance is ultimately a business where parties are expected to behave as rational actors looking out for their own material interests. This prompts one to ask: is a system that is focused on maximizing the material interests of each party antithetical to the vision of a sustainable insurance regime within the neo-liberal state? The answer depends on the rationale for the maximization of self-interest in the insurer-insured relationship. No conflict arises if both insured and insurer realize a shared purpose in ensuring a strong and solvent insurance system that promotes fairness not only between the insured and insurer but also among insureds. However, the necessary characteristics of such a system are still in formation and the reality that this is a system of unequal players has yet to be fully addressed.

The insurance regimes in jurisdictions like British Columbia, Alberta, Manitoba, and soon to be Saskatchewan, have taken critical steps in recognizing the need for greater consumer protection under the current insurance regime. The dispute resolution provisions, which have been greatly expanded under the current regime, recognize that there are alternative, and often more preferable, means outside of the courtroom for parties to work out their issues. However, the emphasis on private and non-judicial dispute resolution also reflects the growing culture of deregulation

69 See Adjin-Tettey, “Potential for Genetic Discrimination,” supra note 37 at 582-83.
in commercial relationships and the delegalization of disputes. This is a culture that can be as troubling as it is liberating. While it recognizes that access to justice has become a critical issue in the modern justice system, there is also the potential for its abuse. For example, this trend has permitted a proliferation of arbitration clauses in ordinary consumer contracts by which disputes between the contracting parties are channelled through arbitration procedures. As Murray has observed,

The late 20th Century atmosphere of deregulation has permitted powerful economic players such as credit card companies, the securities industry, insurance companies, and banks to channel disputes raised by their customers, employees, and other contracting parties into various forms of private arbitration, ostensibly as a quicker, cheaper, and easier method of resolving such disputes.  

Consumer protection groups have been harshly critical of these arbitration clauses as a form of social and economic control by large corporations such as utility companies, credit card companies, banks and insurance companies, to the detriment of consumers. It is therefore ironic that a regime that is ostensibly focused on the consumer protection goal of insurance regulation would promote the very mechanism that is favoured by the most powerful economic actors. Australia specifically addressed the use of arbitration clauses in insurance contracts when it enacted the Insurance Contracts Act, 1984. The legislation provides that provisions in an insurance contract that require or authorize parties to submit their differences or disputes to arbitration are void unless parties entered into that agreement after the difference or dispute arose. Thus, an insurer cannot unilaterally force an insured into a private and/or informal dispute resolution process.  

Although the informal dispute resolution process has the potential to produce therapeutic justice, it may be an ill-fitting mode for what is inherently an unequal commercial relationship. The privatization of justice favours parties with the greatest power and resources – repeat players in closed-door arenas that do not require public transparency or accountability. It is the vulnerable insured that ultimately bears the greatest burden of the costs of such a system. Steps need to be taken to strengthen the dispute resolution provision to better protect insureds and to ensure effective consumer protection necessary for promoting financial security for individuals in the neo-liberal state.

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70 See Murray, supra note 46 at 136.
71 Insurance Contracts Act 1984, Commonwealth Consolidated Acts (Australia), s 43.