ONTARIO TRIAL LAWYERS ASSOCIATION (OTLA)

OTLA's Submission to the Review of FSCO's Dispute Resolution Services

9/20/2013

The Ontario Trial Lawyers Association (OTLA) was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating strongly for safety initiatives.

Our mandate is: to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice.

As an association of lawyers acting for plaintiffs, our organization has 1,400 members who are dedicated to our work across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students from Ontario. We also have out-of-province members who are lawyers from Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Manitoba, Saskatchewan and British Columbia, along with the United States. Together we work in our local communities to ensure equal accessibility to justice, full and fair protection of the rights of those who have suffered injury and the safety of all.

Given our members' daily involvement with insurance disputes on behalf of their clients, we welcome the opportunity to comment on the current state and the future of the Dispute Resolution Services (DRS) at the Financial Services Commission (FSCO).

In this review, we examine the efficacy of the two-part FSCO Dispute Resolution Services system: mediation and then arbitration. Each section looks at the history and current status of the system and makes recommendations for improvement where necessary.

FSCO vs. PRIVATIZATION

OTLA feels very strongly that the DRS system should remain with FSCO and should not be privatized. FSCO is in the best position to offer training to mediators and arbitrators on complex accident benefits issues and, as the governmental regulatory agency for insurance in Ontario, is best poised to provide dispute resolution services to consumers and insurers on automobile insurance issues.

We note the following passage from the recent Ontario Court of Appeal decision in *Pastore v. Aviva*:

> "The specialized adjudicative scheme for deciding issues of entitlement to SABS benefits, which includes interpreting the 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."

FSCO DRS - Mediation

The compulsory mediation of first party benefit disputes has been a part of the Ontario Auto Insurance dispute resolution system for almost 25 years.

Persons injured in automobile accidents who have disputes with their automobile insurer about the payment of their benefits must complete and send into FSCO an Application for mediation. This system allows unrepresented claimants to access dispute resolution services with relative ease. The goal of the program is laudable: to allow claimants and insurers to settle their disputes in a timely and cost-effective manner.

The Backlog

From approximately 2006 to 2013, the ability of FSCO to carry out mediations in a timely fashion was severely compromised, to the point that mediations often took a year or more to be scheduled. This backlog was contrary to the legislatively established timelines and proved a significant hardship for injured claimants who required resolution of their claims in order to be able to access necessary treatment and services.

The mediation backlog has now been eliminated. Indeed, the FSCO website declares that the mediation backlog was eliminated on August 19, 2013. In effect, all applications for Mediation that are now filed will be scheduled and heard within sixty days.

Two important events led to the elimination of the mediation backlog. In 2012, the Ontario Court of Appeal in the *Cornie* series of decisions confirmed that the *Insurance Act* mandates FSCO mediations to take place within sixty days of the Application being filed and if this does not occur, the mediation is deemed to have failed, thus freeing the applicant to proceed to Court or arbitration without the requirement to participate in a mediation session.

The other significant event leading to the elimination of the mediation backlog was the initiative by FSCO to retain private sector mediators to mediate approximately 2,000 backlogged mediations each month. In the nine or ten months following the commencement of this initiative, upwards of 20,000 mediations were conducted.

With the elimination of the backlog, FSCO mediation has, once again, become a timely procedure with applications being scheduled and heard within sixty days. This conforms with the intention of the government at the time that the FSCO mediation system was created in 1990 – to have in place a simple, fast and cost effective method of attempting to resolve first-party benefit disputes.

The elimination of the mediation backlog is permanent. The backlog can never again develop, regardless of the number of available FSCO mediators or the number of mediation applications filed. The reason for this is simple and, in fact, was built in by the government in 1990 as a fail-safe provision to make sure that mediations would be completed in a timely manner. If, for any reason, mediations are not completed within sixty days, they are deemed to have failed. This provision should prove to be of considerable comfort to applicants whose auto insurance benefits have been terminated and who require a timely determination of entitlement.

A system of consent-failed mediations was brought in by FSCO a few years ago in an attempt to help address the mediation backlog. It was not a very successful endeavour, in that only a few hundred "consent fails" were ever completed. With sixty days now being the guaranteed end date for all mediations, consent fails have outlived their usefulness.

Improving the Mediation System

RECOMMENDATION #1

Mediation Opt-Out Provision

An important stated objective of the DRS Review to be undertaken by Justice Cunningham is the determination of whether mediation should remain mandatory for all Ontario automobile insurance disputes.

FSCO statistics have, over the years, consistently shown that anywhere from sixty to seventy-five percent of mediation applications result in a settlement of the disputes in issue. Because of the high success rate of resolving claims at FSCO mediation, the number of benefit disputes that proceed to Court or arbitration is drastically reduced. For that reason alone, FSCO mediation is useful and should remain a compulsory part of the DRS system.

However, certain types of disputes cannot be effectively resolved by the current FSCO mediation process. For example, if insurers and applicants are entrenched in their positions without any prospect for resolution at an early juncture, FSCO mediation can be seen as a barrier to resolution.

The current dispute resolution process makes mediation mandatory for all claims. It is proposed that all claims be subject to a "mediation opt-out" alternative available to the claimant but not to the insurer. This would leave the current system in place, whereby mediation remains the "default" requirement. Where claimants wish to go forward with mediation, insurers would continue to be required to participate in mediation.

RECOMMENDATION #2

"Compelling Good Faith"

Although a seeming oxymoron, "compelling good faith" on the part of insurers in the handling of mediation claims is a concept in need of exploring as part of the DRS review. It is beyond debate that all insurers have contractual, statutory and common law duties of good faith and fair dealings with insureds inside the claims process. As a practical matter, however, we have routinely seen conduct on the part of insurers, acting through their adjusters and other representatives, that raises legitimate concerns about the exercise of bona fides in the mediation process. Representatives who have had little or no involvement in the handling of a particular claim, and who are only marginally if at all familiar with the claim history, appear as designated mediation specialists at mediation. Authority (or lack of settlement authority) issues arise frequently in the course of FSCO mediations. An adjuster-mentality that says, "A claim denied (or a mediation failed) is another file that can be shifted to the caseload of another claims handler", should not be an option as an exit strategy. All of these failings, and others, portend an atmosphere of "bad faith" that leads to abortive mediations and wasted time and resources, demanding close scrutiny and a fundamental change in attitude if the DRS mediation process is to fulfill its intended goal of speedy and fair case resolution. "Compelling good faith" can involve progressive solutions, such as requiring the participation at mediation of the insurer representative actually assigned to the claim at the time of the denial or actually responsible for the denial; and compelling insurer representatives to openly disclose their levels of settlement authority prior to mediation.

RECOMMENDATION #3

Mediator Training

If it becomes necessary to continue to use privately contracted mediators on an ad hoc basis, the public interest is best served by insuring that those mediators are well-trained and have the necessary skills required to meet the challenges presented by a complex and frequently changing accident benefits system. Mediator training should be examined as an integral part of the review of the dispute resolution process.

<u>Improving the Arbitration System</u>

RECOMMENDATION #4

Arbitrations should remain at FSCO

As an overriding comment, OTLA believes that the current system of arbitrations offered through FSCO should remain, rather than be abolished.

Disputes involving claims under the Statutory Accident Benefits Schedule have become quite complex and benefit from the specialized expertise brought to adjudication by a dedicated arbitrator. Just as Workers' Compensation claims benefit from the specialized Workplace Safety and Insurance Appeals Tribunal, and labour disputes benefit from the Ontario Labour Relations Board, so too do disputes between insureds and insurers benefit from FSCO arbitrations. Consequently, the recommendations that follow assume that FSCO arbitrations will continue, and are made with a view to enhancing - substantively and procedurally – the delivery of arbitrations through FSCO to Ontarians.

One of the benefits of arbitration is the knowledge that the claim will be adjudicated by an individual who is intimately familiar with the Statutory Accident Benefits Schedule and the relevant judicial and arbitral decisions. A great deal of law has developed with the passage of time, and it is unrealistic to expect that a temporary "rental arbitrator" would be capable of mastering the vast body of law in the same fashion as a dedicated full-time FSCO arbitrator. As an organization, we are concerned that "rental arbitrators," who have neither judicial background nor the specific expertise and experience with a home statute, offer the worst of all worlds. Arbitrations should be determined by dedicated FSCO arbitrators rather than outsourced arbitrators.

RECOMMENDATION #5

Arbitrations should be timely

There is a reason the following expression exists: "Justice delayed is justice denied."

Many of the disputes that proceed to arbitration are relatively small in nature, but time-sensitive, such as those relating to Treatment Plans. Without timely adjudication, the treatment window can close and the potential benefits of treatment lost. Other disputes proceeding through arbitration can be very sizeable in nature, and the timely determination of such disputes may be critical to the well-being of the claimant, such as a claim for income replacement benefits, housing modifications, attendant care, or the catastrophic impairment designation. Thus, both the small disputes and the large disputes require timely delivery of decisions.

As an organization, we urge two things:

1. The creation of an arbitration model within FSCO capable of ensuring that arbitrations can be commenced within 12 months of filing of the application for arbitration (and preferably faster for the many small disputes in the system);

2. A requirement imposed upon arbitrators that decisions be rendered no later than 90 days after the hearing of the case. We hear from our members far too often tales of decisions left under reserve for many months, or even a year, following the hearing. If arbitrators require more time for the writing of decisions, that should be afforded. If the arbitrators are over-worked, more on-staff arbitrators should be hired. But there should be reasonable deadlines imposed, in order to comply with the goal of providing dispute resolution services in a timely and cost-effective manner.

RECOMMENDATION #6

Streamline FSCO Pre-Hearings

Now that some of the previous mediation backlog will now shift to the arbitration venue, our organization believes that there can be many improvements to the efficiency of the arbitration unit:

- Creation of a more formalized documentary exchange model, such as Affidavits of Documents;
- A requirement that 30 days before the date of a pre-arbitration hearing call, the parties were obliged to exchange all of the relevant documents;
- Introduce electronic scheduling to the pre-arbitration unit;
- Create the ability to schedule motions and preliminary hearings at any time, rather than traditionally waiting to schedule same at a pre-hearing;
- Create the ability to ask for an arbitrator-led mediation while in the arbitration process, rather than being forced to rely on a shortened pre-hearing or a settlement conference one week prior to the actual arbitration;
- Require all surveillance to be disclosed and producible in an affidavit of documents, considering the first-party nature of the dispute;
- Create a streamlined process to easily add issues to the arbitration prior to the pre-hearing;
- Allow for automatic consent adjournments of an arbitration without prior approval of FSCO.

RECOMMENDATION #7

Dispute Resolution Expenses

There are many items in the Dispute Resolution Practice Code - Expense Regulation that are out of date and need to be revisited. For example, the $1,500-cap on payment for experts' reports is completely inadequate. This results in injustices to injured persons rather than insurance companies. Arbitrators should have discretion to award reasonable fees for these reports.

Conclusion

OTLA welcomes the opportunity to provide comment at this early stage of the review of FSCO's Dispute Resolution Services. We look forward to participating further in this process, in particular, following the release of Justice Cunningham's interim report and prior to the release of the final report in February 2014.