FSCO Mediators' Response to Justice Cunningham's Interim Report on Ontario's Dispute Resolution System

Introduction

This submission is in response to the invitation for input regarding Justice Cunningham's Interim Report on the Ontario Automobile Insurance Dispute Resolution System Review. As Mediators within this system, we acknowledge the possible appearance of self-interest; however we feel that we are uniquely positioned to provide insight from the perspective of our front-line experience. We appreciate both the work that has gone into the review, and the opportunity to contribute to the process.

The focus of this response is to offer suggestions that would further Justice Cunningham's stated goals of making the current system more timely, proportional, accessible, predictable, streamlined and cost-efficient.

Timeliness

The highly publicized backlog of files waiting to be mediated was eliminated in August. We are now processing new applications within a few days of receipt, and applications can be scheduled for mediation within 60 days, as statutorily mandated. Any extensions are upon the consent of both parties.

Several new initiatives have been implemented at FSCO designed to increase productivity to ensure disputes continue to be mediated in a timely manner. Previously, parties were accustomed to being granted adjournments upon request. These requests are now vetted by an Adjournment Mediator. This has, over the past year, reduced the number of requests and streamlined the scheduling of mediation files. Scheduling has also been improved by the development of the eCalendar, with which the parties are able to schedule their own mediations in available timeslots, thereby freeing up Mediators to conduct more mediations.

We agree that additional operational efficiencies should be considered including the requirement that claimants notify insurers of their intention to file an application; the acceptance of only complete applications and the development of an electronic filing system to streamline the application and file management process. As well, certain categories of dispute could also be considered for differentiated treatment, such as catastrophic disputes, Estate files and disputes with self-represented claimants and new issues to be added to upcoming arbitration hearings.

The outsourcing pilot project was effective in helping reduce the backlog, and this model could be used in times of higher than normal volumes of applications, typically seen in response to a revision of the Statutory Accident Benefit Schedule (SABS).

Proportionality

Related to the issue of timeliness is proportionality. We recognize that not all applications are alike and support the idea of fast-tracking those dealing with, for example, adding issues to an already pending arbitration or dealing with classification of injuries, such as catastrophic or minor. Applications dealing

with income replacement benefits, catastrophic benefits, large benefit settlements and large medical/rehabilitation benefits have been and continue to be successfully mediated.

Accessibility

The SABS is consumer protection legislation. As such, the auto insurance dispute resolution process should be easy to understand, accessible, inclusive and cost-effective. As Mediators, we are often called upon to guide self-represented parties through the process. We have expert knowledge of the current legislation, regulation and process, as we interact with each on a daily basis. In addition we engage in ongoing professional development as it relates to our positions as mediators. There is, as much as is possible, uniformity in the service we provide. The fact that we are salaried employees positively impacts our neutrality, as our income is not determined by the outcome of the mediation. We are all in one location, which means we can hold face-to-face mediations (as some insurers have suggested would be preferable), are able to fill in for each other so the claimant's timeline is not compromised, and have constant access to each other's knowledge base and extensive experience.

Predictability

Mediation is "mandatory" as the first step in the current dispute resolution model. This one-point entry into the system streamlines administration and is cost-efficient. It serves as an informal forum for identifying and clarifying issues and sets the groundwork for successful dialogue. If the parties feel hindered by mediation as an entry stage in the claim, there already exists an option to by-pass by mutually consenting to fail all issues. Most parties seem to prefer to take advantage of the opportunity to resolve at the mediation stage.

Streamlining

A Med-Arb model has been proposed. While we support many of the components identified, we feel that the combination of the mediation and arbitration functions with the same individual would have some significant drawbacks.

An Arbitrator makes decisions and approaches disputes with this mindset, regardless of the stage in the process. A Mediator, on the other hand, is specifically trained to assist the parties to resolve their issues in a non-adjudicative environment. The Mediator provides a forum for "without prejudice" discussion and empowers the parties by assisting their negotiations. The current rate of dispute resolution at the mediation stage is approximately 50% - a significant number of claims are kept out of the more formal, costly and time-consuming arbitration or court process.

Currently, Arbitrators are conducting settlement conferences and prehearings, both functions that more resemble the process of mediation than adjudication. If Mediators provided more of these functions, Arbitrators could concentrate on hearings and decision-writing, both of which could then occur in a much more timely fashion. Mediators were formerly responsible for conducting settlement conferences prior to the backlog. Mediators could be, with minimal changes, the key to streamlining the dispute

resolution system by being given more authority to deal with procedural issues, address productions and given the opportunity provide a more evaluative role at later stages of the process.

Mediations provide a safe opportunity for the parties to present their arguments and explore options. Information and offers to settle are exchanged between the parties, or shared with the Mediator in caucus. Two of the fundamental principles of the mediation process are confidentiality and the without prejudice nature of the discussion. Once privy to confidential and potentially prejudicial information, it is impossible for the Mediator/Arbitrator to be unaffected by this information and remain neutral when later tasked with adjudicating the dispute. The parties are also aware of this, and will be less willing to share information or participate freely in the mediation process, compromising its effectiveness.

In conclusion, we appreciate the opportunity to provide input into this important process, and look forward to the recommendations in the Final Report. If you require any additional information, feel free to contact us at **FSCOmediators@gmail.com.**

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