Ontario's Auto Insurance Dispute Resolution System Review

Date: October 1, 2013

Submitted to: Ministry of Finance, Industrial and Financial Policy Branch, Automobile Insurance Policy Unit

Submitted by: The Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to provide comments as part of the auto insurance dispute resolution review being conducted by the Honourable J. Douglas Cunningham. The OBA understands that Mr. Cunningham is anticipated to deliver an interim report to the Minister of Finance in October 2013, and a final report in February 2014.

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents 18,000 lawyers, judges, law professors and law students. The OBA is pleased to analyze and assist government with dozens of legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was jointly prepared by an OBA working group comprised of members of our Insurance Law Section, Civil Litigation Section, and the Alternative Dispute Resolution (ADR) Section. Together, these sections have some 3,400 members, including leading practitioners in each of their fields.

The OBA Insurance Law Section has over 700 members representing both the insurance industry and injured claimants within the auto insurance system. The OBA Civil Litigation Section has over 2,100 members in all areas of civil litigation including both plaintiff and defense, with extensive experience in the auto insurance system and the dispute resolution process. The OBA ADR Section has nearly 600 members who are alternative dispute resolution practitioners, including lawyers, arbitrators and mediators, many of whom have practiced extensively within the Ontario auto insurance system.

Overview

The OBA supports the objective of having a dispute resolution system in Ontario that addresses auto insurance disputes fairly, quickly, and as cost effectively as possible.

For the purpose of this submission we have addressed three issues. First, we provide an overview of our view of mediation and the role it can play in helping to resolve auto insurance disputes. Second, we address a fundamental question that we understand the Interim Report is expected to address; namely, whether mandatory mediation should be retained. Third, we recommend how the system should best address any unexpected backlog of mediation applications in the future.

In summary, the OBA believes that mediation can often work effectively to resolve or help resolve many auto insurance disputes according to the above noted imperatives. The OBA is of the view that a mandatory mediation scheme should be retained for disputes, with an exception for cases

that benefit little or nothing from being required to follow this process; namely, applications in which a catastrophic impairment is indicated and both parties wish to opt out of the process. The OBA further recommends that in the normal course, mediations should be carried out by Financial Services Commission of Ontario ("FSCO") mediators but, as in the past, a process of engaging private mediators may be undertaken if an unexpected backlog of cases arises in the future.

The OBA recognizes that there may be further opportunities to improve the auto insurance dispute resolution system and we look forward to meeting with Mr. Cunningham and the Ministry of Finance as the review proceeds to assist in identifying these improvements.

Background

Currently in Ontario, all disputes between an insured and their insurer in relation to an injury to the insured as the result of an automobile accident must be mediated by a FSCO appointed mediator before they can proceed towards arbitration or trial. The procedures are primarily governed by the relevant provisions in the *Insurance Act*, the applicable Statutory Accident Benefits Schedule ("SABS"), and the Dispute Resolution Practice Code.

Experience with a backlog of FSCO applications for mediation

As of 2012, at the height of a backlog of cases being handled by FSCO, the total average time from an Application for Mediation being received at FSCO to its being assigned to a mediator was approximately 10 months.

According to the FSCO website (as of Sept. 16, 2013):[1]

> Mediation at the Financial Services Commission of Ontario (FSCO) is a mandatory first step in the dispute resolution process. Claimants cannot proceed to court or arbitration unless mediation at FSCO has been sought and failed. Beginning in 2008, however, an unprecedented increase in Applications for Mediation resulted in a major backlog of mediation files.
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> Between 2007 and 2012 FSCO experienced an unprecedented 99 per cent increase in Applications for Mediation, which resulted in a substantial backlog of files.
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> FSCO successfully implemented an aggressive action plan to address the backlog. This included initiatives such as the eCalendar, Consent Failures, mandatory settlement blitz days, and the use of a private service provider to supplement FSCO's mediation and arbitration services. As a result, the mediation backlog has been reduced to 1,016, down from 29,142 files at the end of March 2012.

[1] http://www.fsco.gov.on.ca/en/drs/Pages/mediation-statistics-timelines.aspx

As a result, the backlog was eliminated on August 19, 2013.

There are no longer any wait times for new Applications for Mediation, which are assigned to FSCO mediators within a couple of days of receipt.

The tables below provide statistics for the period January 1, 2007 to July 31, 2013.

Number of Mediation Cases

Calendar Year	Applications Received	[4] Cases Closed	[1]Total Open Cases	[2]Cases Closed as Full Settlement	Cases Closed as Partial Settlement	Cases Closed as Failed	[3] Mediation Backlog
2007	14281	13107	4745	5074	1765	4658	2496
2008	16318	14026	7037	6370	1581	4576	3938
2009	20918	15446	12509	7947	1553	4542	9215
2010	27956	18351	22114	10579	1415	4997	17850
2011	36496	22631	35981	13898	1200	5991	29305
2012	28389	33856	30561	17755	1734	11744	17540
2013 (Jan.1 – July 31)	13,088	28,964	14,707	10,313	1,579	11,872	1,016

[1] The total number of cases open at the end of the reporting period.
[2] Cases Closed as Full Settlement, Partial or Failed refer to the closure type.
[3] All open files that are not yet assigned to a mediator.
[4] Includes cases closed without a mediation.

There has been a steady increase in Applications for Arbitration since 2006-07. As a result of clearing the mediation backlog and other external factors, this trend is continuing. Currently, approximately 72% of failed mediations proceed to arbitration at FSCO. FSCO is continuing to use the private service provider to assist with arbitration files.

These facts disclose that there was a relatively recent and surprising increase in Applications for Mediation over the last 6 years, which led to a temporary backlog of more than 29,000 files. By instituting a number of measures, including the contracting of a private roster of trained and experienced Ontario mediators (the ADR Chambers FSCO roster) that began operating in late

September of 2012, it appears FSCO was able to eliminate the mediation backlog completely by August 19, 2013.

It is the OBA's understanding that FSCO is now processing new Applications for Mediation, and assigning them to FSCO mediators within a couple of days of receipt, well within the statutory timelines. Parties may then request extensions to the statutory timelines, but those are handled under the SABS and Dispute Resolution Practice Code in the discretion of the assigned FSCO mediator. Such further delays tend to relate to party/representative availability issues and are rarely excessive or unreasonable. Consequently, it appears that FSCO mediations are no longer creating any significant delay in the dispute resolution process.

One cause of the backlog was that, at the time, FSCO's ADR team did not have enough internal mediators to process those mediations in a timely manner, and had no release valve in place to deal with the sudden backlog externally. FSCO also had a policy of interpreting the legislation in a way that suggested the statutory timeline did not start until FSCO took action to assign the file to a mediator. That interpretation has since been corrected by the Ontario Court of Appeal in *Hurst v. Aviva Insurance Company*, 2012 ONCA 837 and FSCO is now actively working towards the timelines as interpreted by the Court of Appeal.

Experience with mandatory mediation in resolving cases

Historically, approximately two out of three cases (66%) resolved at the mediation stage. Of those cases that did not settle, approximately half of the remaining cases did not ultimately proceed to arbitration (either settling after their mediation or being dropped by claimants). Often such post-mediation settlements occur because of the discussions that were begun at mediation. For example, parties may have failed to resolve at the mediation, due to missing evidence such as medical reports, but the settlement discussions resume and succeed once that information is finally in hand.

We note that settlement rates at FSCO mediations in the last year have dipped slightly in the last year but more than half the cases are still being removed from the system at the mediation stage, a very good result for the system and the parties.

The slightly lower rate of settlement in the last year is likely due primarily to the much higher proportion of New SABS cases now being mediated. The New SABS are more restrictive and have led, at least initially, to more positional approaches on the entitlements in dispute. As parties and counsel become more comfortable with the New SABS and case law develops around them, the settlement rates will likely rise again.

As noted above, we do not believe that the previous backlog of cases was caused by the existence of mediation as a mandatory step in the dispute resolution process. In fact, mandatory mediation had a very high rate of resolution, removing approximately two thirds of cases from the system, so that they did not have to proceed through a pre-arb hearing and an arbitration, which are much more time consuming and resource intensive processes.

Recommendations

Mediation should be mandatory for most cases

The OBA strongly recommends that mediation remain a mandatory step in FSCO's SABS Dispute Resolution procedures, provided that mandatory mediations are scheduled in a timely manner, and unless otherwise consented to, heard within 60 days (and except for applications involving catastrophic injury as described in the following section). This recommendation is based on several considerations.

First, the available statistics and the considerable experience of our members suggest that mandatory mediation provides a very effective early resolution method and screen to filter out a significant number of cases that should settle. In particular, our view is that the majority of applications involving lower value claims benefit from the mediation process, even in cases where one or both of the parties may initially be reluctant to participate because they believe that resolution is unlikely.

Second, if mediation were removed entirely or made non-mandatory, the impact would be a significant reduction in matters resolving quickly and an increase in cases proceeding to arbitration, which has significantly higher process costs for both the parties and FSCO (the cost of arbitrators, materials preparation by their representatives, arbitration venues etc.). We note that 98% of the time mediation is conducted over the phone. The vast majority of arbitration hearings and pre-arb hearings are conducted face-to-face, requiring greater time from arbitrators, parties and their counsel, and space to hold these sessions. This would also overload the system dangerously at the arbitration stage. As of 2012, only about 18% of overall cases went to arbitration.

Parties may opt out of mediation in applications involving catastrophic impairment

While the OBA believes that the majority of cases can benefit from the mediation process, the experience of our members also suggests that in a small percentage of higher value cases, there is little or no benefit in forcing reluctant parties to proceed through the mediation process. For these cases it is our view that the administration of justice benefits from allowing parties to opt out, and reduce the costs and time associated with any step of the mediation process. As noted above, it is our recommendation that the opt-out be available only on the consent of both parties.

While there is not a singular attribute to identify cases for which there is little or no benefit to proceeding through mediation, our view is that applications involving catastrophic injury are typical of such cases. Although the issue of whether a catastrophic impairment exists may be in dispute, we believe that it is reasonable and practicable to determine which cases are eligible for this exemption by resort to the existing FSCO application, which requires an indication that a catastrophic impairment is being claimed. Allowing parties to opt out of mediation for these cases

supports the objective of timely and cost effective process by allowing those cases to move directly to arbitration or litigation.

Consequently, the OBA recommends that in cases where an application is made for catastrophic impairment, mediation should not be mandatory if both parties opt out. Timelines would need to be established for this option to be exercised e.g. 30 days. If both parties do not exercise the option to opt out, the case involving catastrophic impairment would continue in the mandatory mediation process.

Mediations should be conducted by FSCO, unless a backlog arises

In keeping with the objectives of providing access to a fair, timely and cost-effective process, the OBA recommends that FSCO mediators with expertise in SABS disputes continue to be responsible for conducting mediations in the normal course.

On the existing legislative and common law interpretation, FSCO is required to mediate these cases within 60 days of the filing of an Application for Mediation (s. 19.1 of the Dispute Resolution Practice Code) or the matter would be deemed a failed mediation. Our understanding is that FSCO staff mediators are now handling all FSCO mediation cases well within the statutory time limits without current need for support from a private roster. As noted on the FSCO website, new Applications for Mediation are being assigned to FSCO mediators within a couple of days of receipt.

In the event a backlog of applications for mediation develops in the future, the OBA recommends that FSCO take steps to resolve the issue early by;

> a) utilizing the hybrid system currently being used (or a variation thereon) in which SABS mediation need not be conducted only by FSCO's internal mediators, but can be conducted by a private roster of experienced mediators, duly vetted, qualified, and appointed by the Superintendent of Insurance, with no greater cost to the parties; and/or
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> b) hiring supplemental mediators and arbitrators internally at FSCO to properly fulfill FSCO's statutory mandate (i.e. within the statutory time limits), if the growth in cases appears to be a permanent increase in flow justifying such longer term hiring.

After ADR Chambers was contracted to provide a supplemental private roster of trained and experienced external mediators (who were fully vetted by FSCO for training, experience and qualifications), the backlog of mediation cases was quickly eliminated with a high rate of satisfaction from parties and counsel.

Less than a year after ADR Chambers was retained, the backlog of 29,305 mediation cases (at its height) that took years to build up has completely cleared. It is noteworthy that the use of private sector mediators came at no additional cost to the parties, as only standard FSCO fees were charged to parties.

Even if a new backlog arises, which is not presently anticipated, FSCO now has a successful private sector procedure in place to deal with such a backlog quickly and efficiently. Should further backlog issues arise, FSCO can again retain the services of a qualified private mediation roster to supplement its staff mediators on an "as needed" basis.

In doing so, FSCO should require that any such mediators meet appropriately high standards of training, experience, and knowledge as per the requirements of the Superintendent of Insurance, and that the services come at no additional cost to the parties.

Conclusion

The OBA believes that mandatory mediation can often work effectively to help resolve many auto insurance disputes fairly, quickly, and as cost effectively as possible.

The OBA is of the view that the mandatory mediation scheme should be retained for auto insurance SABS disputes, except in applications involving catastrophic impairment where both parties indicate a desire to opt out, and provided that mandatory mediations are scheduled in a timely manner, and unless otherwise consented to, heard within 60 days of the filing of the Application for Mediation.

The OBA further recommends that in the normal course, mediations should be carried out by FSCO mediators, but that a process of engaging private mediators may be undertaken if an unexpected backlog of cases arises in the future.

The OBA appreciates the opportunity to be involved in the stakeholder consultation process, and looks forward to the opportunity to participate in continuing discussions regarding the Dispute Resolution review.