

Focus PERSONAL INJURY

Early mediation requirements buried under backlog

Decision allows parties to proceed to court to obtain funding for accident benefit entitlements



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On Nov. 29, the Court of Appeal for Ontario confirmed that injured parties with disputes concerning statutory accident benefits (SABs) need not wait in a year-long backlog for mediation at the Financial Services Commission of Ontario (FSCO) before proceeding to court or arbitration to resolve their disputes.

While the decision in *Cornie v. Security National Co. (C.O.B. TD Meloche Monnex)* [2012] O.J. No. 5602 will allow injured parties to proceed to court to attempt to obtain funding for the accident benefit entitlements they claim, it does nothing to put back into place the early mediation requirements of the *Insurance Act* that the Court of Appeal found were an integral part of the SABs legislation, and which FSCO has been failing for years to provide.

In its 2012 budget, the Ontario government proposed to engage in a review of the automobile insurance dispute resolution system. This review should make note of the concerns set out by the appeal court and the importance it placed on early

effective mediation.

FSCO was created in 1997 as an arm's-length agency of the Ministry of Finance. With the introduction of "no-fault" SABs, FSCO was to provide the dispute resolution services required under the statutory accident benefits schedule to resolve disputes concerning entitlement to benefits such as income replacement or medical benefits.

Regulations made pursuant to the *Insurance Act* require that a mediator appointed by FSCO attempt to effect a settlement of any dispute concerning benefits filed by an injured claimant within 60 days after the date upon which an application for mediation is filed.

Despite the regulations, FSCO long ago accumulated a backlog. By 2007, the average wait for mediation was 101 days, or 41 more than the legislated requirement. Between 2008 and 2012, applications for mediation increased and by last September, the average wait time was an astonishing 406 days after an application was filed.

Justice Russell Juriensz, writing for the court, noted that FSCO had the responsibility of providing "an efficient and economical method" to resolve disputes and that the "purpose of the legislation is to provide a mandatory mediation process that is timely and effective." And it did work when mediation was reached: Justice Juriensz observed that when cases

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reached that stage, qualified FSCO mediators were able to resolve 75 per cent of them.

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When asked via e-mail how the extreme backlog accumulated at FSCO, agency spokesperson Kristen Rose said that "like other government agencies, FSCO has been faced with resource constraints in recent years, which prevented the hiring of additional FSCO mediators to deal with the backlog."

This response, however, ignores the fact that FSCO is funded exclusively through assessments and fees paid for by the insurance industry, and not from general revenues.

Indeed, FSCO in September entered into an agreement with ADR Chambers, a private mediation service provider, to assist with clearing the backlog in an effort to "outsource" a solution. Alan Stitt of ADR Chambers confirmed the company has received about 2,000 mediations per month from FSCO since last September, and has about 100 mediators dealing exclusively with the files. However, he would not detail how many of these mediations have been completed and how many were still outstanding to date.

"It is FSCO's intention to clear the backlog as quickly as possible through the use of ADR Chambers, and we will be closely monitoring this initiative's success...we expect the average wait time will substantially decrease," Rose SAID.

Practitioners in the area hope that with the *Cornie* decision, and the recent government review of the automobile insurance dispute resolution system, steps will be taken to ensure that FSCO meets its legislated requirement of providing early effective mediation.

If the outsourcing to ADR Chambers is not successful, FSCO should be required to seek the funding necessary to hire the mediators it requires to meet its mandate.

Alternatively, changes may be necessary to open up the mediation process to provide for an expanded roster of available mediators from an approved list.

Injured claimants require access to early mediation to ensure that they receive the statutory accident benefits to which they are entitled. Similarly, insurers should desire the efficiency and economy that early mediation can provide.

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