

Case Name:

**Mamaca (Litigaton guardian of) v. Coseco Insurance Co.**

RE: Ozcan Mamaca by his litigation guardian Ahmet  
Mamaca, and  
Coseco Insurance Company

[2007] O.J. No. 1190  
Court File No. 01-CV-215026CM3

**Ontario Superior Court of Justice**  
**Master R. Dash**

Heard: February 8 and March 7, 2007.  
Judgment: March 30, 2007.  
(46 paras.)

*Civil procedure — Discovery — Examination for discovery — Range of examination — Objections and compelling answers to questions — Production and inspection of documents — Objections and compelling production — Privileged documents — Documents prepared in contemplation of litigation — The defendant insurer was obligated to produce documents related to the plaintiff's file created before Sept. 5, 2001 relevant to the plaintiff's case, as until then the insurer had not contemplated litigation — The defendant was ordered to answer various questions for discovery, and any claims and training manuals and materials were ordered produced.*

*Insurance law — Automobile insurance — Compulsory government schemes — Claims against parties unknown — The defendant insurer was obligated to produce documents related to the plaintiff's file created before Sept. 5, 2001 relevant to the plaintiff's case, as until then the insurer had not contemplated litigation — The defendant was ordered to answer various questions for discovery, and any claims and training manuals and materials were ordered produced.*

*The plaintiff brought a motion to compel the defendant accident benefits insurer to answer questions refused on an examination for discovery and to deliver a further and better affidavit of documents — In the underlying action, the plaintiff was injured in a motor vehicle accident when he was cut off by an unidentified driver — He commenced this action when the defendant insurer declined to issue accident benefits, seeking the benefits and damages for the alleged bad faith handling of his claim — He sought production of the defendant's entire claims file up to the date that the statement of claim was served — The defendant resisted, relying on litigation privilege — The issues included (a) at what date was there a reasonable anticipation of litigation, (b) where the documents prepared after that date for the dominant purpose of claims assessment, (c) was there prima facie evidence of bad faith disentiing the defendant from claiming litigation privilege, and (d) had that privilege been waived — HELD: The defendant insurer was obligated to produce documents related to the plaintiff's file created before Sept. 5, 2001 relevant to the plaintiff's case, as until then the insurer had not contemplated litigation — The onus was on the defendant, as the party asserting privilege, to adduce such evidence — No internal documents had been produced indicating that the responsible claims handlers at the time contemplated litigation, reasonably or not, or that documents were created for such purpose — To the contrary, all of the evidence suggested that the ensuing documents were created as part of the normal claims assessment process — In all the circumstances, litigation privilege began on Sept. 5, 2001 upon receipt of the statement of claim — All documents created prior to that date would be produced — Alternatively, the*

*production of the documents would have been ordered on the grounds of bad faith — If the documents were protected by litigation privilege, it had not been waived — The defendant was ordered to answer various questions for discovery, and any claims and training manuals and materials were ordered produced.*

### **Statutes, Regulations and Rules Cited:**

Ontario Rules of Civil Procedure, Rule 30.06(d)

### **Counsel:**

George Karahotzitis, for the plaintiff.

Ted Charney, for the defendant.

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[Editor's note: A corrected version was released by the Court April 11, 2007; the corrections have been made to the text and the corrigendum is appended to this document.]

### **REASONS FOR DECISION**

¶ 1 **MASTER R. DASH:**— This is a motion by the plaintiff to compel the defendant accident benefits insurer to answer questions refused on an examination for discovery and to deliver a further and better affidavit of documents. The plaintiff was injured in a motor vehicle accident that occurred on August 21, 1998 when he was apparently cut off by an unidentified driver. He looked to the defendant insurer for payment of accident benefits. When they were not paid he commenced this action for accident benefits and for damages arising out of the bad faith handling of his claim. [See Note 1 below] In connection with his claim for damages for bad faith the plaintiff is seeking production of the defendant's entire claims file (and other documents) up to the date that the statement of claim was served. The defendant relies on litigation privilege to resist production of documents created after the claim for benefits was denied and mediation was requested.

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Note 1: A second action had already been commenced for tort damages based on the unidentified driver coverage as No. 00-CV-195010CM This endorsement applies to both actions

¶ 2 The parties disagree on the date that litigation was reasonably anticipated. What this motion illustrates is that even after there is a reasonable contemplation of litigation, an insurer who continues to investigate and assess the plaintiff's claim for accident benefits may be bound to continue to produce its internal claims documents unless it can establish that they were created for the dominant purpose of that litigation as opposed to claims assessment. I must also consider whether litigation privilege, once established, can be pierced if there is prima facie evidence of bad faith.

### **CLAIMS ADJUSTMENT HISTORY**

¶ 3 The defendant initially suspected a staged accident as a result of an engineering report and on October 1, 1998 sent a letter refusing to pay any accident benefits based primarily on material

misrepresentation. It also relied on a failure to receive a statutory declaration. Denial was further based on an orthopaedic report from Dr French indicating that the plaintiff could shortly return to work and the defendant indicated that even if he were otherwise entitled, his eligibility would cease as of November 5, 1998. A notice of stoppage of weekly benefits was attached. The plaintiff initiated mediation proceedings with the Financial Services Commission of Ontario ("FSCO") on October 30, 1998. On or about November 5, 1998 the defendant consulted with the Insurance Crime Prevention Bureau ("ICPB") for the purpose of further investigating the accident. As a result of a conversation between the defendant's adjuster and the ICPB investigator on or about November 19, 1998, the defendant abandoned its assertion that the accident had been staged and began to "handle the claim as if the accident happened." Benefits were still being denied because the defendant had not received the statutory declaration and income documentation and because of the French report. [See Note 2 below]

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Note 2: Transcript of examination for discovery of Debrah Sherren conducted November 24, 2005, questions 578 to 585

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¶ 4 The ICPB interviewed various witnesses and ultimately reported to the defendant on November 23 and December 7, 1998. On December 8, 1998 the defendant continued its assessment of the plaintiff's claim for benefits by requesting insurer medical evaluations from another orthopaedic surgeon and from a neurologist and requesting income documentation. On February 8, 1999 the defendant concluded that their engineer's assumptions may have been incorrect and by letter of the same date requested an insurer medical examination by a psychiatrist and indicated it would then like to discuss settlement options. The mediation was abandoned. On March 31, 1999 the defendant formally changed its fault determination for the accident to 100% against the unidentified driver. In April and May 1999 the defendant continued to invite settlement discussions and in June sought self employment information and the statutory declaration. On July 19 the plaintiff's solicitor sent in the statutory declaration and confirmed that the plaintiff was an employee, not self-employed. On July 23, Mr. Belsito, plaintiff's then solicitor, wrote to the defendant's adjuster, holding out "one last invitation to enter into a constructive working relationship" failing which he intended to raise the issue of bad faith with the adjuster's supervisor and the ombudsman.

¶ 5 On August 3, 1999 the defendant determined based on Insurer's Examination reports that the plaintiff was not substantially disabled from returning to his pre-accident employment and advised that Income Replacement Benefits ("IRB") would be discontinued effective August 23, 1999. A second notice of stoppage of weekly benefits was attached. Notwithstanding this notice, on the same date the defendant arranged for an insurer's neuropsychological evaluation. Between August 1999 and January 2000 the defendant agreed to pay for certain medical and rehabilitation benefits. On October 26, 1999 and February 24, 2000 the defendant requested further income information to quantify IRBs and agreed in the latter correspondence that IRBs should be paid if the plaintiff was "eligible for same". It appears that this caveat related to the plaintiff's income since all requests for information related to quantification of the benefit. In April 2000 the defendant retained a nurse/case manager to determine rehabilitation needs.

¶ 6 From April through November 2000 Mr. Belsito made repeated enquiries of the defendant as to whether it had made a determination as to payment of IRBs with no response. He expressed his frustration that the defendant kept changing adjusters on the file. In a letter dated August 10, 2000 he indicated that although a tort action was commenced, he had held off commencing an action with respect to accident benefits "in the hope that good faith and common sense will prevail." Finally on November 7, 2000 there was a telephone conversation between Mr. Belsito and Pat Riopelle, the defendant's latest file handler. According to Ms. Riopelle's notes:

Received a call from Rick Belsito. He is very upset that we are still not paying his client. If we don't send formal denial of benefits by Friday this week he will institute court action. I will review the file with Scott Knight to determine the status of IRB payments.

¶ 7 Mr. Belsito followed up with a letter on November 29, 2000 to Ms. Riopelle. He stated that Ms. Riopelle gave her solemn word to get back by the end of the week but that three weeks had since expired with no word from Ms. Riopelle. He indicated that he was taking a conciliatory approach because his client "needs benefits ... not mediations and lawsuits." He added: "If I do not hear from you within five days, I must assume that our claim for income replacement benefits has been denied. I will then have to proceed accordingly."

¶ 8 On December 1, 2000 Ms. Riopelle wrote to Mr. Belsito indicating that she was compiling the file "so that a decision with respect to the income replacement could be made." She indicated that she had sent the file to Mr. Charney (the defendant's solicitor) "so that he may review it and contact you to discuss a possible global settlement for all outstanding issues "

¶ 9 There is no evidence as to what transpired between then and May 28, 2001 except as stated in the affidavit of Mr. Macdonald, a solicitor with the firm currently representing the plaintiff, that "presumably" negotiations took place between Mr. Belsito and Mr. Charney. On May 28, 2001 the plaintiff applied for mediation at FSCO, although the defendant was not aware of the application until September 5, 2001 when it was served with both the application for mediation and the statement of claim in the accident benefit action

¶ 10 The plaintiff pleads 26 separate particulars of bad faith, some specific as to certain acts and some more general. Included among the more general particulars are allegations that the defendant took an adversarial approach to the plaintiff, treating him with suspicion from the outset, that the defendant failed to give proper attention to the claim and sent confusing and contradictory correspondence, that it failed to act with reasonable promptness at each step of the claims process, that it failed to act fairly and in a balanced manner in the investigation and assessment of the claim and that it failed to pay benefits when there was no reasonable basis to withhold payment

## THE LITIGATION PRIVILEGE ISSUES

¶ 11 The issues with respect to litigation privilege may be set out as follows:

- (a) At what date was there a reasonable anticipation of litigation?
- (b) Were documents prepared after that date for the dominant purpose of claims assessment or of defending the litigation?
- (c) Notwithstanding the answers to (a) and (b) is there prima facie evidence of bad faith such that the insurer is prohibited from hiding behind the cloak of litigation privilege?
- (d) Notwithstanding the existence of litigation privilege, has that privilege been waived with respect to documents submitted to and from ICPB?

## LITIGATION PRIVILEGE AND BAD FAITH CLAIMS

### *Insurer's Duties and Relevance of Claims File*

¶ 12 In accident benefit claims an insurer receives applications for benefits, investigates and assesses the claim, usually with medical evidence, and often with investigative evidence, and then determines whether to pay the claim. This decision is revisited from time to time in assessing whether to continue (or

commence) the payment of benefits. [See Note 3 below] An insurer has a duty to act with utmost good faith toward its insured. It must deal with its insured's claim fairly both in the manner it investigates and assesses the claim and in its decision whether to pay the claim. This includes an obligation to assess and decide whether to pay a claim in a balanced and reasonable manner. [See Note 4 below] A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine if the insurer in all the circumstances acted fairly and promptly in responding to the claim. [See Note 5 below] The only way that an insured can ascertain whether his claim was treated in good faith is by production of the insurer's internal file and other information available to it, thereby indicating how it handled the investigation and determined whether to honour the claim. [See Note 6 below] This makes almost every document in the insurer's file critical and relevant to the issue of bad faith if properly pleaded. However, "litigation privilege ... when properly asserted, trumps relevance in almost all circumstances." [See Note 7 below]

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Note 3: *Contos v. Kingsway General Insurance Co.*, [2001] O.J. No. 1327 (S.C.J. Master) at p. 7.

Note 4: *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London*, [2000] O.J. No. 866, 184 D.L.R. (4th) 687 (C.A.) at paragraph 29; *Royal & Sun Alliance Insurance Co. of Canada v. Fiberglas Canada Inc.*, [2002] O.J. No. 3846 (S.C.J. Master) at paragraph 16; *Davies v. American Home Assurance Co.*, [2002] O.J. No. 2696 (Div. Ct.)

Note 5: *702535 Ontario Inc. v. Non-Marine Underwriters*, supra at paragraph 31.

Note 6: *Samoila v. Prudential of America General Insurance Co.* (2000), 50 O.R. (3d) 65 (S.C.J.); *Royal v. Fiberglas*, supra

Note 7: *Davies v. American Home*, supra, at paragraph 44.

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### *Reasonable Contemplation of Litigation*

¶ 13 Litigation privilege exists to protect from production a communication made or a document created for the dominant purpose of assisting the client in litigation, actual or contemplated. It is not necessary that litigation have been commenced, nor is it necessary that it be created at a time when there is a certainty of litigation but merely that litigation is in reasonable prospect. On the other hand, there must be more than a suspicion that there will be litigation. [See Note 8 below]

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Note 8: *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), *Davies*, supra at p. 7; *Carlucci v. Laurentian Casualty Co. of Canada*, [1991] O.J. No. 269 (S.C.J.).

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### *Dominant Purpose for Assistance in Litigation or for Claims Assessment*

¶ 14 It is however not sufficient to establish litigation privilege that documents be prepared or actions be taken at a time when litigation is reasonably contemplated. The documents for which litigation privilege is claimed must also have been prepared for the dominant purpose of that contemplated litigation, that is for assistance in preparation for or conduct of that litigation. [See Note 9 below] There is a distinction between the creation of a document for the dominant purpose of investigation and claim determination as opposed to creation of the document for the dominant purpose of anticipated litigation.

After determining that there is "a real prospect of litigation reasonably supported by the evidence ... the question then is whether the dominant purpose of the documents in question was to investigate the accident and the claim or to assist the defendant in the contemplated litigation." [See Note 10 below] It would not be sufficient to establish that the ongoing investigation and resulting documents were for the dual purpose of claims assessment and anticipated litigation. The *dominant* purpose must be to assist in the anticipated litigation.

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Note 9: *Royal v Fiberglas*, supra, at p. 5; *First Choice Foods v Royal Insurance*, [1999] O J. No. 2260 (S C J).

Note 10: *Gabany v. Sobeys Capital Inc*, [2002] O J. No. 3151 (S C J) at paragraphs 9-10; See similar conclusion in *Young Men's Christian Association v. 331783 Ontario Limited*, [2001] O J. No. 4027 (S C J) at paragraph 37.

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### *Evidentiary Requirement to Establish Litigation Privilege*

¶ 15 The onus is on the party claiming litigation privilege to lay an evidentiary foundation for that privilege. [See Note 11 below] The best evidence would be an affidavit from the claims handler as to when she reasonably anticipated that litigation was likely and why and that her ongoing investigation and document creation was to assist in the defence of that litigation. It would however not be sufficient evidence for the adjuster to make general assertions that all documents created after litigation was reasonably anticipated were prepared for purposes of that litigation. The evidence must be specific and speak to the content of each document. [See Note 12 below] The court could also look to the circumstances and the chronology of events to help in determining the dominant purpose for creation of the documents. It may also "inspect the document for the purpose of determining ... the validity of a claim of privilege" pursuant to rule 30.06(d).

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Note 11: *Davies v American Home*, supra, at paragraph 28.

Note 12: *Correa v. CIBC General Insurance Co*, [2001] O J. No. 3599 (S C J) at paragraphs 15-16.

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### *The Decision to Refuse Benefits and Litigation Privilege*

¶ 16 The defendant suggests that the decision to refuse benefits and the communication of that decision to the plaintiff indicates the date that litigation was reasonably contemplated. Until there is a decision to refuse benefits there would not normally be a real likelihood that litigation will result, since if the decision is made to pay benefits, there will be no dispute between insurer and insured. At least until that date, claims documentation is created for the dominant purpose of assessing and paying claims and not for anticipated litigation. [See Note 13 below] Even if there is a denial of benefits, that does not necessarily colour all subsequent documents created in adjusting the file with having the dominant purpose of anticipated litigation. [See Note 14 below] On the other hand, an insurer can reasonably contemplate litigation even before the denial of benefits and a continued claims investigation thereafter does not detract from a *properly asserted* claim of privilege since an insurer is obliged to keep an open mind. [See Note 15 below] Simply because benefits are denied, it does not necessarily follow that litigation will be reasonably contemplated, or even if contemplated, that any ongoing investigation and document creation was for the dominant purpose of that litigation, particularly when the insurer continues

to assess the claim after a denial. It will depend on the circumstances of each case and the evidence provided by the insurer.

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Note 13: *Contos v. Kingsway*, supra at p. 7, *SNC Lavelin Engineers v. Citadel General Insurance Co* (2003), 63 O.R. (3d) 226 (S.C.J. Master) at paragraph 32.

Note 14: *Levin v. Security National Insurance Co*, [2006] O.F.S.C.D. No. 148, FSCO A06-000257, September 8, 2006 at p. 4

Note 15: *Royal v. Fiberglas*, supra, at p. 5; *First Choice Foods v. Royal Insurance*, supra; *Scopis Restaurant Ltd v. Prudential Assurance Co.*, [1999] O.J. No. 1319 (S.C.J.)

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### *The Request for Mediation and Litigation Privilege*

¶ 17 The defendant suggests that the court consider the plaintiff's request for mediation at FSCO as an indication to the insurer that litigation is reasonably contemplated. In my view a request for mediation at FSCO is an attempt to resolve a dispute, even if mediation is also a statutory pre-condition to commencing litigation, and not necessarily a procedure taken in contemplation of litigation. [See Note 16 below] After all, the mediation could successfully result in a settlement of the claim for benefits without litigation, or even if unsuccessful a claimant may determine to take no further steps to pursue his claim. Furthermore, the application for mediation itself could result in resolution of the matter in dispute prior to mediation and the withdrawal of the mediation, such as happened herein. Whether the insurer reasonably contemplated litigation as a result of a request for a mediation and whether documents created after that date were for the dominant purpose of that litigation will depend on the circumstances and the evidence adduced by the insurer to support the claim for privilege.

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Note 16: *Garrat v. CGU Insurance Co. of Canada*, [2001] O.J. No. 4124 (S.C.J. Master) at paragraph 4; *Contos v. Kingsway*, supra, at paragraph 29.

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### *Conclusion: Ongoing Claims Assessment*

¶ 18 Mr. Charney suggests that litigation privilege must attach after there is a reasonable contemplation of litigation and that just because the insurer is keeping an open mind and continuing to assess or reassess a claim it should not lose that privilege and expose all of its subsequently prepared documents to its insured. What that submission ignores is that the insurer's duty to act in good faith and to continue to reassess the decision whether to pay benefits in light of new evidence does not end just because litigation is contemplated or even commenced. How can the plaintiff test whether the insurer's ongoing assessment is being conducted in good faith without access to the documents? Whether the plaintiff is entitled to production of the ongoing claims assessment documents created after the prospect of litigation became real depends on whether the documents were created for the dominant purpose of the ongoing duty to reassess the claim or if they were prepared for the dominant purpose of the litigation. The onus is on the insurer to provide proper evidence as the dominant purpose each such document was created.

## DATE FOR LITIGATION PRIVILEGE: EVIDENCE AND ANALYSIS

¶ 19 What direct evidence has the defendant provided to establish litigation privilege? There is no affidavit from any file handler at Coseco to indicate the date that Coseco reasonably anticipated litigation or the dominant purpose for which documents were created. The only evidence is an affidavit of Vickie Snider, a law clerk assisting Mr. Charney, who indicates that she has reviewed the file to identify documents relevant to ascertaining when litigation privilege attached and a transcript of the examination for discovery of Debrah Sherren, a claims specialist at Coseco, who was not assigned to the plaintiff's claim until February 2004, long after the events material to this action took place. Not only do Ms. Snider and Ms. Sherren have no direct knowledge other than revealed in the claims file, their evidence is only as to the date that Coseco reasonably anticipated litigation. There is no evidence whatsoever with respect the dominant purpose for which documents were created at any time.

¶ 20 Ms. Sherren gave evidence at her examination for discovery that benefits were initially denied on October 1, 1998, but acknowledged she was not the adjuster involved. She stated her belief from a review of the file that "litigation was reasonably pending when [the adjuster] sent out that October 1, 1998 letter" because "we had denied all benefits and he was presenting a claim" for accident benefits. [See Note 17 below] When questioned whether the defendant would contemplate litigation whenever a benefit was denied she replied: "Everybody has the right to dispute when we don't agree to fund something" [See Note 18 below] and "we have to be prepared for everything." [See Note 19 below] This general assertion that litigation is always reasonably pending after a denial of any benefits does not meet the evidentiary burden of establishing that litigation was reasonably anticipated in the context of this specific denial.

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Note 17: Transcript of examination for discovery of Debrah Sherren conducted November 24, 2005, questions 344-345.

Note 18: Ibid, question 351

Note 19: Ibid, question 354

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¶ 21 Ms. Snider on the other hand in her affidavit states: "I am informed by Mr. Charney that litigation privilege has been claimed for all communications subsequent to November 5, 1998." This is the date after which Coseco would no longer pay IRBs in accordance with the October 1 letter of denial, is the date that the ICPB was first consulted and follows receipt on October 30 of an application for mediation at FSCO. This is no evidence at all. Ms. Snider does not say that the claims handler at Coseco reasonably contemplated litigation on November 5, 1998. She merely asserts that Mr. Charney *claims* litigation privilege after that date. By itself this is no more than a conclusion without the evidentiary basis therefor.

¶ 22 During the examination of Ms. Sherren, Mr. Charney stated that upon a review of the file he determined not to produce documents after November 13, 1998 because he "concluded that reasonable contemplation of litigation occurred on that date" [See Note 20 below] that being the date Coseco received the application for mediation. [See Note 21 below] Again, this is but the statement of a conclusion that Mr. Charney has made retrospectively and is not evidence from those responsible for the claims handling at the time of what they reasonably anticipated.

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Note 20: Ibid, question 313.

Note 21: Ibid, question 315. This contradicts Ms Sherren's affidavit, which indicates that the application for mediation was received on October 30, but this discrepancy has no bearing on this decision.

¶ 23 In any event, the denial on October 1, 1998 was primarily based on material misrepresentation, an allegation the defendant retracted on November 19 when it realized its engineering report was erroneous as a result of the ICPB investigation. The mediation was withdrawn and in any event as I have indicated earlier in these reasons an application for mediation does not automatically create a reasonable anticipation of litigation. Coseco began to adjust the claim on the basis of an accident. It continued to request medical information and assess the claim. It was awaiting income information before determining whether to pay IRBs. There could be no reality to a prospect of litigation on October 1 or November 5 or November 13, 1998. Even if litigation could have been reasonably anticipated on one of those dates, there is no evidence whatsoever that the documents created thereafter were prepared for the dominant purpose of assisting in that litigation as opposed to the ongoing investigation and assessment of the plaintiff's claim for benefits. The onus is on the defendant, as the party asserting privilege, to adduce such evidence. No internal documents have been produced indicating that the responsible claims handlers at the time contemplated litigation, reasonably or not, or that documents were created for such purpose. To the contrary, all of the evidence suggests that the ensuing documents were created as part of the normal claims assessment process.

¶ 24 A heading then follows in Ms. Snider's affidavit called "Alternative dates for privilege to attach - July 27, 1999 (sic: reference should be July 23), August 3, 1999, November 2, 2000, September 5, 2001." The affidavit is a mere recitation of certain correspondence on certain dates. There is no evidence that the defendant reasonably contemplated litigation on any of those dates. There is not even an assertion that Mr. Charney claims those dates in the alternative. It is only a heading in an affidavit. However, as the dates appear in the heading in the affidavit I will consider them. July 23, 1999 represents a date that Mr. Belsito, frustrated with Coseco's failure to deal with the IRB issue, wrote to the adjuster and indicated that he was holding out one last invitation to "enter a constructive working relation" with him, failing which he would raise the issue of bad faith with her supervisor and with the ombudsmen. In my view that was not a threat of litigation and Coseco could not have reasonably anticipated litigation.

¶ 25 August 3, 1999 was the date that Coseco informed the plaintiff of its intention to terminate IRBs effective August 23, 1999 based on medical reports indicating the plaintiff was not disabled from his pre-accident employment. I agree with Mr. Charney that this was an unequivocal denial of income benefits and in fact the plaintiff pleads in paragraph 14 of the statement of claim that by this notice Coseco "categorically denied coverage to the plaintiff." I do not however believe that there could have been a reasonable anticipation of litigation on that date given that on the same day Coseco sent a second letter arranging for an insurer's neuropsychological examination and thereafter continued to request medical and income information about Mr. Mamaca. Even as late as December 1, 2000 the insurer was telling plaintiff's counsel that it had still not determined whether to pay IRBs. If I am wrong, and if the defendant reasonably anticipated litigation as a result of the August 3 denial, it is clear that the defendant continued to investigate and assess the plaintiff's claim for IRBs and there is no evidence whatsoever that the documents produced as a result of that investigation were for the dominant purpose of litigation rather than for the dominant purpose of investigating the claim for benefits in the normal course of claims processing. Again, the onus was on the defendant asserting privilege to provide evidence of dominant purpose. This it has failed to do.

¶ 26 In my view litigation was reasonably anticipated on November 7, 2000 when Mr. Belsito threatened litigation if the defendant did not deal with the claim for IRBs that week. That however does not end the inquiry. The onus is on the defendant to adduce evidence that the investigation was undertaken and that the specific claims documents were prepared for the dominant purpose of that

anticipated litigation and this they have failed to do. They have failed to adduce any evidence whatsoever as to the dominant purpose of the work done between November 7, 2000 and the date the statement of claim was served on September 5, 2001. To the contrary, the evidence is that the defendant continued its claims investigation and assessment and on December 1, 2000 indicated that they had still not made a decision with respect to the payment of IRBs. I have no reason to believe that the continuing investigation and the creation of documents as a result of that investigation were for the dominant purpose of litigation rather than claims investigation and assessment. I therefore conclude that all claims documents prepared up until September 5, 2001 were for the dominant purpose of claims adjustment.

¶ 27 Notwithstanding the failure of the defendant to provide evidence as to the dominant purpose for which documents were created after the various suggested litigation privilege dates I reviewed the defendant's Schedule B documents pursuant to rule 30.06(d). All of the documents appear to relate to the gathering and assessing of information for the purpose of determining whether accident benefits should be paid and recommendations with respect to such payment. None of the documents appear to relate to the defence of any anticipated litigation and other than the note indicating Mr. Belsito's threat on November 7, 2000 there no mention whatsoever of possible litigation until the file is referred to Mr. Charney on September 5, 2001 upon receipt of the statement of claim. There is no indication even after the threat of November 7, 2000 that documents were being created for any purpose other than claim assessment.

¶ 28 In all the circumstances, the date that litigation privilege commenced is September 5, 2001. All of the documents listed in Schedule B of the defendant's affidavit of documents and supplementary affidavit of documents, with the exception of item 13 of the affidavit of documents sworn May 11, 2004, were created prior to that date and will be produced. The defendant must serve a further and better affidavit of documents to transfer such documents from Schedule B to Schedule A. The defendant may however redact from these documents the quantum set out as a reserve. Information about setting a reserve is not relevant to the insurer's conduct in assessing and responding to the claim absent rare and exceptional circumstances. [See Note 22 below] I find no such exceptional circumstances herein. More specific direction is provided further in these reasons.

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Note 22: *Osborne v Non-Marine Underwriters, Lloyd's of London*, [2003] O.J. No. 5500, 68 O.R. (3d) 770 (S.C.J.) at paragraph 21

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#### PIERCING LITIGATION PRIVILEGE IF PRIMA FACIE EVIDENCE OF BAD FAITH

¶ 29 If I am wrong about the date that litigation privilege commences, then I must consider the effect of the recent Supreme Court of Canada decision in *Blank v. Canada*. [See Note 23 below] In that case the plaintiff Blank claimed damages inter alia for abuse of prosecutorial powers in a criminal prosecution and sought production of documents prepared for the dominant purpose of that prosecution. Since litigation privilege normally comes to an end with the end of the litigation for which the privilege is claimed, the case was primarily concerned with the enlarged definition of litigation so as to include closely related proceedings. The court determined that the criminal and civil actions were not so closely related and that litigation privilege over the crown's documents ended with the completion of the prosecution. It did however find an additional basis to compel production of the documents. It held at paragraph 44 as follows:

The litigation privilege would not in any event protect from disclosure evidence of the

claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

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Note 23: *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39

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¶ 30 In other words, a party cannot hide "similar blameworthy conduct" behind a cloak of litigation privilege. The question is whether breach of a duty of good faith by an insurer to its insured in the assessment of accident benefits can be considered similar blameworthy conduct to abuse by a prosecutor of his prosecutorial powers in the prosecution of a criminal charge so as to override litigation privilege. In my view it is. Both involve positions of utmost good faith and both involve acts by a party exercising power over another.

¶ 31 In *Smith v. London Life Insurance Co.* [See Note 24 below] the Divisional Court applied *Blank* to a bad faith claim against a long term disability ("LTD") insurer. Although it did not specifically state that breach of a duty of good faith by a LTD insurer was "similar blameworthy conduct" it did quote the above passage from *Blank* and stated:

Thus, in summary, after a determination has been made as to whether or not litigation privilege applies to a particular document, a further review may be required of the privileged documents to determine whether or not the production of such documents may be required on the ground set out by the Court in *Blank*, referred to in paragraph 24, *supra*.

In *Smith*, the court ordered the defendant to deliver an affidavit of documents individually listing each document and particularizing the grounds of privilege, with leave to the plaintiff to move for production of documents for which litigation privilege was claimed. If *Blank* applies to breach of good faith duties of an LTD insurer there is no reason it should not similarly apply to an accident benefits insurer. Unlike in *Smith* however the defendant here has delivered an affidavit of documents with the documents particularized over which it claims privilege and the motion for productions may be considered on its merits.

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Note 24: *Smith v. London Life Insurance Co.*, [2007] O.J. No. 189

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¶ 32 A litigant of course must have a protected area to facilitate investigation and preparation of a case for trial. Litigation privilege must not lightly be set aside. To avoid opening the floodgates, the court, before intruding on that zone of protection, must first determine that there is *prima facie* evidence of bad faith. A mere allegation in a pleading is insufficient. The Supreme Court in *Blank* put it this way at paragraph 45:

Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine

whether their disclosure should be ordered on this ground.

The Divisional Court in *Smith* added as follows at paragraph 26:

We are of the view that "a *prima facie* showing of actual misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed" requires something more than merely an allegation in the pleading (emphasis in original).

¶ 33 Of course it is often difficult for a plaintiff alleging bad faith by his insurer in the processing of his claim to know exactly how the insurer internally handled the claim and arrived at its decision to deny benefits or to provide *prima facie* evidence of bad faith in that process without seeing the very documents protected by litigation privilege. On the other hand, giving the plaintiff *carte blanche* to examine the protected documents to see if there is *prima facie* evidence of bad faith would defeat the very purpose of the protected zone. The answer is to permit the court if appropriate to examine the documents over which privilege is claimed to ascertain if they reveal *prima facie* evidence of bad faith. That in my view is why the Supreme Court stated in *Blank* at paragraphs 44: "Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground."

¶ 34 In the case before me there is substantial evidence of delay on the part of the defendant in coming to a final decision and in sending contradictory messages and in denying benefits on one ground and then abandoning it in favour of another ground when the first became unsustainable. That raises considerable suspicions whether the insurer treated this claim in a fair and balanced manner but in itself is not in my view *prima facie* evidence of bad faith. It may be no more than an ordinary claims investigation and assessment procedure and the defendant keeping an open mind to new evidence. That will be a matter for determination by the trial court.

¶ 35 I have however examined the Schedule B documents over which the defendant claims litigation privilege. I have agreed not to refer to the specific contents of these documents except in a general way since any decision that I make may be appealed. Some of these documents reveal the process by which the defendant arrived at its various decisions. I take particular notice of one document, a report from Patricia Riopelle dated November 29, 2000, and in particular the section entitled "Recommendations", which gives substantial insight into the defendant's past and ongoing strategy with respect to determination of the plaintiff's benefits. In my view at a minimum this is evidence of an approach to the determination of Mr. Mamaca's claim that could be seen as unfair and not balanced and in my view is *prima facie* evidence of bad faith. It will be up to the trial judge to determine whether this document, together with the other evidence, establishes bad faith that would warrant the imposition of punitive damages.

¶ 36 I have previously determined that claims handling documents up to September 5, 2001 are not protected by litigation privilege. However, if I am wrong, and if litigation privilege attaches at an earlier date, I would order production of the claims file to that date on this additional ground. It would be wrong to allow the defendant to hide evidence of bad faith behind the cloak of litigation privilege or else, as stated in *Blank*, "evidence of one's own misconduct can never be exposed to the light of day."

#### WAIVER OF LITIGATION PRIVILEGE: THE ICPB DOCUMENTS

¶ 37 Included among the documents ordered produced are correspondence with the ICPB and reports respecting the investigation conducted by the ICPB at the request of the defendant. These five documents were created between September 11, 1998 when the investigation was requested and December 7, 1998

when the ICPB issued its supplementary report. It includes a request by the defendant to investigate, a fax to the ICPB from a lawyer, who was a witness to the accident, a report from the ICPB (mainly witness interviews), a request by ICPB to the defendant for further information and a supplementary report from ICPB (collectively the "ICPB documents"). In my view the ICPB documents are clearly compellable as they are relevant to the bad faith claim and were created prior to the date that litigation privilege was established. By investigating whether the accident was staged, the documents appear to have been created for the dominant purpose of assessing the validity of the claim and determining whether benefits would be payable to the plaintiff.

¶ 38 If I am wrong and if the ICPB documents are protected by litigation privilege, the plaintiff argues that privilege has been waived by virtue of the reasoning in *Supercom of California Ltd. v. Sovereign General Insurance Co.* [See Note 25 below] In that case Wilson J. held that the ICPB performs two different tasks. Firstly it serves as a repository of adjuster and investigative reports submitted by its members (most casualty and property insurers in Canada), key information from which is recorded on a national database. If a report discloses suspected fraud the actual reports are retained by ICPB for up to ten years. Secondly, its member insurers may retain the ICPB to conduct an investigation in the event of suspected fraud.

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Note 25: *Supercom of California Ltd. v. Sovereign General Insurance Co.*, [1998] O.J. No. 711, 37 O.R. (3d) 597 (OCGD).

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¶ 39 Wilson J. was considering whether litigation privilege was waived with respect to the data base and insurer's reports deposited with the ICPB. She held that because reports submitted by insurer members for the repository can be used by ICPB investigators when performing its investigatory functions on behalf of unrelated insurers and because other insurers can access the computerized data base as of right and access the actual reports submitted by other insurers with their consent, any litigation privilege attached to those reports were deemed waived by implication. She also held that the doctrine of common privilege among all member insurers did not apply and she ordered production of both the database and the underlying insurer reports.

¶ 40 Wilson J. was not asked to consider whether any litigation privilege that attached to investigation reports prepared by ICPB at the request of a member insurer was waived by implication. It is that type of report, and not a report prepared by an insurer and deposited with ICPB, that is in issue on this motion. In my view, if the reports were covered by litigation privilege, they have not been waived by implication or otherwise. The report is one prepared by ICPB at the request of an individual insurer as part of ICPB's investigative function. There is no evidence that such report is included in the database or that ICPB is at liberty to share the report or the information in it with any other member insurer. I agree with Mr. Charney that Cosco hiring ICPB to do an investigation is no different from hiring a private investigator. As such the investigative report by and communication with the ICPB would be covered by litigation privilege if conducted for the dominant purpose of reasonably anticipated litigation and would not be waived by implication.

¶ 41 Since I have concluded that litigation was not reasonably anticipated at that time and that the report was requested and prepared as part of and for the dominant purpose of the claims adjustment process, the ICPB documents will be produced.

QUESTIONS REFUSED AT EXAMINATION FOR DISCOVERY

¶ 42 With respect to the specific questions refused:

(a) Examination of Vinti Sansanwal on November 23, 2005:

- (i) Questions 31, 82, 83, 101 and 103 will be answered. They deal with production of the ICPB documents and the reason why the defendant requested further information from the ICPB. No issue has been raised as to the relevance of these documents and I have in these reasons determined that they are not protected by litigation privilege. The documents were not created at a time when litigation was reasonably contemplated, and even if they were, they were not created for the dominant purpose of assisting in the defence of that litigation but for the dominant purpose of claims assessment.
- (ii) Questions 120, 121 and 122 seek production of three internal adjuster reports assessing the claims and making recommendations (items 1, 2 and 3 in the supplementary affidavit of documents). Again, no issue has been raised as to the relevance of these documents and I have in these reasons determined that they are not protected by litigation privilege. The documents were not created at a time when litigation was reasonably contemplated, and even if they were, they were not created for the dominant purpose of assisting in the defence of that litigation but for the dominant purpose of claims assessment. They will be produced. References to reserves may be redacted since as confirmed in *Osborne* and similar cases they are not relevant barring exceptional circumstances. This includes both the actual numbers recommended for reserve as well as the basis for setting or increasing specific numbers. In my view however the fact that the insurer acknowledges that it will be responsible for IRBs or that an IRB reserve is inadequate, while connected with the setting of reserves, is relevant to the manner in which the insurer assessed the claim and treated their insured in light of such acknowledgement. In the alternative, this would be the exceptional case referenced in *Osborne*, particularly given the various bases raised by the insurer from time to time to deny IRBs and what I have found to be prima facie evidence of bad faith in the documents. Therefore in item 1, the following may be redacted: from "I recommend" in line 15 to "IEs" in line 19 (but not the next two sentences) and from "the reserve" in line 26 to "is recommended" in line 29. In item 2 all of point 2 on the "to do" list may be redacted. In item 3 under "Request for Authority" on page 3, the first sentence from "I don't" to "point" may be redacted as may the actual number in the fourth sentence. All of the numbers and codes under the heading "Reserve" may be redacted.
- (iii) Question 124 asks for notepad entries (item 4 on the supplementary affidavit of documents). All entries prior to September 5, 2001 will be produced as they were not created either at a time when litigation was reasonably contemplated, and even if they were, they were not created for the dominant purpose of assisting in the defence of that litigation but for the dominant purpose of claims assessment. The September 5 entries may be redacted.

(b) Examination of Deborah Sherren on November 24, 2005:

- (i) In questions 8, 9, 10 and 11 the defendant is asked whether the obligation to act in good faith includes specific duties, namely to act fairly in claims handling, to fully investigate, to act promptly and to treat the plaintiff's interest on an equal basis with that of the insurer. In other words the plaintiff is asking the defendant what its understanding is of its obligations to its insured. In my view these are questions requiring the party to state its position on issues raised in the pleadings and such questions to a discovery witness are permissible in the interests of full and open disclosure, to narrow the issues before and at trial and to minimize costs and save time. [See Note 26 below] Since the trial court must assess whether the insurer complied with its duties of good faith, it is proper to explore what the adjuster or insurer understood its obligations to be. Questions directed to an insurer to elicit its position as to its understanding of the nature of those duties are proper. [See Note 27 below] Even if questions as to the insurer's position amount to questions of mixed fact and law they are not improper. [See Note 28 below] The questions will be answered. Question 496 asks for the defendant's position paraphrased as follows: when a claims supervisor learns that an insured has claimed benefits in an another accident, does that affect the way the current accident benefits claim is handled? In my view that question has no semblance of relevance to the issues as framed by the pleadings. No foundation was laid for the question. It need not be answered.
- (ii) Question 288 asks if the defendant has training manuals and then asks if the defendant has claims manuals. These manuals have a semblance of relevance to paragraph 17(w) of the statement of claim which alleges that the defendant "failed to follow its own claims manuals, internal policies, procedures, guidelines, directives ... for the handling of claims, or in the alternative it failed to have proper and reasonable claims manuals, internal policies, procedures, guidelines, directive for the handling of claims." The method of file handling and any instructions or training connected therewith has a further semblance of relevance to the actual manner in which the claim was handled and whether it was done in good faith. I am told that no claims manuals existed at the material time and it appears there were no training manuals, but a further search would be undertaken. Therefore any such manuals or other claims or training materials in existence up to September 5, 2001 will be produced if available. If they do not exist, there is nothing to produce. Manuals first created after September 5, 2001 have no semblance of relevance to the issues herein
- (iii) Question 604 is identical to question 124 of the November 23 examination and will be answered in the same manner.
- (iv) The defendant is now prepared to answer question 59 (return of premiums) and will be ordered accordingly. Question 598 to produce written reports attached to surveillance videos: the defendant does not object to producing them and claims it has already done so. The plaintiff claims he does not have it. It will again be reproduced for the plaintiff at the plaintiff's cost.

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Note 26: *Law v Zurich Insurance Co.*, [2002] O.J. No. 1635 (S.C.J.) at paragraph 13; *Six Nations v. Attorney General of Canada*, [2000] O.J. No. 1431, 48 O.R. (3d) 377 (Div. Ct.) at paragraphs 9-10

Note 27: *Micciche v. Mittag*, December 31, 2004, unreported, Court File No. 98-CV-149050CM (Master Kelly)

Note 28: *Law v Zurich*, supra, at paragraph 13.

## FURTHER AND BETTER AFFIDAVIT OF DOCUMENTS

¶ 43 The plaintiff's request for a further and better affidavit of documents, in addition to questioning the claim for litigation privilege over Schedule B documents, includes requests for the following:

- (a) Claims and training or educational manuals and materials. This has been dealt by way of questions refused. They will be produced if and to the extent they existed prior to September 5, 2001.
- (b) Internal memorandum and emails. This has been dealt with by my order to produce copies of Schedule B documents up to September 5, 2001. There is no evidence that other documents exist.
- (c) The defendant's financial statements. While the financial means of the defendant are relevant to quantum of any award for punitive damages, simply because bad faith is pleaded does not mean that financial statements must automatically be produced. They should normally not be ordered produced until trial and only after a finding of bad faith has been made. [See Note 29 below]

Note 29: *Monks v Zurich Insurance Co.* (2001), 55 O.R. (3d) 196 (S.C.J.), *Freise v. Citadel Insurance Co.*, [2000] O.J. No. 2365 (S.C.J.) at paragraph 22. See also *Whiten v Pilot Insurance Co.*, [2002] S.C.J. No. 19 at paragraph 121.

## ORDER

¶ 44 In summary, the following order shall issue:

- (a) The defendant shall within 30 days produce copies of all of its schedule B documents, except item 13 listed in the May 11, 2004 affidavit of documents, with redactions as permitted in these reasons. It shall serve a further and better affidavit of documents in which it transfers these Schedule B documents to Schedule A and includes any claims or training manuals, memos or directives if and to the extent they existed before September 5, 2001.
- (b) The defendant shall within 30 days answer the following questions from the examination for discovery of Vinti Sansanwal conducted November 23, 2005: questions 31, 82, 83, 101, 103 and questions 120, 121, 122 and 124 subject to permitted redactions.
- (c) The defendant shall within 30 days answer the following questions from the examination for discovery of Deborah Sherren conducted November 24, 2005: questions 8, 9, 10, 11, 59 (on consent), 288 (up to September 5, 2001, if they exist), 598 (on consent, at plaintiff's cost) and 604. The defendant need not answer question 496.
- (d) Vinti Sansanwal and Deborah Sherren shall reattend to answer proper follow up questions to answers to undertakings and questions ordered to be answered and on documents subsequently produced.

¶ 45 The schedule B documents provided to me under rule 30.06(d) shall be returned to the solicitor for the defendant pending any appeal of this decision.

¶ 46 I am prepared to receive brief submissions as to costs of this motion from the plaintiff within 10 days of release of these reasons and from the defendant within seven days of receipt of the plaintiff's submissions. Any party seeking costs shall include a Costs Outline (Form 57B) and supporting dockets.

MASTER R. DASH

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Corrigendum  
Released: April 11, 2007

A correction to the last word in paragraph 11(d) has been made; changed from "FSCO" to "ICPB".

QL UPDATE: 20070412 cp/e/qlgxc/qlesm/qlkbb/qlhcs