EB-2011-0120

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.15 (Schedule B);

AND IN THE MATTER OF an application by Canadian Distributed Antenna Systems Coalition ("CANDAS") for certain orders under the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF a Motion by the Consumers Council of Canada for an Order requiring further and better answers to Interrogatories delivered to Toronto Hydro-Electric System Limited.

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE MOVING PARTY THE CONSUMERS COUNCIL OF CANADA

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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

47 C.C.L.I. (4th) 288

156 A.C.W.S. (3d) 313

2007 CanLII 9890

2007 CarswellOnt 1828

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 disentitling 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.

[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.[1] 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.

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.[2]

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.[3] 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.[4] 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.[5] 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.[6] 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."[7]

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.[8]

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.[9] 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."[10] 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.

Evidentiary Requirement to Establish Litigation Privilege

15 The onus is on the party claiming litigation privilege to lay an evidentiary foundation for that privilege.[11] 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.[12] 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).

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.[13] 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.[14] 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.[15] 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.

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.[16] 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.

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.[17] 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"[18] and "we have to be prepared for everything."[19] 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.

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"[20] that being the date Coseco received

the application for mediation.[21] 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.

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.[22] I find no such exceptional circumstances herein. More specific direction is provided further in these reasons.

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*.[23] 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.

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.*[24] 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.

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.*[25] 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.

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 Coseco 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.[26] 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.[27] Even if questions as to the insurer's position amount to questions of mixed fact and law they are not improper.[28] 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.

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.[29]

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

* * * * *

Corrigendum
Released: April 11, 2007

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

cp/e/qlgxc/qlesm/qllkb/qlhcs/qljyw

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

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

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.).

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

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

Royal v. Fiberglas, supra.

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

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.).

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

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.

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

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

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.

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

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.).

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.

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

18 Ibid, question 351.

19 Ibid, question 354.

20 Ibid, question 313.

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.

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.

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

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

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

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.

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

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

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.

TAB 2

Case Name:

Midland Resources Holding Ltd. v. Shtaif

RE: Midland Resources Holding Limited, Alex Shnaider and Eduard Shyfrin, Plaintiffs, and Michael Shtaif, Gregory Roberts, Eugene Bokserman, Ilya Entin, Irwin Boock a.k.a. Irwin Krakowsky, Stanton DeFreitas and Patricia Groag as Executrix of the Estate of Anthony Groag, Defendants

[2010] O.J. No. 2767

2010 ONSC 3772

Court File No. 08-CL-7446

Ontario Superior Court of Justice

Master R.A. Muir

Heard: June 28, 2010.
Judgment: June 29, 2010.

(22 paras.)

Civil litigation -- Civil procedure -- Discovery -- Examination for discovery -- Attendance -- Order to attend or re-attend -- Range of examination -- Objections and compelling answers -- Production and inspection of documents -- Objections and compelling production -- Orders for production -- Relevancy -- Motion by plaintiffs for order requiring one defendant to answer undertakings and questions refused on examination for discovery allowed and motions by defendants for production and order requiring two plaintiffs to answer questions and re-attend at examinations for discovery allowed -- Plaintiffs commenced action for conspiracy, fraud and related causes of action and defendants counterclaimed for breach of contract, conspiracy and related causes of action -- Plaintiff's allegations of conspiracy and one defendant's evidence established relevance of questions -- Defendants' request for additional production not out of proportion and as production likely to lead to additional questions, re-attendance of plaintiffs reasonable and appropriate.

Motion by the plaintiffs for an order requiring one defendant to answer undertakings and questions

refused on his examination for discovery and motions by the defendants for production of certain documents and for an order requiring two plaintiffs to answer questions refused and taken under advisement on their examinations for discovery and to re-attend at continued examinations for discovery. The action arose out of a series of business ventures entered into among the parties relating to the purchase and development of oil and gas properties in Russia. The plaintiffs claimed damages from the defendants in an amount in excess of $100 million USD for conspiracy, fraud, fraudulent misrepresentation and other related causes of action. The defendants counterclaimed for more than $750 million for breach of contract, conspiracy and other related causes of action. The plaintiffs alleged that the defendant Bokserman, along with a number of other defendants, conspired to injure the plaintiffs by unlawful means. As a result of production made by one of the other defendants and evidence given on his examination for discovery, an allegation arose as that a portion of a commission received by Bokserman was paid to another defendant. When asked about the commission, Bokersman refused to answer. At the examination for discovery of the plaintiff Shnaider, he was asked to provide a full accounting of a corporation that was under the control of the plaintiffs and was involved in the business ventures. The plaintiffs did not dispute the relevance of the documents, but argued that disclosure should be limited to items or transactions valued at over $5,000 USD.

HELD: Motions allowed. With respect to the plaintiff's motion, the allegations of conspiracy in the claim and the evidence given by one of the other defendants was sufficient to establish the relevance of the questions, although the questions as asked were too general. The additional production of documents requested by the defendants was not out of proportion. As the production of such documents was likely to lead to additional questions, the re-attendance of the plaintiffs at continued examinations for discovery was reasonable and appropriate.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 1.04(1.1), Rule 29.2, Rule 29.2.03, Rule 30, Rule 31, Rule 31.06(1), Rule 34

Counsel:

K. Mullin, for the plaintiffs.

G. Roberts, in person.

E. Hiutin, for the defendants Michael Shtaif, Eugene Bokserman and Ilya Entin.

REASONS FOR DECISION

1 **MASTER R.A. MUIR**:-- I have before me three motions brought pursuant to Rules 30, 31 and 34 of the *Rules of Civil Procedure* (the "Rules").

2 The plaintiffs seek an order requiring the defendant Eugene Bokserman ("Bokserman") to answer undertakings and questions refused on his examination for discovery held on February 17, 2010. The plaintiffs' notice of motion also seeks an order requiring the defendants Michael Shtaif ("Shtaif") and Ilya Entin ("Entin") to answer undertakings and questions refused or taken under advisement on their respective examinations for discovery. All of the issues related to the defendants Shtaif and Entin were resolved by the parties prior to the argument of these motions as were a number of the issues relating to the defendant Bokserman.

3 The defendant Gregory Roberts ("Roberts") seeks and order requiring the plaintiff Alex Shnaider ("Shnaider") and the plaintiff Eduard Shyfrin ("Shyfrin") to answer questions refused and taken under advisement on their respective examinations for discovery and to reattend at continued examinations for discovery to answer questions arising from undertakings and from questions refused and taken under advisement. The issues relating to a number of the questions refused were resolved by the parties during the course of argument.

4 The defendants Shtaif, Bokserman and Entin also seek an order requiring Shnaider and Shyfrin to answer questions refused and taken under advisement on their respective examinations for discovery and to reattend at continued examinations for discovery to answer questions arising from undertakings and from the questions refused and taken under advisement. The issues relating to a number of the questions refused were also resolved by the parties prior to the argument of these motions.

5 This action arises out of what appear to be a series of business ventures entered into among the parties relating to the purchase and development of oil and gas properties located in the Russian Federation (the "Business Venture"). The factual background to the various claims is long and complex. The plaintiffs are claiming damages from the defendants for amounts in excess of US$100,000,000.00 for conspiracy, fraud, fraudulent misrepresentation and other related causes of action. The defendants Shtaif, Bokserman and Entin have counterclaimed for more than $750,000,000.00 for breach of contract, conspiracy and other related causes of action. Roberts has counterclaimed for more than $60,000,000.00 in respect of similar causes of action. The pleadings alone are nearly 200 pages in length. Many thousands of documents have been produced and there appear to have been more than a dozen days of discovery to date. I commend the parties for having worked together, in what appears to have been a cooperative fashion, in order to limit the number of issues to be argued on these motions.

6 The parties did not address the issue of the test I was to apply in deciding the issues on these motions. I have, however, applied the relevance test set out in Rule 31.06(1), as amended effective January 1, 2010. This test replaces the "semblance of relevance" test previously applicable to motions of this nature. While some of the examinations took place prior to January 1, 2010 others

took place after that date and these motions were not heard until June 28, 2010 after the Rules amendments came into force. The January 1, 2010 Rules amendments do not contain any transition provisions relating to the change from "semblance of relevance" to "relevance". Consequently, it is my view that the "relevance" test is applicable to this motion and is the test I must apply as mandated by the Rules. See my decision in *Noble v. York University Foundation*, 2010 ONSC 399. This is also the view taken by Justice Belobaba in *Onex Corp. v. American Home Assurance*, [2009] O.J. No. 5526 (S.C.J.) in relation to the Rules amendments dealing with summary judgment.

7 In applying the relevance test I am mindful of the comments found in the *Summary of Findings and Recommendations of the Civil Justice Reform Project* led by the Honourable Coulter A. Osborne, upon which the January 1, 2010 Rules amendments are based. In particular I note the comments at part 8 of the Report dealing with discovery:

> I agree with these views. The "semblance of relevance" test ought to be replaced with a stricter test of "relevance." This step is needed to provide a clear signal to the profession that restraint should be exercised in the discovery process and, as the Discovery Task Force put it, to "strengthen the objective that discovery be conducted with due regard to cost and efficiency." In keeping with the principle of proportionality, the time has come for this change to be made, which I hope in turn will inform the culture of litigation in the province, particularly in larger cities.
>
> This reform is not targeted at lawyers who make reasonable discovery requests, but rather at those who make excessive requests or otherwise abuse the discovery process. Therefore, a change from "relating to" to "relevant" would likely have little or no impact on those lawyers who already act reasonably during the discovery process. Its effects will be felt by those who abuse discovery or engage in areas of inquiry that could not reasonably be considered necessary, even though they currently survive "semblance of relevance" analysis.

THE PLAINTIFFS' MOTION

8 Argument of the plaintiffs' motion was limited to two questions refused on the Bokserman examination. In their Fresh as Amended Statement of Claim the plaintiffs make a number of allegations that Bokserman, along with a number of the other defendants, was part of a conspiracy to injure the plaintiffs by unlawful means (see, for example, paragraphs 13 to 15 of the Fresh as Amended Statement of Claim). As a result of certain production made by the defendant Stanton DeFreitas ("DeFreitas") and evidence given on his examination for discovery, an allegation surfaced that a portion of a commission received by Bokserman in relation to one aspect of the Business Venture may have been paid to Shtaif. Based on this information, the plaintiffs asked Bokserman to advise where the commission moneys went after they were wired to him and to advise what

Bokserman did with the funds (questions 557 and 559). The plaintiffs acknowledge that there is no specific allegation in the pleadings that a portion of the commission moneys were redirected to Shtaif, but point to their general allegations of conspiracy and the evidence from DeFreitas as the basis for making the questions relevant.

9 Bokserman takes the position that the questions are irrelevant on the basis that no such allegation has been pleaded even in the Fresh as Amended Statement of Claim which was drafted after Bokserman's examination.

10 In my view, the allegations of conspiracy made by the plaintiffs in the Fresh as Amended Statement of Claim, coupled with the evidence from DeFreitas, are sufficient to establish the relevance of the questions, but only insofar as they relate to Shtaif. The questions as asked are too general. An order will go requiring Bokserman to answer questions 557 and 559 but only to the extent of advising whether any portions of the commission were subsequently paid to or benefited Shtaif, either directly or indirectly.

THE SHTAIF, BOKSERMAN AND ENTIN MOTION

11 Argument of the motion brought by these defendants was limited to one question refused on Shnaider's examination and certain other issues related to reattendance and the answering of what these defendants argue were seven improperly answered undertakings.

12 One of the entities involved in the Business Venture was the defendant by counterclaim, Koll Resources Limited ("Koll"). Koll is not represented in this litigation. By order of the Honourable Justice Hoy, previously made in this proceeding, Koll was relieved of the obligation of delivering a statement of defence to the counterclaim but could not be noted in default. Koll has not served an affidavit of documents. It appears, however, that Koll is under the control of the plaintiffs who have access to its books and records.

13 During the course of Shnaider's examination for discovery he was asked to provide a full accounting of Koll's affairs from its inception to the date of trial and to provide access to all of Koll's books and records (questions 3142 to 3145). These defendants argue that this information and documentation is relevant to the issue of the current state of affairs of what they allege was one of the Business Venture's corporate vehicles and to the issue of the quantum of damages being claimed by the plaintiffs. These defendants also argue that they are entitled to access to these documents as alleged shareholders and owners of Koll.

14 The plaintiffs do not dispute the relevance of these documents to this litigation and are prepared to make a "reasonable and proportionate" degree of disclosure and access. They argue that the principle of proportionality set out in Rules 1.04(1.1) and 29.2 militates in favour of limiting the disclosure in a reasonable and proportionate manner, as they have suggested. As an example, they suggest that such disclosure and access only extend to information and documentation relating to items or transactions valued at over US$5,000.00.

15 While these defendants are prepared to agree to a "materiality" threshold of US$1,000.00, they point out that the plaintiffs have put forward no evidence that would allow the court to conduct an assessment of the factors under Rule 29.2.03. I agree with this submission. In my view a party who seeks to limit the production of relevant documents on the basis of proportionality must put forward at least some evidence addressing the Rule 29.2.03 factors. The plaintiffs have not done so. Moreover, what evidence I do have about this litigation does not favour a limit on this area of production. This action involves tens of millions of dollars at a minimum and perhaps much more. There has already been extensive documentary and oral discovery. The additional production of the Koll documents requested by these defendants does not seem out of proportion under the circumstances. As a result an order will go requiring Shnaider and the plaintiff Midland Resources Limited ("Midland") to provide the disclosure and access requested by these defendants at questions 3142 to 3145 of Shnaider's examination, to the extent that such information and documentation relates to items or transactions valued at over US$1,000.00.

16 These defendants also seek an order that Shnaider, on his own behalf and on behalf of Midland, and Shyfrin, reattend at a continued examination for discovery to answer the questions refused and answer questions arising from the answers to their undertakings. The plaintiffs argue that Shnaider and Shyfrin should not have to reattend. They point out that although Shnaider is a resident of Toronto, Shyfrin resides in Moscow and has experienced health issues in the past. Moreover, they note that Shnaider and Shyfrin have already undergone many days of discovery. In my view, however, reattendance is appropriate in the circumstance of this action. More than 100 undertakings have been answered by Shnaider and Shyfrin subsequent to their examinations. Further answers will be provided to questions initially refused but which will now be answered. Production of the Koll documents will undoubtedly lead to further questions. The plaintiffs are in the process of amending their statement of claim which will necessitate the further exchange of amended pleadings. The plaintiffs have chosen to commence this action in Toronto. They seek payment of significant damages and have made very serious allegations of wrongdoing. I have no evidence before me that such reattendance would result in hardship to either Shnaider or Shyfrin. In my view, further attendance by Shnaider and Shyfrin is reasonable and appropriate in the circumstances of this case. An order will go requiring Shnaider and Shyfrin to reattend at a continued examination for discovery in accordance with the same arrangements utilized for their previous examinations or upon such other arrangements as the parties may agree to.

17 These defendants also seek an order requiring Shyfrin to provide answers to certain undertakings which these defendants allege have been improperly answered. The defendants want these answers by July 30, 2010. Shyfrin is prepared to provide the answers by August 31, 2010. Justice Hoy has previously ordered that Shyfrin's undertakings be answered by May 31, 2010. This was done but not to the satisfaction of these defendants. In my view, I am not being asked to vary Justice Hoy's order but rather to rule on a fresh motion requiring Shyfrin to answer the allegedly improperly answered undertakings. Given that the parties have agreed that the Koll production will not be required before September 30, 2010 and that Shyfrin has agreed to answer other questions relating to Shnaider's discovery evidence that will undoubtedly take a significant period of time, I

am of the view that August 31, 2010 is a more reasonable deadline. An order will go requiring Shyfrin to answer by August 31, 2010, the seven undertakings identified by these defendants as allegedly improperly answered.

ROBERTS' MOTION

18 During the course of argument it was agreed as between Roberts and the plaintiffs that certain of the refused questions that were the subject of this motion would be answered. In accordance with that agreement, an order will go requiring Shyfrin to answer question 1651 within 30 days. With respect to questions 1720 to 1724 and 1729, WeirFoulds LLP will provide Avi Greenspoon's complete file and confirm that what is provided is the complete file. With respect to question 1727, the plaintiffs will provide the names and contact information for the individuals interviewed by John Keefe along with a summary of the contents of their witness statements.

19 The remaining questions all relate to inquires by Roberts with respect to what facts and information were in the possession of the plaintiffs' former lawyer, John Keefe ("Keefe"), when he drafted the original version of the statement of claim. Specifically, these questions relate to a certain email dated May 26, 2006 which Roberts purportedly sent to Groag, Shnaider, Shyfrin and Shtaif. In the Fresh as Amended Statement of Claim, the plaintiffs deny receiving this email and deny that they were apprised of its contents until Roberts' lawyer sent an email to the plaintiffs' lawyer on June 19, 2006. Roberts alleges that the Fresh as Amended Statement of Claim contains information that would only have been available to Keefe through Roberts' May 26, 2006 email and not his lawyers' June 19, 2006 email.

20 The question of whether the plaintiffs received Roberts' May 26, 2006 email is clearly relevant based on the allegations in the statement of claim (see paragraphs 87 to 89 of the Fresh as Amended Statement of Claim). The plaintiffs do not deny this but rather take the position that the information sought by Roberts in these questions is protected by privilege. They are, however, prepared to answer the questions on the understanding that they are not waiving any lawyer-client or litigation privilege. In my view, these questions simply ask for facts relevant to issues raised in the plaintiffs' Fresh as Amended Statement of Claim. It is well settled law that such facts must be revealed even if the source of the information is privileged. See *Pearson v. Inco Limited*, 2008 CanLII 46701 (ON SC). An order will go requiring Shnaider to answer questions 3968 and 3969 and requiring Shyfrin to answer questions 1719, 1732 to 1734 and 1736, to the extent that the questions ask for facts relevant to the allegations in the Fresh as Amended Statement of Claim.

21 Roberts also seeks an order for the reattendance of Shnaider and Shyfrin. For the reasons set out above in the portion of these reasons dealing with the motion brought by Shtaif, Bokserman and Entin, such an order is appropriate in the circumstances of this action. Roberts also seeks an order that he be permitted to ask questions of Shnaider and Shyfrin in connection with certain evidence produced as a result of answers to undertakings and documents produced by DeFreitas. As this evidence only came to light subsequent to the examination of Shnaider and Shyfrin, and given that

further oral examinations have been ordered in any event, I am of the view that such an order is appropriate in the circumstances.

ORDER AND COSTS

22 The court therefore orders as follows:

* Bokserman shall answer questions 557 and 559 but only to the extent of advising whether any portions of the commission were subsequently paid to or benefited Shtaif, either directly or indirectly, by August 31, 2010;

* Shnaider and Midland shall provide the disclosure and access requested by Shtaif, Bokserman and Entin at questions 3142 to 3145 of Shnaider's examination to the extent that such information and documentation relates to items or transactions valued at over US$1,000.00, by September 30, 2010;

* Shyfrin shall answer question 1651 within 30 days;

* WeirFoulds LLP shall provide Roberts with Avi Greenspoon's complete file and confirm that what is provided is the complete file, by August 31, 2010;

* Shyfrin shall answer question 1727 by providing the names and contact information for the individuals interviewed by John Keefe along with a summary of the contents of their witness statements, by August 31, 2010;

* Shnaider shall answer questions 3968 and 3969 and Shyfrin shall answer questions 1719, 1732 to 1734 and 1736, to the extent that the questions ask for facts relevant to the allegations in the statement of claim, by August 31, 2010;

* Shyfrin shall answer the seven undertakings identified by Shtaif, Bokserman and Entin as allegedly improperly answered, by August 31, 2010;

* Shnaider, on his own behalf and on behalf of Midland, and Shyfrin shall, prior to November 30, 2010, reattend at a continued examination for discovery to answer questions from Roberts and counsel for Shtaif, Bokserman and Entin, in accordance with the same arrangements utilized for their previous examinations,

or upon such other arrangements as the parties may agree to, such continued examinations to include any questions arising from their answers to undertakings and questions refused and subsequently answered and questions arising from the answers to undertakings given and documents produced by DeFreitas subsequent to the examinations for discovery of Shnaider and Shyfrin;

* The continued examinations of Shnaider and Shyfrin shall not exceed 14 hours each; and,

* If the parties are unable to agree on a costs disposition, they shall provide the court with costs outlines and brief costs submissions (not to exceed three pages in length) by July 30, 2010.

MASTER R.A. MUIR

cp/e/qllxr/qlmxj/qljxr

TAB 3

Indexed as:

Mistik Management Ltd. v. Canada (Attorney General)

Between
Mistik Management Ltd., plaintiff, and
Attorney General of Canada, defendant

[1997] S.J. No. 73

69 A.C.W.S. (3d) 250

Q.B. No. 1872 of 1994 J.C.S.

Saskatchewan Court of Queen's Bench
Judicial District of Saskatoon

Krueger J.

February 21, 1997.

(9 pp.)

Practice -- Discovery -- What documents must be produced -- Privileged documents, solicitor-client communications -- Privileged documents, litigation documents, dominant purpose test.

Application brought pursuant to Rule 215 for an order directing the defendant to produce documents. The defendant claimed that the documents were privileged as solicitor-client communications and documents made in contemplation of litigation. After a fire broke out on a weapons range located in northwestern Saskatchewan, certain parties sent letters to the Minister of National Defence, demanding compensation for their loss. The plaintiff did not send a letter of demand. Upon receiving the letters, the Minister caused an investigation to be conducted and three reports were issued. The plaintiff issued a statement of claim asserting damages as a result of the fire. The plaintiff now sought production of the reports of the fire investigation.

HELD: Application dismissed. The dominant purpose of the reports was to provide advice and counselling relating to possible litigation. In light of the several letters demanding compensation, the defendant reasonably anticipated litigation at the time of directing the investigation. While some portions of the reports may not have had litigation as their dominant purpose, where the dominant

purpose of a whole report was for the purpose of litigation, the entire report was protected by litigation privilege.

Statutes, Regulations and Rules Cited:

Saskatchewan Queen's Bench Rules, Rule 215.

Counsel:

J.D. Denis Pelletier, for the plaintiff (Mistik).
Mark R. Kindrachuk, for the defendant (Canada).

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1 **KRUEGER J.**:-- This application was brought pursuant to Queen's Bench Rule 215 by the Plaintiff, Mistik Management Ltd. (Mistik), when an officer of the Defendant, Attorney General of Canada (Canada), who was being examined for discovery, declined to produce documents for inspection.

2 Production of three documents is requested:

(a) Correspondence dated July 29, 1993, from the Directorate of Law/Claims of the Office of the Judge Advocate General to the Base Commander at the Primrose Air Weapons Range at Cold Lake, Colonel Bartram;
(b) Terms of reference for the summary investigation dated August 16, 1993, and prepared under the direction of Colonel Bartram;
(c) Summary investigation report dated August 31, 1993, prepared by Colonel MacNeil, Captain Beswick and Captain Girouard.

3 Canada claims that all of the documents are subject to solicitor/client privilege or litigation privilege.

BACKGROUND

4 In order to fully appreciate the nature of the application, some history of the action may be helpful.

5 As part of the Canadian Forces, Canada established the Primrose Cold Lake Air Weapons Range. It is located partially in northeastern Alberta and partially in northwestern Saskatchewan. Mistik is, in part, a logging company occupying land in northwestern Saskatchewan adjacent to the Air Weapons Range. On May 13, 1993, fires broke out on the Air Weapons Range and eventually spread to the land occupied by Mistik. No letter of demand to Canada was sent by Mistik but three

letters were written to the Minister of National Defence as follows:

1. On June 28, 1993, Chief Guy Lariviere of the Canoe Lake Reservation wrote claiming $5,000.00 as the cost of evacuating people from the fire zone.
2. NorSask Forest Products Inc., a forest management and harvesting business, also operating in northwestern Saskatchewan, served notice on July 14, 1993, that it intended to claim from Canada compensation for losses resulting from the fire.
3. The Minister of Environment and Resource Management for Saskatchewan requested that Canada undertake the full cost of suppressing the fire. That letter was dated July 21, 1993.

6 Those letters prompted the Minister of National Defence to consult with the Director of Law/Claims who, in turn, directed Colonel Bartram, the Commander of the Cold Lake Base, to cause a summary investigation to be conducted. The terms of reference for the investigation were dated August 16, 1993, and prepared by Colonel Bartram. Three officers were instructed to conduct the summary investigation. Their report is dated August 31, 1993.

7 The Statement of Claim of Mistik was not issued until June 08, 1994.

8 Canada maintains that the three documents which Mistik wants produced were all created to provide legal advice by its internal legal department for the use and benefit of Canada.

THE LAW

9 In Saskatchewan, a party seeking production of documents must show them to be relevant to the court action. Once relevance is established, the onus shifts to the party claiming privilege: Bank of Montreal v. 3D Properties Inc. et al. (No.2) (1994), 111 Sask.R. 63 (Q.B.).

10 In determining relevance, the "broad relevance" test is applied: Cominco Ltd. v. Phillips Cable Limited et al. [1987] 3 W.W.R. 562 (Sask. C.A.).

11 Using the broad relevance test as defined by Tallis J.A. of the Saskatchewan Court of Appeal in Steir v. University Hospital Board et al. [1988] 4 W.W.R. 303 (Sask. C.A.), the documents must either directly or indirectly enable Mistik to advance its own case, or to destroy that of Canada, or fairly lead to a train of inquiry which may have either of these consequences. Once Mistik has met the broad relevance test, Canada bears the onus of establishing its right to refuse production of the documents.

12 It is generally accepted that documents attaching privilege may be described either as those prepared in contemplation of litigation or those providing solicitor/client advice. Solicitor/client privilege attaches to all confidential communications made between a lawyer (or lawyer's agent)

and client where the client is seeking the lawyer's advice. Litigation privilege attaches to all communications or documents prepared by third parties for use in litigation. See: Standard Machine Ltd. v. Royal Insurance Co. of Canada (1996), Q.B. No. 3513 of 1995, J.C. Saskatoon. (Geatros J. in that case reviewed the history and application of privilege).

13 It is also established law that in-house counsel or salaried legal advisors of a company enjoy the same privilege as their practising counterparts, but only when dispensing legal advice: I.B.M. Canada Ltd. v. Xerox Canada Ltd (1978), 15 N.R. 11 (Federal C.A.).

14 When applied to reports or investigations, the privilege, if it exists, is based on an anticipation of litigation. Laxton Holdings Ltd. et al. v. Lloyd's Non-Marine Underwriters et al. (1988), 72 Sask.R. 313 (C.A.) establishes that there are two tests in determining litigation privilege as follows:

1. The dominant purpose for which the document was created must be litigation, and;
2. Litigation must be a reasonable prospect at the time of creation of the document.

See also: Windpower Inc. and Dove Industries Inc. v. Saskatchewan Power Corporation, Q.B. 126/96, J.C. Regina, MacPherson, C.J.Q.B., February 07, 1997, (as yet unreported).

15 Mere assertion in an affidavit that the document was prepared for litigation purposes is not necessarily sufficient to establish privilege. The document must address the issue of blame, fault, responsibility or liability, or in some other way establish that its dominant purpose was for litigation. In addition, there must be some reasonable anticipation that litigation will be the result of the event being reviewed or investigated.

DISCUSSION

16 Applying the broad relevance test from the Steir case, I am satisfied, from the pleadings and on the basis of the arguments, that the documents would either directly or indirectly enable Mistik to advance its own case, or at least lead to inquiries that would result in its being able to do so. Accordingly, I have concluded that the documents are relevant.

17 There remains to be determined whether privilege attaches to any of the documents. Canada claims both solicitor/client privilege and litigation privilege.

18 In support of the claim of privilege, Lieutenant-Colonel Benoit Pinsonneault, the current Director of Law/Claims (L/C), Office of the Judge Advocate General (JAG), filed an affidavit sworn on February 03, 1997. It is his office that provides legal advice and services to the Department of National Defence and Canadian Forces. He was not, at the time the summary investigation was ordered, the Director of Law/Claims. His affidavit provides in part as follows:

> Paragraph 11 ... (T)he documents are written communications between officials of 4 Wing Cold Lake and their solicitors at JAG and L/C Directorate, concerning the rendering of legal advice. The communications were intended to be and remain confidential and, therefore, are privileged solicitor and client communications.
>
> Paragraph 14 ... Lieutenant-Colonel J.G. Rycroft, acting in the capacity of Director of Law/C, did on July 29, 1993, direct Colonel Bartram at 4 Wing Cold Lake to conduct a summary investigation for his Directorate's benefit and use in rendering legal advice with respect to allegations being made against the Crown.
>
> Paragraph 18 ... (I)n these circumstances, the main purpose for which the summary investigation report was created was for its submission to legal counsel, both for advice and use in litigation which was contemplated at the time.

19 While the affidavit asserts the provision of legal advice respecting allegations made against Canada and the conduct of a summary investigation and report to be used in providing legal advice, the only basis for legal advice or an investigation was the three letters directed to the Minister of National Defence. It is difficult to imagine how the Law/Claims Department could provide any legal advice based on the three letters received by the Minister of National Defence. It is far more reasonable to conclude that, as a result of those letters, the Director of Law/Claims instructed Colonel Bartram to undertake an investigation in order that some decision could be made as to whether there was any fault on the part of Canada and what liability was likely to flow from that fault. I, accordingly, conclude that there was no legal advice of any kind sought from a professional legal advisor in his capacity as such. The communications relate to a request to have produced or prepared by a third party a report which may be used in giving future advice. Any privilege attached to the three documents requested to be produced is, therefore, restricted to litigation privilege.

20 The affidavit of Lieutenant-Colonel Benoit Pinsonneault is clear and unequivocal in stating that the purpose of the summary investigation report was for the purpose of providing legal counsel. The affidavit was prepared in retrospect and some considerable time after the litigation had actually been commenced. A review of the questioned documents satisfies me that the request for the report by the Director of Law/Claims was to address the issue of liability. One of the responsibilities of the investigating officers as set out in the terms of reference was to determine whether anyone was to blame.

21 The dominant purpose of a document and the reasonable prospect of litigation at the time the document was created are not matters which can be determined in the abstract. Each case must be examined on its own unique set of circumstances and the findings of that case are not to be regarded as changing the test to be applied in determining privilege. Any time a party receives a

communication suggesting that another has suffered damages as a result of some act or omission by the other, litigation is a prospect. Until sufficient information is gathered to formulate an opinion as to the cause of the loss or complaint, advice on such matters as liability cannot be readily given. It is, therefore, necessary to determine whether litigation was a reasonable prospect when the summary investigation report was produced and, if so, whether that litigation was the dominant purpose for producing the report.

22 The letter dated July 29, 1993, directed to the Base Commander from the Director of Law/Claims focused in particular on allegations by the Province of Saskatchewan. That may have been due either to the amount of the claim by the Province (in excess of $10,000,000.00), or the fact that a contract existed between Canada and the Province relating to the suppression of fires on the Air Weapons Range. In any event, the direction by the Base Commander to the three officers who were instructed to carry out the investigation was to review all available documents and obtain statements from witnesses, make findings of fact and offer recommendations. Paragraph 3 of the terms of reference contained the following provision:

> As the matter to be investigated may give rise to potential litigation either against or at the suit of the Crown, the investigation is to be conducted with a view to obtaining evidence that will be useful instruction to the Crown solicitors and counsels (sic). The investigation officers shall liaise closely with the D.J.A. throughout the progress of this investigation. (Emphasis added)

23 There is no doubt that the Base Commander was concerned with the possibility of litigation. Indeed, the three letters received by the Minister of Defence all made claims for compensation. If the claimants could not be persuaded that Canada was not at fault, or if the claims could not be satisfied, then litigation was not only a reasonable prospect but an inevitable result.

24 The ultimate question to be decided is whether the dominant purpose of the summary investigation was to provide a report to be used in assisting Crown solicitors in advising Canada for the purpose of litigation or was merely a fact-finding mission. The report produced information and recommendations which can, and undoubtedly will, be used by Canada in conducting the defence of the action commenced by Mistik. It also produced conclusions and recommendations relating to fire investigation, control and reporting which will assist Canada in dealing with the suppression of future fires.

25 The report dated August 31, 1993, is only 27 pages in length. In Paragraph 2 of Page 1, the investigators state their purpose:

> ... (T)he investigation was conducted and the report written in contemplation of litigation, with a view to obtaining evidence that will be useful instruction to the Crown's solicitors and counsels (sic).

26 That statement was in keeping with the terms of reference. The investigation was not limited

to the complaints raised in the three letters sent to the Minister of National Defence. It includes others. Most of the recommendations in the report relate to claims and procedures to be adopted in dealing with them.

27 I am satisfied that the dominant purpose for which the report was produced was to provide advice and counselling relating to possible litigation. I am also satisfied that Canada reasonably anticipated that litigation would result unless the claims were satisfied. Without a doubt, some portions of the report do not have, as their dominant purpose, litigation. It is my understanding, however, that where the dominant purpose of the report was for the purpose of litigation, and litigation was a reasonable prospect at the time of its creation, the entire report attaches litigation privilege. The three requested documents must be read together and, accordingly, the privilege attaches all three.

28 The application of Mistik is dismissed with costs.

KRUEGER J.

qp/d/mii/mjb/DRS/DRS

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.15 (Schedule B);

AND IN THE MATTER OF an application by Canadian Distributed Antenna Systems Coalition ("CANDAS") for certain orders under the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF a Motion by the Consumers Council of Canada for an Order requiring further and better answers to Interrogatories delivered to Toronto Hydro-Electric System Limited.

EB-2011-0120

ONTARIO ENERGY BOARD

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE MOVING PARTY,
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