DEFENCE & INDEMNITY

AN ANALYSIS OF INSURANCE CASE LAW AND LEGISLATION

OUR INSURANCE LAWYERS

EDMONTON
DANIEL CARROLL, Q.C.
BRIAN VAIL, Q.C.
SHARON STEFANYK
LEAH WINTERMUTE
SANDRA CORBETT
KEVIN FETH Q.C.
CHRISTINE PRATT
PETER GIBSON
RANDAL CARLSON
GEOFFREY HOPE
BRIAN FILIPS
JEREMY TAYLOR
ALEXANDER YIU
DANIELLE BOURGEOIS
RYAN KRUSHELNITZKY
KAREN HERRINGTON
SCOTT MATHESON
MARC YU

CALGARY
MICHAEL CASEY, Q.C.
JEAN VAN DER LEE, Q.C.
DAN DOWNE, Q.C.
ANNE WALLIS
DOREEN SAUNDERSON
BARBARA BOECKX
TODD KATHOL
RAY WONG
JIM DOYLE
JUSTIN DENIS
MIKE DOERKSEN
MURRAY SUDERMAN
JANE FREEMAN
NANCY BAINS
ERIKA CARRASCO
ANDREW WILKINSON
STACEY LEE-SZOTT
LAURA BUCKINGHAM
CATRIONA OTTO
DYLAN ESCH
LAURA MACFARLANE
JOHN GILBERT

YELLOWKNIFE
JACK WILLIAMS

2000 - 10235 101 ST NW
EDMONTON AB T5J 3G1
PH 780 423 3003

400 - 604 1 ST SW
CALGARY AB T2P 1M7
PH 403 260 8500

601 - 4920 52 ST
YELLOWKNIFE NT X1A 3T1
PH 867 920 4542

WHAT'S INSIDE

Release No. 143, December 2012

INSURANCE ISSUES

Allegations Of Systemic Bad Faith

Rose v. British Columbia Life & Casualty Co., 2012 BCSC 1296, per Voith, J. [3981]

The plaintiff was insured under an employment group long term disability policy underwritten by the defendant insurer. In 2008 she alleged that she began to suffer significant health problems that precluded her being able to work. She applied for LTD benefits and did receive them for some time. However, at some point, the insurer denied the claim and stopped paying her. She unsuccessfully appealed the insurer's denial three times. She then brought civil action. On the eve of the summary judgment application, the insurer reinstated the plaintiff's LTD benefits.

The plaintiff's amended notice of civil claim alleged systemic bad faith on the part of the insurer (in ¶19), and that she lived in fear that she would be forced into an inappropriate rehabilitation program or wrongfully denied LTD benefits again in the future (¶21). The insurer applied to strike out the underlined portions of paragraphs 19 and 21 from the plaintiff's amended notice of civil claim:

> 19. The defendant was and remains under a duty to adjudicate the plaintiff's claim fairly and in good faith. The duty of good faith includes a fair and timely investigation and adjudication of the plaintiff's claim and timely payment of benefits when due and owing. The defendant breached its duty of good faith by offering to reconsider its decision and failing to do so in a careful and responsible manner. In its adjudication of long-term disability claims, the defendant has a practice of offering to reconsider a denial of long-term disability benefits and declining the vast majority of appeals knowing that while the offer to reconsider its decision provides an appearance of fairness, the reality is that successive unsuccessful appeals have the effect of wearing out and discouraging claimants and exposing them to missed limitation periods.
>
> ...
>
> 21. Since benefits were reinstated, the plaintiff has continued to experience severe negative after-effects of her struggles with BC Life in 2009. In the summer of 2010, the defendant attempted to put the plaintiff in a rehabilitation program which would have been inappropriate for her. The plaintiff continues to fear that the defendant will force her into an inappropriate rehabilitation program or wrongly deny disability benefits.

The insurer alleged that paragraph 19 pleaded systemic bad faith, requiring the Court to consider all of the defendant insurer's files with respect to claims of that type which the insurer argued had been ruled out in a number of cases dealing with document production: ***Curry v. Advocate General Insurance Company of Canada*** (1986) 9 CPC (2nd) 247 (Ont. HCJ Master); ***Kelly v. Unum Life Insurance Co. of America,*** 2000 BCCA 667; ***Astels v. Canada Life Assurance Co.***, 2006 BCSC 941; and ***Logan v. RBC Life Insurance Co.***, 2007 BCSC 2046.

With respect to the paragraph 21 issues, the defence argued that the plaintiff's claim for potential future bad faith on the part of the defendant was speculative and did not disclose a reasonable cause of action.

HELD: For the plaintiff; application dismissed:

(a) The Court noted that all parties agreed with respect to the principles relating to an application to strike out pleadings:

> **3** The recent and leading case of ***R. v. Imperial Tobacco Canada***, 2011 SCC 42, [2011] 3 S.C.R. 45, confirmed the following propositions in relation to the former Rule 19(24)(a):
>
> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action (at para. 17);
>
> > The power to strike claims that have no reasonable prospect of success promotes efficiency in the conduct of the litigation and contributes to more effective and fair litigation (at para. 19); and
> >
> > The motion to strike is a tool that must be used with care, as the law is not static and actions previously were deemed hopeless may in the future succeed. Therefore, it is not determinative that the law has not yet recognized the particular claim. In its analysis the court must be generous and err on the side of permitting a novel but arguable claim to proceed to trial (at para. 21).
>
> **4** The foregoing propositions are consistent with the conclusions and statements found in cases such as ***Hunt v. Carey Canada Inc***., [1990] 2 S.C.R. 959 at 980, ***Odhavi Estate v. Woodhouse***, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 15, and ***Mohl v. University of British Columbia***, 2006 BCCA 70 at paras. 40 and 41.

(b) The Court held that paragraph 19 should not be struck out. It was held that the defence proposition confused the concepts of pleading a cause of action and pleading material facts. It was held that paragraph 19 pleaded material facts (of systemic bad faith on the part of the defendant insurer) which were material to the plaintiff's claim for punitive damages. The Court noted that in assessing whether or not a plaintiff is entitled to punitive damages, systemic bad faith by the insurer is an aggravating factor. The Court relied on Ontario decisions decided after ***Curry*** and ***Whiten v. Pilot Insurance Co***., 2002 SCC 18: ***Covelli v. Sears Canada Inc***., 2011 ONSC 6984, at para. 3; ***Craig-Smith v. John Doe*** [2009] OJ No. 4041 (Ont.

SC); ***Hodson v. CIBC*** [2001] OJ No. 4378 (Ont. Div. Ct.). The Court held as follows:

> **22** In this case, the application of the defendant, as it relates to para. 19, is flawed in several respects. The object of Rule 9-5(1)(a) is to enable a party to strike "any part of the pleading" that fails to disclose "a claim or defence". The defendant in its focus on the plaintiff's plea of a "practice" of wrongdoing has confused: (i) a claim or cause of action with a material fact; and (ii) the need to plead material facts with pleading evidence.
>
> **23** Rule 3-1(2)(a) requires that a notice of civil claim "set out a concise statement of the material facts giving rise to the claim". "Claim" and "cause of action" have been interpreted to mean the same thing in this context: ***Masse v. N. Hoolsema & Sons Ltd.*** (1977), 2 B.C.L.R. 345 (S.C.).
>
> . . .
>
> **28** I do not understand the plaintiff's allegation regarding the systemic nature of the defendant's conduct as being intended to ground a distinct cause of action based on systemic bad faith, separate from her individual bad faith claim. Rather, I understand her only to be arguing that it is an aggravating factor in her claim for punitive damages. In short, I consider it to be a material fact relating to her claim, rather than a claim or cause of action in its own right.
>
> **29** This interpretation is supported by the plaintiff's reference in her written submissions to ***Whiten***, where Binnie J. states:
>
> > [120] Deterrence is an important justification for punitive damages. It would play an even greater role in this case if there had been evidence that what happened on this file were typical of Pilot's conduct towards policyholders. There was no such evidence. The deterrence factor is still important, however, because the egregious misconduct of middle management was known at the time to top management, who took no corrective action.
>
> **30** It is also supported by the fact that the plaintiff's Notice of Civil Claim seeks, *inter alia*, "damages, including punitive and/or exemplary damages, for breach of the Defendant's duty of good faith toward the Plaintiff". There is no mention of a separate claim based solely on the defendant's systemic conduct or acts towards others.
>
> **31** Thus, properly analyzed, the assertion of a "practice" or pattern of wrongdoing is a basis upon which, in this case, the claim for punitive damages is advanced.
>
> **32** The defendant, in its written submission, further argues "that allegations of 'widespread practices' have no relevance to the issue of whether the adjudication of the plaintiff's claim attracts punitive damages".
>
> **33** This is not correct. In ***Whiten***, Binnie J. said:
>
> > [84] The respondent says that even if a separate claim arising under the insurance contract *could* provide the basis for punitive damages, none was pleaded in this case.
> >
> > [85] In other words, while "punitive and exemplary damages" are explicitly requested in para. 13 of the statement of claim, the material facts necessary for the grant of such an award are not spelled out in the body of the pleading. Further, the respondent in its cross-appeal says that even if the plaintiff has established an "independent actionable wrong", she failed to prove any separate and distinct damage flowing from it. The appellant thus failed, Pilot says, to meet the *Vorvis*, [1989] 1 S.C.R. 1085, requirements and her claim for punitive damages ought to have been dismissed.
> >
> > ...
> >
> > [87] One of the purposes of a statement of claim is to alert the defendant to the case it has to meet, and if at the end of the day the defendant is surprised by an award against it that is a multiple of what it thought was the amount in issue, there is an obvious unfairness. Moreover, the facts said to justify punitive damages should be pleaded with some particularity. The time-honoured adjectives describing conduct as harsh, vindictive, reprehensible and malicious" (*per* McIntyre J. in *Vorvis*, *supra*, p. 1108) or their pejorative equivalent, however apt to capture the essence of the remedy, are conclusory rather than explanatory.
>
> **34** I emphasize para. 120 of ***Whiten***, found at para. 29 of these reasons, which expressly deals with the relevance of conduct that is "typical" of a defendant. The reference, in para. 120 of *Whiten* to "evidence" of conduct is, however, for a different stage of the proceedings. At this point, the plaintiff has simply identified to the defendant the fact that it is advancing a claim for punitive damages and has set out a material fact that that claim is based on - namely, a practice or pattern of wrongdoing.
>
> **35** To the extent that the defendant argues that in some cases, ***Hodson*** being an example, there was some evidence to support the claim of systemic wrongdoing being advanced, the defendant has

> confused the difference between pleading material facts and pleading evidence and has further ignored the prohibition on pleading evidence contained in Rule 3-7(1); ***Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc***., 2005 BCSC 371 at para. 9. Again, the assertion that the defendant has engaged in a pattern of wrongdoing simply constitutes a material fact that underlies the plaintiff's claim for punitive damages. A pleading which addressed, by way of example, the defendant's earlier treatment of Messrs. Jones, Smith, Black, and White would constitute an impermissible pleading of evidence.

(c) In reaching this conclusion, the Court recognized that the decision was giving rise to a "conceptual disconnect" with the case law holding that an insurer need not produce documents with respect to other claims in the course of a bad faith action, as this would allow plaintiff's "fishing in the wide ocean of all insurance decisions" made by the defendant insurer (holding that the question of the production of documents is something left to a later date):

> **36** I accept that the interaction between Rule 9-5(1)(a) and an application for document production may give rise to something of a conceptual disconnect. An application brought on the basis of Rule 9-5(1)(a) is based on the claim or defense as pleaded and is limited to those material facts necessary to make out the claim or cause of action. An application for further discovery of documents, whether brought under Rule 7-1(1) or Rule 7-1(11), is, in turn, based on the pleadings.
>
> **37** This would engage the very concern raised in each of ***Kelly***, ***Logan*** and ***Astels*** about "defendant's fishing in the wide ocean of all insurance decisions taken by the defendants". This issue was not, however, argued before me. It requires an analysis of those cases which pertain to applications brought under the Rules that are relevant to document disclosure and would also have to engage the overarching consideration of proportionality. These issues are for another day.

(d) With respect to paragraph 21, the Court held that the defence position again confused the concepts of pleading a cause of action and the necessity of pleading material facts. The Court held that the plaintiff was not claiming for speculative future instances of bad faith on the part of the defendant but, rather, her mental distress with respect to how she views the future in light of the past conduct alleged against the insurer:

> **40** The defendant's submissions in this regard focus exclusively on the relevance of the assertion to the plaintiff's claim for punitive damages as a result of the defendant's alleged breach of its duty of good faith. The defendant appears to conceptualize the plaintiff's claim for punitive damages as relevant to a speculative future breach of that duty. . . .
>
> . . .
>
> **44** A claim for punitive damages for bad faith founded on the plaintiff's fear of a speculative future breach would therefore indeed not disclose a reasonable claim.
>
> **45** However, I do not understand this to be a claim the plaintiff is making. Instead, I again understand the plaintiff to intend the allegation in question to be a material fact, supporting a cause or causes of action, rather than a cause of action in its own right. This is clear from her amended application response, where she asserts that her continuing fears are relevant to both her claim for damages for mental distress and her claim for punitive damages.
>
> **46** The relevance of the assertion to the plaintiff's claim for damages for mental distress is not addressed by the defendant. My understanding of the plaintiff's claim for punitive damages is that it is based on the defendant's past conduct, rather than on any prospective breach.
>
> **47** There is no question that damages for mental distress are recoverable in a disability insurance context, even when benefits have been restored before trial. In ***Fidler v. Sun Life Assurance Company of Canada***, 2006 SCC 30, [2006] 2 S.C.R. 3, which involved just such a fact pattern, McLachlin C.J. and Abella J., writing for the Court, stated:
>
> > [57] Mental distress is an effect which parties to a disability insurance contract may reasonably contemplate may flow from a failure to pay the required benefits. The intangible benefit provided by such a contract is the prospect of continued financial security when a person's disability makes working, and therefore receiving an income, no longer possible. If benefits are unfairly denied, it may not be possible to meet ordinary living expenses. This financial pressure, on top of the loss of work and the existence of a disability, is likely to heighten an insured's anxiety and stress. Moreover, once disabled, an insured faces the difficulty of finding an economic substitute for the loss of income caused by the denial of benefits. See D. Tartaglio, "The Expectation of Peace of Mind: A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts" (1983), 56 ***S. Cal. L. Rev.*** 1345, at pp. 1365-66.
> >
> > [58] People enter into disability insurance contracts to protect themselves from this very financial and emotional stress and insecurity. An unwarranted delay in receiving this protection

can be extremely stressful. ...

. . .

49 That the plaintiff continues to suffer mental distress is clearly material to any assessment of the damages she has suffered as a result of the defendant's conduct under this head.

COMMENTARY: Accordingly, this case supports the proposition that the insured can plead bad faith as against himself/herself, in the context of an alleged systemic bad faith and mental distress with respect to the future caused by the alleged past bad faith on the part of the insurer. With respect, concluding that it should be left for another day to determine what documents the defendant must produce (i.e.: must it produce all of its files with a view to litigating whether or not there is systemic bad faith) is a method by which the Court had ducked a significant issue, and done away with having to consider a significant factor. The case law with respect to production of documents, which this Court accepts, indicates that the insurer need not open its files for such a review. However, if the plaintiff is allowed to allege systemic bad faith, how is it that a review of the defendants files on that basis is not warranted? This decision does indeed give rise to a "disconnect" such that its logic and finding is questionable.

Doctrine Of Reasonable Expectations

Shelton-Johnson v. Delta School District No. 37, 2012 BCCA 439, per Tysoe, J.A. [3982]

This is the appeal of the trial decision briefed in the December 2011 edition of ***Defence & Indemnity.*** The Sons of Scotland hosted highland games on grounds adjacent to the defendant school district's school. Specifically, the Sons of Scotland entered into a rental agreement with the Corporation of Delta with respect to the outdoor soccer oval and track. It entered into a separate rental agreement with the School District with respect to the District's "facilities" which were described as "SD Cafeteria" and "SD Classroom 1". In short, Sons of Scotland had use of the municipality's oval and track and the District's cafeteria, a classroom and washrooms. All other parts of the school were locked. The Sons of Scotland knew that to gain access to those interior school areas, people would have to use exterior areas surrounding the school, including the walkway leading to the cafeteria entrance. The rental agreement between the Sons of Scotland and the School District contained the following hold harmless and indemnity clause:

> 8. The user agrees to accept the premises at his own risk and to save harmless and keep indemnified the School Board and its respective agents, officials, servants, employees and representatives from and against all claims, actions, costs and expenses and demands in respect to death, injury, loss or damage to any person, or property of any person howsoever cause[d], who use[s] the School facilities as a result of the user entering into this agreement, or who is permitted by the user to use the School facilities, notwithstanding that same may have been contributed to or occasioned by the negligence of the said School Board, its agents, officials[,] servants, employees and representatives.

The plaintiff Shelton-Johnson claimed against the School District and the Sons of Scotland for personal injury in occupiers' liability. She alleged that she tripped on a walkway outside the school while she was attending the highland games. This was the walkway leading to the entrance to the school cafeteria.

After concluding an agreed statement of facts with the Sons of Scotland, the School District applied by way of special case to determine that the indemnity clause applied so as to render the Sons of Scotland liable for past and future legal and adjusting expenses incurred by the School District in defending the case. The Chambers Judge held that the indemnity clause did not apply because it did not clearly state that the Sons of Scotland must indemnify the School District for injuries arising from the use of a sidewalk outside of the school buildings. The Chambers Judge applied ***Canada Steamship Lines Ltd. v. The King*** [1952] AC 192 (P.C.) for the proposition that "if a party has been negligent and seeks to make an innocent party for that negligence under an indemnity clause in a contract between the parties, the clause must be unequivocally certain". The Chambers Judge held that the terms "premises" and "facilities" in the documents applied only to areas inside the school and not exterior portions of the school property, including sidewalks.

The School District appealed.

HELD: For the School District; indemnity clause applied.

(a) The Court held that the indemnity clause in question provided for two alternative bases for the application of the indemnity agreement. One was for use of the premises within the school and the other was with respect to anyone "who was permitted by the user to use the School Facilities". Even if the term "Facilities" only applied to the interior of the school, the plaintiff was a person addressed in the indemnity clause as someone who was permitted by the Sons of Scotland to use those Facilities, which included using the means of ingress and egress (the exterior walkway leading to the cafeteria entrance). The Court held that this interpretation was a commercially sensible one and did not lead to a commercial absurdity:

> [22] In my opinion, the above interpretation of the indemnity clause does not lead to a commercial absurdity. Sons of Scotland wanted to hold an event on the field adjacent to the School and wanted to use some interior rooms of the School in conjunction with the event. The School District was prepared to rent out part of the School as long as it would not attract any liability as a result of the event taking place. In that regard, one of the requirements in the rental agreement was that Sons of Scotland obtain liability insurance with the School District named as an additional insured. The parties agreed upon an allocation of risk in the event someone was injured while attending the Highland Games.

> [23] I do not regard it as a commercial absurdity that the indemnity clause would apply to incidents occurring on the outside of the School as well as events occurring within the School. Indeed, it would seem an odd commercial result if the indemnity applied to an incident occurring just inside the cafeteria but not to an incident taking place on the outside pathway leading to the cafeteria. The plaintiff was walking on the sidewalk because Sons of Scotland was holding the Highland Games on the field and wanted participants, volunteers and spectators to have access to the interior of the School. Both of the parties contemplated that the participants, volunteers and spectators would make use of the exterior areas leading to the cafeteria.

Duty To Defend And Obligation To Indemnify Additional Insureds

Papapetrou v. 1054422 Ontario Ltd., 2012 ONCA 506, per Simmons, J.A. [3983]

Briefed below under Liability Issues.

Privilege Re Insurer Investigation Into Coverage Issues Involving Bad Faith Allegations

Intact Insurance Co. v. 1367229 Ontario Inc., 2012 ONSC 5256, per Allen, J. [3987]

A controversy arose with respect to privilege asserted over document relating to coverage issues on a property damage claim. The action revolved around an explosion in August, 2008 on the premises of 1367229 Ontario Inc. (Sunrise) which was a propane storage and distribution facility in Toronto. At the time, Sunrise had a commercial general liability policy from Intact. The landlord of the premises was insured by the Dominion of Canada.

Between August 2008 and May 2009, Intact conducted an investigation with respect to coverage. It ultimately denied coverage on 5 May, 2009. During the period of that investigation, documents and communications were generated for or by Intact with respect to the coverage investigation.

In June, 2009, Intact commenced an action seeking a declaration that the policy extending to Sunrise was void *ab initio*. Sunrise counterclaimed that the policy was in force and that Intact had breached its duty of good faith.

At discoveries, the Intact officer refused to provide documentation sought by way of a request for undertakings including a "complete copy of the claims file", at least up until the point when counsel was appointed.

Sunrise applied for an order directing the undertakings to be answered, and thus the documents produced.

Before the Master, Intact relied on litigation privilege and did not make arguments to the effect that the documents in question were covered by solicitor/client privilege. Additionally, Intact produced no sworn evidence that litigation was being contemplated as a dominant purpose throughout the coverage investigation process. Intact relied on evidence in the discovery transcripts with respect to the involvement of lawyers with Intact during the coverage investigation process:

> 17 For instance, Intact points to areas of the transcript that refer to:
>
> - the claim being transferred from the claims department to legal counsel on August 18, 2008 (Transcript, p. 307, Q. 1368)
> - the presence of the two lawyers' retained in discussions about coverage and in decisions before the May 5, 2009 refusal (Transcript, p. 246, Q. 1099, p.p. 246-248, Q. 1103-1112);
> - the August 18, 2008 discussions by two lawyers retained by Intact with Intact underwriting personnel (Transcript, p. 267, Q. 1191);
> - the agreement on the record by Sunrise's counsel that the discussions between the lawyers retained by Intact and Intact representatives would be covered by privilege. (Transcript, p. 266, Q. 1190); and
> - the notes resulting from the January 20, 2009 meeting with the lawyers Intact retained and a witness (Transcript, p. 267, Q. 1193); and the reference that the lawyers for all parties were involved from the "get-go" in August 2008 (Transcript, p. 331, Q. 1476).

The Master decided in favour of the insured and directed production of the documents.

Intact appealed. On appeal, Intact also purported to rely on solicitor/client privilege in addition to litigation privilege, notwithstanding that the former had not formed the basis of its position before the Master.

HELD: For the insured; appeal dismissed.

(a) The Court rejected Intact's submission that it could raise solicitor/client privilege on appeal even though the issue had not been raised before the Master, asserting that an appeal from a Master's decision involves a *de novo* hearing. The Court acknowledged that that had previously been the law but that the law had since changed direction, such that the current position is that an appeal from a Master is not a *de novo* hearing and the standard of review is relying on wrong principles, misapprehending the evidence or palpable and over-riding error:

> 9 A later case changed the direction of the law in this area. The Ontario Divisional Court in ***Zeitoun v.***

Economical Insurance Group [2008 CarswellOnt 2576 (Ont. Div. Ct.)], upheld by the Ontario Court of Appeal, addressed the issue of de novo hearings of masters' motions in the context of considering the deference that should be accorded masters' decisions. Low, J. had this to say:

> In my view there is no justification in principle why the standard of review applied on appeals from judges ought not to be applied equally to appeals from masters. That appeals from masters have been permitted to be treated as a de novo hearings in some circumstances appears to have been driven in large degree by historical notions of hierarchy and prerogative that now warrant re-examination in light of (a) the evolution and rationalization of standards of review in Canadian jurisprudence, (b) the expansion of the role of the master within Ontario's civil justice system, (c) the values of economy and expediency expressed in the general principles underlying the Rules of Civil Procedure (see Rule 1.04), and (d) the difficulty and contentiousness in deciding in each case whether the interlocutory order appealed from is one which is vital to the final issue in the case.
>
> [***Zeitoun v. Economical Insurance*** Group, [2008] O.J. No. 1771, (Ont. S.C.J. — Div. Ct); affirmed by Ont. C.A. at 2009 ONCA 415 (CanLII).

10 Low, J. held that a master's decision can only be interfered with on an error of law, on an exercise of discretion on the wrong principles or on a misapprehension of the evidence by the master such that there is a palpable and overriding error [***Zeitoun v. Economical Insurance Group*****,** supra, para. 40].

11 In a subsequent decision, the Ontario Court of Appeal held:

> Based on this court's recent decision in ***Zeitoun v. Insurance Group*** (2009) ONCA 415, it is now settled law in Ontario that an appeal from a master's decision is not a rehearing. Rather, on questions of fact and mixed fact and law, deference applies and the role of the reviewing court is limited. An appellate court cannot substitute its interpretation of the facts or reweigh the evidence simply because it takes a different view of the evidence from that of the master. On questions of law, the correctness standard applies:
>
> [***Wellwood v. Ontario Provincial Police***, 2010 ONCA 386 (Ont. C.A.), para. 28. Also see ***Moore v. Bertuzzi***, 2012 ONSC 3248 (Ont. S.C.J.), paras. 61-63 and ***Kennedy v. Toronto Hydro-Electric System Ltd***., 2012 ONSC 2582 (Ont. S.C.J.), at para. 22]
>
> 12 On a standard of correctness my review is therefore restricted to determining whether the master erred in law, applied wrong principles or misapprehended the evidence. I have no jurisdiction to hear the matter again or consider evidence and issues that were not before Master Graham.

(b) Even assuming that the Court could consider solicitor/client privilege on appeal, the Court held that Intact had not established the basis for that privilege.

(i) The Court summarized the principles with respect to solicitor/client privilege:

> 14 The basic principles that govern lawyer/client privilege are commonly known. The party seeking the privilege has the onus of showing on a balance of probabilities an evidentiary basis for the privilege [***General Accident Assurance Co. v.*** Chrusz, [1999] O.J. No. 3291 (Ont. C.A.), at para. 95]. It is well known that privilege does not attach to all communications or documents that pass between a lawyer and their client. The privilege attaches only when legal advice is sought from or provided by the client's lawyer [***Davies v. American Home Assurance Co***. (2002), 60 O.R. (3d) 512 (Ont. Div. Ct.), at para. 22].
>
> 15 The party seeking the privilege must show on a balance of probabilities that the documents in question are (a) a communication between a solicitor and client for the purpose seeking or giving legal advice and (b) the parties intended it to be confidential [***Belgravia Investments Ltd. v. R***., [2002] F.C.J. No. 870 (Fed. T.D.), para. 48].

(ii) The Court held that the mere fact that lawyers were somehow involved in Intact's coverage investigation did not, in and of itself, establish the basis for solicitor/client privilege, as mere involvement of counsel is not sufficient to justify that privilege:

> 19 As a general submission, the respondents assert it is not their intention to seek access to material that is covered by lawyer/client privilege. They are simply challenging Intact's attempt to gain blanket protection over documents when it has failed in its obligation to show a clear evidentiary basis to justify the protection.
>
> 20 As the respondents submit, and I agree, Intact's above references from the record go

> no distance in discharging Intact's burden to demonstrate an evidentiary basis for the privilege. At best the references give only cursory information. They inform us that lawyers were present at telephone conferences and interviews where coverage and refusal were discussed, that the claims file was referred to counsel on August 18, 2008 and that lawyers were present when a witness was interviewed on January 20, 2009. Regarding Sunrise's counsel's acknowledgment during discovery that lawyer/client privilege applied to some documents, it is not a novel notion that comments by lawyers are not evidence [***Belgravia Investments Ltd. v. R***., *supra*, at para. 66].
>
> 21 Privilege does not attach to all communications between a lawyer and their client. A party seeking privilege cannot simply cloak notes, documents or communications with privilege merely because a lawyer was involved or handled the documents [***Davies v. American Home Assurance Co.*** supra, para. 22]. Intact provided no details as to the nature of the lawyer's involvement — no proof that the memoranda and emails that are the subject of the refusals establish the giving or receiving of legal advice. That is, there are no statements in either the transcripts of Ms. Pingree's discovery or in the affidavit of Intact's counsel Krista Springstead — that were before Master Graham — that any of the subject documents contain legal advice or were generated for the purpose of giving or receiving legal advice.
>
> 22 A claim of privilege will not be established by merely asserting it. With respect to the claim to lawyer/client privilege on portions of the January 20, 2009 memo /minutes and the claims file, Intact was required at a minimum to provide a sworn affidavit or viva voce evidence setting out the basis of the claim to lawyer client privilege.

(c) The Court also held that the Master had not erred in refusing to find that litigation privilege applied to the documents in question.

(i) The Court summarized the principles with respect to litigation privilege:

> 26 A party seeking litigation privilege is required to establish (a) that litigation was contemplated and (b) that the documents for which privilege is sought were created for the dominant purpose of litigation [***Mamaca (Litigation Guardian of) v. Coseco Insurance Co***., [2007] O.J. No. 1190 (Ont. Master), at paras. 6, 14, 16, 17, 22 and 23 and ***Kennedy v. McKenzie*** [2005 CarswellOnt 2109 (Ont. S.C.J.)], 2005 CanLII 18295, at paras. 20 and 23].

(ii) The Court held that where bad faith is alleged with respect to an insurance investigation, litigation privilege cannot apply because, theoretically, a good faith investigation into whether or not coverage exists proceeds on the basis that the insurer is trying to determine whether or not coverage exists and cannot logically contemplate litigation as a dominant consideration for its considerations until it concludes its investigation and decides that coverage does not exist:

> 27 Intact claims against Sunrise's bad faith allegation. Courts have held that where the documents at issue are pertinent to a bad faith claim by an insured against their insurer, the insurer asserting litigation privilege over the documents must provide an evidentiary basis for the claim to privilege. The insurer must provide affidavit evidence from the claims handler to establish on a balance of probabilities that litigation was likely and that the ongoing investigation and generation of the documents was for the dominant purpose of assisting in the defence of that litigation [***Mamaca***, *supra*, paras. 6, 15, 16, 18, 19 and 22 and ***Davies v. American Home Assurance Co***., *supra*, para. 36].
>
> 28 Again, Intact makes a broad assertion with respect to its entitlement to the protection of litigation privilege over the subject documents. Intact asserts that with such a momentous explosion it stands to reason that litigation would be contemplated from August 2008 and hence during the investigation period until the refusal on May 5, 2009. The problem with Intact's position, as the respondents point out, is that a good faith defence runs counter to the requirement that litigation be the dominant purpose for communications and the generation of documents. Put another way, good faith during the claims investigation phase requires an open mind or neutrality on the part of the insurer, not an orientation toward litigation.
>
> …
>
> 31 The determination of when there is a dominant purpose of litigation is a question of fact. Therefore a finding by a master on this issue should be interfered with only where there is an overriding and palpable error [***1207301 Ontario Inc. v. Zurich Insurance Co***. [2003 CarswellOnt 4562 (Ont. S.C.J.)] CanLII 5014, at para, 18].

(iii) Additionally, it was held that Intact had not produced

evidence that litigation was being contemplated as a dominant purpose during the time-frame of its coverage investigation. At Discovery, the insurer's officer testified that it was not conducting the investigation with a view to supporting a denial of coverage but, rather, that it was looking at things with an open mind to determine whether or not coverage ought to be denied and that during that time-frame litigation was only one of the possibilities being contemplated. The Court concluded as follows:

> 32 Intact put forth no sworn evidence that litigation was being contemplated as a dominant purpose. Insurers have an obligation to conduct a good faith investigation into whether or not there would be coverage and until that investigation is complete the insurer could not logically contemplate litigation as a dominant consideration. Ms. Pingree [Intact's officer] confirmed that Intact was conducting a good faith investigation into coverage before it refused the claim.

COMMENTARY: This is unlikely to be seen to be the law of Alberta. On questions of privilege, Ontario courts have shown a distinctly different attitude from that of the Alberta courts. The Alberta courts have expressly rejected the concept that until an insurance investigation is concluded, litigation cannot be considered a dominant purpose: ***Moseley v. Spray Lakes Sawmills (1980) Ltd***. (1996) 135 DLR (4th) 69 (Alta CA). With respect, it is indeed a fantastic proposition that any insurance investigation in a situation where bad faith is alleged, automatically rules out the application of litigation privilege, at least where the insurer has not pleaded good faith on the basis of having relied on legal opinions.

LIABILITY ISSUES

Indemnity And Hold Harmless Agreements

Shelton-Johnson v. Delta School District No. 37, 2012 BCCA 439, per Tysoe, J.A. [3982]

Briefed above under Insurance Issues.

Indemnity And Hold Harmless Agreements And Breach Of Contractual Obligation To Provide Insurance

Papapetrou v. 1054422 Ontario Ltd., 2012 ONCA 506, per Simmons, J.A. [3983]

The plaintiff Papapetrou sued in occupiers' liability for a slip and fall accident. She claimed that she slipped and fell on black ice that had accumulated on stairs of a building owned by the defendant 1054422 Ontario Ltd. and managed by the Cora Group Inc. (collectively referred to as the "Cora Group"). Cora Group contracted with the defendant Callingwood Landscape to have Callingwood provide winter maintenance and snow removal services for the building. In that agreement, Callingwood contracted to name Cora Group as an Additional Insured in Callingwood's commercial general liability policy with limits of $2,000,000.00. Callingwood breached its obligation in that it only obtained CGL coverage for $1,000,000.00 and it did not have Cora Group added as an Additional Insured.

In addition, the contract between Cora Group and Callingwood contained an indemnity and hold harmless clause in favour of Cora Group in the following terms:

The Contractor assumes sole responsibility for all persons engaged or employed in respect of the Work and shall take all reasonable and necessary precautions to protect persons and property from injury or damage. The Owner shall not be responsible in any way for any injury to or the death of the Contractor's employees ... or to any other person ... in any way resulting from any act or omission of the Contractor. ... The Contractor shall indemnify and save harmless the Owner ... against all claims, losses, liabilities, demands, suits and expenses from whatever source, nature and kind in any manner based upon, incidental to or arising out of the performance or non-performance of the contract by the Contractor. ... [Emphasis added by the Court.]

In her action against the defendants, the plaintiff alleged several particulars of negligence against all of the defendants:

> **9** In her statement of claim, Ms. Papapetrou makes several allegations of negligence against Collingwood and The Cora Group, either individually or collectively. Her allegations include:
>
> > *failing to prevent the formation and accumulation of ice;
> >
> > *failing to properly inspect or maintain the steps;
> >
> > *failing to remove the ice;
> >
> > *failing to warn of the danger created by the ice;
> >
> > *failing to have a regular system of inspection and maintenance;
> >
> > *failing to ensure that the defendants' employees, agents and servants carried out their responsibilities to keep the premises safe; and
> >
> > *failing to ensure that the defendants' employees, agents and servants had the requisite training, skill and knowledge to inspect and maintain the premises.

Cora Group brought an application for summary judgment, upon which the Chambers Judge ordered Callingwood to assume Cora Group's defence and to indemnify Cora Group for any damages awarded in the action. The Motion's Judge concluded that the true nature of the plaintiff's claim was that Callingwood and the Cora Group were negligent in failing to maintain an ice-free pedestrian stairway. She held that the duty to defend and indemnify arose from

the service contract entered into by Callingwood and Cora Group. While she recognized that some of the allegations against Cora Group were for "a breach of their responsibilities as occupiers apart from allegations relative to the icy stairs, she concluded that these allegations were still linked to "the essential negligence alleged – the defendant's failure to address icy conditions on the pedestrian stairway leading into the building". She applied ***RioCan Real Estate Investment Trust v. Lombard General Insurance Co.*** (2008) 91 OR (3rd) 63 (Ont. SC), finding that the true nature of the plaintiff's claim was that the defendants were negligent in failing to maintain an ice-free pedestrian stairway.

Callingwood appealed arguing that the Motion's Judge erred in ordering Callingwood to indemnify the Cora Group at this stage in the litigation (in addition to assuming the Cora Group's defence), and that she erred in ordering Callingwood to assume the defence of Cora Group in its entirety. Callingwood also argued that its insurer was in effect already defending Cora Group by defending Callingwood against the claims in question, whereas Cora Group insisted on having its own independent counsel paid for by Callingwood to defend Cora Group's interest.

HELD: For Callingwood; appeal allowed.

(a) The Court accepted Cora Group's concession on appeal that the Motion Judge's direction that Callingwood indemnity Cora Group was premature at this stage in the action. Callingwood's obligation to indemnify the Cora Group would only arise once liability was found against Cora Group on a basis for which Callingwood was obliged to indemnify Cora Group under their agreement.

(b) The Court held that the Motion's Judge erred in holding that Callingwood was obligated to assume the defence of Cora Group. Given that on appeal Cora Group did not argue that Callingwood's duty to defend arose out of the indemnification provision in the service contract but on Callingwood's failure to have Cora Group added to Callingwood's CGL policy as an additional insured, the remedy for such a contractual breach was not to require Callingwood to assume Cora Group's defence but, rather, to pay as damages the amount that Callingwood's insurer would have been obliged to pay to defend Cora Group:

> **31** I agree that the motion judge erred in ordering Collingwood to assume The Cora Group's defence.
>
> **32** In my view, however, Collingwood is liable in damages to The Cora Group for the cost of The Cora Group's defence of the Papapetrou action, save for any costs incurred exclusively to defend claims that do not arise from Collingwood's performance or non-performance of the service contract.
>
> **33** On appeal, The Cora Group did not argue that Collingwood's obligation to defend arises out of the indemnification provision in the service contract. Rather, it relied on Collingwood's failure to satisfy its contractual obligation to have The Cora Group named as an additional insured in its comprehensive general insurance policy.
>
> **34** However, Collingwood's breach of this contractual obligation does not create a duty to defend; rather, it gives rise to a remedy in damages.
>
> **35** The fact that The Cora Group did not object to the form of insurance Collingwood obtained is irrelevant. Collingwood's contractual obligation remained. Collingwood is liable to The Cora Group in damages for failing to satisfy its duty to have The Cora Group named as an additional insured.
>
> **36** The quantum of such damages is the amount The Cora Group will be required to pay for a defence of the claims Collingwood's insurer would have been obliged to defend on The Cora Group's behalf had Collingwood fulfilled its contractual obligations.

(c) Additionally, the Court noted that Callingwood would not be liable to Cora Group with respect to the costs of defending those portions of the claim that related only to Cora Group's liability to the plaintiff for reasons outside of Callingwood's negligence in fulfilling its duties under the contract. It was noted that the obligation that Callingwood's insurer would have owed to Cora Group would only have been with respect to liability arising from Callingwood's negligence and not any additional negligence on the part of Cora Group. In the first place, the service contract only provided for indemnity with respect to Callingwood's negligence:

> **26** Moreover, contrary to the motion judge's finding, the service contract does not provide that Collingwood will "assume sole responsibility ... to protect persons and property from injury and damage." Rather, it provides that Collingwood "assumes sole responsibility for all persons engaged or employed in respect of the Work" and that it shall "take all reasonable and necessary precautions to protect persons and property from injury and damage."
>
> **27** In addition, Collingwood's obligation to indemnify The Cora Group under the terms of the service contract is not absolute. It is limited to claims "based upon, incidental to or arising out of [Collingwood's] performance or non-performance of the [service] contract".

(d) Additionally, that would reflect what Callingwood's insurer's obligation to defend and indemnify the Cora Group would have been, had Callingwood added Cora Group to its policy as an Additional Insured:

> **38** As noted above, Collingwood was obliged to obtain comprehensive general liability insurance to insure against bodily injury. However, the

scope of Collingwood's obligation to indemnify under the service contract was limited to "claims ... based upon, incidental to or arising out of the performance or non-performance of the contract by the Contractor".

39 Accordingly, in my view, the quantum of damages is the amount The Cora Group must pay to defend claims for bodily injury arising out of the manner in which Collingwood performed or failed to perform the service contract.

40 As I have said, in my opinion, these costs will include all costs of The Cora Group's defence of the Papapetrou action, save for any costs incurred exclusively to defend claims that do not arise from Collingwood's performance or non-performance of the service contract

(e) The Court noted that in situations where some claims are covered by the policy and some are not, an insurer's obligation is limited to defending claims that fall within coverage:

41 I reach this conclusion for two reasons. The first is that an insurer's obligation to defend is limited to defending claims that - if proven true - would fall within coverage under the policy: ***Non-Marine Underwriters, Lloyd's of London v. Scalera,*** 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 74-76 and ***Nichols v. American Home Assurance Co.***, [1990] 1 S.C.R. 801, at pp. 810-12. On this issue, McLachlin J.'s comments in *Nichols*, at p. 812, are worth noting:

> *Requiring the insurer to defend claims which cannot fall within the policy puts the insurer in the position of having to defend claims which it is in its interest should succeed.* The respondent suggested that this potential conflict could be avoided if the insured was able to retain his own lawyer, with the cost to be borne by the insurer. However, this would not end the difficulty. An insurer would be understandably reluctant to sign a "blank cheque", and cover whatever costs are borne by whatever lawyer is retained, no matter how expensive. Yet the insurer could not challenge any of these expenses without raising precisely the same conflict. *For this reason, the practice is for the insurer to defend only those claims which potentially fall under the policy, while calling upon the insured to obtain independent counsel with respect to those which clearly fall outside its terms.*
>
> [Emphasis added by the Court.]

42 As Collingwood's obligation to pay for The Cora Group's defence is limited to the cost of defending claims that Collingwood's insurer would have been obliged to defend, Collingwood's obligation does not extend to paying for the cost of defending independent claims against The Cora Group that Collingwood's insurer would not have been required to defend on The Cora Group's behalf.

. . .

51 The second reason for my conclusion about the extent of Collingwood's liability to pay for The Cora Group's defence is that where an action includes both covered and uncovered claims, an insurer may nonetheless be obliged by the terms of the policy to pay all costs of defending the action save for those costs incurred exclusively to defend uncovered claims: ***Hanis v. Teevan***, 2008 ONCA 678, 92 O.R. (3d) 594, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 504.

52 In this case, as Collingwood failed to satisfy its insurance obligation under the service contract, it is unable to demonstrate that it should escape responsibility for paying for The Cora Group's costs of defending the action save for those costs incurred exclusively to defend uncovered claims.

[footnote omitted]

(f) The Court disagreed with the Motion Judge's conclusion that all claims against Cora (as opposed to those in negligence for failing to maintain an ice free pedestrian stairway) would have been covered under the insurer's duty to defend, concluding that Cora Group's obligations as an occupier were not derivative of the allegations relating to Callingwood's obligation to maintain an ice free pedestrian stairway:

44 In order to determine whether an insurer's duty to defend arises in relation to the claims raised in a particular action, the court is required to assess the substance or the "true nature" of each claim contained within the pleadings to see if it falls within the scope of coverage: ***Monenco Ltd. v. Commonwealth Insurance Co.***, 2001 SCC 49, [2001] 2 S.C.R. 699, at paras. 28-35; ***Scalera***, at paras. 74 and 79-82; and *Nichols*, at pp. 810-11.

45 This assessment must be made substantially on the facts as stated in the pleadings themselves; however, extrinsic evidence sometimes may be considered, including when such evidence has been referred to in the pleadings: ***Monenco***, at paras. 36-38.

46 In this regard, it is important to bear in mind that a pleading may contain both covered and uncovered claims. As Doherty J.A. stated in *obiter* in ***Unger (Litigation Guardian of) v. Unger*** (2003), 68 O.R. (3d) 257 (C.A.), at para. 10: "If there is a possibility that any of the claims are captured by

[an insurer's] coverage, [that insurer] has a duty to defend *those* claims" (emphasis added). See also ***Atlific Hotels and Resorts Ltd. v. Aviva Insurance Co. of Canada*** (2009), 97 O.R. (3d) 233 (S.C.).

47 However, assessing the true nature of a particular claim is not an exercise to be undertaken in the abstract. Rather it should be approached with a view to the specific limitations of the insurance coverage at issue.

48 In this case, the coverage would be limited to the matters relating to Collingwood's performance or non-performance of the contract.

49 With a view to the limits of coverage, the "true nature" of the claims in the action are best classified as allegations concerning: (i) negligent maintenance due to Collingwood's performance or non-performance of the service contract (which may include claims under the *Occupiers' Liability Act* with regard to obligations which have been delegated to Collingwood); (ii) negligent conduct on the part of The Cora Group extending beyond Collingwood's obligations under the contract; as well as (iii) a statutory cause of action under the *Occupiers' Liability Act* extending beyond those obligations delegated to Collingwood under the contract. The duty to defend only extends to allegations that can be classified as falling under the first category of claims.

(g) The Court rejected Callingwood's argument that it need not pay the costs of Cora Group retaining its own defence counsel, because Callingwood's insurer was, in effect, providing counsel that would defend Cora Group's interests as well as Callingwood's. Court reiterated that the proper remedy against Callingwood was to pay damages and, additionally, a single counsel would be hindered in defending both Cora Group and Callingwood because of an inherent conflict of interest.

53 Collingwood also argued that its insurer is, in effect, already defending The Cora Group by defending Collingwood against the claims arising from its performance of the service contract. Collingwood argued that this is a sufficient answer to The Cora Group's claim for a defence.

54 I disagree. In this case, it would not be appropriate for Collingwood to assume The Cora Group's defence, nor is it sufficient for Collingwood to simply defend the primary allegations of negligence for which both Collingwood and The Cora Group may be found liable; rather, the proper remedy is in damages, and Collingwood must pay The Cora Group a quantum of damages equivalent to the cost of The Cora Group's defence in the manner I have explained.

55 In any event, where, as here, distinct claims are made against a service provider and a property owner, the ability of a single counsel to defend both claims is hampered by an inherent conflict. In this case, the conflict is accentuated by the fact that both Collingwood and The Cora Group have cross-claimed against each other. The service provider and the property owner each have an interest in blaming the other for the circumstances giving rise to the claim.

56 An insurer has a right to control its own defence (and appoint its own defence counsel), which, though not absolute, can only be shifted where there is a reasonable apprehension of conflict of interest on the part of counsel appointed by the insurer: see ***Brockton (Municipality) v. Frank Cowan Co***. (2002), 57 O.R. (3d) 447 (C.A.), at paras. 31-32 and 43; also see ***Appin Realty Corp. v. Economical Mutual Insurance Co.***, 2008 ONCA 95, 89 O.R. (3d) 654, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 145. However, the present case is not governed by this rule.

57 The Cora Group is not, in fact, insured under Collingwood's policy and the duty to defend does not flow from the policy, itself. Rather, Collingwood is simply being ordered to pay damages for the breach of a contractual obligation under the service contract. Thus, in considering whether The Cora Group is entitled to choose their own counsel for whom Collingwood must pay, it is unnecessary to consider whether the potential conflict in this case meets the standard set in ***Brockton***.

58 Nevertheless, the potential for conflict between Collingwood and The Cora Group's interests is clear. In fact, it likely meets the ***Brockton*** standard: see ***Brockton***, at para. 43. This conflict is best dealt with by The Cora Group continuing to retain independent counsel in respect of all allegations in the action. The obligation to pay (at least, in part,) for two defence counsel is a necessary consequence of Collingwood's breach of its contractual obligation.

Liability Waiver Forms

Niedermeyer v. Charlton, 2012 BCSC 1668, per Armstrong, J. [3984]

The plaintiff was a 51 year old school teacher living in Singapore. She had been born and raised in Australia. She had been a school teacher in Australia for some years and then for 20 years prior to the accident, she had been a college teacher in Singapore. She had an education degree and a master's degree. She was described as "well educated… [and] able to read and understand difficult written documents".

In October 2008, the plaintiff came to B.C. with students from her school to attend a conference in Victoria. After the conference, she took her students on a tour to Whistler, B.C. When planning the post-conference tour to Whistler, she was provided with an itinerary that included two events in Whistler: a kayak trip on 11 October, 2008 and a zip line tour in a valley between Whistler and the Black Comb Mountains on 12 October, 2008. The itinerary noted that participants were to have their "waiver form completed and ready" for the river trip but did not mention the zip line activity in that context.

On the morning of 12 October, 2008 the plaintiff and her students walked to the defendant Zip Trek's kiosk at the hotel in Whistler. They were asked to wait for Zip Trek staff to take them to the zip line activity. The plaintiff had little memory of these events and could not recall any discussion about the mode of transport to and from the zip line site.

After being equipped with helmets and harnesses and some training in the village of Whistler, the group was driven up the mountain in a van owned and operated by Zip Trek. The first part of the road was a paved surface but then the balance of the journey was along a decommissioned gravel logging road maintained by the defendant Zip Trek. The entrance to the gravel road was restricted by a gate.

After participating in the zip line activity, the plaintiff and her students were driven down the mountain towards the hotel in Whistler on a Zip Trek bus. On the way down the mountain, on the decommissioned gravel logging road portion of the route, the Zip Trek bus driver allowed the bus to get too close to the edge of the road and it went over the edge and down a hill. The plaintiff sustained serious orthopedic injuries.

Prior to being driven up the mountain to the zip line activity, the plaintiff had executed a form of Release, one for herself and one for each of her six students. The Release contained the following provisions:

> In this Agreement, the term "Adventure Activities" shall include all activities, events or services provided, arranged, organized, conducted, sponsored or authorized by THE OPERATORS and shall include, but are not limited to use of zip lines; suspension bridges, climbing, rappelling, hiking, sightseeing, snow shoeing; travel to and from the tour areas; back country travel; orientation and instructional courses, seminars and sessions; and other such activities, events and services in any way connected with or related to those activities.
>
> ...
>
> RELEASE OF LIABILITY, WAIVER OF CLAIMS AND INDEMNITY AGREEMENT
>
> In consideration of THE RELEASEES allowing me to participate in Adventure Activities and permitting my use of their property, zip lines, platforms, bridges, trails, roads, other structures and equipment (hereinafter referred to as "the facilities"), and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, I hereby agree as follows:
>
> TO WAIVE ANY AND ALL CLAIMS that I have or may in the future have against the RELEASEES and to RELEASE THE RELEASEES from any and all liability for any loss, damage, expense or injury, including death that I may suffer, or that my next of kin may suffer resulting from either my use of or my presence on the facilities DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE UNDER THE OCCUPIER'S LIABILITY ACT, R.S.B.C. 1996, c. 337, ON THE PART OF THE RELEASEES, AND ALSO INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF ADVENTURE ACTIVITIES REFERRED TO ABOVE;
>
> ...
>
> I CONFIRM THAT I HAVE READ AND UNDERSTAND THIS AGREEMENT PRIOR TO SIGNING IT, AND I AM AWARE THAT BY SIGNING THIS AGREEMENT I AM WAIVING CERTAIN LEGAL RIGHTS WHICH I....MAY HAVE AGAINST THE RELEASEES.
>
> [emphasis added]

The plaintiff did not have an independent memory of signing the releases but confirmed at discovery that she had done so for herself and the six students. She "assumed that she had filled in the details on these documents prior to signing" and "accepts that she was acting as a prudent and careful guardian of the children and, in that capacity, would likely have read the document". She initialled the top corner of the document by the words "Please Read Carefully".

The plaintiff had previously signed a release before parachuting, recognizing that in those circumstances it limited her right to sue for injuries suffered while skydiving.

A co-director of Zip Trek testified that staff were required to obtain signed releases from guests but were not permitted to interpret or comment on the release to prospective customers. Signing the release was a pre-condition to allowing customers to engage in zip line activities. Changes to the release by customers were not permitted. Customers were required to either sign the release as presented or they were not permitted to participate. Staff were instructed that if a customer refuses to read the release, staff were to hand the document back and tell the prospective customer to read it.

After the accident, the plaintiff made a subsequent trip up the mountain and signed the same release to permit her to travel up

the mountain to meet staff there who had helped her after the accident.

The defendant admitted liability for the vehicular accident. The parties agreed that the matter should proceed to an initial trial with respect to the issue of whether or not the release had protected the defendants from liability.

The plaintiff argued that she did not understand the release to apply to travel to and from the zip line site, as opposed to the zip lining activities themselves. She argued that the term "travel to and from the tour areas" and "back country travel" in the Release were not intended to relieve the defendants of liability for their negligence in the operation of the motor vehicle. She argued that if that is what the defendants had intended, the Release should have included language referencing bus transportation to and from the zip line location. She argued that the Release was unconscionable in that the defendant, Zip Trek allegedly took advantage of her ignorance of motor vehicle insurance legislation in B.C. and enforced an unfair bargain on her. She argued that enforcement of the Release would be contrary to public policy because it does away with benefits afforded by the statutory automobile insurance scheme in B.C.

HELD: For the defence; action dismissed.

(a) The Court rejected the plaintiff's arguments to the effect that the Release was designed to circumvent the statutorily enshrined universal automobile insurance legislation in British Columbia. In making this unsuccessful argument, the plaintiff had relied on s.s. 7(1) and 76 of *The Insurance Vehicle Act*, RSBC 1996, c. 231, which provide as follows:

> Plan
>
> 7 (1) Subject to section 2 and compliance with this Act and the regulations, the corporation must administer a plan of universal compulsory vehicle insurance providing coverage under a motor vehicle liability policy required by the *Motor Vehicle Act*, of at least the amount prescribed, to all persons:
>
> (a) whether named in a certificate or not, to whom, or in respect of whom, or to whose dependants, benefits are payable if bodily injury is sustained or death results,
>
> (b) whether named in a certificate or not, to whom or on whose behalf insurance money is payable, if bodily injury to, or the death of another or others, or damage to property, for which he or she is legally liable, results, or
>
> (c) to whom insurance money is payable, if loss or damage to a vehicle results from one of the perils mentioned in the regulations caused by a vehicle or its use or operation, or any other risk arising out of its use or operation.
>
> Third party rights
>
> 76 (1) In this section and sections 77 and 78, "claimant" means a person who has a claim or a judgment against an insured for which indemnity is provided by the plan or an optional insurance contract.
>
> (2) Even though he or she does not have a contractual relationship with the insurer, a claimant is entitled, on recovering a judgment against an insured or making a settlement with the insurer, to have the insurance money applied toward the claimant's judgment or settlement and toward any other judgments or claims against the insured who is covered by the indemnity.
>
> (3) The claimant may, on behalf of himself or herself and all persons having judgments or claims against the insured who is covered by the indemnity, bring an action against the insurer to have the insurance money applied in accordance with subsection (2).
>
> (4) The insurer may at any stage compromise or settle the claim.
>
> (5) A creditor of the insured is not entitled to share in the insurance money unless the creditor's claim is one for which indemnity is provided for by the plan or the optional insurance contract.
>
> (6) The following do not prejudice the right of a person entitled under subsection (2) to have the insurance money applied toward the person's judgment or settlement, and are not available to the insurer as a defence to an action under subsection (3):
>
> (a) assignment, transfer, surrender, cancellation, suspension, waiver or discharge of coverage under the plan or an optional insurance contract or under a provision of the plan or an optional insurance contract, or of an interest in either of them or of insurance money payable under either of them, made by the insured after the event giving rise to a claim under the plan or optional insurance contract occurs;
>
> (b) an act or default of the insured before or after the event giving rise to a claim under the plan or an optional insurance contract in contravention of this Act or the regulations or of the plan or optional insurance contract;
>
> (c) contravention of the *Criminal Code* or of a law or statute of any province, state or country by the owner, lessee or driver of the vehicle specified in the owner's certificate or policy.

(b) The Court held that ss.76(2) and (3) [which are roughly equivalent to *The Insurance Act,* R.S.A. 2000 c. I-3, s.579(1) in Alberta] were a complete answer to the plaintiff's claim. The Court held as follows:

> [46] In my view, ss. 76(2) and (3) are a complete answer to the plaintiff's claim. Third party rights are dependent on a successful claimant recovering a judgment or settlement for which indemnity is provided by the plan. Persons with claims or judgments against the insured are entitled to bring action against the insurer to have insurance money applied in accordance with subsection (2).
>
> [47] It is a precondition that a claimant either have a judgment or a settlement of a claim against an insured party for which indemnity is provided. However, in this case the plaintiff (the claimant) pre-emptively released the defendants from all claims and therefore does not have a claim for indemnity.

The Court expressly rejected the plaintiff's argument based on s.76(6)(a) [equivalent to Alberta's s.579(4)(a)] which provides that "the following do not prejudice the right of a person entitled under subsection (2) to have the insurance money applied toward the person's judgment or settlement, and are not available to the insurer as a defence to an action under subsection (3): …. Waiver or discharge of coverage under the plan". The Court held that these statutory provisions relate to waiver or discharge of insurance coverage, not waiver or release of liability for negligence, which is a pre-condition to a claimant's rights to pursue the insurer with respect to the negligence of one of its insured's for payment under the policy:

> [49] A plain reading of subsection 6(a) relates to a "waiver or discharge of coverage under the plan". This section does not address a waiver of the Ziptrek's liability for a claim for damages arising from a motor vehicle accident; the Release in this case does not involve a waiver or discharge of coverage; it involves a waiver or release of liability for negligence and damages, including injury caused by the negligence of the Ziptrek's bus operator.

(d) The Court also rejected the plaintiff's argument based on the Insurance (Vehicle) Regulation, B.C. Reg. 447-83, s.64 [which is equivalent to the Alberta Provisions in the *Insurance Act* R.S.A. 2000, c. I-3, (559(1))]. The Court reiterated as follows:

> [51] In the circumstances of this case, the Release relieves the defendants of any liability that might otherwise been imposed by law for Ms. Niedermeyer's injury. The law does not impose liability on Ziptrek and ICBC is not obliged to indemnify the defendants in the absence of a settlement or judgment in her favour. This section does not support the plaintiff's claim.

(e) The Court held that the Release was effective to extinguish the defendant's liability. Court summarized the three factors to be considered as set out by the Supreme Court of Canada in ***Tercon Contractors Ltd. v. British Columbia*** (transportation and highways), 2010 SCC 4:

> [54] In ***Tercon,*** Mr. Justice Binnie's minority opinion, accepted by Cromwell J. for the majority of the Court at para. 62, explains that three enquiries should be made in analyzing a plaintiff's claim to avoid the impact of an exclusion clause in a release. These enquiries, at paras. 122 - 123, are:
>
> Whether the parties' intentions as expressed in the contract support an interpretation that the clause applies to the circumstances?
>
> If the exclusion clause applies in the circumstances, is the clause unconscionable, as might arise from situations of unequal bargaining power between the parties at the time the contract is made?
>
> Is there a reason to refuse enforcement of the release because of an overriding public policy? The burden of proof rests with the party seeking to avoid enforcement. To satisfy this burden, it must be established that the overriding public policy to refuse enforcement must outweigh a strong public interest in the enforcement of contracts generally.

(f) The Court passed upon the principles relating to the obligation of a defendant to bring waiver provisions to the attention of a plaintiff:

> [56] The principles applicable to this issue are set out in ***Karroll v. Silver Star Mountain Resorts Ltd***. (1988), 33 B.C.L.R. (2d) 160 (S.C.) in which McLachlin, C.J.S.C. (as she then was) says at 166:
>
> ... there is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question that such an obligation arises. For to stay silent in the face of such knowledge is, in effect, to misrepresent by omission.
>
> . . .
>
> [61] In ***Karroll*** McLachlin C.J.S.C. says at 166:
>
> Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term. The length and format of

> the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.
>
> Applying these rules to this case, we start from the fact that Miss Karroll signed the release knowing that it was a legal document affecting her rights. Under the principles set forth in ***L'Estrange v. F. Graucob Ltd.***, she is bound by its terms unless she can bring herself within one of the exceptions to the rule. This is not a case of non est factum. Nor was there active misrepresentation. It follows that Miss Karroll is bound by the release unless she can establish: (1) that in the circumstances a reasonable person would have known that she did not intend to agree to the release she signed; and (2) that in these circumstances the defendants failed to take reasonable steps to bring the content of the release to her attention.

(g) The Court rejected the plaintiff's reliance on ***Newsham v. Canwest Trade Show Inc***., 2012 BCSC 289, which the plaintiff argued supported the proposition that there must be a direct link between the type of activity during which the injury was caused and the purpose of the waiver clause. However, the Court held that the bus trip to the zip line was not sufficiently disparate from the zip line activity itself as to make ***Newsham*** applicable:

> [71] I do not think ***Newsham*** assists the plaintiff. In the circumstances of this case, travel to and from the zip line was expressed as one aspect forming part of the zip line activities and would have been in the contemplation of a reasonable person who had read the Release. The Release was essential to her participation in the zip line activity and referred to the transportation component of the activity.
>
> [72] Although the plaintiff may not have been aware of the need for a bus trip to the zip line site, travel to and from the tour area was clearly identified as one of the adventure activities included in the Release. The accident happened in precisely the circumstances contemplated by and described in the Release; she suffered an injury as a result of the negligence of Ziptrek's driver while travelling from the tour area.
>
> . . .
>
> [80] In my view, the Release is a clear and relatively easy to read document. Although some of the print is small, large capitalized portions of the Release draw attention to the important features of safety, assumption of risks, release of liability and waiver of claims. A reasonable person would recognize the purpose and extent of the document, including the connection between the release and travel to and from the tour site.
>
> [81] I have concluded that the defendants were not obliged to point out the waiver clauses, with specific reference to the bus transportation to and from the tour site. There were no distinct features of the bus trip as opposed to the other zip line activities that should have been brought to the plaintiff's attention.

The Court held that there was "no evidence that Ms. Niedermeyer lacked sufficient time to read the document", inferring from the fact that she signed seven Releases, six of which as the guardian of her students, "that she was aware that she was releasing the defendants from any misfortune that might occur until everyone was returned to the village area".

(h) The Court held that the Release was <u>not</u> unconscionable. The Court summarized the law with respect to unconscionability:

> [83] The law relating to unconscionability is referred to in ***Loychuk v. Cougar Mountain Adventures Ltd.***, 2012 BCCA 122 where the Court said at paras. 33 and 40:
>
> > [33] To begin, the authorities are clear that there is no power-imbalance where a person wishes to engage in an inherently risky recreational activity that is controlled or operated by another. Equally important, they are also clear that it is not unfair for the operator to require a release or waiver as a condition of participating.
> >
> > ...
> >
> > [40] The principle evinced by the foregoing authorities is that it is not unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for negligence against the operator and its employees. If a person does not want to participate on that basis, then he or she is free not to engage in the activity.
>
> . . .
>
> [85] It is clear that in the case at bar, for the plaintiff to succeed she must establish that there was an inequality in her position arising out of endurance or weakness, which left her in the power of the defendants. She must also establish proof of substantial unfairness in the bargain obtained by the defendants.

(j) The Court concluded as follows:

> [89] It is not unconscionable for the operator of a recreational sports facility to require persons to sign releases as preconditions to the use of that facility. Although the defendants' bus may have been insured under by ICBC, I do not accept that the failure to disclose the existence of the insurance, and the fact that the release would operate in favor of the defendants in the case of a motor vehicle accident, rises to the level of an unfair advantage to the defendants obtained as a result of the imbalance of the relative strengths of the parties. This is not a case where "the transaction seen as a whole is sufficiently divergent from community standards of commercial morality that it should be rescinded" as per Lambert J.A. in ***Harry v. Kreutziger*** (1978), 9 B.C.L.R. 166 at 177(C.A.).

(k) The Court also rejected the plaintiff's argument that the Release was contrary to public policy. The Court accepted that it might be contrary to public policy in some circumstances where the waiver purports to contractually preclude one party from taking advantage of statutory rights but, in this case, statutory rights relied upon by the plaintiff were not applicable. The plaintiff relied upon rights in the British Columbia insurance legislation allowing a claimant to pursue an insured's insurer for payment if the insured is found liable. In this case, the Release did not deal with that right but, rather, the question or whether or not the insured is liable in the first place:

> [91] On this issue, I accept the plaintiff's argument that contracts precluding one party from taking advantage of statutory rights may, in some circumstances, constitute an impermissible undermining of public policy.
>
> [92] However, in this case, the Release does not impact public policy or the statutory automobile insurance scheme. This Release deals only with the plaintiff's right to recover damages from the defendants caused by the defendants' negligence. The statutory scheme is not engaged until there has been a determination, or settlement, of a complainant's entitlement to money as compensation for injury suffered as a result of the negligence. In my view, the plaintiff's argument does not engage a debate about public policy.

Occupiers' Liability: Schoolyard In The Summer

Farias v. Peel District School Board, 2012 ONCA 759 [3988]

The plaintiff had brought an action against the school board for a slip and fall accident. She had caught her foot in a hole on an asphalt walkway on the grounds of a Brampton public school. This occurred on a mid-summer weekend. She had been wearing a form of "flip-flop" sandals at the time.

The school yard involved 96000 square feet. The hole was a small one, being "about the size of a toe box of a running shoe". It was situated next to a sewer grate at the side of the walkway.

The Facilities Manager of the school testified that during the summer vacation, the school yard did not get the same amount of use as during the school year. He testified that there would be 80% fewer people on the site each day during the summer, as compared to the school year. During the summer vacation, the custodians' inspection of the school yard was focussed on high-use areas, such as the climber area in the playground. Their policy was not to inspect the grounds to the same degree as during the school year. Their inspection of paved areas concentrated on areas surrounding the building, as opposed to the asphalt walkway which would see very little traffic during the summer.

The jury found that the defendant School District had not been in breach of its obligations under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, (3) and that the plaintiff was responsible for her own injuries, including by way of wearing the flip-flop sandals. Provisionally, the jury set general damages at $15,000.00.

The plaintiff appealed both the finding of liability and the quantum of damages.

HELD: For the defendant School District, appeal dismissed.

(a) The Court held that there was no basis to interfere with the jury's finding:

> [7] On the record, there was a basis on which the jury could conclude that, in all the circumstances of the case, the respondent had taken such care as was reasonable to ensure the safety of persons entering on its premises. Given the jury's conclusion that the standard of care was not breached, it went on to find the appellant was wholly responsible for her own injury. Having regard to our conclusion on this issue, we need not address the appellant's argument with respect to the quantum of general damages assessed by the jury.

Settlement And Release

Hodaie v. RBC Dominion Securities, 2012 ONCA 796 [3989]

The plaintiff appealed from an order enforcing an oral settlement agreement. The Motion's Judge granted summary dismissal after finding that before the action was commenced, a verbal settlement had been reached to the effect that the defendant would pay the plaintiff a specified sum in exchange for a release. The parties had not agreed on the form of release. The Motion's Judge had concluded that the parties had agreed on the essential terms of the settlement.

The plaintiff appealed, arguing that absent an agreement as to

the form of release, no binding settlement agreement had been reached.

HELD: For the defendant, appeal dismissed.

(a) The Court rejected the plaintiff's argument that no binding settlement agreement involving a release can be reached unless and until the parties agree on a form of release. It was held that except where the contract specifies differently, a settlement agreement implies the promise to furnish a release:

> [2] The appellant argues that absent agreement on the form of release, no binding settlement was agreed upon. Further, he contends that this case is factually distinct from the authorities relied on by the motion judge since he is an unsophisticated lay person who lacks familiarity with the "norms of legal dispute resolution" and since he was unrepresented at the time of the alleged settlement.
>
> [3] We do not accept his submissions. The authorities are clear that absent a contractual stipulation to the contrary, a settlement agreement implies a promise to furnish a release. See for example, ***Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc***., [1995] O.J. No. 721 (Gen. Div.), aff'd [1995] O.J. No. 3773 (C.A.); ***Ferron v. Avotus Corp***. (2005), 19 C.P.C. (6th) 75 (Ont. S.C.), aff'd 2007 ONCA 73. If any exception to this rule exists, it cannot apply in this case. The form of release required was a simple release of the appellant's claim. On the motion judge's findings, the appellant knew he was required to supply a release.

(b) The Court rejected the plaintiff's argument to the effect that ***Girouard v. Druet***, 2012 NBCA 40 supported a contrary conclusion. It was held that that case was distinguishable, *inter alia,* on the basis that there had been an express agreement between the parties that a formal contract would be prepared for their consideration such that the Court concluded that there had not been an intention to create a binding contract unless and until that formal agreement had been drafted.

QUANTUM/DAMAGES ISSUES

Punitive Damages

Rose v. British Columbia Life & Casualty Co., 2012 BCSC 1296, per Voith, J. [3981]

Briefed above under Insurance Issues.

PRACTICE ISSUES

The "Drop Dead" Rule 15.4 And Standstill Agreements

Sucker Creek First Nation v. Canada (Attorney General), 2012 ABQB 460, per Master Smart. [3979]

The defendants Attorney General of Canada and Her Majesty the Queen in Right of Alberta applied for an order dismissing the plaintiff's action against them pursuant to the "Drop Dead" Rule 15.4(1), taking the position that the plaintiffs had done "nothing to significantly advance the action for five years prior to the date upon which this application was filed".

The plaintiff issued the statement of claim on 22 March, 1996. Almost eight years later, it amended that pleading on 19 March, 2004. The Government of Canada filed a demand for particulars in October 2004, and Alberta filed a request for information and a demand pursuant to s.20 of the *Proceedings Against the Crown Act* and a demand for particulars in November of that year. On 29 November, 2004 the plaintiff wrote to the defendants, confirming an agreement to establish a time-line to complete upcoming litigation steps. That contemplated the filing of replies to demands for particulars by 31 March, 2005, and for defences to be filed on or before 1 September, 2005.

On 8 February, 2006 the plaintiff filed its replies to the demands for particulars and indicated that it expected to receive defences by 8 July, 2006. However, the Government of Canada had been improperly named as "Her Majesty the Queen in Right of Canada". On 22 February, 2006, Canada advised Sucker Creek of this and of the need for an amendment. In April of that year, Sucker Creek advised the defendants that it would agree to amend the pleadings but indicated that there was no reason why the "procedural matter" should affect the timeline and affirmed the July, 2006 deadline for defences. By July 2006, plaintiff's counsel had not received instructions to amend its statement of claim and the parties agreed that it would be practical for the amendment to be made before the filing of a defence and the deadline for filing defences was extended to the end of August 2006. Similar extensions were requested and granted in September and November 2006. In November, the plaintiff confirmed that the defendants need not file their defences until amendments were completed. There was no further exchange of correspondence until the dismissal applications were filed on 22 February, 2011. The plaintiff subsequently served the defendants with an amended, amended statement of claim, correcting the misnomer of the Government of Canada on 24 March, 2011.

The defendants argued that the plaintiffs had not done anything to significantly advance the case for five years prior to the date of filing of the motion to dismiss on 22 February, 2011. The plaintiffs responded that the parties had entered into a series of letter agreements from April through November 2006 which they argued amounted to a standstill agreement or, alternatively, that each individual extension granted for the filing of a defence should be tacked on to the five year "drop dead" period. The issue for the Court was as to whether or not this exchange of correspondence qualified as a "standstill agreement" within the meaning of the Rules.

HELD: For the defendants; action dismissed.

The Court summarized the law with respect to standstill agreements under the Rules as follows:

[10] The question is whether there was an express agreement. Discussion at paragraphs 8, 9, 17, 18 and 19 in ***Bugg v. Beau Canada Exploration Ltd***., 2006 ABCA 201 deals with this issue:

> 8. Rule 243.1(1) dictates that a standstill agreement must be "express". ***Black's Law Dictionary*** defines that term as follows:
>
> > Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference .... Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied".
>
> 9. In the context of R. 243.1(1), express means that the parties' intention is clear and not left to inference: ***Webber v. Canada (Attorney General),*** 2005 ABQB 718 (Alta. Q.B.) at para. 54. A standstill agreement cannot be implied from conduct: ***525812 Alberta Ltd. v. Purewal*** (2004), 366 A.R. 1, 2004 ABQB 938 (Alta. Q.B.) at para. 13. At the very least, the evidence must establish the basic elements of an agreement: for example, the identity of the parties to the contract, when the standstill began and its essential terms.
>
> 17. Moreover, according to Fridman, an express term of a contract is one that has been "specifically mentioned, and agreed upon by the parties, and its form, character and content expressed in the oral or written exchanges between the parties to the contract at the time the contract was made" (G.J.L. Fridman, ***The Law of Contract in Canada***, 3rd ed. 2006 CarswellAlta 787, 2006 ABCA 201, [2006] A.W.L.D. 2233, [2006] A.W.L.D. 2232 [2006] A.W.L.D. 2225, 61 Alta. L.R. (4th) 104, 377 W.A.C. 208, 391 A.R. 208.
>
> 18. It follows that a standstill agreement can be written, oral, or partly written and partly oral, as long as it is express and not based on intent or inference. This interpretation is consistent with Webber, supra and 525812 Alberta Ltd., supra. Because it will be more difficult to prove an oral agreement, the best course of action is to reduce the agreement to writing and specifically set out its terms. This Court has said: "when a standstill agreement is entered into, it would be preferable to describe it as such, and to state precisely what steps in the litigation process are waived or suspended pending the exploration of settlement": ***Weasyleshko v. Chamakese*** (1999), 228 A.R. 384, 1999 ABCA 47 (Alta. C.A.).
>
> 19. Bugg's third ground of appeal questions the effect of a standstill agreement and, in particular, whether the time during which the action is suspended under a standstill agreement can be added or tacked on to the five-year time period. In a slightly different context, this Court decided that parties can create a "clock-stopping, time-tacking" standstill agreement by contract; however, not all agreements that remove the need to take an immediate step automatically add the time to the end of the period. The interpretation must arise from the words used, or must be a reasonable implication or inference from them. In each case, the terms of the actual agreement must be considered: ***Martinez v. Hogeweide*** (1998), 209 A.R. 388, 1998 ABCA 34 (Alta. C.A.); ***Kapki v. Palacz*** (1999), 228 A.R. 373, 1999 ABCA 40 (Alta. C.A.) at para. 5.

(b) The Court noted that there was an inherent contradiction among the binding authorities as to what the requirement that any standstill agreement be "express" means, some claiming that a standstill agreement cannot be based on conduct while others taking the position that standstill agreement can be inferred on the basis of "clear implication". The Master noted that he could not question the correctness of binding decisions from the Court of Appeal and the Court of Queen's Bench: ***South Side Woodwork v. R.C. Contr.*** (1989) 95 A.R. 161; ***Bahcheli v. Yorkton Securities Inc.***, 2012 ABCA 166.

(c) The Court resisted coming to a conclusion that in every case where there is an undertaking to defend, a standstill agreement arises, noting that the circumstances of each case must be considered to determine whether or not such an inference is warranted. In this case, it was held that the exchange of correspondence after the amendment of the statement of claim in March 2004 (which put a "fresh face" on the action) were analogous to the "usual courtesies" and did not amount to a standstill agreement:

> [19] The Reply(s) to the Demand(s) were things that materially advanced the action as of February 8th, 2006. There was no express agreement for a standstill or tacking agreement asdefined by Black's. Nonetheless, I may find by way of implication or inference an agreement. In examining the words used in the exchange of correspondence although there was never an express undertaking to defend, in my view the exchange and agreements reached on timing for filing the defences were tantamount to such an undertaking. There was never any doubt that Alberta and Canada would defend.
>
> [20] Although it is difficult to resist reaching the

conclusion that in every case where there is an undertaking to defend a standstill agreement arises, I understand Bugg to say that I must consider whether or not the facts and circumstances support such an inference. Agreements to file defences and the setting of timelines, without more, are not in every case an agreement for a standstill agreement. In this case is there a clear implication that Alberta and Canada agreed to be contractually bound not to do something inconsistent to its undertaking to defend, that is, bring an application to dismiss under the drop dead rule? It is true that Sucker Creek agreed not to note in default although ostensibly it could do so at any time upon giving reasonable notice (perhaps one month being the last agreed period for filing a defence before the open ended timeframe later established by the November 8th, 2006 correspondence). The undertaking in this case was initially given as early as the November, 2004 in the correspondence agreeing to timelines well before Reply(s) had been delivered. Sucker Creek was not then in a position to enter default albeit timelines were re-confirmed and amended on a number of occasions when they were in a position to enter default. In addition, the undertakings were last given some eight months following a material advance in the action or conversely some 51 months before the drop dead aspect of the Rules would come in to play. Futhermore, the extension was requested by Alberta and Canada but granted by Sucker Creek to permit Sucker Creek an opportunity to correct a material defect in their Amended Statement of Claim.

[21] In light of the foregoing factual circumstances and context, in the absence of any supportive wording, I do not see a basis upon which I am able to clearly (or at all) find by inference or implication a standstill agreement by time tacking or otherwise. According the application of Canada and Alberta is granted and the action is dismissed.

Plaintiff's Right To Videorecord Independent Medical Examinations And/Or To Have A Nominee Present

Nguyen v. Koehn, 2012 ABQB 655, per Moreau, J. [3980]

The plaintiff sued for personal injury as a result of a motor vehicle accident that occurred on 14 November, 2007. The plaintiff alleged injuries to his left foot, flank, hip, elbow and shoulder, as well as to his lower back. The plaintiff had retained an orthopedic surgeon of his choice to do a complete medical examination. At the time of the application, the plaintiff had not produced a copy of that orthopedic surgeon's report to the defence.

The defence sought to have an orthopedic IME carried out by Dr. Gordon Russell. The plaintiff indicated that he wanted the examination videotaped pursuant to new Rule 5.42(1)(b). Dr. Russell refused, indicating that he would not agree to video recording or the presence of a nominee health care professional on the part of the plaintiff during the medical examination. No reasons were given for the doctor's refusal.

Defence counsel contacted six specialists to see whether or not they would perform a defence IME if it was video recorded. Four (three orthopedic surgeons and one neuro surgeon) indicated that they would not. Two (an occupational medicine specialist and another orthopedic surgeon) said that they would. Defence counsel's preference was to retain one of the four specialists who would not agree to videotaping. The plaintiff produced evidence to the effect that the Alberta College of Physicians and Surgeons listed 55 orthopedic specialists, 53 neurologists, 25 physiatrists, 15 rheumatologists, 11 occupational medicine specialists and 22 neurosurgeons practiced in the Edmonton area and that Viewpoint Medical Assessment Services was able to offer videorecorded defence IMEs. In response, the defence tendered evidence to the effect that defence counsel had called all 55 orthopedic surgeons in the Edmonton area. She was unable to reach 12 of them. Of the rest, 31 would not do IMEs at all. Of the 14 who would, six would not permit videotaping, four indicated that they would and four did not respond. Defence counsel did not want to retain any of the four orthopedic specialists who indicated that they would allow videotaping or the four who had not yet responded. The Court noted that defence counsel's reasons "relate to potential bias, credibility issues and not knowing these specialists as he has not previously retained them". Defence counsel preferred to retain any one of a group of three orthopedic surgeons: Dr. Russell, Dr. Guy Lavoie or Dr. Michele Lavoie. They all performed IMEs but would not agree to videorecording. However, Dr. Guy Lavoie would permit a nominee to be present. Defence counsel indicated that he had retained each of these three orthopedic surgeons in the past, had been exposed to their reports and "has a feeling of comfort with them".

The defence applied to the Master for an order directing that the plaintiff not be permitted to videorecord or audiorecord the defence IME or to have a nominee present. The defence sought an order requiring the plaintiff to go to Dr. Gordon Russell for the defence IME.

The Master held that the purpose behind former Rule 217(5) and the current rules was "to secure an accurate record of what transpired at the defence medical examination" and that there was a presumption in favour of the videorecording unless there was a good reason to disallow it. The Master concluded that perhaps if only one doctor within a particular specialty was prepared to perform an IME that was videorecorded, might be a sufficient reason for the Court to dispense with videorecording but was not satisfied that waiver of the plaintiff's right to videorecording should be waived in this case.

The defendants appealed.

HELD: Appeal allowed in part; defence allowed to choose a specialist who would agree to either a videorecorded IME or the

presence of a nominee (covering the additional expense of a nominee over that of videorecording if that option is chosen).

(a) The Court held that the standard of review on appeal to the Court of Queen's Bench from a Master's decision is one of correctness: ***Bahcheli v. Yorkton Securities Inc.***, 2012 ABCA 166.

(b) The Court held that sub-rule 5.44(5) "pertains to the conduct of the medical examination itself… and not to how the medical examination is recorded" and, accordingly, did not empower the Court to dispense with or limit the ability of the plaintiff to appoint a nominee or videorecord a defence IME.

(c) The Court held that although the former Rule 216.1 did not empower the Court to waive a plaintiff's right to have a nominee present, the new Rule 5.42 allows the Court to "define or limit the presence or role of" a nominee, including the ability to waive it altogether (at ¶30). Cases to the contrary were all decided under the old Rule and are no longer applicable on this point. Additionally, Rule 5.3(1) allows the Court to "modify or waive any right or power under a Rule in this Part", and the Rules for IMEs are part of that Part (Part 5).

(d) The Court held that Rule 5.42 does not expressly limit the circumstances in which the Court may exercise this discretion to limit or waive the plaintiff's ability to appoint a nominee or videorecord a defence IME:

> [33] The heading of Rule 5.42 is "Options during medical examination." I interpret Subrule 5.42(1) and (2) as authorizing the court to limit the manner in which a plaintiff may exercise his or her options under rule 5.42(1) in relation to the recording or witnessing of a defence medical examination. I am of the view that given the inclusion of these specific provisions that do not expressly limit the circumstances in which the Court may exercise its discretion, the Master was not constrained by the conditions set out in Rule 5.3(1). I believe this view is more in keeping with the intention and purpose of the new Rules as expressed in foundational Rule 1.7.

(e) The Court held that Ontario cases are of no assistance with respect to the Alberta rule because the Ontario Rules are silent with respect to recording defence IMEs.

(f) The Court held that the party seeking to dispense with videorecording or the appointment of a nominee bears the onus of justifying that position:

> [35] Clearly, this is not the situation under new Alberta Rule 5.42(1). Unlike the state of the law in Ontario, Rule 5.42(1) contains no requirement that a plaintiff demonstrate the potential for a *bona fide* concern as to the reliability of the doctor's account of any statements made by the plaintiff during the examination. I am of the view that it is for the party seeking to dispense with videotaping to justify the court exercising its discretion to deprive the person being examined of his or her entitlement to have the examination videotaped under the new Rule.

(g) The Court rejected the defence argument that without a waiver of videorecording, the "equal playing field" between the plaintiff and the defence is disrupted. For one thing, the Court held that it is insufficient for the defence to argue that videorecording would disrupt the trust or confidence between the plaintiff and the defence doctor, given that the relationship between a plaintiff and the defence doctor is not the same as that between a plaintiff and his/her own physician:

> [36] The Appellant submits that without a waiver of videotaping in this case, the equal playing field created by permitting defence medical examinations will be disrupted, particularly given there is no requirement that a medical examination of the plaintiff performed at his or her behest be videotaped. While ***Nistor*** [***v. Kankolongo***, 2007 ABQB 684] was decided under the old Rules when the right to have a nominee present at a defence medical examination was considered absolute, the comments of Bielby J (as she then was) at para 23 of that case regarding the difference between the two types of medical examinations nonetheless are germane:
>
> > No one suggests that the Legislature created the right to have a nominee present other than as a means of ensuring accuracy and fair play during an examination ordered and paid for by a party opposite in interest. Different considerations apply when a party is being examined by his own physician." [Emphasis added by the Court.]
>
> [37] Doherty JA, who concurred in the result in ***Bellamy*** [***v. Johnson*** (1992) 8 OR (3d) 591], expanded at para 28 on the different considerations that apply when a plaintiff is being examined by a doctor of the defendant's choosing rather his or her own physician:
>
> > It is unrealistic to view the relationship between the examining doctor and the plaintiff-examinee as akin to that of the relationship which exists when a patient goes to a doctor seeking treatment or advice. It is equally unrealistic to expect that the same rapport based on mutual trust and confidentiality should be expected or even sought. When determining whether the tape recording of the examination would interfere with an effective medical evaluation, the realities of the relationship between the doctor and the plaintiff-examinee must be borne in mind. It is not enough that the presence of the device could inhibit the development of the trust and confidence which would be expected

> in a normal doctor-patient relationship. Those features are not part of the "defence medical" dynamic.
>
> [38] Moreover, as noted by Bielby J in ***Nistor*** at para 24, if the legislature had intended that defendants retain an unfettered right to challenge a plaintiff's case, it would not have introduced the Rules relating to nominees. The same point can be made in relation to videotaping.

(h) Her Ladyship also noted that "the legal landscape was quite different 11 years ago when ***Crone v. Blue Cross Life Insurance Company of Canada,*** 2001 ABQB 787] was decided".

(i) The Court noted that there was no evidence why six orthopedic surgeons refused videorecording or that it might impair their ability to properly conduct an IME, concluding that the defence choice of specialists is limited by the refusal of those doctors as opposed to the position taken by the plaintiff. It was noted that the legislature had seen fit to provide plaintiffs with the option of videorecording and nominees. It was noted that dispensing with videorecording can be done by the court for "cogent reasons" but not without first considering various alternatives. The Court held as follows:

> [41] There is no evidence indicating why the six orthopaedic specialists have refused videotaping and no evidence that it might impair their ability to conduct a proper and effective medical examination. It is the refusal of those orthopaedic specialists to permit videotaping that is limiting the Appellant's choices, not the actions of the Respondent in insisting on an option the legislature has determined he may elect to exercise.
>
> [42] The Appellant argued that plaintiffs could use Rule 5.42(1) to artificially narrow the pool of available health care practitioners by asking for videotaping in every case. I am not satisfied that asking for videotaping, which clearly is an option for a plaintiff under the new Rules, is indicative of a mischievous purpose. In the appropriate case, where there are cogent reasons provided to justify dispensing with videotaping, the Court has the discretion under Rule 5.42(1) and (2) to do so, but not without considering various alternatives.

(j) The Court summarized the "reasoning" behind the decision to allow videorecording, i.e. as a less expensive way of recording the IME than the nomination of a health care professional to attend on the plaintiff's behalf:

> [43] In the Alberta Law Reform Institute's ***Alberta Rules of Court Project: Expert Evidence and "Independent" Medical Examinations, Consultation Memorandum No. 12.3*** (Edmonton: Alberta law Reform Institute, February 2003) pp 44-47, it was noted that having a nominee attend a defence medical examination under former Rule 217(5) was a way in which to ensure the medical practitioner's questions were fair and the record of the examinee's answers was accurate. However, there was a concern that scheduling the attendance of the nominee at the examination could be difficult and it was expensive to have the nominee attend. The Alberta Law Reform Institute concluded that videotaping would meet all of these objectives and, therefore, recommended that the examinee have the option to select videotaping as an alternative to having a nominee present.

(k) The Court held that a fair result in this case would be to allow the defence to have the option of choosing either a specialist who would allow a videorecording or a specialist who would allow the presence of a nominee, taking into account that one of the doctors preferred by defence counsel (Dr. Guy Lavoie) would agree to the presence of a nominee:

> [45] The evidence also discloses that Dr. Guy Lavoie signed a form addressed to him by counsel for the Appellant indicating that while he would not permit his medical examination to be videotaped, he would permit a nominee to be present. Counsel for the Appellant named Dr. Guy Lavoie as one of the three orthopaedic specialists he favoured to perform the examination.
>
> [46] In all of the circumstances, a fair result that would give effect to the purpose of Rule 5.42 would be to allow the Appellant, at his option to be exercised within 30 days of the release of these reasons, to select a health care professional who will permit videotaping, or instead to select one who will accept only the presence of a nominee. If the Appellant decides on the latter option, he will be responsible for the payment of any costs associated with the attendance of the nominee to be selected by the Respondent which are over and above those that would be entailed with videotaping the examination.

(l) Note that in these circumstances, as opposed to requiring the plaintiff to pay the costs of the nominee, the defendant was ordered to pay the costs of nominee in excess of the costs of videorecording if the defence chose to go with a specialist who would allow a nominee.

COMMENTARY: The decision of Madame Justice Moreau is quite logical in light of Alberta's current Rule 5.42. With all due respect, the problem is not with her interpretation thereof, but with the rule itself. The rule was promulgated either with an institutional bias in favour of plaintiffs or an ignorance of the realities of hiring a defence independent medical examination specialist. The defence in this case directly advanced a notion that defence counsel have been annunciating for some time, to the effect that the new rule creates an uneven playing field in favour of plaintiffs with respect to IMEs. Under the old rules, videorecording of defence IMEs was not obligatory because the courts (quite rationally) recognized that it

would create an uneven playing field to allow plaintiff experts to be able to minutely nit-pick defence IMEs because they are recorded where plaintiff medical examinations are not recorded so as to give the defence side the same opportunity. Additionally, what this means is that the pool of specialists available for defence IMEs has been drastically narrowed in all specialties (especially with respect to psychological experts). Many credible physicians and psychologists who would perform medical examinations for either plaintiffs or defendants will now only work for plaintiffs because they are not available to the defence if the plaintiff in any given case should insist on videorecording. That this would happen should not have been unforeseeable to those who drafted the current Rule 5.42.

Striking Out Pleadings

Rose v. British Columbia *Life & Casualty Co.*, 2012 BCSC 1296, per Voith, J. [3981]

Briefed above under Insurance Issues.

Privilege Re Documents Provided To A Certified Medical Examiner Under the *Minor Injury Regulation*

Rodruguez v. Woloszyn, 2012 ABB 671, per Master Schlosser [3985]

In an automobile personal injury case, the defendant exercised its rights to nominate a certified examiner under the *Minor Injury Regulation*, Alta. Reg. 123/2004. The plaintiff acceded to the defendant's choice of CME. Plaintiff's counsel provided two expert reports to the CME. It was not in dispute that they had been obtained for the dominant purpose of prosecuting the litigation and would be privileged unless and until the privilege was waived. Notwithstanding having seen these reports from the plaintiff, the CME concluded that the plaintiff's injuries were minor.

The defendant argued that by providing copies of these reports to the CME, the plaintiff had waived the privilege to them and that the defendant was entitled to production of same. The defendant applied for an order directing production:

HELD: for the plaintiff; application dismissed.

(a) Master Schlosser noted that the purpose of certified medical examinations under the Minor Injury Regulation was to facilitate early settlement negotiations, noting that although the parties are not bound by the conclusions of the CME, the Regulation provides that the CME's opinion is prima facie evidence as to whether or not the plaintiff's injury is a "minor injury" under the Regulation:

> [4] The Court of Appeal (affirming the decision of Master Mason, in part) recently discussed the history and operation of the Regulation in ***Benc v. Parker***, 2012 ABCA 249. Madam Justice Bielby, writing for the Court said:
>
> [9] The Regulation does not limit the use of other evidence generally available in civil litigation, including admissions obtained on questioning, production of medical and other records and so-called "independent medical examinations" provided by physicians engaged by the defendant. However, while neither party is confined to relying upon the opinion of the certified examiner at trial, such opinion no doubt bears considerable weight in settlement negotiations and trial preparation. Plaintiffs faced with reports opining that their injuries fall within the definition of "minor" must determine whether the prima facie effect of those reports can be rebutted by other available evidence. Defendants faced with reports opining that injuries fall outside of the definition of "minor injury" lose a major negotiating lever. Either way, ensuring settlement negotiations may result in early settlement, without the need or expense of trial.
>
> [5] Section 12 of the *Regulation* provides that the opinion of the certified examiner is prima facie evidence that the claimant's injury is or is not a minor injury . . . . The Regulation essentially creates a rebuttable presumption in favour of the examiner's opinion.

(b) The Court held that pursuant to s.10(2)(b) of the *Minor Injury Regulation*, the CME may receive information from the plaintiff or the defendant that either party considers relevant to the assessment, noting that the ability to provide material to the CME provides the party doing so with the opportunity to persuade the doctor as to whether or not the plaintiff's injuries are or are not minor.

(c) The Court held that "the party that asserts the waiver bears the burden: ***Syncrude Canada v. Babocs & Wilcox*** (1992) 10 CPC (3rd) 388 (Alta CA) at para. 5".

(d) The Court held that:

> "A Plaintiff's and a Defendant's position in a personal injury lawsuit are not the same" and adopted an analysis that could "accommodate these differences" (¶17).

(e) The Court rejected the argument of the defendant that production of a privileged document to an expert who is to give evidence or decide anything, as a CME does, constitutes a waiver of any litigation privilege applying to that document, relying on ***Browne (Litigation Guardian of) v. Lavery***, (2002) 58 OR (3rd) 49 (where Expert No. 1's report was provided to Expert No. 2 and Expert No. 2 testified at trial as to an opinion partially based on that) and the Court held that the privilege on Expert No. 1's report had been waived) and ***Aherne v. Chang*** (2011) 106 OR (3rd) 297 (Ont. Masters; aff'g 2011 ONSC 3846) (where the defendant's production of surveillance video to an IME doctor

was held to constitute a waiver to the privilege on that video). The Court held that "this reasoning may apply to a defendant's materials provided to a health care professional retained by a Defendant in Alberta pursuant to Rule 5.41" and "it might also be argued that these decisions apply to material provided by a Defendant to a certified medical examiner under the *Minor Injury Regulation*". However, the Court held that the converse (i.e. production by a plaintiff of material to the CME), is not necessarily true. It was held that an IME pursuant to Alberta's Rule 5.41 and a CME pursuant to the Minor Injury Regulation both involve a plaintiff submitting to an examination such that "fairness requires that [the plaintiff] know what information the examiner has" (¶16). Master Schlosser purported to rely on ***Pinder v. Sproule***, 2003 ABQB 33 where it was held that the plaintiff's disclosure of privileged medical reports to her treating physician (who was likely to be called as an expert at trial) did not necessarily constitute a waiver or eliminate a legitimate reason for maintaining the privilege or those documents. The Master quoted with approval paragraphs 72 and 73 of the ***Pinder*** decision, which provide as follows:

> [19] ***Pinder*** had to do (in part) with opinions given by the Plaintiff to one of the Plaintiff's treating physicians, Dr. Block, who was likely to be called as an expert at trial. The Court held:
>
> > 72 It remains to apply these principles to the facts of this case. As I have previously intimated, the two expert reports in question were clearly created for the dominant purpose of prosecuting the litigation, and were privileged on creation. Mrs. Pinder voluntarily released them to Dr. Block, although I am satisfied that she did not know the documents were privileged, what that would involve, and that releasing the documents to a third party might jeopardize the privilege. There was certainly no informed intention to waive privilege. In releasing the documents to Dr. Block, Mrs. Pinder would have had a legitimate expectation that he would keep them confidential, and would not release them to the Defendants. There is nothing improper or mischievous about this disclosure from patient to doctor. Given the content and nature of the reports, whatever use Dr. Block make of them in treating Mrs. Pinder would have been minimal.
> >
> > 73 On these facts there is still a legitimate reason for maintaining the privilege over the documents. Under the rules of the adversarial system, Mrs. Pinder was entitled to keep these documents away from the Defendants, and could even suppress the information in them at trial. Whatever inherent unfairness to the Defendants there may be in that rule, the unfairness has not in any way been enhanced by the disclosure to Dr. Block. The Defendants are essentially in the same position after the disclosure to Dr. Block, as they were before. I see no prejudice or unfairness that would weigh decisively in favour of the Defendants. Nor does the mere fact that the documents have now been disclosed to Dr. Block have an impact on the integrity of the system of administration of justice. In all of the circumstances, I do not regard the disclosure of these two reports to Dr. Block as being sufficient to undermine the privilege over the reports. The Plaintiff is accordingly not obliged to produce the two reports to the Defendants.
>
> [20] Mr. Justice Slatter's remarks are applicable to this case and would probably be enough to decide it. However, there are some additional features of this litigation that merit consideration.

The Court held that it is always open to a defendant to have a plaintiff examined by a health care professional in the context of an independent medical examination pursuant to Rule 5.41 after the plaintiff has been examined by a CME under the *Minor Injury Regulation*. Upon the plaintiff being sent to an IME under Rule 5.41, the defendant is entitled to receive medical reports relating to the plaintiff that would otherwise have been privileged pursuant to Rule 5.44(3), but not in advance of the IME. The Master held that to require a plaintiff to disclose expert reports provided to a CME under the *Minor Injury Regulation* would run contrary to the Rules providing that the defendant is not entitled to the plaintiff's expert reports in advance of an IME conducted under the Rules. The Master held that this was "fair":

> [23] If a Defendant were automatically entitled to a Plaintiff's privileged expert reports provided to a certified examiner under the Minor Injury Regulation, there is a risk that a subsequent examination by a Defendant's health care professional could, in effect, become a Defendant's rebuttal report. The risk detracts from the purpose of this procedure and it reverses the timing of disclosure that is otherwise mandated by Rule 5.44(3)(b). In this case, the Plaintiff offered to waive privilege immediately if the Defendant were to waive her right to a Rule 5.41 examination. But the Defendant refused.
>
> . . .
>
> [26] The circumstances of Plaintiffs and Defendants are quite different in a personal injury lawsuit. Fairness might require disclosure of defence materials provided to a defence expert to whom a Plaintiff is about to submit herself for examination, but the reverse is not necessarily true. This Court ought to be reluctant to deprive a Plaintiff of whatever strategic benefit they might gain from the existing, well-established timing and manner of disclosure.

Indeed, the Court held that in the context of a CME under the *Minor Injury Regulation* there remains a legitimate interest to protect privilege with respect to plaintiff documents disclosed to the CME:

> [27] In the context of the Minor Injury Regulation there is, in my opinion, still a legitimate interest to be protected by the privilege, notwithstanding disclosure of Plaintiff's medical reports to a Certified Medical Examiner. If anything, disclosure of a Plaintiff's expert reports to the certified examiner ought to be encouraged. That way the examiner's report might gain additional persuasive force.
>
> [28] Maintenance of the privilege will not result in unfairness or prejudice to the Defendant. In fact, there is a risk that automatic disclosure could result in prejudice to the owner of the privilege. Refusing something that a Defendant would not otherwise be entitled to is hardly prejudice.
>
> [29] Maintenance of the privilege in the face of disclosure would not undermine the integrity of the system of administration of justice, given the well-established disclosure regime in personal injury litigation. Waiver ought to be interpreted in a manner that is in harmony with the order and timing of disclosure otherwise mandated by the Rules.

COMMENTARY: With respect, the reasoning of Master Schlosser in this decision is wrong in so many ways that it is difficult to know where to begin. Where is there any authority for the fantastic proposition that the Rules do not apply to both sides of a personal injury suit, unless the rules expressly provide otherwise? The Pinder decision is distinguishable. That was a case where the plaintiff disclosed her expert reports to her treating physician, presumably for the purpose of treatment. Even assuming that Mr. Justice Slatter's decision in that case on that point is correct (which, with respect, is a stretch), the situation is distinguishable from the case at bar. When one goes to see one's physician for the purposes of treatment, one might very well have an expectation that the treating physician will not disclose what information is provided to him/her. However, provision of information to a CME is more analogous to the situation of a defendant's providing information (such as video surveillance or another expert report) to an IME physician as was the case in ***Browne (Litigation Guardian of) v. Lavery*** and ***Aherne v. Chang***. How can the defendant challenge the decision of a CME if the defendant cannot get at the basis upon which the CME made his/her decision? Accepting Master Schlosser's indication that one of the main purposes of the CME process is to encourage early settlement, how is a defendant supposed to have any confidence in a CME decision (particularly where it goes against the defendant) if it is based on information provided to the CME that the Defendant is not allowed to see? Finally, it has long been a principle in Alberta law that whatever privilege might cover a plaintiff's disclosures to treating physicians (as was the case in **Pinder**), such a privilege is waived vis-à-vis the defendants in a personal injury lawsuit where the plaintiff puts his/her medical condition in issue. Fortunately, being a decision of the Master, this decision is not binding on any other Court (judge or master) in the province. Hopefully, it will be overturned or, if not, not followed.

Mandatory ADR/JDR Rule 4.16

Rampersaud v. Baumgartner, 2012 ABQB 673, per Burrows, J. [3986]

Both sides of this litigation presented the Court with a Consent Order in morning chambers for an order waiving the mandatory dispute resolution process required by Rule 4.16. There was no evidence to establish which, if any, of the reasons listed in Rule 4.16(2) upon which a waiver might be ordered existed. The Court was advised that both counsel agreed that engaging in a dispute resolution process would be futile in this case, as the action had been commenced a long time ago (August, 2006) and that the parties could not agree on anything such that it would be a waste of resources to attempt dispute resolution prior to trial. The case involved a plaintiff suing a defendant over renovations that were allegedly done negligently, giving rise to an alleged $300,000.00 in damages. The defendant denied the negligence. There had been a summary judgment application, with respect to which both sides had filed evidence in briefs some years ago, that eventually had not proceeded.

HELD: Application denied.

The Court held that waiver of the mandatory ADR/JDR process under Rule 4.16 cannot be waived on the basis of consent of the litigants alone:

> [4] I suggested to counsel that an order under Rule 4.16(2) cannot be granted upon the basis of the consent of the parties alone. I was advised that counsel is aware of other actions where such consent orders have been granted. I find that surprising. Rule 4.16 renders nearly mandatory a process that, before the new Rules came into force, was entirely voluntary. Its adoption has not been universally appreciated among members of the bar. It was adopted despite significant controversy as to its wisdom. The intent that pre-trial dispute resolution no longer be voluntary would be entirely frustrated if the Rule could be waived by the consent of the parties to the litigation.
>
> . . .
>
> [8] Counsel's representations do not satisfy me that engaging in a dispute resolution process in this matter would be futile. In my view evidence of the basis upon which counsel have reached that conclusion is required so that the Court can determine whether the conclusion is sound. A dispute resolution process, such as a JDR, is, at least arguably, not futile, though it does not result in immediate resolution, where it clarifies what is actually in issue in the litigation and gives both sides a clear impression

> of how an independent judicial officer assesses the parties' respective risks and prospects in relation to the issues. It frequently happens that an apparently "unsettleable" action settles with the benefit of those features of a JDR. This is especially so where, as in this case, the alternative is a four or five day trial, an extremely expensive proposition both for the parties and the public.
>
> [9] The order sought cannot be granted on the basis of the consent of the parties or their counsel, even where that consent is supplemented by the statement of counsel that they have both concluded that engaging in a dispute resolution process would be futile. Further, the order sought cannot be granted when the mandatory requirement of Rule 4.16(3), that the parties be in attendance at the application, has not been satisfied.

COMMENTARY: The decision in this case is sound, based on Rule 4.16. We submit that this is a situation analogous to the question of whether or not a matter is capable of being properly litigated in the context of a summary trial. However much the parties may agree that a summary trial process is appropriate, the Court still has the final say. With respect, Mr. Justice Burrows may find it "surprising" that the mandatory ADR/JDR process has been waived in other matters where both sides form the opinion that it would be a futile exercise. We know of situations where such a waiver has been granted at a pre-JDR conference (as opposed to in morning chambers), but, even there, the Court has had to be satisfied that there is a reasonable basis upon which counsel for both sides have concluded that a JDR would be futile.

Privilege Re Insurer Investigation Into Coverage Issues Involving Bad Faith Allegations

***Intact Insurance Co. v. 1367229 Ontario Inc.*, 2012 ONSC 5256, per Allen, J. [3987]**

Briefed above under Insurance Issues.

SCUTTLEBUTT

Points to Ponder

I had amnesia once---or twice

I went to San Francisco. I found someone's heart. Now what?

Protons have mass? I didn't even know they were Catholic.

All I ask is a chance to prove that money can't make me happy

If the world were a logical place, men would be the ones who ride horses sidesaddle.

What is a "free" gift? Aren't all gifts free?

They told me I was gullible and I believed them.

Teach a child to be polite and courteous in the home and, when he grows up, he'll never be able to merge his car onto the freeway.

Experience is the thing you have left when everything else is gone.

One nice thing about egotists: they don't talk about other people.

My weight is perfect for my height -- which varies.

I used to be indecisive. Now I'm not sure.

How can there be self-help "groups"?

If swimming is so good for your figure, how do you explain whales?

Show me a man with both feet firmly on the ground, and I'll show you a man who can't get his pants off.

Is it me --or do buffalo wings taste like chicken?

Merry Christmas, Happy Hanukkah and Happy New Year!

We take this opportunity to wish you all the best of the holidays and a great New Year. As usual, we will not be publishing a ***Defence & Indemnity*** report in January. You can expect to receive our next edition in February 2013.

For Your Information

Defence & Indemnity is a monthly publication of Field LLP, edited by Brian Vail, Sharon Stefanyk and Jean van der Lee. Questions, comments or requests for material can be directed to Brian or Sharon at our Edmonton office {1 800 222 6479 (from anywhere within Alberta) or 780.423.3003 (from outside Alberta), fax number: 780 424 7116, e-mail: bvail@fieldlaw.com *or* sstefanyk@fieldlaw.com} or to Jean in our Calgary office {403 260 8500, fax number: 403 264 7084, e-mail: jvanderlee@fieldlaw.com}.