IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

Citation:2014 NBQB 096
Date: 2014/04/03

M/C/0377/08

BETWEEN: **SHIRLEY WADE,**

Plaintiff

- and -

THE WAWANESA INSURANCE COMPANY, a body corporate

Defendant

DECISION ON A MOTION MADE BY THE PLAINTIFF

BEFORE: Justice Zoël Dionne

AT: Moncton, New Brunswick

DATE OF HEARING: March 11th, 2014

DATE OF DECISION: April14th, 2014

APPEARANCES: Justin Robichaud, for the Plaintiff;

Jade A. Spalding, for the Defendant.

DIONNE, J.

INTRODUCTION AND BACKGROUND

[1] In April of 2005, **Ms Shirley Wade,** the Plaintiff, suffered injuries in a motor vehicle accident. At the time, she held an automobile insurance policy with the **Defendant, Wawanesa Mutual Insurance Company**. That insurance contract provided coverage for wage losses and medical benefits (Section B of the Standard Automobile Policy of this Province).

[2] The Defendant paid the Plaintiff for wage losses in the amount of $250 weekly, from April 1st, 2005 to May 9th, 2009 (162 weeks).

[3] The Defendant ceased paying wage loss benefits after May 9th, 2008.

[4] The Plaintiff filed action on June 4th, 2008, claiming the Defendant has been in breach of contract and has acted in Bad Faith or absence of Good Faith.

[5] The Defendant has since reinstated loss of wages payments to the Plaintiff and this on a retroactive basis. However, the Defendant made a recalculation and retroactively reduced these benefits from the initial amount of $250 weekly to a reduced amount of $114 weekly.

[6] At the present time the outstanding issues in this action are: Firstly the determination of the Bad Faith claim and secondly the determination of the amount of the weekly loss of income payment. These two issues are to be tried together.

[7] While prior discovery had dealt with other issues, there was a "continuation" of the Examination for Discovery on March 26th, 2013 where the parties addressed the issue of Bad Faith.

[8] During that discovery of March 26th, 2013, solicitor for the Plaintiff made various requests to the Defendant, enquiring about how, in the past five years, the Defendant would have dealt in general with those Section B claims, similar to the one at bar.

[9] The Defendant refused to provide the answers or disclose the documents related to those Plaintiff's requests.

[10] On November 29th, 2013, the Plaintiff filed the present Motion, seeking an Order against the Defendant for the said production of answers and documents.

[11] In her Motion, the Plaintiff also seeks leave to file an **Amended Statement of Claim,** part of which proposed amendments the Defendant opposes.

[12] The proposed additions to the Plaintiff's Statement of Claim and that are at issue, would read as follows:

> (o) The Defendant failed to repair, revise and adjust their claims practices based on prior bad faith claims;
>
> (p) The Defendant trained, designed and distributed manuals and training materials designed to train their adjusters on how to investigate for the purpose of denying those claims, and these manuals and materials were applied to improperly deny the Plaintiff's claim.

[13] While more specifics will be provided later with respect to the Plaintiff's request for better disclosure from the Defendant, in this part (Introduction), the Court shall simply point out that the disputed answers and documents can be directly or indirectly related to the two above disputed amendments to the Plaintiff's Statement of Claim.

SPECIFICS OF THE PLAINTIFF'S MOTION

[14] The present Plaintiff's Motion seeks the following orders (the non-necessary parts being omitted):

> 1. .....
>
> 2. The Plaintiff, Shirley Wade, be granted leave to amend her Statement of Claim pursuant to Rules 27.10(1) and 27.10(2)(c) of the *Rules of Court*;

3. The Defendant, Wawanesa Insurance Company, deliver forthwith a further and better Affidavit of Documents disclosing, among others, the following documentation, and that these documents be produced for inspection pursuant to Rules 31.02(2), 31.06(b), 31.06(c) and 33.12(b) of the *Rules of Court*, Section 21 of the *Judicature Act*, R.S.N.B. 1973, c. J-2 and the Court's inherent jurisdiction:

    a) For each of the past five years before the termination of benefits to advise as to the number of policy holders that received benefits from the Defendant Wawanesa pursuant to the policy like the one issued to the Plaintiff; average the length of the time the benefits were received and the actual length of time the benefits were received in the province of New Brunswick;

    b) For each of the last five fiscal years, provide the Defendant's net worth, gross assets, net income or loss, and net operating income or loss from the sale of policies similar to the policy that is the subject of the Plaintiff's action, and copies of the financial statements, annual reports, or documents supporting same;

    c) Regarding **VTL Consulting**, to advise how many times they have been retained by the Defendant Wawanesa in New Brunswick; and

    d) Confirmation of the amount of times the Defendant Wawanesa have referred Section B claimants to the **Atlantic Pain Clinic** for assessments and/or treatments as well as the total amount paid to the **Atlantic Pain Clinic** for same in the last five years, or an authorization for the Plaintiff to contact the **Atlantic Pain Clinic** for same.

4. Should the Defendant fail to provide the requested information or documentation, within 90 days from the order for production of same, the Defendant's Statement of Defense be struck out pursuant to Rules 33.12(c) of the *Rules of Court*;

5. The Defendant be ordered to pay costs in this matter; and

6. Such further and other relief as this Honourable Court deems just.

[15] Still in the Plaintiff's Notice of Motion, the grounds are stated as follows:

[16] In support to her request for leave to amend her Statement of Claim, the Plaintiff states the following grounds: (the non-necessary parts being omitted):

> **Grounds to be argued:**
>
> .....
>
> 11. The Plaintiff's request for leave to amend its Statement of Claim is just and is necessary for the purpose of determining the real question in issue.
>
> 12. Allowing the amendments to the Statement of Claim will promote the convenient administration of justice and achievement of a just outcome in the circumstances.
>
> 13. Allowing the amendments to the Statement of Claim will not unduly prejudice the Defendant.
>
> .....

[17] In support to her request for a better disclosure by the Defendant (answers and documents), the Plaintiff states the following grounds:

> **Grounds to be argued:**
>
> .....
>
> 3. The Plaintiff filed a Notice of Action against the Defendant on June 4, 2008 for breach of contract and bad faith and the Defendant filed a Statement of Defense on July 16, 2008.
>
> .....

5. All pre-trial procedures with respect to the issue of breach of contract were completed and the matter was set down for Trial on December 13, 2011. However, prior to a Pre-trial Settlement Conference, the Defendant admitted entitlement and subsequently amended their Statement of Defense.

6. In addition to the determination of the bad faith claim, the determination of the amount of the weekly indemnity benefits remains at issue.

7. During the Examination for Discovery of the remaining issues was held on March 26, 2013. During same, the Defendant either took the following requests for undertakings "under advisement" or simply refused them:

Request #6: For each of the past five years before the termination of benefits to advise as to the number of policy holders that received benefits from the Defendant Wawanesa pursuant to the policy like the one issued to Ms. Wade; average length of time the benefits were received ad the actual length of time the benefits were received in the province of New Brunswick (page 364-366).

Request #7: For each of the last five fiscal years provide the Defendant's net worth, gross assets, net income or loss, and net operating income or loss from the sale of policies similar to the policy that is the subject of Ms. Wade's action; copies of the financial statements, annual reports, or documents supporting previous questions (page 366 and 367).

Request #11: A request to get a consent or an authorization from Wawanesa allowing them to write Atlantic Pain Clinic and ask them how many times have Wawanesa referred Section B claimants to them asking for assessment as well as treatments in the past five years. And what was the charge to Wawanesa, how much was paid the past five years. So in other words, asking for the authorization to write a letter (page 372 - 374).

Request # 9: Regarding VATL, to advise how many times VATL was retained by Wawanesa in New Brunswick (page 370 and 371).

8. On July 4, 2013, the Defendant denied the requests for undertaking which were taken under advisement during the March 26, 2013 Examination for Discovery.

9. The Defendant has in its possession and/or control certain documents and information material to issues in this proceeding, namely the bad faith conduct of the Defendant, but has failed to disclose and produce them.

10. The documentation and evidence requested relates to and is directly relevant to a matter in issue in this action, namely the bad faith conduct of the Defendant, and is in the control of the Defendant or a third party but which documentation and information the Defendant has refused to disclose.

[18] Still with her Motion, the Plaintiff refers to the following provisions or Rules of Court:

1. The Plaintiff pleads and relies on the Rules of Court of New Brunswick, more particularly Rules 1.02.1, 1.03(2), 1.08, 2.04, 31.02, 31.03, 31.04(4), 31.06(b) and (c), 33.12(b), (c) and (f), 37 and 59; and

2. The Judicature Act, R.S.N.B. 1973, c J-2, s.21.

MATERIAL AND EVIDENCE REFERRED TO BY THE COURT

[19] In dealing with the present Motion, the Court has referred to the following :

- Affidavit of the Plaintiff, dated Aug. 20th, 2013 with schedules A to L;
- Affidavit of Sue Scribner, dated March 5th, 2014 with schedules A to F;
- Affidavit of Joe Hughes, dated March 5th, 2014;
- Affidavit of John Loisselle , dated March 6th, 2014;
- Affidavit of Justin J. Robichaud, dated March 7th, 2014 with schedules A to E;

- Plaintiff's Pre-Motion Brief filed March 7th, 2014;
- Plaintiff's Book of Authorities filed March 10th, 2014;
- Defendant's Pre-Motion Brief filed March 7th, 2014;
- Defendant's Book of Authorities filed March 14th, 2014;
- Record on Motion filed March 7th, 2014.

ANALYSIS AND DECISIONS

FIRST ISSUE:

PLAINTIFF SEEKING LEAVE TO AMEND HER STATEMENT OF CLAIM

Plaintiff's submissions:

[20] In support for the proposed amendments to her Statement of Claim, we can read the following arguments in the Plaintiff's Pre-Motion Brief:

.....

6. A Statement of Defence was issued on July 10, 2008, and filed with the Clerk's office in the Judicial District of Moncton, on July 16, 2008.

7. On March 17, 2009, Mr. Justice Stephen J. McNally granted a Bifurcation Order which severed the issue of entitlement to benefits under the terms of the policy from all other reliefs being sought; that is, the reliefs arising out of the bad faith claim. The Order states that the entitlement to benefits issue be tried first and that all other issues raised in the Statement of Claim be stayed and be considered irrelevant for both written and oral purposes until the entitlement issues are finally judicially determined.

8. The parties proceeded on the question of entitlement of benefits and the Examination for Discovery was completed on December 9, 2009.

9. Prior to the Pre-Trial Settlement Conference on the issue of entitlement, Wawanesa agreed that Ms. Wade was entitled to weekly indemnity benefits and made the decision to reinstate payments. However, the weekly indemnity benefits

were only reinstated, retroactively to May 10, 2008, on May 25, 2012. Issue remained as regards the amount of the weekly indemnity payment owed to Ms. Wade, retroactive to April 1, 2005.

10. The Defendant subsequently amended their Statement of Defense.

11. In accordance with a Consent Order dated October 18, 2012, the bifurcated process as set out in the March 17, 2009 order was vacated and the parties were ordered to proceed with the Examination for Discovery in respect to the bad faith claim and the determination of the amount of the weekly indemnity payment.

12. The parties proceeded to a continuation of the Examination for Discovery on March 26, 2013 with respect to all other claims arising from the allegation of bad faith.

.....

16. By way of Notice of Motion, Ms. Wade seeks leave to amend its Notice of Action with Statement of Claim attached to address the new fact situation and in order to clarify certain facts already contained in same.

.....

18. Ms. Wade submits that the following issues are to be resolved by this eminent Court:

    a. Should leave be granted to permit Ms. Wade to amend her Notice of Action with Statement of Claim attached?

    .....

19. The applicable rules of the Rules of Court of New Brunswick are Rules 27.10(1) and 27.10(2), which read as follows:

    27.10 Amendment of Pleadings

    General Power of Court

    (1) Unless prejudice will result which cannot be compensated for by costs or an adjournment, the court may, at any stage of an action, grant leave to amend any pleading on such terms as may be just and all such amendments shall be made which are necessary for the purpose of determining the real questions in issue.

    When Amendments May Be Made

(2) A party may amend his pleading

(a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action,
(b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent, or
(c) with leave of the court.

20. Ms. Wade submits that it is well settled in law that Rule 27 of the *Rules of Court* grants a wide discretion to the Court to grant a leave to amend pleadings.

21. Mr. Justice Stratton made the following comments with respect to amending pleadings at paragraph 7 in *Pic Realty Canada Limited and Rocca Group Limited vs Disher* (1982), 42 N.B.R. 41 (C.A.) [*Pic Realty*]:

> The principle or rule as to when leave to amend should be given was enunciated by Lord Esher in *Steward v. North Metropolitan Tramways Co.* (186), 16 Q.B.D. 556 and expressly approved by Martland, J. In *Frobisher Limited v. Canadian Pipelines and Petroleums Limited et al.*, [1960] S.C.R. 126. Lord Exher said (at p. 558):
> The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is not injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made. [Our emphasis.]

22. Therefore, generally, leave will be granted if it can be done without prejudice to the other side or if the prejudice can be compensated with costs. See also *Patterson v. Canada Life Assurance Co.* (1983), 45 N.B.R. (2d) 401 [*Patterson*], *Wilson Roofing Ltd. V. Wayne*, [1985] N.B.J. No. 120 [*Wilson*], *Guimond Estate v. Fiberglas Canada Inc.*, 190 N.B.R. (2d) 354 [*Guimond*] and *Triathlon Leasing Inc. v. Juniberry Corp. and Hong* (1995), 157 N.B.R. (2d) 217 (C.A.) [*Triathlon*].

23. In further support of this assertion, Ms. Wade relies on Mr. Justice Drapeau's, as he then was, conclusion with respect to a request for leave to amend a pleading at paragraph 5 of *Béchard v. Ouellet* (1999), 210 N.B.R. (2d) 246 (C.A.) [*Béchard*]:

> The test set out in current caselaw focuses on the prejudice caused to the opposite party. See, for example, *Triathlon Leasing Inc. v. Juniberry Corp. and Hong* (1995), 157 N.B.R. (2d) 217; 404 A.P.R. 217 (C.A.). Any amendment to pleadings must be allowed unless it would cause prejudice to the other party that cannot be adequately compensated by costs and, where warranted, by setting appropriate conditions, including adjournment. Even when a motion to amend raises a new issue, it must be granted unless it would result in prejudice that cannot be remedied. [Our emphasis.]

24. Mr. Chief Justice Drapeau confirmed the applicable test when considering a request for leave to amend pleadings at paragraph 15 of the Court of Appeal's decision in *Enbridge Gas New Brunswick Inc. v. Modern Construction (1983) Limited*, 2003 NBCA 78 [*Enbridge*]:

> Rule 27.10 of the *Rules of Court* provide that unless prejudice will result that cannot be compensated by costs or an adjournment, the court may, in its discretion, grant leave to amend any pleading on such terms as may be just. The rule in question goes on to obligate the court to allow any amendment that is necessary for the purpose of determining the real questions in issue. The jurisprudence on point supports the view that amendments to pleadings that comply with the rules of pleadings found in Rule 27 should be only very rarely refused. That approach is shaped by the direction articulated in Rule 1.03, namely that the rules are to be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on the merits... [Our emphasis].

25. Ms. Wade respectfully submits that the governing principle consistently followed by Courts in New Brunswick is that an amendment to a Statement of Claim should be granted, however late the proposed amendment, unless the Defendant can demonstrate prejudice which cannot be compensated for, either by costs or by an adjournment.

26. In the present case, Ms. Wade submits that no prejudice results to Wawanesa. The proposed amendments either bring forth new facts which have occurred after commencement of the action, or a better particularization of the allegation of bad faith advanced by Ms. Wade. Wawanesa has been fully aware of these allegations since the beginning of these proceedings.

27. Ms. Wade submits that new information has been presented by Susan Scribner, adjuster for Wawanesa, at the Examination for Discovery and the fact situation has changed as a result. In light of this new information, Ms. Wade wished to amend the Notice of Action and Statement of Claim for the purposes of updating them, and therefore, there are sufficient grounds to grant the requested amendments.

28. Ms. Wade further submits that the requested amendments do not seek to set up a new cause of action, but rather are seeking an extension of the cause of action already raised; as explained by Mr. Justice Stratton in *Pic Realty*.

29. Ms. Wade submits that the requested amendments are necessary for determining real questions in issue and should be permitted. The amendments to Ms. Wade's Notice of Action with Attached Statement of Claim are necessary, for the purposes of determining all the questions in issue and to assure that the interest of justice is served.

30. Lastly, as stated by Mr. Justice McNally in *King v. Touchie*, 2009 NBQB 001 [*King*], we must not fail to recognize the principle that at this stage of the inquiry (the motion to amend) the Court is to assume "that the facts as stated in the Statement of Claim can be proved".

31. Ms. Wade submits that, if the requested amendment is refused, it will result in a serious curtailment of Ms. Wade's right to fully advance her claim.

Defendant's submissions: Opposing some of the proposed amendments.

[21] In opposing two of the Plaintiff's proposed amendments to her Statement of Claim (Par. [12] supra to this decision), the Defendant's solicitors have filed their own written submissions (Defendant's Pre-Motion Brief).

[22] As it did with the Plaintiff's written submissions, the Court will this time reproduce parts of the Defendant's submissions:

> 18. The Plaintiff has sought leave to amend her Statement of Claim. The Defendant consents to these amendments with the exception of paragraphs 20(o) and (p). The Defendant submits that those paragraphs should not be allowed as they do not comply with the Rules of pleading, will delay the fair trial of this matter and are an abuse of process.
>
> 19. Rules 27.10(1) and (2) allow for the amending of pleadings and read as follows:
>
> 27.10 Amendment of Pleadings
> General Power of Court
> (1) Unless prejudice will result which cannot be compensated for by costs or an adjournment, the court may, at any stage of an action, grant leave to amend any pleading on such terms as may be just and all such amendments shall be made which are necessary for the purpose of determining the real questions in issue.
>
> When Amendments May Be Made
>
> (2) A party may amend his pleading
>
> (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action,
> (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent, or
> (c) with leave of the court
>
> 20. Rule 27 provides the Court with wide discretion to allow amendments to pleadings unless prejudice will result that cannot be compensated by costs or an adjournment. Generally, the Rule obligates the Court to allow any amendment that is necessary for the purpose of determining the real questions in issue.
>
> (See: *Enbridge Gas New Brunswick Inc. v. Modern Construction (1983) Limited*, 2003 N.B.C.A. 78 (CanLii) at par. 15)
>
> 21. Although the Court is afforded wide discretion in allowing

amendments to pleadings, an amendment designed to raise an irrelevant fact or issue, or an amendment that does not comply with the rules for pleading must be denied. Chief Justice Drapeau in *Enbridge Gas New Brunswick Inc. v. Modern Construction (1983) Limited*, supra, states as follows at paragraph 16:

> That said, an amendment to a pleading designed to bring into the mix a clearly irrelevant fact or inapplicable statutory provision must be denied. See *Braid Estate v. Whistler River Adventures Ltd.*, [2000] B.C.J. No. 2442 (S.C.; Dorgan J.) (Q.L.). While there is no specific New Brunswick rule of court on point, that proposition flows logically, *inter alia*, from the following: (1) Rule 27.06(1), which requires that every pleading contain a concise statement of the material facts relied upon by the party pleading for his or her claim or defence; (2) Rule 23.01(1)(b) that empowers the court to strike out any pleading that does not disclose a reasonable cause of action or defence; (3) Rule 27.09, which permits the striking out of any pleading, or other document, or any part thereof on the ground that it is frivolous or may prejudice, embarrass or delay the fair trial of the action; and (4) Rule 27.06(14) that obligates a party to plead the specific section that he or she is relying upon when the cause of action or defence is founded upon an Act. It would make no sense to allow an amendment that would then be struck out pursuant to any of those rules.

22. The proposed additional paragraphs state as follows:

> 20(o) The Defendant failed to repair, revise and adjust their claims practices based on prior bad faith claims;
>
> 20(p) The Defendant trained, designed and distributed manuals and training materials designed to train their adjusters how to investigate for the purpose of denying those claims, and these manuals and materials were applied to improperly deny the Plaintiff's claim.

23. These paragraphs are not specific to the Plaintiff's claim but instead relate to the Defendant's handling of other claims. If the Defendant is held to be liable in this action it will be for its handling of the Plaintiffs claim, not other claims, and therefore this information is irrelevant.

24. The Plaintiff has already alleged systemic bad faith without any facts to support this allegation and is asking for extensive document/information production based on this allegation.

25. If the Plaintiff is permitted to add these paragraphs to her Statement of Claim, the amendment will cause a delay of the fair trail of the issues between the parties and, to the extent they are aimed at requiring further discovery of the Defendant without any factual support, they are an abuse of process and therefore, should not be allowed pursuant to Rule 27.09.

26. The Plaintiff has plead systematic bad faith without any evidence in support of this allegation. She is asking the Court to order the Defendant to produce a substantial amount of information in relation to other claims in a fishing expedition in the hope of finding some evidence which might support this allegation. Similar to her allegation of systemic bad faith, the Plaintiff has not presented any facts to support the allegations in the amendments requested. Further, these allegations relate to other claims and therefore, have no relevance. The intent of the requested amendments is an attempt to allow for further broad discovery into other claims and to retroactively support the present requests for document production. This is an abuse of process which will delay the fair hearing of the trial and should not be permitted.

ANALYSIS, REASONS AND CONCLUSIONS

(Proposed amendments to the Statement of Claim)

[23] The Court has considered both the above respective written submissions of the parties.

[24] The Court has also heard and considered the further oral arguments and further references to case law made by the respective solicitors at the hearing of March 11th, 2014.

[25] Having analysed both positions, this Court favours the one presented by the Plaintiff. It is indeed this Court's view that the Plaintiff's request for leave to amend her Statement of Claim is a reasonable one in the

circumstances and is fully supported by the Rules of Court and the relevant case law.

[26] For those reasons, the Court grants the Plaintiff leave to amend her Statement of Claim by adding the two allegations that are reproduced at paragraph [12], supra to this decision.

SECOND ISSUE:

PLAINTIFF'S REQUEST FOR A BETTER DISCLOSURE BY DEFENDANT

Plaintiff's submissions in support of a greater disclosure by the Defendant.

[27] The Plaintiff's position on this second part of her Motion was again stated and argued in a Pre-Motion Brief and also by way of oral arguments made solicitor Justin Robichaud, on March 11th, 2014.

[28] The Court will again reproduce some excerpts from the said Plaintiff's Pre-Motion Brief:

[29] It is to be noted that any reference to " **V A T L" or V T L** are references to "**V A T L Consulting"** , an agency that specializes in doing transferrable skills analysis once people have suffered injuries or other health issues affecting their ability to return to their former jobs.

[30] It is also to be noted that "**Atlantic Pain Clinic**" is a reference to a local health clinic offering assessments and treatments for patients experiencing some degrees of incapacitating pain.

[31] Here are those excerpts from the Plaintiff's submissions:

> 9. Prior to the Pre-Trial Settlement Conference on the issue of entitlement, Wawanesa agreed that Ms. Wade was entitled to weekly indemnity benefits and made the decision to reinstate payments. However, the weekly indemnity benefits were only reinstated, retroactively to May 10, 2008, on May 25, 2012. Issue remained as regards the amount of the weekly indemnity payment owed to Ms. Wade, retroactive to April 1, 2005.
>
> 11. In accordance with a Consent Order dated October 18, 2012, the bifurcated process as set out in the March 17, 2009 order was vacated and the parties were ordered to proceed with the Examination for Discovery in respect to the bad faith claim and the determination of the amount of the weekly indemnity payment.
>
> 12. The parties proceeded to a continuation of the Examination for Discovery on March 26, 2013 with respect to all other claims arising from the allegation of bad faith.
>
> 13. At the Discovery, solicitor Joseph E. Cantini made, among others, the following requests:
>
> Request #6: For each of the past five years before the termination of benefits to advise as to the number of policy holders that received benefits from the Defendant Wawanesa pursuant to the policy like the one issued to Ms. Wade; average length of time the benefits were received ad the actual length of time the benefits were received in the province of New Brunswick (page 364-366).
>
> Request #7: For each of the last five fiscal years provide the Defendant's net worth, gross assets, net income or loss, and net operating income or loss from the sale of policies similar to the policy that is the subject of Ms. Wade's action; copies of the financial statements, annual reports, or documents supporting

previous questions (page 366 and 367).

Request #11: A request to get a consent or an authorization from Wawanesa allowing them to write Atlantic Pain Clinic and ask them how many times have Wawanesa referred Section B claimants to them asking for assessment as well as treatments in the past five years. And what was the charge to Wawanesa, how much was paid the past five years. So in other words, asking for the authorization to write a letter (page 372 - 374).

Request # 9: Regarding VATL, to advise how many times VATL was retained by Wawanesa in New Brunswick (page 370 and 371).

14. At Discovery, Solicitor for Wawanesa, Jade A. Spalding, took requests for undertakings #6, #7 and #11 "under advisement" and later refused them in a correspondence to Solicitor for Ms. Wade, Joseph E. Cantini, dated May 15, 2013.

15. At the Discovery, Solicitor Spalding refused to provide Request for undertaking #9 which was to advise how many times VATL was retained by Wawanesa in New Brunswick.

.....

17. Furthermore, Ms. Wade requests that Wawanesa deliver, forthwith, a further and better Affidavit of Documents, disclosing, among others, the information sought and refused at the March 26, 2013 Examination for Discovery.

18. Ms. Wade submits that the following issues are to be resolved by this eminent Court:

.....

b. Should Wawanesa be directed to deliver a further and better Affidavit of Documents, including all documents since the production of its draft Affidavit of Documents, pursuant to Rule 31.06(b) of the *Rules of Court;*

c. Should Wawanesa be directed to produce, pursuant to Rule 31.02 and Rule 31.06(c) of the *Rules of Court*:

i. For each of the past five years before the termination of benefits to advise as to the number of policy holders that received benefits from the Defendant Wawanesa pursuant to the policy like the one issued to Ms. Wade; average length of time the benefits were received ad the actual length of time the benefits were received in the province of New Brunswick;

ii. For each of the last five fiscal years, provide the Defendant's net worth, gross assets, net income or loss, and net operating income or loss from the sale of policies similar to the policy that is the subject of the Plaintiff's action, and copies of the financial statements, annual reports, or documents, supporting same;

iii. Regarding V A TL Consulting, to advise how many times they have been retained by the Defendant Wawanesa in New Brunswick;

iv. Confirmation of the amount of times the Defendant Wawanesa have referred Section B claimants to the **Atlantic Pain Clinic** for assessments and/or treatments as well as the total amount paid to the **Atlantic Pain Clinic** for same in the last five years, or an authorization for the Plaintiff to contact the **Atlantic Pain Clinic** for same; and

v. The entire claims file, including, but not limited to, the adjuster's notes and memos, and computer notes.

Production of a Further and Better Affidavit of Documents

32. The applicable rules of the Rules of Court of New Brunswick are Rules 31.02(2), 31.06(b), 31.06(c) and 33.12(b), which read as follows:

Rule 31.02 Scope of Documentary Discovery

Disclosure

(1) Every document which relates to a matter in issue in an action and which is or has been in the possession or control of a party or which the party believes to be in the possession, custody or control of some person not a party, shall be disclosed as provided in this rule, whether or not privilege is claimed in respect to that document.

Production for Inspection

(2) Every document which relates to a matter in issue in an action and which is in the possession or control of a party to the action, shall be produced for inspection if requested, as provided in this rule, unless privilege is claimed in respect of that document.

Rule 31.06 Where Affidavit Incomplete or Privilege Improperly Claimed

Where the Court is satisfied that a document has been omitted from or inadequately described in an Affidavit of Documents, or a claim of privilege may have been improperly made therein, the court may

(a) order cross-examination upon the Affidavit of Documents,

(b) order delivery of a further and better Affidavit of Documents,

(c) order the disclosure or production for inspection of any document, or any part of any document, which is not privileged, and

(d) inspect any document for the purpose of determining the validity of a claim of privilege.

33.12 Penalty for Refusal or Neglect

Where a person refuses or neglects to attend or to remain in attendance for his examination or refuses to be sworn, or to answer a proper question, or to produce a document which he is bound to produce, or to comply with an order under Rule 33.11, or to fulfill an undertaking, the court may

[...]

(b) order him to produce any document, to re-attend at his own expense and to answer any proper questions

arising from such document,

33. The New Brunswick Court of Appeal's observations in *Kay v. Kay* (1999), 215 N.B.R. (2d) 291 [*Kay*] clearly militates for full disclosure in civil litigation:

> 26 Rule 31.04(6) must be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits. See Rule 1.03(2). The chances of achieving such a determination on the merits are enhanced where the risk of surprise is minimized, if not eliminated, by giving the parties an opportunity to know beforehand precisely what they will face at trial. Thus, our Rules of Court call for full disclosure and production of all documents that relate to a matter in issue in an action. See Rules 31.02(1) and (2). One of the beneficial by-products of full disclosure and production of relevant documents is that settlement efforts will not be stymied by what may be misinformed speculation with respect to the strength of the adverse party's case and the value of any assets at stake in the litigation... [Our emphasis.]

34. Dealing with the issue of production of materials on which an expert's report was based pursuant to Rule 52 of the *Rules of Court* of New Brunswick, Mr. Chief Justice Drapeau stated as follows in *MacKenzie v. Davis*, 2008 NBCA 85 [*MacKenzie*] with respect to the raison d'être of the full disclosure principle in our procedural rules:

> 37 As noted, Rule 1.03(2) calls for a liberal construction of each and every procedural rule, the objective being to secure the just, least expensive and most expeditious determination of every proceeding on its merits. It is unarguably in society's best interest that all relevant evidence be available to the trial court, which, after all, is charged with ascertaining the truth, the central objective of judicial fact-finding. Pointless games of documentary "hide and seek" have no place in Rules-compliant litigation, which requires the fullest disclosure and production possible. Moreover, as Lord Hewart C.J. stated in *R. v. Justices of Sussex* (1923), [1924] 1 K.B. 256 (Eng. K.B.), at p. 259, justice must not only be done: it must be seen to be done. When documents relating to matters in issue in the action are hidden from the other parties, they can never be sure that full disclosure of their contents was provided through oral discovery or on cross-examination at trial. There lingers, throughout the litigation and the trial and, indeed, well after judgment, the suspicion that the court's disposition might not be fully informed. The victim of this state of affairs is none

> other than respect for the judicial process and the proper administration of justice... [Our emphasis.]

35. Ms. Wade is asking for production of documents which relate to a matter in issue, being the breach of the duty of good faith and fair dealing.

36. In the leading case of *Frenette v. Metropolitan Life Insurance Co.* [1992] 1 S.C.R. 647, S.C.J. No. 24 [*Frenette*], the Supreme Court of Canada distinguishes a notion of "relating to" as being a broader concept that the concept of relevance and would entitle a party to production if he or she can satisfy the Court that the production of that document might advance his or her own case or damage the case of his or her adversary even if the document may not in itself tend to prove that this was in fact an issue.

37. In *Frenette*, the Rule as to what constituted a document relating to a matter in question in the proceeding was outlined as follows:

> A document will be said to relate to a matter in question in the proceeding where, it is reasonable to suppose ti may throw any light on the case in the sense that it contains information which may either directly enable the party receiving or seeking the information to advance his or her own case or to damage the case of his or her adversary on which may fairly lead him or her to train of inquiry which may do so. With all due respect to those who have expressed a contrary view, I do not believe that the test for determining production of documents prior to trial should be tried to the concept of relevance at trial. [Our emphasis.]

38. In the case of *Dufault v. Stevens* (1978), 6 B.C.L.R. 1999 [*Dufault*], the British Columbia Court of Appeal took the same approach as the Ontario Court of Appeal in *Cook v. Ip* (1985), 52 O.R. 289 [*Cook*]. Mr. Justice J.A. Craig held at pages 203 to 205:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary...
>
> It follows from this that the applicant need not show that a document is admissible in evidence at the trial as the condition for obtaining an order under this rule. If a party

> seeking the order is able to satisfy the judge that the document, or information in a document, may relate to a matter in issue, the judge should make the order unless there are compelling reasons why he should not make it, e.g., the document is privileged [Our emphasis.]

39. In *Carter v. Municipal Construction Ltd.* (2001), 204 Nfld & P.E.I.R. 112 (NFTD); affirmed (2001), 206 Nfld & P.E.I.R. 181 (NFCA) [*Carter*], Mr. Chief Justice Green stated, at paragraph 7, that for the court to exercise its discretion to order production of documents, at least three things must be satisfied:

> (1) The document in question must "relate" to a matter in question in the proceeding.
>
> (2) The Court must be of the opinion that an order of production is "necessary for disposing fairly of the proceeding or for saving costs" and is not injurious to the public interest.
>
> (3) The document is not privileged from production.

40. Mr. Chief Justice Green relied on *Frenette* in stating at paragraph 8 that "the court has inherent jurisdiction to ensure that all relevant documents are before it in order to determine properly and fairly the issues between the parties".

41. Mr. Justice Green stated as follows in *Eason v. L.I.U.N.A.*, local 1208, 2003 Carswell Nfld 245 (NLSC TD) [*Eason*]:

> The pleadings will generally indicate the outside parameters of the "matters in question" in a proceeding. It would be wrong, however, to assume that, to justify production, it is necessary to show that the document has a direct connection with a specific allegation in the pleading or even with an issue that is joined between the parties. A document will still "relate" to a matter in question in a proceeding if it can be said to be even indirectly connected, not only to proving a fact in issue or a pleaded fact, but also useful in better understanding the events that are in issue or in providing circumstantial evidence from which inferences can be drawn in relation to matters in issue or in assisting in assessing the credibility of and significance of events that are referred to in the pleading.

42. The case at bar seeks to determine, among others, whether

Wawanesa breached its duty of good faith and fair dealing under an implied term of the insurance contract. The New Brunswick Court of Appeal has already concluded that an insurer's breach of its duty of good faith and fair dealing sounded in both tort and contract: see *Norris v Lloyd's of London* (1998), 205 N.B.R. (2d) 29 (N.B.C.A.) [*Norris*], *Cayouette c. Co-operators General Insurance Co.* (2000), 227 N.B.R. (2d) 283 (N.B.C.A.) [*Cayouette*], and *Walsh v. Nicholls*, 2004 NBCA 59 [*Walsh*].

43. In *Walsh*, Mr. Chief Justice Dreapeau stated as follows with respect to the need to protect insured from the power imbalance in favor of no-fault auto insurers:

> 34 I should begin by emphasizing that what is at stake in the present appeal is anything but trivial.
>
> 35 First, the decision under appeal is problematic for the law in general. At first blush, there appears to be something amiss with the attribution of judicial immunity from suit to someone who may have intentionally, and without legal justification, brought about a violation of another's legal rights. That observation is especially apropos where, as here, the relationship between the parties gives rise to a power imbalance that favors the alleged wrongdoer. In processing claims for no-fault auto insurance benefits, the insured is particularly at the mercy of the adjuster; indeed, most insured are unfamiliar with the pertinent terms of the Policy and accept at face value the adjuster's delineation of coverage and determination of entitlement. Moreover, the financial stakes are seldom significant and adjusters know full well that very few insured will go to the expense of retaining a lawyer to challenge the rejection of their claims. In short, the context is fecund ground for abuse by the unscrupulous; in my view, tort law must step into the fray and do its share to discourage abuse of power on the part of the adjusters. [Our emphasis]

44. Mr. Chief Justice Drapeau then went on to state that Courts should not limit the types of actions which can lead to a breach of an insurer's duty of good faith and fair dealing:

> 70 Most judges and commentators agree that any attempt to ascribe an exact meaning to "bad faith" is an unwise, and probably quixotic undertaking. Nonetheless, all would likely agree that an adjuster acts in bad faith when he or she brings about the rejection of a valid claim for insurance benefits out of a sense of personal gain or for the purpose of injuring the insured. However, if bad faith were limited to those undoubtedly rare

> circumstances, its argued-for recognition as a separate tort would truly be a chimeric initiative. In my view, the concept of bad faith is wider in scope. [Our emphasis]

45. What is clear is that the insurer has a duty to act fairly in its investigation and assessment of the insured's claim and in taking the decision to pay or deny the claim.

46. Ms. Wade submits that the requested information relates to a matter in question, being the determination of whether Wawanesa breached its duty of good faith and fair dealings, and should be disclosed and produced for inspection.

47. In Contos v. Kingsway General Insurance Co., [2001] O.J. No. 1327 [Contos], the Plaintiff's request for the insurer's claim file and its corporate financial statements were granted based on the following:

> 12 The resulting productions by n insurer in a bad faith claim are typically voluminous and intrusive, laying bare the entire claims process. Nonetheless in a claim for bad faith, properly pleaded, such productions are relevant to a determination of the bad faith issue and the plaintiff is entitled to such productions, subject to privilege claims.
>
> 13 My concern however is that plaintiffs will adopt as a standard practice the inclusion of bad faith claims in every action for first party benefits, turning a relatively simple lawsuit for the determination of entitlement to benefits into a complex bad faith case requiring substantial production and a lengthy trial. Plaintiffs run the risk of negative cost awards should they not prove bad faith, even if they are successful in proving their entitlement to benefits. That however is a matter for determination by the trial judge. If a claim is properly pled so that it alleges facts which, if proven, could constitute bad faith, I am bound to order relevant production unless protected by privilege. [Our emphasis[

48. It was further ordered, in *Contos*, that the insurer had to breakdown all of the log notes and memoranda, which were privileged, in Schedule B of the Affidavit of Documents.

49. Ms. Wade maintains that the requested information is required in order to, among others, determine whether Wawanesa breached its duty of good faith and fair dealings and, to properly assess whether an award for punitive damages would be warranted in this matter and also the quantum of same.

50. Mr. Justice Juriansz cited the following decisions in explaining the rational to award punitive damages at paragraphs 88 and 89 of his decision in *Clarfield v. Crown Life Insurance Co.*, [2001] O.J. No. 4074 [*Clarfield*]:

> Wildon J. In *Vorvis v. Insurance Corp. of British Columbia* (1989), 58 D.L.R. (4th) 193 (S.C.C.), commented at page 222 that the prohibition against punitive-damage awards "seems to have fallen by the wayside although some courts continue to proclaim it." She went on to highlight what seems to me the most persuasive rationale for awarding punitive damages. That is "...in order to deter the strong from deliberately and callously disregarding the legal rights of the weak whenever it is in their economic interests to do so." [The words are those of Galligan J. in *Nantel v. Parisien* (1981), 18 C.C.L.T. 79 (Ont. H.C.), as adopted by Linden J. In *Brown v. Waterloo (Region) Commissioners of Police* (1982), 136 D.L.R. (3d) 49, 37 O.R. (2d) 277 (Ont. H.C.), at 64-65]
>
> The Ontario Court of Appeal in *Whiten v. Pilot Insurance Co.* (1999), 170 D.L.R. (4th) 280 (Ont. C.A.), [hereinafter Whiten] has emphasized deterrence as a basis for award of punitive damages. Laskin J.A. indicated an award punitive damages may serve the rational purpose of achieving deterrence and this was of particular importance in insurance cases. He said at page 299:
>
> > [V] indicating the goal of deterrence is especially important in first party insurance cases. Insurers annually deal with thousands and thousands of claims by their insureds. A significant award was needed to declare Pilot and other insurers from exploiting the vulnerability of insureds, who are entirely dependent on their insurers when disaster strikes. [Our emphasis]

51. In assessing the quantum of damages to be awarded in *Clarfield*, Mr. Justice Juriansz stated the following, at paragraph 114, with respect to additional evidence which would have beneficial at trial in order to properly assess the quantum of punitive damages:

> However the degree of deterrence and punishment required in this case is not precisely clear because the evidence did not establish how many times:
>
> i. an insured earning no income at the time of disability was refused benefits for that reason alone;

> ii. a claimant had been required to sign away rights as a condition of receiving extra-contractual benefits;
>
> iii. a claimant protesting an adverse decision had been reminded that extra-contractual benefits might have to be repaid; or
>
> iv. how many times a claim based on mental disability was determined by GAF score. [Our Emphasis]

52. The Supreme Court of Canada echoed this statement at paragraph 119 of its decision in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 [*Whiten*]:

> 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 stiii important, however, because the egregious misconduct of middle management was known at the time to top management, who took no corrective action. [Our emphasis]

53. Without the opportunity to inspect the requested information and documents, such as it relates to the termination of benefits in other files, the extent to which Wawanesa retained VTL Consulting, specifically with the request to conduct a paper review, and the extent to which Wawanesa directed an insured's treatment plan, specifically in its own referrals to the Atlantic Pain Clinic, Ms. Wade will be unable to properly advance her claim for punitive damages, and is therefore inequitable.

54. As stated by Mr. Chief Justice Drapeau in *McKenzie*, "it is unarguably in society's best interest that all relevant evidence be available to the trial court, which, after all, is charged with ascertaining the truth, the central objective of judicial fact-finding".

55. With respect to Ms. Wade's request for information relating to Wawanesa's financial worth, she relies on *Samoila v. Prudential of America General Insurance Co. (Canada)* (2000), 50 O.R. (3d) 65 (Sup.Ct.J.) [*Samoila*], where Justice Brockenshire stated as follows in paragraphs 14 and 15:

> In *Whiten v. Pilot Insurance Co.* (1999), 32 C.P.C. (4th) 3 (Ont. C.A.) at paragraph 67, Finlayson J.A. for the majority quoted with approval, Mr. Justice Blackmun of the United Stated Supreme Court who listed factors in to

> consider in evaluating a punitive damage award for bad faith. That list included as (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of the litigation.
>
> From the above listing, approved by our Court of Appeal, *it seems obvious that the general financial net worth of the company as well as the particulars of the reserve numbers and defence costs of Prudential are all relevant in considering a possible punitive damage award.* [Our emphasis]

56. The Supreme Court of Canada, in *Whiten*, also agreed that a defendant's net worth was a factor in determining the need for deterrence and thus, the quantum of punitive damages (see paragraphs 118 to 122).

57. See also *Simpson v. Gafar*, [2000] O.J. No. 3351 [*Simpson*], *Rex v. General Accident Assurance Co. of Canada*, [2000] O.J. No. 348 [*Rex*], and Clarfield.

58. Upon review of relevant case law, the courts have taken a liberal approach to the application of the rules relating to discovery and production of documents to effect full disclosure.

59. In summary, Ms. Wade submits that the requested information should be disclosed for the following reasons:

    a. As stated in *MacKenzie*, it is in society's best interest that all relevant information be available to the trial court;

    b. Among others, the matters at issue in this proceeding relate to Ms. Wade's claim that Wawanesa breached its duty of good faith and fair dealings and her claim for punitive damages;

    c. Ms. Wade maintains that Wawanesa breached its duty of good faith and fair dealings by, among others:

        i. Failing to consider all of the medical records and reports available when terminating benefits;

        ii. Relying on a transferable skills analysis prepared by VTL Consulting when they requested and/or knew that the later only

performed a paper review and did not take into consideration any of the standard variables which should form part of a transferable skills analysis;

iii. Critiquing and then disregarding favorable reports prepared by Dr. Paul-Emile Bourque, psychologist;

iv. Imposing extra-contractual obligations to Ms. Wade by directing her treatment plan and referring her to the Atlantic Pain Clinic;

v. Interfering in Ms. Wade's treatment plan; and

vi. Assessed and managed the file in an effort to terminate benefits.

d. The trial judge will be tasked with determining whether these practices constitute a breach of Wawanesa's duty of good faith and fair dealings and also whether said conduct is cause for awarding punitive damages;

e. In *Whiten* and *Clarfield*, the Supreme Court of Canada and Mr. Justice Juriansz, respectively, stated that the type of information Ms. Wade is requesting in this proceeding would have been important evidence to have in order to determine whether the actions justified an award for punitive damages, as well as the quantum of same;

f. Courts have consistently held that the test for production of documents - whether the information related to a matter in issue - is broader than the concept of relevance. Ms. Wade therefore maintains that the requested information relates to a matter in issue;

g. Ms. Wade submits, relying on the interpretation provided in *Eason*, that the information will be "useful in better understanding the events that are in issue or in providing circumstantial evidence from which inferences can be drawn in relation to matters in issue or in assisting in assessing the credibility of and significance of events that are referred to in the pleading";

h. Relying on *Whiten* and *Clarfield*, Ms. Wade maintains that the requested information is essential for her to fully plead her case and that the

production is therefore necessary for disposing fairly of the proceeding.

i. Ms. Wade maintains that it would be inequitable to require her to proceed to trial without the benefit of all the evidence required in order to assess whether an award for punitive damages is warranted and the quantum of said award;

j. Ms. Wade further submits that no privilege exists on the requested information;

k. As stated in *Walsh*, "in processing claims for no-fault auto insurance benefits, the insured is particularly at the mercy of the adjuster" and "tort law must step into the fray and do its share to discourage abuse of power on the part of adjusters";

l. Again, as was stated in *Whiten* (ONCA), insureds are entirely dependent on their insurers and are in a vulnerable situation;

m. Should Courts refuse to provide plaintiffs with the kind of information that is requested in this matter, it would be all too easy for insurers to avoid any paper trail on corporate practices and typical conduct of their adjusters and to baldly assert that the retrieval of the requested information was simply too onerous;

n. Refusal from the Courts to provide the requested information, insureds would once again be left to the mercy of the adjusters and the insurance companies by being forced to solely rely on the adjusters' word with respect to corporate practice and adjusters' typical conduct;

o. Due to the enormous advantage the insurers have over insureds when processing claims, such process and typical practices must be transparent;

p. Any prejudice caused to Wawanesa in producing said information is greatly outweighed by the public policy principles stated above and the significant prejudice caused to Ms. Wade in denying her the ability to properly and fairly advance her claims for breach of good faith and fair dealings, and for punitive damages.

Defendant's submissions in opposing an order for greater disclosure.

[32] In opposing the Plaintiff's request for greater disclosure by the Defendant the latter has stated its position and provided its arguments in writing (Defendant's Pre-Motion Brief) and also orally (Solicitor Jade Spalding's oral of March 11th, 2014)

[33] The following are excerpts from the Defendant's Pre-Motion's Brief:

> 10. The Defendant refused the above-noted undertakings on the following grounds:
>
> > 1. The information is not relevant and does not relate to the Defendant's handling of the Plaintiff's Claim;
> >
> > 2. The requested undertakings are not proportionate pursuant to Rule 1.02.1 as they entail a large expenditure of time and expense by the Defendant to gather this information when it is unlikely to produce any relevant information; and
> >
> > 3. In relation to Undertaking # 11 (paragraph d) above) and the Plaintiff's request for information relating to the Atlantic Pain Clinic, the Statement of Claim does not include any allegation that Wawanesa's reliance on the Atlantic Pain Clinic or any other expert was done in bad faith or that Atlantic Pain Clinic's report was biased by the relationship with Wawanesa. Therefore, there is no basis in the pleadings for this request.
>
> 11. The requests for information/documentation purportedly to the Plaintiff's claim of systemic bad faith. However, at discovery the Plaintiff admitted that she did not have any facts to support this allegation and was relying on "rumours" and "innuendo". The relevant portions of the examination for discovery are as follows:
>
> > Q. 1379 ... Paragraph 18 of the Statement of Claim states that "The Defendant's bad faith is systemic. It has a policy of denying and/or delaying the payment of accident benefits to its insureds notwithstanding entitlement. The adjusting practice is motivated by profit to ensure the financial success and viability of the company at the expense of the insured's". What facts

does the Plaintiff rely upon in respect to the allegations set out in paragraph 18?

Mr. Cantini: In our questioning of the Defendant we're going to request certain type of files that were adjusted by the Defendant in the past five years to show that the practice they've used in this case is systematic.

Mr. Spalding: Right. So at this point in time, and I realize you haven't questioned the defendant on this yet, but what facts does the plaintiff have to indicate that at this point in time?

Mr. Cantini: We don't have any specific facts except that in our firm's experience we feel Wawanesa systematically denies claims when they shouldn't, and that's just rumors and innuendo between plaintiff lawyers when we talk about Section B insurers, so we believe and due to these allegations in the pleading that we're going to be entitled to investigate Wawanesa's files in this - in these type of cases. (emphasis added)

(See: Affidavit of Sue Scribner at paragraph 5 and Exhibit "F")

.....

C. Availability of Information Requested

13. The Defendant has already provided the full claims file relating to the Plaintiff, including prior adjusters' notes, their Section B. Guidelines and electronic documents which relate to matters at issue and were accessible in the Defendant's New Brunswick office. The production the Plaintiff is seeking is not specific to her claim but relates to other claims and would require the Defendant to undertake an extensive search to answer. (Affidavit of Sue Scribner - paragraph 3)

14. The local office of the Defendant does not have the records of information to allow them to answer requests (a) and (b) above. In relation to requests (c) and (d), the Defendant would need to review each individual claims file (hundreds per year) in an attempt to answer these undertakings. Further, even if the Defendant undertook the onerous task of reviewing each claims file, they would be unlikely to find the requested information as the Defendant does not require its adjusters to track whether payments made to vendors arise out of referrals/retainers by the Defendant or referrals/retainers from the claimant or their treating

physician. (Affidavit of Joe Hughes - paragraphs 4, 5, 8 and 11)

15. Generally all of the Defendant's electronic data for Canada and the United States of America is stored at the Defendant's executive office in Winnipeg, Manitoba. There is a large amount of data stored at this office (the equivalent of hundreds of millions of documents) and specialized computer software is required to search and retrieve data. (Affidavit of John Loiselle - paragraph 4)

16. The information to potentially respond to these requests is located in several depositories and with several departments. This makes responding to the requested undertakings an onerous and time consuming task. In order to attempt to retrieve the requested information, it would take a research project of approximately three months to determine what information could be retrieved and specialized extracts would be required. (Affidavit of John Loiselle - paragraphs 7 and 8).

....

27. The Plaintiff has requested that the Defendant deliver forthwith a further and better Affidavit of Documents, disclosing various documentation and relies on Rules 31.02(2), 31.06(b) and (c) and 33.12(b) which state as follows:

> 31.02(2) Every document which relates to a matter in issue in an action and which is in the possession or control of a party to the action, shall be produced for inspection if requested, as provided in this rule, unless privilege is claimed in respect of that document.
>
> **31.06 Where Affidavit Incomplete or Privilege Improperly Claimed**
>
> Where the court is satisfied that a document has been omitted from or inadequately described in an Affidavit of Documents, or a claim of privilege may have been improperly made therein, the court may ...
>
> (b) order delivery of a further and better Affidavit of Documents,

© order the disclosure or production for inspection of any document, or any part of any document, which is not privileged, ...

33.12 Penalty for Refusal or Neglect

Where a person refuses or neglects to attend or to remain in attendance for his examination or refuses to be sworn, or to answer a proper question, or to produce a document which he is bound to produce, or to comply with an order under Rule 33.11, or to fulfill an undertaking, the court may ...

(b) order him to produce any document, to re-attend at his own expense and to answer any proper questions arising from such document, ...

28. Rule 31.02 requires a party to disclose every document which relates to a matter in issue. New Brunswick courts have generally applied the "full disclosure" approach to the interpretation of discovery rules. Relevance, in the discovery context, stands to be assessed broadly.

29. However, semblance of relevancy is not a blanket license to require production of each and every document that might possibly have a glimmer of relevancy to the Plaintiff's case. Discovery is not to be a fishing expedition and a balance must be struck between full disclosure of relevant facts and the protection of the right against unjustified intrusion.

(See: ***Agnew et al. v. The New Brunswick Telephone Company,*** 2002 NBQB 179 (Q.B.) (CanLii) at par. 56 and 60).

30. There is a prima facie obligation on the party seeking production to establish a basis to show relevancy and the failure to do so will cause the Court not to order that production. A mere suspicion is not enough. Discovery is never ordered for the mere purpose of enabling a party to fish out some case.
(See: ***Agnew et al. v. The New Brunswick Telephone Company***, 2002 NBQB 179 (Q.B.) (CanLii)at par. 66 and 72).

31. The information requested by the Plaintiff is not relevant and therefore disclosure should not be ordered. The Plaintiff has made the general allegation that the bad faith of the Defendant is systemic **(Affidavit of Sue Scribner – Exhibit "A" - paragraph 18 of the Statement of Claim)**. The Plaintiff has no facts to support this general allegation and is relying on "rumours" and "innuendo". Courts will not order

production based on a mere suspicion nor have Courts allowed parties to engage in fishing expeditions.

32. All four of the undertaking requests ask for information relating to other claims. These requests do not meet the "semblance of relevance" test. The information in these requests will not provide any information that will make the Defendant's liability any more or less likely. The Plaintiff is not suing in a representative capacity and the conduct towards other insureds is irrelevant.

33. In relation to the first request, the number of policyholders that received benefits other than the Plaintiff and length of time each of these policyholders received benefits has no bearing on the Plaintiff's claim. Further, it would not provide any evidence as to whether the Defendant's actions in respect to these other insureds was proper. To have any possible relevance a Court would have to look into the merits of each claim, hundreds per year, to determine whether the termination of benefits (if any) was relevant.

34. In relation to the second request, the financial information requested has no bearing on the Defendant's liability to the Plaintiff and is not relevant.

35. The third and fourth request relating to the medical service providers VTL Consulting and Atlantic Pain Clinic are similar to the first request in that they relate to other claims and therefore are not relevant. Further, as set out in the affidavit of Joe Hughes, the Defendant does not distinguish between those claimants which are referred to medical service providers by the Defendant and those that choose the service provider themselves, so the information requested is likely not available even with an extensive manual search of records.

36. The Courts have consistently stated that evidence of the insurer's financial capacity and actions towards other insureds are not relevant in a claim of bad faith against an insurance company. In ***Kelly v. Unum Life Insurance Company of America***, 2000 BCCA 667 (CanLII) [***Unum***], the Plaintiff applied for disability benefits following a motor vehicle accident and was denied. The Plaintiff brought a claim in damages as a result of the Defendant's "breach of its duty of good faith and fair dealing" owed to him. The Plaintiff further alleged the following:

> The Plaintiff is informed, and verily believes that the Defendant's flagrant practices are widespread, have occurred for many years, in many jurisdictions, are frequent, are continuing presently, and in consequence

> of its improper conduct, the Defendant has wrongfully amassed, annually, many, many millions of dollars, disregarding the needs, well-being, and rights of the Plaintiff an its insureds generally.

37. The Plaintiff brought a motion at the discovery stage requesting a vast array of documents and information relating to various policies, incentive plans, claims registers and indices kept by Unum, past complaints, speeches by Unum personnel given in training disability adjusters etc. The Court refused the request of the Plaintiff as there was no basic relevance shown, stating at paragraph 5:

> ... Unless the plaintiff were suing in some representative capacity, the conduct of Unum via-a-vis other insureds is irrelevant to Dr. Kelly's claim including that for punitive damages. The motion he makes amounts not to a fishing expedition in a lake or a stream but an entire ocean. This simply is not permitted without some basic relevance being shown. If and when Dr. Kelly obtains damages, they will reflect his own situation and not that of others. I see no possibility Dr. Kelly would succeed in this Court on this point, which is not a matter of public importance, but rather an application of a clear principle to the facts of this case.

38. As stated in ***Unum***, the conduct of an insurance company towards other insureds is irrelevant and liability, if any, will be based on the Defendant's conduct towards the Plaintiff. As such, requests for disclosure relating to other insureds amounts to a fishing expedition which should not be permitted. This is particularly true in the present case where the Plaintiff has admitted that she has not facts to support her claim of systemic bad faith.

39. In ***Whiten v. Pilot Insurance Co.***, 2002 SCC 18 (CanLII), the Supreme Court of Canada stated that financial information may be relevant in the assessment of punitive damages in some limited instances alleging bad faith against an insurance company. However, the Court stated that such information should not be ordered prior to liability being decided and warned that disclosure of such information may unnecessary delay matters.

40. In ***Astels v. The Canadian Life Assurance Company***, 2006 BCSC 941 (CanLII), the Plaintiff claimed for disability benefits. She was paid short-term disability benefits for approximately three months, at which time the Defendant terminated her benefits on the basis that she was not "disabled" within the terms of the policy. The issue to be determined in that case was whether the Plaintiff was totally

"disabled" within the meaning of the policy and whether the Defendant had engaged in bad faith or had failed to act in the utmost good faith when dealing with their claim. The plaintiff was seeking to establish systemic bad faith within the adjusting practices of the defendant, allegedly to increase profits and offset losses incurred in speculative investment.

41. The plaintiff was seeking extensive and broadly-based disclosure of the defendant's past and present practice relating to the adjudication of claims, as well as their financial statements and had brought an application seeking disclosure of those documents. The court started its analysis by addressing the general test for disclosure of documents in British Columbia. Similar to New Brunswick, a party must disclose documents if they relate directly or indirectly to matters in question in the action. The court stated there must be at least a low threshold of relevance shown with regards to the information sought. The court refused the plaintiff's request for disclosure, stating that the information required must have an appreciable use beyond a bald assertion in the Statement of Claim:

> [27] To my mind, the information sought by the plaintiff must have an appreciable use in the context of the action that extends beyond merely advancing a bald assertion in the statement of claim, such as the allegation of bad faith and a failure to act in the utmost of good faith on the part of the defendants in this case. If such disclosure was ordered, any and all dealings of companies such as the defendants related to how they conduct their business in the context of all or a class of persons insured by them, would be the target of vast pre-trial disclosure, as would all their internal policies and workings, their staff personnel files and evaluations, and their financial records, (other than those required to be disclosed pursuant to the requirements imposed on publicly-traded companies).
>
> ...
>
> [31] Specifically, in relation to the production of financial information from the defendants, I do not interpret the ***Whiten*** case to compel production at this stage. Specifically, I do not interpret ***Whiten*** to mean that financial information about a large corporate defendant, from which the plaintiff seeks aggravated or punitive damages, is relevant to the question of liability as opposed to damages, which may best be raised in a bifurcated trial, see: ***Whiten***, *supra*, at ¶121-122.
>
> ...

> [35] Thus, without the specific facts of the case giving rise to allegations of bad faith or failure to act in the utmost of good faith, the plaintiff is simply fishing in the wide ocean of all insurance decisions taken by the defendants in the hopes of turning up systemic conduct that would found their claims of bad faith, from which they could then impute the same conduct in the case at bar.

42. As stated above, the Plaintiff must provide evidence beyond a bald assertion in a Statement of Claim. Otherwise, insurance companies and other large corporations would be faced with vast pre-trial disclosure obligations anytime there was an allegation of bad faith. No such evidence has been provided by the Plaintiff in the present case.

43. A similar comment was made in ***Rose v. British Columbia Life and Casualty Co.***, 2012 BCSC 1296 [***Rose***]. In ***Rose*** the plaintiff brought a claim against her group long-term disability insurer. The defendant brought an application to strike out paragraphs 19 and 21 of the plaintiff's Amended Notice of Civil Claim in which to the plaintiff alleged that the defendant engaged in systemic bad faith similar to the present case. Specifically, at paragraph 19, the plaintiff in ***Rose*** claimed as follows:

> 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 blaring out and discouraging claimants in exposing them to missed limitation periods.

44. The Court did not strike the paragraphs. However, the Court made the following comments regarding the rights of a plaintiff suing in an individual capacity:

> Secondly, it must be borne in mind, that this is an action between two persons, the object of which is to do justice between them. The plaintiff is a private individual suing only on his own behalf. He is not a public officer nor is this a class action ... He has no status to seek to vindicate a public right. It is worth mentioning although it would not be a factor in all cases, that the defendant here is an insurance company subject to regulation by government. If it makes a practice of contravening the regulations laid down for the protection of the public, it is for the governmental authorities to take appropriate steps.

45. In the present case, the Defendant produced at discovery the adjuster handling the Plaintiff's claim as well as the contents of her file. The adjuster was questioned in relation to her training and the company material she relies on. Despite this questioning and document production, the Plaintiff has failed to provide any evidence to this Court as to systemic bad faith beyond "rumours" and "innuendo".

46. It is respectfully submitted that Courts should not allow fishing expeditions into the handling of other claims based only on unsubstantiated assertions in the Statement of Claim. To do so would unfairly open insurers up to very broad and overly onerous disclosure obligations in every instance a Plaintiff pleads bad faith, even when there is no factual support for the claim.

Proportionality

47. Even if the Court were to find that the Plaintiff's requests may have some possibility of disclosing relevant information, this must be weighed against the costs that would be incurred by the Defendant in gathering the information. New Brunswick has recently codified the principal of proportionality at Rule 1.02.1 which states:

> Proportionality
>
> In applying these rules, the court shall make orders and give directions that are proportionate to what is at stake in the proceedings and the importance and complexity of the issues.

48. The Supreme Court of Canada's decision in ***Marcotte v. Longueuil (City)***, 2009 SCC 43 is often cited with respect to the principle of proportionality. Justice LeBel (Fish, Abella, Charron and Rothstein JJ. Concurring) state at paragraph 43:

> The principle of proportionality set out in art. 4.2 C.C.P. is not entirely new. To be considered proper, a proceeding must be consistent with it (see Y.M. Morisette, "Gestion d'instance, proportionalité et prevue civile: état proviso ire des questions" 92009), 50 C. de D. 381). Moreover, the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which while frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an

> abuse of the public service provided by the institutions of the civil justice system. There are of course special rules of the most diverse aspects of civil procedure. The application of these rules will often make it possible to avoid having recourse to the principle of proportionality. However, care must be taken not to deny this principle, from the outset, any value as a source of the courts power to intervene in case management ...

49. The issue of proportionality as it relates to electronic disclosure and discovery was the subject of a Working Group of The Sedona Conference which published their paper "The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery" in 2010. These guidelines were recently cited with approval in ***Murphy et al v. Bank of Nova Scotia et al***, 2013 NBQB 316 (CanLII). Factors that they site as relevant to the issue of proportionality include: uniqueness of the information; its importance to the resolution of key issues; whether the request for further production is intended to pressure the opponent to settle; whether the refusal to produce reflects a desire to keep damaging evidence from disclosure; and the likely prejudice to the opponent if the documents are not produced.

50. The relevant Sedona Canada Principles Addressing Electronic Discovery are as follows:

> 1. Electronically stored information is discoverable.
>
> 2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.
>
> ...
>
> 5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.
>
> 6. A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

51. With respect to Principle 2 of The Sedona Canada principles, the group states at page 11:

> Courts frequently balance the costs of discovery with the objective of securing a just, speedy and inexpensive resolution of the dispute on the merits. Courts have not ordered production of documents where the parties have demonstrated that the costs of producing documents or the adverse effect upon other interests such as privacy and confidentiality outweighs the likely probative value of the document.

52. With respect to Principle 5 of *The Sedona Canada Principles Addressing Electronic Discovery,* the group states as follows at pages 23 - 24:

> **Comment 5.a. Scope of Search for Reasonably Accessible Electronically Stored Information**
> ...
>
> It is important, therefore, to recognize that the determination of accessibility does not depend strictly upon convenience, but rather on the concept of marginal utility. Accordingly, the test for the discovery of electronically stored information now becomes: Will the quantity, uniqueness and/or quality of data from any particular type or source of electronically stored information justify the cost of the acquisition of that data?
> ...
>
> ...The more costly and burdensome the effort to access electronically stored information from a particular source, the more certain the parties need to be that the source will yield relevant information.

53 With respect to Principle 6 of *The Sedona Canada Principles Addressing Electronic Discovery*, the group states as follows at page 26:

> **Comment 6.a. The Scope of the Search**
>
> Deleted or residual data that is not accessible except through forensic means should not be presumed to be a document that is discoverable in all circumstances. Such data may be discoverable, but the evaluation of the need for and relevance of such discovery should be analyzed on a case by case basis...

54. The Sedona Working Group further states that requests for further production should be reasonably specific and targeted and the requesting party will have the onus to establish, by convincing evidence rather than mere speculation that specific additional documents exist and are relevant to the substantial issues in dispute.

55. The Defendant has already produced those documents which are reasonably accessible. To even attempt to answer the requests and provide further information and documentation the Defendant will need to extract data from multiple departments and multiple depositories which have undergone system upgrades and changes. This makes the task onerous and time consuming. Mr. Loiselle, Director, Application Services, with the Defendant, estimates that it would take a research project of approximately three months to determine what information can be retrieved and what type of mechanisms or specialized extracts would need to be created in order to answer these requests. This is a significant burden to place on the Defendant.
(Affidavit of John Loiselle – paragraphs 7 and 8)

56. Overall, the Plaintiff's requests do not meet any of the guidelines outlined in the Sedona Guidelines relating to proportionality, specifically:

- The Defendant has already produced 'reasonably accessible' documentation;
- It would be very time consuming and costly for the Defendant to search this data and the likelihood of any relevant information being produced is low;
- The information requested may not even exist. In particular, the Defendant did not require claims examiners to track whether claimants were referred by the Defendant to medical providers or whether the claimants (or treating physicians) chose the medical provider;
- The Plaintiff has not demonstrated a sufficient need or that the information is of sufficient relevance to require a significant effort from the Defendant to reply to the requests;
- The information requested is not important to the key issues in the claim, namely the Defendant's actions toward the Plaintiff; and
- The quantity, uniqueness and quality of data which would be produced does not justify the cost of the acquisition of that data.

COURT'S ANALYSIS AND CONCLUSIONS

(Request of an order for a Defendant's greater disclosure)

[34] The Court has analyzed and put in the balance the above quoted and opposed positions of the parties.

[35] More specifically, the Court has read the cases to which both parties have referred and has given a particular attention to the various and often competing principles, objectives and concerns that come in play when faced with issues of pre-trial disclosure in civil actions.

[36] The Court has then taken into consideration and compared the facts proper to each of these above quoted cases with the facts, circumstances and actual pleadings proper to the case at bar.

[37] When considering the Plaintiff's proposed " Amended Statement of Claim" [Form 16 A - Exhibit L to the Affidavit of the Plaintiff - page 167 of the Record on Motion] , and more specifically it's disputed parts [sub-clauses 20 (o) and 20 (p)] and that this Court has now allowed , the Court finds that all these allegations, do contain references to facts that have been confirmed to be material facts or material issues to be brought before the Court in legal actions alleging bad faith against insurers.

[38] Furthermore, once it has been determined that allegations in a pleading do indeed refer to issues or facts that are material to a claim, it should follow that evidence (documents or answers) that would relate to these material facts or issues should prima-facie be accessible to the parties in a pre-trial discovery, unless there is some form of privilege or other exception rule for non-disclosure or non-production.

[39] At bar what the Plaintiff is seeking from the Defendant, in terms of document disclosure and answers, falls squarely within what this Court finds to be documents and information relating to the issues and facts that are material to the bad faith claim made by the Plaintiff.

[40] This Court will grant the Defendant's argument that the information (documents and answers) that the Plaintiff presently seeks from the Defendant, may never ultimately confirm the Plaintiff's allegations of bad faith and could even ultimately end up being declared irrelevant at Trial. However at this point in time in the procedure (pre-trial discovery), the test is one of simple "relation" or "relating" [Rules 31.02(1) and 32.06 (1)] not one of "definitive or absolute relevancy".

[41] The Court is also of the opinion that, pursuant to Rule 31.02 (2) of the Rules of Court, all the Defendant's documents, relating to the present action, whether "hard copies" or stored electronically, shall be disclosed to

the Plaintiff and eventually produced for inspection if requested, with the exception however of those documents or their parts thereof, containing confidential or privileged information.

[42] The Defendant has raised the argument that the information, requested by the Plaintiff, is not made within an action where the Plaintiff is suing in a representative capacity. The Defendant ads that consequently, the conduct of the Defendant, towards other insured's, would not be relevant. The Court simply does not agree with that submission.

[43] The case law makes it clear that a Court, in dealing with a Bad Faith claim against an insurer an even more so when the allegations are ones of systemic Bad Faith, will not limit its enquiry to the insurer's specific conduct with the specific Plaintiff.

[44] The Courts are interested in knowing if, what happened to the insured Plaintiff, was an isolated thing or if there was indeed, as alleged by the Plaintiff, an insurer's general conduct with these types of insurance claims.

[45] It will accordingly be legitimate for a Plaintiff at the discovery or pre-trial stage, and eventually for a Court at the Trial stage, to look at evidence of how the insurer has conducted itself with other insured. The Court actually

has difficulty figuring how it could be otherwise. The same would apply irrespective of whether we have one or a multiplicity of Plaintiffs.

[46] In further dealing with another Defendant's arguments this time the one to the effect that: "The Court should not allow the Plaintiffs to go on fishing expeditions into how the insurers have handled other claims simply based on unsubstantiated assertions in the Statement of Claim", the Court shall comment that this argument apparently ignores the principle that allegations, made in a Statement of Claim, shall be treated as true and the pre-trial disclosure of documents and discovery of parties shall proceed on that basis.

[47] In dealing with a further Defendant's argument, to wit the "proportionality analysis", pursuant to the recently adopted Rule 1.02.1 of the Rules of Court, this Court shall mention that it is comfortable and satisfied about the fact that what is at stake in the present proceedings and the importance and complexity of the issues raised in this action, do not at all make it overly or disproportionately onerous for the Defendant to be required to provide the information and answers at issue.

[48] Briefly put, in considering the stakes in the case at bar and in weighing, on the one hand, the actual apparent degree of connection..... (documents or information which relate to a matter in issue) and on the other hand the

possibility that these Defendant's documents and answers, if provided, may ultimately not yield anything relevant or supportive of the Plaintiff's allegations, the Court is of the opinion that the balance shall tilt in favour of disclosure as requested by the Plaintiff.

[49] Furthermore and still on a general basis, when comparing, on the one hand, the potential benefits for the Plaintiff and eventually for the Court in having access to these Defendant's documents and answers and, on the other hand, the significance of the efforts and manpower and expenses that may be required from the Defendant if required to produce same, the Court again finds that the Plaintiff's position should prevail.

[50] With this paragraph that could be qualified as an "Obiter Dictum", this Court shall add that it takes judicial notice that the insurance industry and its member insurers, like the Defendant at bar, do regularly prepare and make use of reports and statistics when same serve their needs or are otherwise required by law. If the Defendant has not yet found a way to easily retrieve and make available to potential Plaintiffs, the information that is presently at issue, it is time for the Defendant, and for that matter the other insurers alike, to develop the necessary computer programs or software.

FINAL DISPOSITION

[51] The Court then generally grants to the Plaintiff the remedies sought at items 2 and 3 a) to 3 d) as sated at page 2 of the Plaintiff's Notice of Motion, the same as reproduced earlier under paragraph 14 of this Decision.

[52] More specifically, the Court orders that same documents and answers be provided to the Plaintiff's lawyers, on or before October 1st, 2014, unless in the interim the Defendant is either granted an extension of time or is granted a partial exemption from disclosure.

[53] The Court will indeed keep open for consideration the possibility that some information or parts thereof would otherwise be subject to an obligation of confidentiality or to a privilege. If such an exemptions is felt needed it shall however be requested by the Defendant on its own motion to the Court.

ASSESSMENT AND AWARD OF COSTS

[54] The Court awards costs to be paid to the Plaintiff by the Defendant that are assessed at 3,000 dollars plus admissible disbursements.

DIRECTION TO DRAFT AN ORDER

[55] The Court asks the Plaintiff's lawyer to draft an Order that will essentially reproduce what the Court has ordered in paragraphs: 26, 51, 52 and 53 to this Decision.

DATED at Moncton, New Brunswick this 14th day of April, 2014.

Zoël Dionne
Judge of the Court of Queen's Bench
of New Brunswick