

ONTARIO COURT RELIES ON ANCIENT COMMON LAW PRINCIPLES TO UPHOLD INSURER'S RIGHT TO TAKE POSITION CONTRARY TO ITS INSURED

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In *Buset v. Dominion of Canada General Insurance Co.* (2005), 77 O.R. (3d) 457 a decision of the Superior Court of Ontario delivered August 12, 2005, the court granted the insurer's motion to consolidate an action brought by its insured under the uninsured/underinsured provisions of the *Insurance Act* with an action brought earlier by that same insured against tortfeasors who allegedly caused the accident. The Plaintiff, insured, commenced a separate action against her insurer when the tortfeasor defendants raised a limitations issue (which may have been unfounded). The Plaintiff then sought an order to stay the action against her insurer, pending judgment against the tortfeasors, which the Plaintiff would then present to her own insurer if the tort defendants prove to have been uninsured or underinsured.

The Plaintiff relied heavily on the principle established in *Waterloo Insurance Co. v. Zurbigg* (1983), 43 O.R. (2d) 219, which holds that an insurer cannot seek to be added as party in an action between its insured and an alleged uninsured tortfeasor, primarily because of the principle that an insurer must not take position against its own insured.

In distinguishing this case from the Court of Appeal decision in *Waterloo*, Justice Wright pointed out that in the present case the insured herself initiated litigation against her insurance company by bringing the suit against it. Justice Wright also noted that the principle, that an insurer must not take position against its own insured, had been weakened heavily by both judicial decision and legislation. In conclusion, Justice Wright called for the Court of Appeal to re-visit the case of *Waterloo*, and its principles which restrict the insurer's ability to partake in actions brought by its insured, under the guise of not taking an adverse position to same.

In granting the insurer's motion to consolidate the two actions, and dismissing the Plaintiff's motion to stay the proceeding against its insurer, the court relied heavily on the principle from the ancient feudal document known as the Magna Carta¹, that no person shall be condemned without a lawful hearing.

Interestingly, while the original Magna Carta did include some principles of judicial fairness, these "privileges" were never intended to apply to all levels of society. Similarly, many Ontario court decisions, including the *Waterloo* case, could be seen as

¹ This historical Charter, sealed by King John of England on June 15, 1215, which proclaimed that the King too was subject to the laws of his land, served as a foundation for the codification of civil liberties in many common law jurisdictions, starting with England, where the spirit of the *Magna Carta* was reflected in the 1628 *Petition of Rights*, championed by a famed lawyer, Sir Thomas Coke.

promoting separate standards of judicial fairness for the insured and insurers. It is hoped that this decision signals a favourable turn in the tides of judicial opinion, towards treating insurance companies as regular corporate citizens in the courts of this country.

