

## Does Adverse Costs Protection Insurance negate requiring Security for Costs?



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What is Adverse Costs Protection Insurance? Adverse cost coverage is also known as “legal costs protection”. It provides coverage to litigants who face paying costs to a successful opponent on motions, from pre-examination for discovery to a trial. It can also protect litigants from potential expenses not covered by the contingency fee agreement. I know that I now ask for a copy of the policy from Plaintiffs at discovery, and to date, have been refused a copy of the insurance policy and declaration page. This appears to be contrary to the requirements within the *Rules of Civil Procedure* but that issue will be addressed in a future paper. However, in *Shah v. Loblaw Companies Limited*, a recent 2015 decision of Lemon J, the issue that was addressed was whether having Adverse Costs Protection Insurance negates the need for pursuing an order for Security for costs.

In *Shah*, the Plaintiff allegedly had a slip and fall in a Real Canadian Superstore. When the accident occurred, he was a permanent

resident of Canada. However, at the time of the incident, he had already made plans to fly back to India for a visit. He alleges that he was not aware that he had fractured his shoulder and decided not to postpone his trip. However, when he was in India, he underwent surgery on his shoulder. When he returned back to Canada, he continued to undergo care and treatment in Ontario. The Plaintiff’s permanent residency card was set to expire and although he tried to renew it, it was not renewed before the expiration and therefore, he returned back to India. At the time of the motion, he was still awaiting to hear about the status of his permanent resident card. The Plaintiff alleged that he had no income and was not receiving any pension.

However, when the Defendants and Third Party advised that they were seeking an order for security for costs, the Plaintiff obtained a Legal Protection Certificate and Indemnity Agreement. Although *Shah* goes through the analysis of

what is required to secure an order for security for costs, I will only be focusing on the interplay between the Adverse Costs Protection Insurance and the order for security for costs.

Mr. Shah argued that the Adverse Protection Insurance plan obtained from BridgePoint would “provide sufficient security for the defendants”. Lemon J. disagreed. The policy contained a number of exclusions, which Lemon J. outlined:

- a) The plaintiff does not accept his counsel’s recommendation to accept an offer to settle;
- b) The plaintiff changes counsel and BridgePoint does not agree with the new counsel;
- c) The plaintiff decides to represent himself;
- d) Failure to attend a defence medical examination;
- e) Failure to advise of an adverse cost award within 15 days;
- f) The contingency fee agreement entered into between the plaintiff and his counsel will not be materially amended during the

pursuant of the plaintiff’s claim;

- g) The plaintiff’s counsel’s professional opinion must be that there is a greater likelihood that the plaintiff will have a successful claim;
- h) The plaintiff provides BridgePoint materially mis-leading information;
- i) The plaintiff fails or delays to provide instructions to or fails to cooperate with counsel; and
- j) If the plaintiff or counsel abandons any or all of the plaintiff’s claim.

Accordingly, it was found that the policy could be cancelled at any point in the litigation. The “policy provides no protection to the defendants in the event of an adverse cost award should the matter proceed to trial”. Furthermore, it was found that misrepresentations were made about the state of the examinations for discovery when the policy was secured. The policy was issued with the understanding that discoveries had not taken place. However, discoveries had already commenced a year before the policy was obtained. Therefore,

Lemon J was concerned that other misrepresentations made have been made to secure the policy, which may negate it.

Therefore, Lemon J found that

1. The Plaintiff resides in India and had no immediate intention to return to Canada;
2. The Plaintiff had not made full disclosure of his financial circumstances; and
3. The Plaintiff had an Adverse Protection Insurance plan that does not appear to be of assistance to the defendants.

Accordingly, an order for Security for Costs was granted to the Defendants. However, the order was not made in favour of the Third Parties, because it was found that the Plaintiff did not sue the Third Party and was not responsible for joining them into the case.

This case supports that Adverse Protection Insurance Plans are not a “golden ticket” for pursuing litigation, given the number of exclusions contained within the policies and the possibility that it could be voided at any time.