*Case Name:*

# Mamaca (Litigation Guardian of) v. Coseco Insurance Co.

**Between**
**Ozcan Mamaca, by his Litigation Guardian, Ahmet Mamaca,**
**Plaintiff/Respondent, and**
**Coseco Insurance Company, Defendant/Appellant**

[2007] O.J. No. 4899

162 A.C.W.S. (3d) 578

56 C.C.L.I. (4th) 103

50 C.P.C. (6th) 194

2007 CarswellOnt 8133

Court File No. 01-CV-215026CM3

Ontario Superior Court of Justice

**J. Macdonald J.**

Heard: November 1 and 28, 2007.
Judgment: December 13, 2007.

(44 paras.)

*Civil procedure -- Discovery -- Production and inspection of documents -- Affidavit or list of documents -- Inspection by Court -- Objections and compelling production -- Privileged documents -- Documents prepared in contemplation of litigation -- Appeal by defendant insurer from Master's rejection of claim that litigation privilege applied to certain documents denied -- Despite legal errors in Master's summary of applicable law, applicant failing to satisfy burden of proving documents were prepared for dominant purpose of anticipated litigation.*

*Civil procedure -- Appeals -- From Master's decisions -- Appeal by defendant insurer from Master's rejection of claim that litigation privilege applied to certain documents denied -- Appeal by defendant insurer from Master's rejection of claim that litigation privilege applied to certain*

*documents denied -- Despite legal errors in Master's summary of applicable law, applicant failing to satisfy burden of proving documents were prepared for dominant purpose of anticipated litigation.*

Appeal by defendant insurer, Coseco Insurance Company ("Coseco") from a Master's rejection of its claim that litigation privilege applied to certain of its documents including portions of its claims file -- The respondent was insured by Coseco for accident benefits pursuant to a motor vehicle liability policy -- Following a motor vehicle accident, the respondent sought a claim for income replacement benefits, a substantial part of which was rejected -- The respondent commenced an action against Coseco for damages for bad faith, and Coseco's affidavit of documents asserted that litigation privilege applied to numerous of its documents -- The Master held that the appellant did not have a reasonable apprehension of litigation as of the date upon which Coseco rested its assertion of litigation privilege and that Coseco failed to prove that the documents were prepared for the dominant purpose of litigation -- HELD: Appeal dismissed -- Notwithstanding the Master's legal errors in summarizing the relevant case law, his comprehensive written reasons demonstrated that Coseco failed to meet its burden of proving that the documents were prepared for the dominant purpose of the anticipated litigation -- The Master gave detailed consideration to Coseco's diffuse and somewhat contradictory assertions of the various dates it reasonably anticipated litigation -- Furthermore, the Master's erroneous conclusion that Coseco did not reasonably anticipate litigation on the date upon which Coseco rested its assertion of litigation privilege did not change the fact that the documents were prepared after that date -- The Master did not err in holding that a two step procedure should apply to the adjudication of Coseco's litigation privilege claim in the circumstances and that Coseco bore the burden of proof in respect of each step as the Master had the discretion to follow either a one step or a two step procedure -- As the Master had concluded that litigation privilege had not been established, it was unnecessary to conclude that the documents contained prima facie evidence of bad faith upon review.

**Statutes, Regulations and Rules Cited:**

Rules, Rule 30.04(6), Rule 30.06(d)

**Counsel:**

*Mr. G. Karahotzitis* and *Mr. M.L. Bennett* for the Plaintiff/Respondent.

*Mr. T.P. Charney* for the Defendant/Appellant.

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**J. MACDONALD J.**:--

**INTRODUCTION:**

**1** The defendant/insurer (the appellant) appeals the Master's rejection of its claim that litigation privilege applies to certain of its documents, including portions of its claims file.

**2** The plaintiff (the respondent) is insured by the appellant for statutory accident benefits pursuant to a motor vehicle liability policy. The respondent was injured in a motor vehicle accident on August 21, 1998. He applied for income replacement benefits (IRB) on September 22, 1998, as well for other accident benefits. The appellant rejected a substantial part, but not all of the respondent's IRB claim. The respondent sues the appellant for damages for bad faith in dealing with his IRB claim. The appellant's affidavit of documents asserted that litigation privilege applies to numerous of its documents.

**3** In detailed written reasons, the Master held that the appellant did not have a reasonable apprehension of litigation as of August 3, 1999, the date upon which the appellant now rests its assertion of litigation privilege. The Master held that the date that litigation privilege commenced was September 5, 2001. The appellant has produced to the plaintiff all of the documents which were in dispute up to and including August 2, 1999. The remaining documents which are the subject of this appeal are described in Schedule B of the appellants affidavit of documents as:

i. Loss Advice Report of Kathy Metzger re handling of disputed items and setting of reserves dated December 30, 1999;
ii. Memorandum from Kathy Metzger to Rob Landriault re handling of disputed items and setting of reserves dated January 11, 2000;
iii. Status Report of Patricia Riopelle re handling of disputed items and setting of reserves dated November 29, 2000;
iv. Adjuster Note Pad entries on and after August 3, 1999;

The Master also held that the appellant had failed to prove that documents prepared on and after August 3, 1999 were for the dominant purpose of litigation.

**THE MASTER'S ANALYSIS OF THE LAW:**

**4** The Master summarized some of the law relating to litigation privilege. Leaving aside the cases cited, his summary is generally an accurate statement of the issues addressed. However, contained in the summary are two propositions which I consider to be erroneous, as follows.

**5** In discussing litigation privilege, the Master stated that:

> "[a]fter determining that there is a real prospect of litigation reasonably supported by the evidence, the question then is whether the dominant purpose of the documents in question was to investigate the accident and the claim or to assist the defendant in the contemplated litigation.

> It would not be sufficient to establish that the ongoing investigation and resulting documents were for the dual purpose of claims assessment and anticipated litigation. The dominant purpose must be to assist anticipated litigation".

**6** With respect, I am of the view that this statement is in error for two reasons. Firstly, in stating the question, the Master assumed that there is a distinction between investigating the accident and the claim on one hand, and assisting in contemplated litigation on the other. In my view, the assumption that investigation of the accident and claim cannot be for the purpose of assisting in contemplated litigation is inaccurate. Anticipating litigation, or retaining counsel to act in that litigation may give rise to investigation of the accident and the claim which is for the dominant or exclusive purpose of preparing for trial. Documents prepared as a result of that investigation would also be for the dominant or exclusive purpose of preparing for trial, and subject to litigation privilege. Secondly, the Master's reasons may be read as stating that, if documents have a dual purpose, that may prevent them from having the dominant purpose of assisting in anticipated litigation. If that is what the Master intended to say, I respectfully disagree. If an investigation and the reports about it have a dual purpose, one of which is to assist in anticipated litigation, the duality of purpose does not mean that litigation privilege cannot exist. A document may be prepared for a multitude of purposes and, if the dominant purpose is to assist in anticipated litigation, then litigation privilege applies to the document: *Waugh v. British Railways Board* [1979] 2 AII E.R. 1169 (H.L.) at pp. 1173-74.

**7** The second difficulty in the Master's analysis of the law of litigation privilege is this. In addressing the duties of an insurer and the relevance of its claims file in a bad faith claim, the Master stated:

> "The only way that an insured can ascertain whether his claim was treated in good faith is by production of the insurer's internal file and other information available to it, thereby indicating how it handled the investigation and determined whether to honour the claim. This makes almost every document in the insurer's file critical and relevant to the issue of bad faith if properly pleaded".

Subsequently, in a conclusory paragraph, the Master returned to the aforesaid concept, asking rhetorically,

> "[h]ow can the plaintiff test whether the insurer's ongoing assessment (of the plaintiff's claim) is being conducted in good faith without access to the documents" (parenthesis added).

The authority cited by the Master for this concept is *Samoila v. Prudential of America General Ins. Co. (Canada) et al.*, (2000), 50 O.R. (3d) 65 (S.C.J.).

**8** In *Samoila*, the plaintiff sued for damages for bad faith because his insurer pursuant to a motor vehicle liability policy had stopped payment of accident benefits for a period of four years. The plaintiff sought production of the entire claims file. The insurer asserted litigation privilege in respect of these documents. The insurer was ordered to produce the "entire claims file, including anything and everything in the file during the period that the company maintained its refusal to pay", on the authority of *Berguson v. National Surety Corporation*, 112 F.D.R. 692 (1986 U.S.D.C., Montana). In that case, District Judge Lovell held at p. 697 that the insurance company's claims file constituted the only source of information about what the insurer knew, the way in which the decision to deny the claim was made and whether there was a good faith basis for the decision to deny. Judge Lovell quoted from another U.S. case holding that the insurer's claims file is a "unique contemporaneously prepared history of the company's handling of the claim ...", and that, in a bad faith claim against the insurer, there is an "overwhelming" need for the information in the claims file.

**9** These views about the problems faced by plaintiffs in proving bad faith claims were accepted in *Samoila*. However, the analysis did not consider litigation privilege, including the important purpose which the privilege serves. The decision rested entirely on the importance of the plaintiff knowing the contents of the insurer's claims file in a bad faith claim. Stated differently, the analysis rested entirely upon the relevance of the documents in issue.

**10** In *Davies v. American Home Assurance Co.* (2002), 60 O.R. (3d) 512 (Divisional Court) Blair J. (as he then was) held at paragraph [44] that litigation privilege, when properly asserted, trumps relevance in almost all circumstances. He explained why in paragraph [34], citing a lecture by R. J. Sharpe (now Sharpe J.A.) entitled "Claiming Privilege in the Discovery Process" in Law in Transition: Evidence, LSUC Special Lectures (Toronto: De Boo, 1984) at pp. 164-65, which states in part that the purpose of litigation privilege

> "... is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate ...".

**11** Litigation privilege, when properly asserted, will shield an insurer's claims file from disclosure despite the fact that the documents therein are highly relevant to the plaintiff's bad faith claim. It is not correct that, in the Ontario context, a plaintiff's need for disclosure of the claims file in a bad faith claim is "overwhelming". Specifically, the relevance or importance of that information to a plaintiff seeking to prove bad faith does not overwhelm litigation privilege. It is the opposite, as Blair J. held in *Davies (supra)*: litigation privilege overwhelms or "trumps" relevance in most cases, even if that deprives the plaintiff of necessary proof.

**12** In addition, I am satisfied that the Master erred in holding that disclosure of the claims file is the "only way" for a plaintiff to ascertain bad faith and, I take him to say inferentially, to prove it. In *Blank v. Canada (Minister of Justice)* [2006] 2 S.C.R. 319, the Supreme Court of Canada

considered litigation privilege. In determining the proper scope and duration of the privilege, Fish J. for the majority held at para. 44 that litigation privilege:

> ... would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct.

In addition, Fish J. held that litigation privilege:

> ... is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

**13** How then does a plaintiff, asserting bad faith against an insurer which asserts litigation privilege over documents which are relevant to the bad faith claim, have the means of gaining access to those documents? It is not by subjugating litigation privilege to the plaintiff's unproven allegations of bad faith, or by subjugating it to the need for disclosure of the documents to discover whether bad faith exists. As Fish J. explained in para. 45:

> [e]ven where the materials sought would otherwise be subject to litigation privilege, the party seeking disclosure may be granted access to them upon a prima facie showing of actionable misconduct by the other party ... .

The majority of the Supreme Court would not have put this burden of *prima facie* proof on, for example, a plaintiff in a bad faith claim against the plaintiff's own insurer, if it shared the view that bad faith cannot be established except by disclosure of the very documents in issue.

**14** Where the party asserting litigation privilege has established that documents such as those in an insurer's claim file are subject to litigation privilege, that privilege must be respected, with the result that the documents will not be disclosed despite their relevance and importance, subject to this. A party seeking disclosure of those privileged documents bears the burden of establishing *prima facie* actionable misconduct by the party which has established the privilege. If the party seeking disclosure of documents which are subject to litigation privilege makes a *prima facie* showing of actionable misconduct by the party which established the privilege, and that misconduct is in relation to the proceedings with respect to which the litigation privilege was claimed, disclosure of the documents may be ordered despite the privilege. An insurer's bad faith in the handling of its insured's accident benefits claim is actionable misconduct.

**15** This approach balances litigation privilege on the one hand, and allegations of bad faith against the party claiming the privilege on the other hand, and provides a principled basis for the disclosure of privileged documents. The *Blank* decision therefore overrules the conclusion in *Samoila* [*supra*] that, in bad faith claims between insured and insurer, the nature of their relationship, the insurer's responsibilities and the insured's need for proof of bad faith are a sufficient basis for ordering disclosure of the insurer's claims file, despite its assertion of litigation privilege.

**16** The appellant also submits that the Master erred in following a two step approach to the determination of litigation privilege. The two steps were:

a) On what date was there a reasonable apprehension of litigation?
b) For each document prepared after that date, was the dominant purpose in preparing the document to assist in the apprehended litigation?

**17** In my opinion, the Master did not err in holding, in the circumstances of this case, that a two step procedure should apply to the adjudication of the appellant's litigation privilege claim.

**18** In addition, despite the appellant's submission to the contrary, the Master did not err in holding that the appellant bore the burden of proof in respect of each step.

**19** In *General Accident Assurance Co. et al. v. Chrusz et al.* (1999), 45 O.R. (3d) 321 (C.A.), Carthy J.A., delivered the majority reasons in respect of litigation privilege. At pages 338 and 339 he described two different ways in which litigation privilege may be established, as follows:

> ... [l]itigation privilege attached to communications ... so long as such litigation was contemplated. The dominant purpose test was satisfied.

Subsequently, Carthy J.A. noted that on May 23, 1995, new litigation was contemplated, and then stated:

> ... [a]ny communications or reports ... after May 23 1995, whose dominant purpose was directed to the litigation now before us are protected by litigation privilege. ...

Carthy J.A.'s reasons therefore contemplated both a one step and a two step process of analysis in litigation privilege claims.

**20** The appellant submits that *Chrusz* [*supra*] was not an accident benefits claim and, in an accident benefits claim, a one step process should be required. Consequently, if the insurer demonstrates that it reasonably anticipated litigation as of a particular date, it should not bear the burden of proving that each document prepared thereafter was for the dominant purpose of the anticipated litigation. The appellant submits that, once it establishes that it had a reasonable apprehension of litigation, every document prepared thereafter should be presumed to be subject to litigation privilege unless the respondent establishes that litigation privilege does not apply.

**21** The Master or Judge who decides a litigation privilege claim has the discretion to follow either a one step or a two step procedure, depending on the circumstances of the case. This follows from Carthy J.A.'s analysis in *Chrusz* [*supra*]. In some cases, it will be appropriate to infer, from the evidence in the case, that litigation privilege applies to documents prepared after litigation was reasonable anticipated. For example, there may be only one issue in dispute between litigants and,

after litigation of that one issue was reasonably anticipated, there may have been no other subject addressed by the party asserting litigation privilege in its documents relating to the adverse party. In determining whether litigation privilege applies in this circumstance, it would be reasonable to require the party asserting litigation privilege to establish when litigation was reasonably anticipated, and then to infer that all documents prepared after that in relation to the one issue are subject to litigation privilege. That is the one step process.

**22** In other circumstances, there may be numerous issues between parties with only one of those issues being the subject of a reasonable apprehension that it will be litigated. This case is an example. The appellant is the respondent's accident benefits insurer and also the insurer responsible for defending his tort claim. In respect of accident benefits claims, the appellant has accepted and is paying a number of different types of ongoing claims, while rejecting and defending against only part of the respondent's claim that he is entitled to IRB's. In its documents relating to the respondent, the appellant has addressed many more issues than just IRB's for the time in dispute. The appellant's documents relating to the respondent which were prepared after it apprehended litigation may relate to the IRB claim which is in litigation, or to other claims which are not in litigation because it is paying those claims. In this circumstance, it is a reasonable exercise of discretion to use a two step process for the determination of litigation privilege, putting the burden of proof in each step on the person asserting litigation privilege.

**23** The appellant accepts that the person asserting litigation privilege bears the burden of leading evidence to establish when litigation was anticipated. It objects to the two step process, and also to bearing the burden of establishing in the second step that each document was prepared for the dominant purpose of the anticipated litigation. In my opinion, if the two step procedure is followed as it was here, the party asserting litigation privilege properly bears the burden of proof in each step. Why? In *Snell v. Farrell*, [1990] 2. S.C.R. 311 at p. 328, Sopinika J. for the court reached to old authority and gave it new relevance. He cited with approval Lord Mansfield's statement in *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969 at page 970 that:

> it is certainly a maxim that all evidence is to be weighed according to the proof which was in the power of one side to have produced, and in the power of the other to have contradicted.

Included in the cases which Sopinka J. cited as examples of this principle is *Pleet v. Canadian Northern Quebec Railway Co.* (1921), 64 D.L.R. 316 (Ont. S.C. App. Div.) where Ferguson J.A. for the court held at page 320:

> No doubt the general rule is that he who asserts must prove, and that the onus is generally upon the plaintiff, but there are two well known exceptions:
>
> (1) that where the subject-matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, whether

it be of an affirmative or negative character: *Mahony v. Waterford Limerick and Western R.W. Co*., [1900] 2 I.R. 273 at page 280; *Kent v. Midland R.W. Co*. (1874), L.R. 10 Q.B. 1.

(2) that he who relies on an exception to the general rule must prove that he comes within the exception: *Ashton & Co. v. London and North-Western R.W. Co.*, [1918] 2 K.B. 488; *London and North-Western R.W. Co. v. Aston & Co*. [1920] A.C. 84.

The Master was correct that the appellant bore the burden in each step of the two step process.

**THE INSURER'S DENIAL:**

**24** The appellant submits that its denial of IRB's on August 3, 1999 and the reasons which it gave for that denial clearly establish that it reasonably anticipated litigation on that date, and that the Master erred in rejecting this position. When denying IRB's, the appellant stated that a doctor had reported matters consistent with the respondent malingering, surveillance of him disclosed a lack of injury, and he had engaged in activities which were inconsistent with his injury claims.

**25** A denial of a claim may or may not establish that litigation was anticipated on that date, depending upon the evidence in a particular case. In this case, the Master looked at the whole of the evidence, including the appellant's conduct after its denial, and concluded that the appellant had not established a reasonable apprehension of litigation as of August 3, 1999. The Master was required to consider the whole of the evidence and clearly, he did not err in doing so.

**MISAPPREHENSION OF EVIDENCE:**

**26** The appellant argues, however, that the Master misapprehended the nature and effect of the evidence which he relied upon in holding that the date of the appellant's denial, August 3, 1999, was not the date upon which it reasonably apprehended litigation.

**27** The Master's determination in this regard appears to rest on four conclusions:

1) On the same day that it denied the IRB claim, the appellant scheduled a medical examination of the respondent;
2) After denying the IRB claim, the appellant continued to request medical information about the respondent;
3) After denying the IRB claim, the appellant continued to request income information about the respondent; and
4) As late as December 1, 2000 (16 months after the denial), the appellant stated that it had not determined whether to pay IRB's.

**28** I have concluded that the Master misapprehended the evidence. The appellant was dealing with a number of ongoing accident benefits claims by the respondent which it was paying, as the

necessary documentation was received. The appellant was dealing with only one claim which, it asserted, gave rise to a reasonable apprehension of litigation. It is correct that the appellant scheduled a medical examination on the same date that it issued its denial to the respondent. However, several weeks before this, the respondent's former solicitor had requested this examination and the insurer had agreed to it. The multitude of issues between insurer and insured limits the effect of this arrangement on the question of whether the appellant reasonably apprehended on August 3, 1999 that the denied IRB claim would be litigated.

**29** The Master's reliance on the appellant's requests for information relevant to the IRB claim was misplaced. That is because, after it denied certain IRB's, the appellant still had to adjust and pay that portion of the claim which it had not denied, but in which there was an issue between the parties about the respondent's income. The Master erred in failing to relate the request for income information to the undenied portion of the IRB claim, and in regarding the request as indicating that the appellant was continuing to adjust the denied portion of the claim, and thus did not reasonably anticipate that it would be litigated.

**30** The Master also stated that as late as December 1, 2000, the appellant had stated that it had not decided whether to pay IRB's. This was one basis for the Master's conclusion that the appellant did not anticipate litigation of the claim as of August 3, 1999. There is some confused correspondence between the respondent's former solicitor and the appellant which led to the appellant's letter of December 1, 2000 containing the statement which the Master accepted as indicating that it had not yet denied the IRB claim. If this were the only issue, I would defer to the Master's fact finding.

**31** The appellant's denial of IRB's on August 3, 1999 was clearly stated. It rested its denial on strong assertions said to be backed by expert and investigative evidence in its possession. As of August 3, 1999, the appellant was unequivocal in rejecting the respondent's claim. I do not understand the Master to have disagreed with that view of the evidence.

**32** The Master held that evidence of the appellant's conduct after August 3, 1999 showed that it had not rejected the respondent's claim, and therefore the appellant's position of August 3, 1999 did not establish that it reasonably anticipated litigation of the respondent's claim as of that date. I have reviewed the evidence with deference for the Master's fact finding. All of the evidence is written evidence. Assessing its meaning and effect does not require assessment of *viva voce* evidence. I am satisfied that the Master misapprehended the appellant's actions after August 3, 1999 and, as a result, that it is clear that he erred in concluding that the appellant did not reasonably anticipate litigation of the denied IRB claim as of August 3, 1999.

**THE DOCUMENTS IN ISSUE:**

**33** In relation to the date of August 3, 1999, the Master held:

> ... if the (appellant) reasonably anticipated litigation as a result of the August 3rd denial, it is clear that the (appellant) continued to investigate and assess the

> (respondent's) claim for IRB's and there is no evidence whatsoever that the documents produced as a result of that investigation were for the dominant purpose of litigation. ...
>
> Again, the onus was on the (appellant) asserting privilege to provide evidence of dominant purpose. This it has failed to do. (Parentheses added)

**34** This extract from the Master's reasons addresses both his erroneous conclusion that litigation was not reasonably anticipated as of August 3, 1999, and his conclusion that the appellant failed to prove that the dominant purpose of documents prepared after that date was for the litigation. I see no error in the second conclusion. I do not accept the appellant's argument that the Master must have overlooked the evidence in the affidavit of documents because he made no mention of it. The appellant did not file an affidavit from one of its employees with knowledge of its actions. The evidence which it relied upon consisted primarily of an affidavit from a law clerk in the employ of its counsel. It also relied on the transcripts of the examinations for discovery. In my view, the appellant relied on relatively thin evidence and there is no error in the Master's conclusion that it simply failed to meet the burden in respect of the documents which are in issue in this appeal.

**CONCLUSION:**

**35** The Master gave detailed consideration to the appellant's diffuse and somewhat contradictory assertions of various dates when it reasonably anticipated litigation. Having properly determined that litigation privilege issues in this case were best determined by means of a two step procedure, the Master's erroneous conclusion that the appellant did not reasonably anticipate litigation on August 3, 1999 does not change the fact that the documents in issue were prepared after that date, and the appellant failed to meet its burden of proving that they were prepared for the dominant purpose of the anticipated litigation.

**36** I am satisfied that the legal errors in the Master's summary of the relevant law did not affect the outcome. The Master gave detailed consideration to the evidentiary issues. His comprehensive written reasons demonstrate that the appellant failed in its litigation privilege claim because it failed to meet the applicable burden of proof.

**37** Since the Master did not err in dismissing the claim of litigation privilege in respect of the documents remaining in issue, it will not be necessary to address the question of whether, pursuant to the *Blank* decision [*supra*], the respondent can make out a *prima facie* case of actionable bad faith against the appellant. Consequently, I think it is advisable to address now one other issue which arose in the hearing before the Master. The Master requested the opportunity to review the documents for which litigation privilege was claimed. The appellant agreed and provided the documents. The appellant did not have an opportunity to address the question of whether these documents contain evidence of bad faith on its part.

**38** Without hearing submissions on the bad faith issue, the Master released his reasons which refer to the *Blank* decision and to Fish J.'s further statement in para. 44 that the court may review the materials to determine whether their disclosure should be ordered on the basis of bad faith. The Master then purported to find "*prima facie* evidence of bad faith". This finding was unnecessary because the Master found that litigation privilege was not established.

**39** It is most unfortunate that a finding of *prima facie* evidence of bad faith, a serious finding from the appellant's perspective, resulted from a hearing in which the appellant did not have the requisite opportunity to make submissions on that issue. The Master's conclusion that the documents in issue contain *prima facie* evidence of bad faith cannot stand. Since the documents are not subject to litigation privilege, the parties are now able to address the issue of bad faith in the usual fashion.

**40** Rules 30.04(6) and 30.06(d) give the court jurisdiction to inspect documents in the circumstances in issue. The appellant consented to the Master reviewing the documents so I do not think that I need to state and address these rules. However, I wish to address what I think is the preferred course in hearing and deciding litigation privilege claims when there is an assertion that actionable misconduct by the party asserting litigation privilege should result in disclosure of the documents in issue. I think the preferred course is to determine first whether litigation privilege exists, and not to combine that hearing with a hearing in which the party seeking disclosure attempts to prove a *prima facie* case of actionable misconduct. Of course, if the party asserting litigation privilege fails to prove that it applies, there is no need for a "misconduct hearing". If litigation privilege is established, a separate hearing to determine whether there is a *prima facie* case of actionable misconduct avoids the risk of procedural unfairness, and the substantive risk of the separate issues being merged in a fashion which could deprive litigation privilege of its proper role in the adversarial process. Rules 30.04(6) and 30.06(d) may well play a role in the resolution of these issues. However, I would think that their proper role should be determined by reference to the adversarial process, and to the fact that Masters and Judges are not engaged in an inquisitorial process.

**41** I wish to note that, while the Master held that litigation privilege does not apply to documents described as addressing the appellant's reserve position, the Master permitted the appellant to delete references to its reserve figures. The Master clearly was correct in this regard.

**42** The appeal in respect of litigation privilege issues is dismissed.

**43** The appeal in respect of discovery answers will be dealt with separately.

**44** If the parties are unable to resolve costs, the respondent's brief written submissions shall be delivered by January 15, 2008. The appellant's brief written submissions shall be delivered by January 29, 2008, and the respondent's reply, if any, shall be delivered by February 8, 2008.

J. MACDONALD J.

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