Case Name:

Mamaca v. Coseco Insurance Co.

Between
Ozcan Mamaca and Ahmet Mamaca, and
Coseco Insurance Company
And between
Ozcan Mamaca, and
Coseco Insurance Company

[2004] O.J. No. 4611

[2004] O.T.C. 994

17 C.C.L.I. (4th) 293

12 E.T.R. (3d) 268

135 A.C.W.S. (3d) 48

Court File Nos. 00-CV-195010CM and 01-CV-215026CM3

Ontario Superior Court of Justice

Master Dash

Heard: October 29, 2004.
Judgment: November 10, 2004.

(33 paras.)

Practice -- Discovery -- Examination -- Objections to questions, review of -- Witnesses, privilege -- Lawyer-client communications -- When privilege may be invoked -- Waiver, putting communication in issue.

Application by the defendant Coseco Insurance for an order to compel the litigation guardian of the injured plaintiff Mamaca to answer questions objected to at his examinations for discovery. Mamaca was injured in a motor vehicle accident on August 21, 1998 that involved an unidentified

motorist. He commenced two actions against his insurer Coseco. The first action was for unidentified motorist coverage and the second was for accident benefits. Mamaca became mentally incompetent subsequent to the accident. He was declared mentally incompetent under the Substitute Decisions Act on August 11, 2003. His brother became his litigation guardian and also claimed damages under the Family Law Act. There were differing medical opinions as to the cause of Mamaca's incompetence. It was also uncertain when Mamaca became disabled. It appeared that his symptoms gradually evolved since the accident. Determinations as to the precise date that Mamaca became disabled and the cause of the disability were critical trial issues. Mamaca hired and fired several lawyers over the years to represent him regarding the accident. He was also involved with two other lawyers during this period. One lawyer represented him in an estate matter and the other dealt with criminal charges against him. The guardian refused to answer questions related to Mamaca's representation by these lawyers. All these questions were refused on the basis of solicitor-client privilege. The guardian's refusal to review the lawyers' files was based on the litigation privilege.

HELD: Application allowed in part. Most of the questions were relevant to the issue of Mamaca's competence. However, solicitor-client privilege and litigation privilege took precedence. Generally, the questions based on personal observations were to be answered, while those based on client communications were not to be responded to. Although Mamaca's mental competence and his state of mind were put into issue in his action, there was no pleading that his state of mind resulted from a solicitor-client communication or that a solicitor's advice was relied upon. The involvement of the solicitor in Mamaca's state of mind was that of a witness to his competence. That was insufficient to waive the privilege. It would not be unfair to deny a party access to the private conversations and opinions of the solicitor for the opposite party merely because the lawyer was witness to the client's mental capacity.

Statutes, Regulations and Rules Cited:

Family Law Act.

Substitute Decisions Act.

Ontario Rules of Civil Procedure, Rules 31.10, 77.02, 77.14(4), 77.14(6)(c).

Counsel:

Laura Barillaro (student-at-law), for the plaintiffs

Ted Charney, for the defendant

ENDORSEMENT

1 **MASTER DASH** (endorsement):-- The defendant moves to compel answers refused at examinations for discovery by the litigation guardian of the injured plaintiff. This endorsement concerns a request to compel enquiries to the plaintiff's former solicitors respecting the plaintiff's mental competence at specific moments of time. The plaintiff resists these enquiries based on both solicitor-client privilege and litigation privilege.

BACKGROUND

2 The plaintiff Ozcan Mamaca ("Ozcan") was injured in a motor vehicle accident that occurred on August 21, 1998 involving an unidentified motorist. Both actions are against the insurer of the car he was operating, the first action being a tort claim for unidentified motorist coverage and the second action being for accident benefits. Ozcan became mentally incompetent at some point subsequent to the accident and was so declared by Low J. on August 11, 2003 in an application under the Substitute Decisions Act. His brother Ahmet Mamaca ("Ahmet") acts as his litigation guardian and also asserts a claim for damages under the Family Law Act.

3 There are differing medical opinions as to the cause of Ozcan's mental incompetence. Suggested causes include traumatic head injury, accident induced schizophrenia, schizophrenia accelerated by the accident but which would have manifested in any event and schizophrenia unrelated to the accident. There is a suggestion of genetic predisposition.

4 It is also uncertain exactly when Ozcan became disabled but it appears that his symptoms gradually evolved since the accident. There is evidence of some decline in or about January 1999 although he was able to communicate with a psychiatrist in March 1999. When he saw a psychologist in November 1999 and a psychiatrist in December 1999 he was unable to communicate in any comprehensible manner or to understand what was being said to him. All psychiatrists who have subsequently examined him have encountered a similar problem and were required to obtain Ozcan's history from Ahmet. There are some anomalies such as information that Ozcan was able to play soccer in July 2000 and drive a car in May 2000 and June 2001. The plaintiff has claimed for income replacement benefits in the accident benefits action and past loss of income and future loss of earning capacity in the tort action. Therefore determinations as to the precise date that Ozcan became disabled, as well as the cause of the disability, are critical issues to be determined at the trial of these actions.

THE SOLICITORS AND THE REFUSALS

5 Ozcan retained solicitor Todd Reybroek in September 1998. Ahmet believed Ozcan was capable of instructing Mr. Reybroek at that time. On September 17, 1998 Ozcan signed an Application for Accident Benefits and an Activities of Normal Life form both in support of his application for accident benefits. It is unknown who completed the forms or who provided the information on the forms. On his examination for discovery, Ahmet was neither able to provide

those answers nor advise if his brother was capable of providing the information himself at that time. Ahmet did not go with his brother to see Mr. Reybroek and he does not know who, if anyone, attended with him. Todd Reybroek is listed on the form as Ozcan's representative and Mr. Reybroek sent the forms to the defendant. The forms describe how the accident occurred and provide detailed information as to how the injuries from the accident affected Ozcan's life.

6 Ahmet refused to ask Mr. Reybroek if he knows whose handwriting appears on the form (Q. 1675), where the information came from that is on the application for accident benefits (Q. 1680), who completed the form and if the form was completed at Mr. Reybroek's office (Q. 1699), how he came into possession of Ozcan's employment confirmation form (Qs. 1714 and 1717) and whether Mr. Reybroek had difficulty communicating with Ozcan which caused him to be concerned about Ozcan's "mental behaviour" while he was counsel (Q. 1717). Mr. Bennett, the solicitor for the plaintiffs, indicated an intention to introduce the accident benefits application documents at trial, but refused to advise if it will be introduced on the basis that Ozcan completed the form at a time when he was competent as an exception to the hearsay rule, although he undertook to advise within a reasonable time before trial (Q. 1702). If introduced on that basis, the information on the form could conceivably be admissible as evidence of Ozcan's injuries on the date the form was signed.

7 Ozcan then retained his second solicitor, Daniel Daly, around December 10, 1998 and according to Ahmet, Ozcan was still capable of instructing his solicitor on that date. Mr. Daly wrote to the defendant enclosing an authorization to correspond with and send benefits cheques to Mr. Daly dated February 12, 1999 and signed by Ozcan. Ahmet refused to ask Mr. Daly when and where the authorization was signed, although he agreed to ask who witnessed the signature (Q. 2000). On April 8, 1999 Mr. Daly invited the defendant to "buy-out" Ozcan's accident benefits claims, but Ahmet refused to advise if Ozcan was aware of the position taken by Mr. Daly (Q. 2009), whether Mr. Daly had instructions to write that letter (Q. 2010) and whether the family received a copy of the letter (Q. 2014). He refused to answer how many meetings he (Ahmet) attended at Mr. Daly's office (Q. 2015). Finally he refused to obtain and vet Mr. Daly's file and then produce "whatever notes or letters are on file which would reflect Ozcan's cognitive abilities to instruct counsel and understand the implications of settling his accident benefits at the time" (Q. 2015).

8 On June 9, 1999 Ozcan retained his third lawyers, the firm of Mitchell, Bardyn & Zalucky ("MBZ") and signed a direction to the defendant to communicate with solicitor Richard Belsito of MBZ, which direction was witnessed by solicitor Daniel Lokun of MBZ. Ahmet testified that Ozcan was capable of instructing his new counsel "with my help". On July 19, 1999 Ozcan signed a statutory declaration in front of Mr. Lokun to comply with his claim for accident benefits in which he describes how the accident occurred. Ahmet stated that Ozcan understood the document with his help slowly translating it into Turkish (as he had lost his ability to read English by then). Ahmet refused to answer which lawyer at MBZ he first met with on June 9, 1999 (Q. 2035), whether Mr. Lokun was handling the case or assisting Mr. Belsito (Q. 2047), whether Mr. Lokun expressed any concerns about Ozcan's ability to understand the July 19, 1999 declaration (Q. 2063), to request any

notes made by Mr. Lokun and Mr. Belsito regarding the July 19 meeting relating to instructions on completing the declaration so as to reflect on Ozcan's ability to instruct and understand a sworn document and to ask Mr. Lokun if he perceived any difficulties in Ozcan being able to appreciate the nature of the declaration he swore (Q. 2071).

9 Ahmet testified that up to November 1999 Ozcan was "somewhat" capable of instructing lawyers although he was not capable of having "a reasonably normal conversation", but Ahmet refused to answer how Ozcan was then able to instruct the lawyer (Q. 2079). Mr. Belsito ultimately issued the two statements of claim herein on July 30, 2001 and August 2, 2000, although he was no longer with MBZ.

10 All of the questions were refused on the basis of solicitor-client privilege, and in the case of the solicitors' files also on the basis of litigation privilege. Some questions were also refused on the basis of relevance.

11 Ozcan retained his fourth and current solicitors in relation to these claims, Thomson, Rogers, in or about October 2002.

12 Ozcan had involvement with two further lawyers during this period, although not as solicitors representing him in relation to the motor vehicle accidents.

13 In August 2000 the father of Ozcan and Ahmet, Bekir Mamaca, passed away without a will. Ahmet and his sister, Gulcan Mamaca, retained solicitor Neil Boyko during the fall of 2000 to wind up the estate and were appointed the estate trustees without a will. On November 20 and 21, 2000 each of Ahmet and Gulcan swore affidavits before Mr. Boyko in support of an order to dispense with an administration bond in which they stated that none of the listed next-of-kin of Bekir, including Ozcan, were mentally incapable within the meaning of the Substitute Decisions Act. During the process of wrapping up the estate Mr. Boyko met with Ozcan, although Ahmet does not recall what it was for. Ahmet refused to ask Mr. Boyko what his impression was of Ozcan's demeanour and mental capacity and to produce those portions of his estate file relevant to determining whether Ozcan, as beneficiary, was of sufficient mental capacity (Q. 2456).

14 Finally, in February 2001 Ozcan was arrested for assaulting and kidnapping his sister (Gulcan). Ahmet hired a criminal lawyer for Ozcan but could not remember her name. Ahmet agreed to provide Mr. Charney with the name of the criminal lawyer and an authorization to obtain the police file, the crown brief and the jail file, and agreed to look for documents at home relating to the criminal proceedings, but he refused to request all non-privileged productions from the criminal lawyer's file relating to the charges, including transcripts and court documents (Q. 2564). After service of this motion, the plaintiffs agreed to request all documents from the criminal lawyer's file not covered by solicitor-client privilege and Mr. Charney was content with that undertaking.

ANALYSIS

15 Most of the questions refused are directed to adducing evidence of Ozcan's competence at various points in time and as such have a semblance of relevance to the issue of when Ozcan became mentally disabled and thereby entitled to accident benefits and to damages for loss of income. The information from Mr. Reybroek would also be relevant to the issue of Ozcan's competence at the time he signed the accident benefits application if the application form is to be introduced as evidence of the truth of its contents made at a time before Ozcan became incompetent. I fail to see a semblance of relevance to the question as to whether Mr. Daly copied to Ozcan's family members his letter to the insurer.

16 Notwithstanding the relevance of the information, litigation privilege and solicitor-client privilege, when properly asserted, "trumps relevance in almost all circumstances": Davies v. American Home Assurance Co. (2002), 60 O.R. (3d) 512 (Div. Ct.) at p. 527. The defendant argues that the information sought from the solicitors is not in the nature of communications between solicitor and client for the purpose of obtaining legal advice but rather evidence of facts or acts and therefore not protected by solicitor-client privilege. In the alternative the defendant argues that the privilege has been waived by implication as the plaintiff has put his state of mind in issue.

17 In General Accident Assurance Co. v. Chrusz (1999), 45 O.R. (3d) 321 (C.A.) at page 347 Doherty J.A. sets out the description of solicitor-client privilege as described by Wigmore as follows:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

He adds at p. 347 that the privilege "extends to communications in whatever form, but does not extend to facts which may be referred to in those communications if they are otherwise discoverable and relevant."

18 In Sopinka, Lederman & Bryant, The Law of Evidence in Canada, 2nd ed. (Toronto: Butterworths 1999) it is stated at p. 734 that "the protection is for communications only and facts that exist independent of a communication may be ordered to be disclosed ... The distinction between fact' and communication' is often a difficult one and courts should be wary of drawing the line too fine lest the privilege be seriously emasculated." In Re Ontario Securities Commission and Greymac Credit Corp. (1983), 41 O.R. (2d) 328 (Div. Ct.) the court determined that movements of funds in a lawyer's trust account constituted acts or transactions that exist independent of a communication and solicitor-client privilege was held not to apply. However, in Madge v. City of Thunder Bay (1990), 72 O.R. (2d) 41 (S.C.O.) Kozak L.J.S.C. held that Greymac should be confined to its particular facts. He determined that delivery of a document (minutes of a meeting) by the defendant to her solicitor constituted a confidential communication protected by solicitor-client privilege such that the defendant need not disclose whether she delivered the minutes to her solicitor

nor disclose any visits to her solicitor's office that relate to those minutes.

19 In my view execution of or handwriting on a form is an act, not a communication, and is not privileged, but communications by the client with respect to the form or its contents and information as to how, when and where it was completed or delivered to the solicitor are privileged. Therefore if Mr. Reybroek is able to identify the handwriting on the accident benefits forms either because he saw them completed or because he recognises the handwriting, revealing this information would not breach solicitor-client privilege. On the other hand, if he knows whose handwriting is on the form because his client told him who completed it, that would be a privileged communication. The source of information on the form is clearly a privileged communication as is any information as to how, where and by whom the form was completed. Likewise how Mr. Reybroek came into possession of an employment form results from a privileged communication. How, when and where an authorization to Mr. Daly was signed is likewise privileged, but not the name of the witness. Information about visits to a lawyer's office is privileged and as a result Mr. Daly cannot be asked to reveal the number of meetings at his office. Instructions to counsel to write a letter are clearly a privileged communication. If Ozcan was aware that Mr. Daly took a certain position in a letter to the insurer such information must have emanated from a communication between solicitor and client and is also privileged.

20 Neither party has produced any Canadian authority on whether a client's characteristics, behaviour, demeanour or a solicitor's opinion on his client's mental competence are facts or communications. Some U.S. authorities were cited by the defendant that suggest such expressive acts of the client, although determined during interaction with the solicitor, are not privileged. U.S. courts appear to be divided over the question whether an attorney may be compelled to testify to his lay opinion about the client's mental competence. In my view this is not the law of Ontario. The observations, opinions or concerns of each of the solicitors representing Ozcan as to his competence, behaviour or ability to communicate or to understand documents are in my view part of the communications between solicitor and client and are thereby privileged. Communication may be verbal (oral or written) or non-verbal. For the solicitor to form an opinion about his client's ability to understand or communicate, such opinion must necessarily be founded upon communications, including the client's words, gestures and behaviour or upon an inability to communicate, which is itself also a form of communication. Therefore any difficulties that Mr. Reybroek, Mr. Daly or Mr. Lokun had in communicating with Ozcan, and their concerns or opinion with respect to his ability to comprehend are all protected from disclosure by solicitor-client privilege. Similarly asking which lawyer at MBZ was "handling the case" could only be relevant to the issue as to which lawyer observed Ozcan's behaviour and is therefore likewise privileged.

21 Similarly, how a communication takes place with a solicitor is as much a part of the communication and therefore privileged as are the contents of the communication. Therefore, notwithstanding that such question is of significant relevance to the issue of evolving mental disability, Ahmet need not answer how Ozcan was able to communicate with his solicitors during such time as he could not carry on a normal conversation.

22 The solicitors' notes respecting Ozcan's mental ability to instruct and understand constitute a written record of a solicitor-client communication and are likewise protected from disclosure by solicitor-client privilege. Litigation privilege would also apply to the notes of the solicitors representing Ozcan in respect to his claims arising out of this accident as they were prepared for the dominant purpose of this litigation either when it was extant or when it was reasonably anticipated.

23 Notwithstanding that solicitor-client privilege extends to the solicitor's opinions about the client's mental capacity I must determine whether the privilege has been waived by implication since the client's state of mind - his mental competence - has been put in issue in the action by the client claiming to be mentally disabled. Solicitor-client privilege is a cornerstone of our system of justice and courts must be vigilant to protect this long enshrined privilege except in the clearest case of waiver.

24 Typically solicitor-client privilege may be waived where a party places his state of mind in issue and relies on legal advice in relation to that state of mind: Davies v. American Home, supra; Bank Leu Ag v. Gaming Lottery Corp., [1999] O.J. No. 3949 (S.C.J.), appeal to Divisional Court dismissed [2000] O.J. No. 1137. As stated in Davies, page 519,

> The privilege is not absolute, but must be as close to absolute as possible to ensure public confidence and retain relevance'... One of the ways in which solicitor-client privilege may be waived is where a party asserting the privilege places its state of mind in issue by attempting to justify its position on the grounds of detrimental reliance upon the legal advice received. When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice.

25 In Bank Leu Ag, supra, Ground J. suggests at paragraph 5 a guideline for determining whether solicitor-client privilege is deemed to have been waived:

> When determining whether privilege should be deemed to have been waived, the court must balance the interests of full disclosure for purposes of a fair trial against the preservation of solicitor client and litigation privilege. Fairness to a party facing a trial has become a guiding principle in Canadian law. Privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action.

26 Mr. Charney submits that fairness is the guiding principle in waiver of privilege by implication and that a party placing his state of mind in issue is just one example thereof. He relies on the following passage in Leadbeater v. Ontario, [2004] O.J. No. 1228 (S.C.J.) where Spence J. states at paragraph 51:

> The principle that solicitor-client privilege is deemed waived when a party has placed its state of mind or knowledge in issue is a particular application of the broader principle that waiver may occur when fairness requires it. Courts have recognized that the issue of fairness to the party facing a trial has become one of the guiding principles that determine what constitutes waiver by implication, or deemed waiver.

It must however be remembered that despite this broad statement, in Leadbeater the plaintiff alleged that the defendant crown had not disclosed certain information to him in a criminal trial, although the information was known to his solicitor, who was sued by the plaintiff in a separate action and Spence J. concluded at paragraphs 47 and 48 that the plaintiff had put in issue his state of mind respecting the knowledge of himself and his solicitor as to the materials in question.

27 Sopinka, Lederman & Bryant, The Law of Evidence in Canada, supra, states at p. 758: "Whether intended or not, waiver may occur when fairness requires it, for example, if a party has taken positions which would make it inconsistent to maintain the privilege ... The notion of fairness has also been invoked as a basis for waiver when the party directly raises in a pleading or proceeding the legal advice that he or she received, thereby putting that advice in issue." Typically implied waiver occurs when a client has placed his or her state of mind in issue as a result of a communication with a solicitor. Examples in Sopinka include when a client relies on legal advice from a solicitor to support a good faith belief that he was legally entitled to take certain actions, or a client denies giving certain instructions to a solicitor, or an opposite party asserts that a client relied on her own solicitor's legal advice rather than on the opposite parties' representations. Solicitor-client privilege will be taken to have been waived according to the fairness test "whenever the communications between the solicitor and the client are legitimately brought in issue in the action": Sopinka, p. 760.

28 Although Ozcan's mental competence, and thus his state of mind have been put into issue in this action, there is no pleading that such state of mind resulted from a solicitor-client communication or that a solicitor's advice was relied upon. The involvement of the solicitor in Ozcan's state of mind is that of a witness to his competence and in my view that is insufficient to waive solicitor-client privilege by implication. Even if fairness was the sole determinant of waiver without regard to whether a solicitor-client communication was relevant to the client's state of mind, in my view there has been no waiver on the facts herein. It would not be unfair to deny a party access to the private conversations with and opinions of the solicitor for the opposite party merely because the lawyer was witness to the client's mental capacity. I note that the defendant herein has been granted a right to examine Ozcan's mother and sister, his primary caregivers, under rule 31.10 and they will be a source of information as to his evolving incompetence. While this in my view supports the result, I would have come to the same conclusion in any event. In my view, on balance, the interest in preserving the solicitor-client relationship outweighs the interest in full disclosure in all the circumstances herein.

29 An additional argument is raised specifically with respect to Mr. Reybroek's opinion or concerns about Ozcan's competence at the time Ozcan signed the application for accident benefits. The defendant submits that since Ozcan may be relying on the contents of the application as an expression by Ozcan at a time when he was competent of how the accident occurred and of the extent of his injuries resulting from the accident and since Ozcan may seek to introduce those forms for the truth of their contents as an exception to the hearsay rule, his state of mind on that date is clearly in issue and fairness dictates that solicitor-client privilege be deemed to be waived. While it may be fair to allow the defendant to explore all available evidence as to Ozcan's mental competence in September 1998, in my view this must stop short of breaching solicitor-client privilege, which must be protected except in the clearest cases of waiver. There is no evidence that Ozcan's state of mind was any way dependent upon or related to any legal advice he obtained. In my view fairness does not dictate an implied waiver of privilege in these circumstances. The onus will be on Ozcan to prove at trial that he was competent when he signed the form. He may able to prove this without calling Mr. Reybroek as a witness. If he does call Mr. Reybroek as a witness as to his competence in September 1998, then, and only then, will solicitor-client privilege be waived.

30 Although a party is entitled to production of relevant non-privileged documents, they are not, as part of the discovery process, entitled to the opposite party's trial strategy, including the basis for and method of introducing the document. Therefore at the discovery stage, the defendant cannot demand that the plaintiff reveal the basis upon which the accident benefits forms will be introduced at trial, or whether Mr. Reybroek will be called as a witness with respect to introducing the document. However, the plaintiffs must advise as to their witnesses and the substance of their evidence at the settlement conference in accordance with rule 77.14(6)(c) and as required by rule 77.14(4) such information must be provided at least 10 days before the settlement conference. Mr. Bennett has undertaken at discovery to confirm the basis upon which the forms would be introduced "a reasonable time before trial." In my view, in the interests of "bringing proceedings expeditiously to a just determination" (rule 77.02) and preventing "trial by ambush", the plaintiff should advise at least 60 days before the settlement conference as to the basis upon which he intends to introduce the accident benefits forms.

31 The issues respecting Mr. Boyko are very different. There is no evidence that Ozcan was ever his client. Ahmet of course was his client and any communications between Ahmet and Mr. Boyko in the course of obtaining legal advice about his father's estate, including communications about Ozcan and how Ozcan should be dealt with in processing the estate, are protected by solicitor-client privilege. Although the communications may not concern the claims in this action, solicitor-client communications are forever protected from disclosure, unless waived. On the other hand if, as indicated, Mr. Boyko met with Ozcan and Mr. Boyko formed an impression of Ozcan's demeanour and mental capacity independent of communications from Ahmet, evidence of such impression, including portions of the estate file relating to Ozcan's capacity, cannot be protected by solicitor-client privilege. Likewise, his notes were not prepared for the dominant purpose of litigation and are not protected by litigation privilege.

ORDER

32 I therefore order with respect to questions that Ahmet Mamaca refused to answer on his examination for discovery:

(a) Question 1675 shall be answered unless Mr. Reybroek's knowledge was the result of a solicitor-client communication from Ozcan Mamaca;
(b) Question 1702 shall be answered at least 60 days before the settlement conference;
(c) Question 2456 shall be answered to the extent that Mr. Boyko's impression and resulting file notes resulted from his personal observations of Ozcan Mamaca and not from communications from Ahmet Mamaca;
(d) Question 2564 shall be answered on consent to request all documents from the criminal lawyer's file except solicitor-client communications;
(e) Questions 1680, 1699, 1714, 1717, 2000 (except as the name of the witness), 2009, 2010, 2014, 2015, 2035, 2047, 2063, 2071 and 2079 need not be answered.

33 The issues in this endorsement are part of a broader refusals motion heard on October 29 and November 5, 2004. It was agreed that issues of costs of the entire motion would be dealt with after these reasons were released. Although the plaintiffs were substantially successful on the solicitor-client privilege issue herein, the defendant was successful on the rule 31.10 aspect of the motion. There has been some division of success on the other refusals. If the parties are unable to agree on an appropriate costs order, I would be prepared to receive brief written submissions from the plaintiffs within 7 days, responding submissions from the defendant within a further 7 days and any reply from the plaintiffs within a further 3 days. Any party seeking costs shall include a bill of costs and dockets.

MASTER DASH

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