

**CITATION:** Kennedy v. Toronto Hydro et al, 2012 ONSC 1088  
**COURT FILE NO.:** CV-08-00361906-00CP  
**MOTION HEARD:** 2012-02-03

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Lee Kennedy and Bekalla Yusuf, Plaintiffs  
And  
Toronto Hydro-Electric System Ltd., Defendants  
And  
Gonte Construction Limited and City of Toronto, Third Parties

**BEFORE:** Master Joan Haberman

**COUNSEL:** Charney, T. and Eckart, A. for the moving parties the plaintiffs  
Pangos, C. for the City of Toronto  
Bowker, E. For the third party, Gonte  
Lavrence, I Y. For Toronto Hydro

**REASONS FOR DECISION**

**Master Haberman:**

- [1] On July 20, 2008, smoke was seen emerging from an underground concrete vault owned by Gonte and located in an apartment building they own and manage at 2 Secord in Toronto. Toronto fire fighters were called to the scene and opened the padlocked vault, allowing oxygen into what appears to have been a volatile situation. There were two Toronto Hydro electrical transformers in the vault. When it was opened, the transformers exploded and a fire ensued. It is unclear who controlled access to the vault and whether the vault had been equipped with operating smoke detectors at the time of these events. These issues remain to be determined at trial.
- [2] A number of the building's occupants lost property as a result of these events and were forced to leave their homes and live elsewhere. They have banded together to sue Toronto Hydro in class action, started by Notice of Action, issued in September 2008. The City was later added as a defendant to the action and Gonte has been brought in as a third party.
- [3] The matter came before me in the context of the plaintiffs' motion to have Hydro respond to refusals and to questions taken under advisement. The plaintiffs also sought to have

further discovery of Hydro; with a different witness who may be better informed as to investigations undertaken by and on behalf of Hydro

- [4] In large part, rulings were made during the course of the hearing on February 3, 2012, with only a few of the smaller issues left to be dealt with afterwards. What follows are my reasons for decisions already made in court, as well as my disposition of the issues which I held in reserve.
- [5] Plaintiffs' counsel opted to group his questions and to address his submissions to the court on a group by group, rather than question by question, basis. Hydro had no objection to that approach and the motion was therefore argued issue by issue, with counsel for the "supporting parties" (the City and Gonte supported the plaintiffs) being provided with an opportunity to contribute as and when they felt appropriate. Each also filed a factum.

**General comments about Hydro's position at discovery and their evidence on this motion**

- [6] The plaintiffs have filed and taken me through portions of the discovery transcript of Hydro's representative, Benny La Pianta. The impression one gets when reviewing the transcript is that Hydro counsel was waiting to pounce if any questions were asked that touched on any aspect of any form of investigation, regardless of who conducted it. Counsel was quick to shut down all lines of inquiry of that nature before first clarifying whether what was sought involved investigations by experts or by Hydro staff, or whether what was sought was a document or simply the information contained within it. Hydro counsel appeared to have a scripted response that she repeated whenever the subject of investigations arose.
- [7] When asked to make inquiries to find out the nature of the investigation which took place - a very general question- Hydro's response was simply "no" (page 159). When asked to advise who was in charge of the investigation, again the response was "no" (same page). When plaintiffs' counsel clarified on the following page that his line of questioning was directed at investigations conducted by Hydro, again the response was "no", supplemented by *it's privileged. It was all done in anticipation of litigation.*
- [8] A similar approach was adopted whenever Hydro's representative produced at discovery was asked about anything that required him to provide Hydro's belief regarding what went wrong. Here is one example: on page 89, at question 367, plaintiffs' counsel advised that he had a list of questions that were somewhat technical that he was about to ask and he suggested that he would provide a copy of the list to all participants before he began.
- [9] Hydro's counsel response was:  
*Sorry, he's not here to give opinions as an electrical engineer*
- [10] When asked to deal with the questions on a one by one basis, Hydro counsel jumped in to stop the line of questioning. At one point, she halted a response being given by her client to a question on page 91 on the basis that what it sought was speculative. When the

question was reworded to remove its speculative nature, Hydro counsel maintained the refusal, but this time, on the following basis:

*Because we don't know and we're not here to give opinions*

- [11] Regardless of what was asked or how it was asked, the responses at discovery were often evasive and unhelpful. The evidence filed in response to the motion is equally unhelpful.
- [12] Further, in almost all cases, the response from Hydro presupposed that what was sought required them to disclose opinions from experts reduced to writing.
- [13] Rather than stopping to consider the very first question, *do you have any information with respect to the nature of the investigation that took place*, in many cases, Hydro counsel simply shut down the entire area of questioning by asserting that Hydro knew from the start that there would be litigation *so that the information regarding this matter immediately became privileged because it is all in anticipation of litigation*. Thereafter, privilege was claimed to block a host of questions regarding information pertaining to investigations regardless of source or form.
- [14] This position was taken despite Mr. La Pianta's very clear evidence as to when Hydro would initiate its own investigations (page 157, questions 673-677:

*Q: ...and in what circumstances will Hydro initiate an investigation into a failed transformer?*

*A: In general, if it appears to be something unusual. So distribution-class transformers fail every day. We've probably had a few fail today.*

*Q: Sure.*

*A: But if they fail in a catastrophic sense or under suspicious circumstances, typically we would investigate further.*

*Q: And the purpose of the investigation is to determine why it failed?*

*A: the counsel, yes (sic)*

*Q: And would you agree with me that these types of investigations are part of the ordinary course of business of Hydro?*

*A: Yes.*

*Q: And in this case was there an investigation by Hydro to determine the cause of the explosion?*

*A: I'm not aware of...again, it was turned over to Asset Management. I'm uncertain.*

- [15] And at questions 680:

*Q: So you don't know whether an investigation was done by Hydro to determine the cause of the explosion?*

*A: No*

[16] Plaintiffs' counsel then asked to go off the record to discuss whether it was more appropriate to have someone else from Hydro attend to respond to these questions in view of the fact that Mr. La Pianta could not even say if Hydro had conducted any form of investigation in this case despite its normal practice.

[17] Hydro's counsel responded as follows on page 159:

*A: A) We're not prepared to produce anybody else and B) Toronto Hydro knew immediately that there was going to be litigation, and therefore the investigation regarding this matter immediately became privileged because it was all in anticipation of litigation.*

[18] In this instance, it was clear the parties were speaking about investigations conducted in-house, investigations that, according to Hydro's representative, were generally conducted by Hydro in the usual course of business for events such as this one. It is extremely difficult to reconcile this evidence with Hydro's legal position that any investigations they may have conducted were protected by privilege.

[19] The examinations for discovery of Hydro's representative took place in December 2009, more than a year after this loss. In its role as a public utility, it is reasonable to assume that by the time discoveries had taken place, Hydro had undertaken some level of investigation to determine possible causes of the explosion in order to avoid a repeat of the incident. Clearly, Hydro has some idea of why this incident occurred as they have a concrete theory for the loss set out in their pleadings. This theory had to have been based on some form of instigation.

[20] By the time this motion was heard, more than two years had passed since Hydro's witness was examined for discovery. It is therefore also reasonable to assume that by now, to the extent that any of the information they have regarding what may have caused or contributed to the explosion came from experts, Hydro has addressed its mind to whether or not those experts will be called as witnesses at trial.

[21] I turn from the discovery room to the evidence filed for the motion.

[22] I have repeatedly stated in court and written in a myriad of decisions that motions are generally won or lost on the evidence that has been filed. Regardless of how compelling the oral submissions are or how helpful the law, without the necessary evidentiary underpinning in proper form a motion – or resistance to a motion- will not get off the ground without the necessary and appropriate evidence. This motion is no exception.

[23] During the course of discovery of Hydro's representative, Hydro refused to disclose several kinds of information (as distinct from documents) on the basis of litigation

privilege. It is trite law that, as a result, Hydro now has the onus of setting up a factual basis to support that claim by filing the necessary evidence. The evidence ought to have been clear and sufficiently detailed to allow the court so assess whether the privilege asserted had been made out. In large part, that is not what was done.

- [24] Often, what a party has chosen not to say is equally or even more telling than what they have omitted. Overall, I found the Barwell affidavit to be evasive and to some extent inconsistent within itself. The way in which Shauna Barwell framed her evidence made it difficult to relate her evidence to the matters in issue.
- [25] The plaintiffs sought information about investigation into these events that were conducted by Hydro of a general nature. Thus, their questions extended to:
1. Information gleaned from individuals who cannot properly be classified as "experts"
  2. Information obtained from those who can properly be characterized as experts; and
  3. Documents.
- [26] In many cases, the plaintiffs did not specify whether what they sought came from experts or otherwise - they simply asked for information about particular subject areas at large. The focus of the questions that fall under issue #1 for example was on investigations generally, rather than on those investigations specifically conducted by experts.
- [27] Thus, Hydro could have easily indicated that some or all of its investigations were conducted by experts if that was the case and then moved on to set up a factual matrix from which the court might conclude that that information was therefore privileged. If Hydro gleaned any information as to the cause of these events from anyone other than experts, that information ought to have been provided when their representative was examined for discovery, as it was relevant but not privileged. That is not what happened.
- [28] It is also clear that, in many instances, what the plaintiffs sought was information, rather than documentation. Yet, the Barwell affidavit in large part targets why documents were not released - again, not helpful in the context of that was really in issue.
- [29] It is worthwhile reviewing the Barwell affidavit to see what she actually does and what she fails to say.
- [30] Shauna Barwell describes herself as senior litigation counsel, legal division, of Hydro. As litigation counsel one would expect Barwell to have some familiarity with and understanding of the Rules. While I am not prepared to assume that Barwell was actively attempting to mislead the court, I do find that some of the statements in her affidavit, particularly those dealing with Rule 31.06, are clearly incorrect.
- [31] Barwell begins her evidence with the heading: **Parties and Overview** and starts by describing Toronto Hydro, indicating that they owned two transformers located in an electrical vault located in the parking garage level of the Secord property.

[32] Barwell then goes on to discuss the event, without explaining how the information she relates came to her attention. She states the following occurred on July 20, 2008:

- The Secord property experienced electrical disturbances but she does not indicate of what nature or how she came to learn this;
- Other customers did so, as well but she does not indicate where in the city they were located or why this is relevant;
- There were severe thunderstorms that night. Again, is this her own recollection or did she learn about this more recently and if so, how? In any event, why is it relevant?
- In the morning "smoke" (Barwell uses quotes) was reported in the parking garage and Gonte employees called the fire department. How does Barwell know this?
- Instead of waiting for Hydro to attend or asking Hydro to de-energize the vault, one of the firefighters cut the padlock to the vault and opened the door. How does Barwell know all this and what would "de-energizing" have involved?
- The firefighter looked in and confirmed the presence of smoke, then *allegedly closed the door*. Up to this point, Barwell recites information as facts. Here, she states that the door was only allegedly closed. Again, what is the basis for Barwell's information?
- Very shortly afterwards, the vault exploded with significant force, *causing structural damage to the concrete within the parking garage, causing injuries and rendering the Secord Property uninhabitable for a period of time*. How does Barwell know all this?

[33] Barwell indicates that Hydro crossclaimed against Toronto and third parties Gonte because of the following:

With respect to Toronto: Hydro alleges that the fire crew acted improperly and contrary to established procedures when they opened the vault before the electrical equipment within was de-energized. This allowed oxygen into the vault and when it mixed with evaporated oil, it set up the conditions for an explosion. The city also failed to inspect the vault to ensure that Gonte complied with Fire Code provisions requiring the installation of smoke and/or leak detection within the vault; and

With respect to Gonte: they were under a duty to install and maintain smoke and heat detectors in the vault, but they failed to comply, which permitted the evaporated oil to build up.

[34] Before going further in the affidavit, it is clear that Hydro already had a theory regarding causation when it delivered these pleadings in March 2009, well before the Fire Marshall rendered its report in January 2011. Therefore, Hydro either had the necessary expertise in-house to reach these conclusions or they must have retained experts before they arrived at these theories. Either way, there had to have been some sort of investigation

for Hydro to have become aware of these facts and to have developed their theory of the case. That much is clear.

- [35] The key to Hydro's position regarding causation evaporated oil. Thus, the first issues to be determined in the context of Hydro's analysis are: did the oil actually evaporate and if so, why? These are both questions that one would expect Hydro to have looked into, either on its own or through experts. As Hydro has not amended its pleadings to delete or reframe this theory, this appears to be the position they plan to take at trial. If they are being so closed-fisted about their investigations in this regard, how can they possibly hope to prove that theory at trial?
- [36] Barwell then turned in her evidence to the **Motions for answers to Toronto Hydro Refusals**, providing two broad categories of reasons for having refused to answer these questions. She does not link the two reasons with an "and" or an "or" but I will assume the latter as she refers to particular item numbers in (a):
- a) The answers sought are not within Hydro's knowledge;
  - b) *Virtually all of the remaining questions regarding which refusals are maintained are related to the disclosure of opinions of experts who were retained (by litigation counsel) for the sole purpose of responding to litigation. More particularly, the questions repeatedly asked that Toronto Hydro provide any opinions obtained as to the potential causes of the explosion.*
- [37] Barwell appears to be of the view that not all, but "virtually all" of the questions pertain to disclosure of opinions from experts. That, however, is not the case when one actually reads the questions. In many cases, the information sought is simply that, without qualification as to the source. Further, she fails to distinguish between providing information and providing documents when the Rules clearly establish a different approach for each.
- [38] In her evidence, Barwell is careful to avoid saying anything about investigations that may have been conducted by Hydro internally. It appears from La Pianta's evidence that Hydro would have conducted its own investigation in the ordinary course of business for a failure such as this one. Instead of addressing the information that may have been gleaned from those investigations, Hydro presented a witness at discovery who was unable to say whether, in fact, such an investigation had even occurred here and, when dealing with the refusals, Hydro characterised the questions as pertaining to opinions from experts when many were not so restricted.
- [39] Barwell then addresses what she calls **The Documents and Opinions Sought are Subject to Litigation Privilege**. Barwell again ignored the fact that a different regime applies for a document and for the information contained within it. While she can claim privilege over documents prepared by experts by addressing the purpose for which they were created, that does not end the inquiry when dealing with the information that the documents contains or to verbal opinions obtained from experts. Further, none of these

Rules about privilege has any application if the opinions were generated internally rather than by experts.

- [40] At this stage, Barwell's evidence becomes very odd. Having claimed earlier that Hydro refused to respond to questions because they related to disclosure of opinions provided by experts retained for the sole purpose of responding to litigation, at this point in her evidence, Barwell is suddenly unprepared to confirm or deny the existence of such reports or results of any investigation.
- [41] Yet, Hydro has articulated a theory as to the causal factors for this explosion in their pleadings. This theory must have been based either on internal investigations or those conducted by experts as the theory predates the Fire Marshall's report. Sitting on the fence as to whether or not experts were retained is completely inappropriate here. It is also inconsistent with Hydro's response to this motion as set out in paragraph 10(b) of Barwell's affidavit. How can she seek to shield opinions by relying on litigation privilege on the basis that they were provided by experts for the sole purpose of litigation while refusing to confirm or deny that any investigations were actually conducted by experts? If they weren't, then they were conducted in-house and the issue of privilege does not even arise.
- [42] In paragraph 13 of her affidavit, Barwell sets out to establish why any expert reports should be covered by privilege by establishing a factual context that suggests Hydro always knew this was a significant loss and one extremely likely (see paragraph 14) to lead to litigation. This time, she relies on media reports and other undisclosed sources for her views.
- [43] Of course, this belief makes it all the more likely that Hydro would have conducted its own internal investigation as to the causes of these events, as per La Pianta's discovery evidence but Barwell avoids referring to this subject.
- [44] As a result of the likelihood of litigation, Barwell states that the matter was referred to her and she retained outside counsel on July 24.
- [45] Barwell then launches into a discussion as to the three types of documents which could be considered "investigations", again ignoring that it is not simply documents that are sought here. She states that both "internal operation reports and the Fire Marshall's report have already been produced to the plaintiffs. She then deals with a third category referred to as investigations and reports by expert witnesses.
- [46] Dealing first with the Fire Marshall's report, while the report itself has been produced Hydro claims privilege over the "observations" made by the two expert observers they appointed to participate in the observation stage of the investigation.
- [47] Similarly, Hydro claims privilege over investigations conducted by outside experts, if there are any, again making no distinction between documents and the information contained within documents. Again, I have difficulty with Hydro assuming a hypothetical position - claiming privilege over investigations, the existence of which they are not prepared to admit.

- [48] Barwell then claims that the purpose of the motion is a fishing expedition, **intended to obtain copies of privileged and confidential reports from experts retained by Toronto Hydro to assist in preparing a defence to this litigation.**
- [49] A question designed to elicit relevant information can never be viewed as a fishing expedition, regardless of whether or not it may be privileged. Further, before a party can rely on information meeting the evidentiary criteria to make it privileged, they have to at least admit that it exists. Establishing that the information they seek to shield came from experts is the threshold issue before the privilege analysis even begins.
- [50] Barwell performs her "slight of words" again in paragraph 20(a), stating that before July 24, 2008, when outside counsel were retained, no investigation had been carried out by any experts retained by Hydro. But she does not say if any investigation were conducted by Hydro before that date. She says no one entered the vault for the first few days after the explosion but fails to specify how many days. While the Fire Marshall did not enter until the 28<sup>th</sup>, it is still not clear that Hydro was not permitted by them to enter earlier.
- [51] It is also conceivable that Hydro conducted internal investigations as to the cause of the explosion that did not involve having access to the vault. There were certainly other factors that could have been examined during that time frame by Hydro employees, such as performing tests surrounding why the oil may have evaporated, as well as looking into the possible impact of such an occurrence to see if that was a viable cause. None of this is mentioned.
- [52] Barwell then adds that, after July 24, **excepting any expert witness retained, no other investigations were carried out into the cause of the explosion which has not been produced or over which Hydro has not claimed privilege.** This sounds very much like Barwell is speaking about documents – but the motion goes farther than that.
- [53] Again, in paragraph 20(b)(ii) Barwell refers to these investigations **(if there were any, Toronto Hydro does not state whether there were).** She then goes on to state that these investigations, that may or may not have taken place, were conducted for the sole purpose of the litigation. How can that possibly be if we don't even know if they exist? Why would Barwell feel the need to be enigmatic in her evidence?
- [54] Barwell then tried to paraphrase Rule 31.06(3), but she got it wrong because she came at it backwards. Hydro is not exempted from having to disclose the retainer of an expert **unless they plan to call the expert at trial. They are, in fact, required to disclose the existence of all experts as well as their findings, opinions and conclusions unless they undertake at discoveries not to call the witness.**
- [55] Barwell tells us there are no written reports or opinions – but that does not address Rule 31.06(3), which Barwell clearly does not appear to understand.
- [56] At discoveries, however, Hydro counsel was specifically asked about whether or not she was prepared to give the undertaking not to call this expert evidence at trial, at page 190, question 803:

*Q: Well, on the reports that I'm not sure exist, will you tell me whether you're prepared to waive your right to use the reports?*

*A: We're going to comply with the Rules.*

*Q: Well, the Rule require you to tell me whether you're going to waive your right to use the report or alternatively, give me the findings and conclusions. ... That's my understanding of what the Rule says. Anyone else here think differently?*

*A: We can argue another time*

[57] I will not deal with the remainder of the affidavit at this time as the issue of whether or not the plaintiffs are entitled to examine a second Hydro witness has been adjourned pending their review of what Hydro has now been ordered to produce. Suffice it to say, the Barwell affidavit misses the mark. In her attempt to seek an advantage that only applies to certain documents, she refuses to admit that the documents or even the information contained within them even exist. At the same time, she relies on some form of investigation as the basis for Hydro's position regarding causation, but this she is not prepared to share. The court is simply expected to accept that everything Hydro knows as to the cause of the explosion must be viewed as privileged.

[58] I now turn to the questions in issue.

**ISSUE NO. 1: the particulars of the investigation – refusals 12, 13, 14, 19, 20, 21 and 22**

[59] Hydro also had considerable lead time to prepare for this motion. It is important to bear in mind that they had also been alerted at discoveries to the need to give an undertaking not to call the evidence if they wanted to continue to shield it from view. However in addition to refusing to provide the information, they also refused to undertake to refrain from relying on it.

[60] Yet during all the months that have passed since Hydro set out its theory of the case, since discovery of its representative and since this motion was first put on the table, Hydro has never come forward to undertake not to call any expert witnesses it may have already retained and talked to. Instead, it now refuses to admit it retained any expert witnesses at all, though trying to shield all its investigations into causation behind litigation privilege.

[61] For the most part, what was sought in this line of questions was information – not documents. Only question 14 deals with a document, and in that case, what is sought are observations, thus, factual information rather than expert opinion.

[62] These questions are clearly relevant and the issue of privilege only arises if all of the information in issue came from experts and even then, only if the undertaking contemplated by Rule 31.06(3) has been given. In responding to this motion as it did, it was up to Hydro, as a starting point, to establish unequivocally that that was the case.

Turning to the evidence, I am unable to conclude that they have met even this initial aspect of their onus.

- [63] Throughout her evidence, Barwell is cagey about whether or not Hydro even retained experts or conducted investigations.
- [64] At paragraph 17(b)(iii) on page 9, she claims that *any observations made by the expert observers who are also "expert witnesses" are privileged*.
- [65] Similarly, at paragraph 17(c)(ii), Barwell discusses the retainer of an expert (which, I note, she states was done *in the usual course*). She claims she took over the drafting of the retainer agreement for that expert personally.
- [66] In paragraph 17(c)(iii), she states that instructions were given to the experts regarding their investigations after the retainer of counsel and that all investigations conducted by them were *under the supervision* of counsel.
- [67] All this evidence suggests that experts were retained. It does not, however, indicate that the information in issue was derived from them.
- [68] Having started down the road of trying to set up litigation privilege on the basis of experts having been retained, Barwell then goes on to cast doubt on whether any of them has actually done anything yet that resulted in Hydro obtaining information.
- [69] On page 9 of her affidavit, paragraph 17(c), she states:  
*Apart from the above if there are any investigations which may have been conducted by outside expert witnesses, these investigations were made in anticipation of litigation.*
- [70] On page 11, at paragraph 20(b)(ii), she states:  
*As for any investigation carried out by expert witnesses, such investigation (if there were any, Toronto Hydro does not state whether there were)...*
- [71] Similarly, throughout the Refusals Chart, Hydro sat on the fence as to whether or not any experts aside from the Fire Marshall had conducted an investigation. For example, at item 12 they say:  
*If any investigation was carried out thereafter at the direction of counsel (which is neither admitted nor denied), it is subject to litigation privilege*
- [72] Similar wording was used in response to item 14.
- [73] An affidavit and a response to a refusals chart should not be treated like a pleading, where a party may be reluctant at an early stage to commit to a position. The level of evidence required to meet the threshold issue of whether or not this information even emanates from experts cannot be treated by Hydro as a hypothetical if they expect to hide their information behind the wall of litigation privilege. The onus was on them to make it

very clear that the shielded information comes from experts. This teetering on the fence has stripped any value from their evidence that suggests experts were retained as Hydro fails to assert unequivocally that the information in issue came from those experts.

- [74] Even if Hydro had established that the information in issue came from experts, that would not have ended the inquiry. They would also have had the onus of proving the purpose for which the information was obtained. While case law suggests in order to be able to rely on litigation privilege, Hydro would have had to demonstrate that the dominant purpose of the investigation resulting in all of the information sought was to address anticipated litigation (see *Blank v. Canada* [2006] 2 S.C.R. 319), Rule 31.06(3)(a) suggests that this information had to have been collected *for no other purpose*. I need not resolve whether the test is dominant or sole purpose here as the evidence falls short of showing either.
- [75] Barwell went to some lengths in her evidence to set up a factual context to show that litigation was anticipated from the start. However, the fact that counsel was retained within days of the event does not establish that litigation was reasonably anticipated at that point. Hydro has provided no information as to its general practice in cases of this kind. Again, Barwell's evidence leaves much to be desired - media coverage is generally not an appropriate way to prove much of anything beyond the parameters of a defamation case.
- [76] I also query how Hydro can show the purpose of any or all investigations was anticipation of litigation in view of Barwell's equivocal approach to whether or not the experts that were retained have actually conducted an investigation as yet. The uncertainty as to whether or not an expert actually conducted an investigation impedes Barwell's ability to show what the dominant/sole purpose of this hypothetical investigation was.
- [77] Hydro is a public utility, governed by the *Electricity Act, 1998* S.O. 1998, Chapter 15, schedule A. According to section 1 of the Act, the purpose of this governing legislation is to ensure, among other things, the safety of electricity supply in Ontario.
- [78] Surely, one of the critical reasons behind any investigation conducted by Hydro or on its behalf would be to learn what it could to ensure that incidents of this kind could be avoided in future - at least, one would hope that is the case - as part of ensuring "the safety of the electrical supply in Ontario." Barwell's evidence at paragraph 20(b)(i) is therefore difficult to understand, though once again, it is worded as a hypothetical:

*As for any investigation carried out by expert witnesses, such investigation (if there were any, Toronto Hydro does not state whether there were) were clearly carried out for the sole purpose of preparing for anticipated litigation. They were not conducted for the purpose of being used in any public investigation, contrary to the plaintiffs' assertions, or for any other purpose.*

[79] Simply knowing litigation is on its way is not enough to characterize everything done to learn more about a tragic event as having been undertaken solely for the purpose of addressing that litigation.

[80] It is also extremely difficult to understand how Barwell could possibly state a purpose behind an investigation that may or may not have been conducted. Further, in the context of Hydro's role as a public utility, it is even more difficult to understand that any and all investigations that Hydro conducted would have been undertaken solely to address litigation and not for any other purpose.

[81] Finally, even if Barwell:

- Had admitted that the information sought and refused was exclusively derived from experts;
- Had proved that the experts provided their information in the context of their investigations;
- Had proved that those investigation were undertaken after it was reasonable for Hydro to have anticipated litigation; and
- Had proved that the sole or dominant purpose of the investigation was to address this litigation,

Hydro would still have to address Rule 31.06(3)(a), which deals with the disclosure of information at discoveries, as distinct from documentary disclosure.

[82] At examinations for discovery, a party is entitled to disclosure of:

*the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and address.*

[83] That is the general rule. There is an exception to that Rule such that disclosure is not required where:

- (a) *The findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made for or formed in the preparation for contemplated or pending litigation and for no other purpose; and*
- (b) *The party being examined undertakes not to call the expert as a witness at the trial.*

[84] This provision appears in the Rules governing the conduct of examinations for discovery. The time for invoking the exception to the application to Rule 31.06(3) is therefore at the discovery table, at the time that information is refused on the basis of privilege. The Rule is clear is that the undertaking is to be given "by the party being examined."

[85] In 2002, our Divisional Court made that point in *Jones v. Niklaus* 2002 CarswellOnt 5497. In *Jones*, the plaintiff sought production of an expert's report because of the defendant's refusal at discovery to give an undertaking not to call the expert as a witness

at trial. The defendant had indicated in first instance that more time was needed before that decision could be made.

- [86] The Divisional Court held that *the rule seems plain in its wording*. They were prepared to build in limited flexibility, however, stating:

*In our view, there is a positive obligation the party seeking delay in making the choice to demonstrate why it is premature to have to make that choice. Ideally a reason might be stated at the time of discovery. On a subsequent motion the party ought to present a cogent reason that would justify the exercise of judicial discretion in favour of further delay.*

- [87] A thirty day extension, running from the release of the appeal decision, was therefore granted in that case.

- [88] In this case, no delay was requested at discoveries. Hydro counsel was expressly asked to provide the undertaking not to call the evidence if she was not prepared to disclose it, but she refused. In fact, in the two years plus since these refusals were first given, no request has been made by Hydro for further time to decide whether or not it will be relying on these expert witnesses. Nor has Hydro provided any reason on which to base such a request. They have still not done so.

- [89] Instead, their in-house senior counsel mischaracterized in her affidavit how the Rule operates (see paragraph 20(b)(iii)). That is inconsistent with Hydro seeking an extension of the time frame for giving the undertaking, something only done for the first time in mid-motion and after my disposition was clear.

- [90] It is ironic that having tendered the *Jones* case, Hydro then sought to rely on two other decisions, both from lower courts. *Jones* was only released by the Divisional Court in December 2002, that is, after Lofchik J. heard *Turner (Litigation Guardian) v. Dyck*, 2002 CarswellOnt 4202, which he released in October of that year. Thus, *Jones* is both the higher and more recent authority. But even in *Turner*, the learned judge expressed his scepticism about the party claiming privilege's inability to make a decision regarding whether or not to call the expert at trial. As he stated:

*There is no reason why Rule 31.06(30) cannot be complied with. In the rare case where an undertaking is given not to call an expert at trial and that decision has to be reconsidered in light of subsequent events, leave may be sought and in appropriate cases will be given to retract that undertaking upon the necessary disclosure being made.*

- [91] On that basis the court ordered the plaintiffs to comply with their obligations under the Rule. I am therefore unclear as to how Hydro sees this case as being of assistance to them. They have still not provided any undertaking to refrain from calling any experts -- the existence of which they seem to be prepared to deny.

- [92] In view of Ms. Barwell's evidence, it came as somewhat as a surprise when Mr. Lavrence asked at the end of his submissions for time to consider whether or not to give the undertaking. He Only made the request after it was clear to him that I viewed Hydro's reading of the Rule as incorrect. Absolutely no reason, let alone evidence, was provided to explain why, more than two years post discovery and more than three years post loss Hydro now, for the first time, felt it needed more time to consider whether or not to call whatever experts it may have retained as witnesses at trial.
- [93] Accordingly it is ordered that all of the questions within this category that pertain to investigations conducted by experts shall be answered within 30 days. I am not satisfied that litigation privilege has been properly established and, even if it had been, this disclosure is required as Hydro has failed to provide the necessary undertaking.
- [94] To the extent that the information sought comes from non-experts, Rule 31.06(2), (as qualified by *Dionisopoulos v. Provias*, such that summaries of their evidence must also be provided) applies. There is no basis for privilege when non-experts are involved.

**ISSUE NO. 2: Production of schedule "B" Documents – refusal no. 24**

- [95] Schedule "B" to Hydro's affidavit of documents runs for 58 pages and all but the last two entries refer to e-mails, running in time from July 20, 2008 – the very date of this occurrence. Plaintiffs' counsel was clear that he had no interest in getting his hands on material that actually was privileged, but based on how this schedule is set up, it is difficult to tell the extent to which the document over which privilege has been claimed meet the criteria to be eligible for its application.
- [96] To begin with, both litigation and solicitor-client privilege have been claimed for all 1,639 documents. The e-mails are not grouped in categories. There is, in fact, absolutely no reference at all as to what any one of them pertains to.
- [97] Some refer to individuals having sent or received the e-mail who we know are lawyers (for example, Shauna Hoare is now Ms. Barwell), but even then, particularly when dealing with in-house counsel, there is no indication that the e-mails in question involved these individuals acting qua-counsel when they sent or received each e-mails. In-house counsel often wear several hats so being clear that they were acting as counsel when involved in an exchange is a critical component of establishing privilege, at least on a solicitor-client basis.
- [98] This motion has been outstanding for some time, so Hydro had ample opportunity to address the deficiencies of this schedule. Again, they appear to have relied on their own interpretation of what they were and were not required to do.
- [99] Hydro was asked to bring the materials to court in the event the court was prepared to peruse the e-mails, but Hydro failed to do so, advising plaintiff's counsel in court for the first time that they had been unable to do so as the materials were voluminous. Though they exist in electronic form, and presumably could have been downloaded to a disc, that was not available, either

- [100] Hydro counsel identified Riva Finkel, Lawrence Wilde and Shauna Hoare as counsel. The only evidence they have addressing this group of documents is referred to in the Barwell affidavit, at page 9, paragraph 17(c)(i). Barwell claims that investigations by expert witnesses (the existence of which she is not prepared to admit) were:

*initiated in a series of internal e-mails which deal with the anticipated litigation, the retainer of Blaney McMurtry LLP and with the initial steps recommended to Toronto Hydro by Blaney McMurtry LLP. These include direct communication with Blaney McMurtry LLP with respect to legal advice and other internal communication in which counsel's advice (Blaney McMurtry LLP's or mine) is referred to and passed to individuals within Toronto Hydro. All of these e-mails are subject to litigation privilege and solicitor/client privilege.*

- [101] It was Ms. Barwell's task to put the evidence before the court from which the court could draw its own conclusions, not to state what is and what is not privileged in the face of a motion challenging what she has done.
- [102] In the context of the issue raised here, the failure to have found a way to bring the documents to court or to explain, in evidence, why that was not possible to do so even in electronic form, is seriously problematic for Hydro. Their failure to group the e-mails by subject and to indicate who the players are is equally so. Once again, Hydro used a very broad brush to make their position opaque.
- [103] Accordingly it is ordered that all documents within schedule "B" shall be produced within 30 days, except for those where one or more of these individuals appear as either a sender or recipient. In the context of this case, a boiler plate approach to schedule "B" is not acceptable. Here, I am giving counsel the benefit of the doubt on the basis that at least one player in each e-mail has been identified as counsel.
- [104] Mr. Charney, wary of stepping on privilege properly claimed, has also suggested that, to the extent that Hydro takes the position that any of the documents ordered to be produced should be protected, Hydro should be prepared to put those documents together for my inspection. I am prepared to deal with the matter in that way on the basis that I receive a list of those documents over which privilege is maintained no later than 20 days from the release of this order.

**ISSUE NO. 3: production of a summary of schedule "B" Documents**

- [105] In view of my order above, this is no longer being pursued, other than on an alternative basis, in the event that I had not been prepared to order disclosure as per Item 2, above.
- [106] Hydro counsel agreed that if the document refers to information obtained, that should be disclosed but counsels' views regarding what was obtained should not be. This is an appropriate limitation and it is so ordered, but only in the alternative.

**ISSUE NO. 4: Production of expert reports, if any exist – refusals 26, 27 and 28**

- [107] Late in the day, Hydro counsel advised that, at this juncture, experts had been retained but that no written reports had been received as yet, except for one report, which he described as "factually based" only. He claims this report expressed no opinions and he believed it had been produced. Plaintiffs' counsel maintains that he had not seen it. Hydro advised they were prepared to produce it.
- [108] To the extent that any of these reports was prepared by anyone other than an expert qualified to opine as to the cause of this loss, they shall be disclosed within 30 days.
- [109] As no undertaking has been given by Hydro to refrain from calling any of the experts who may have created these reports as witnesses at trial, Hydro is already required to disclose the findings, opinions and conclusions contained in them. The reports themselves must also be produced within the timelines stipulated by the Rules if the witnesses are going to be relied on at trial. No order is needed at this time.
- [110] I am not prepared to give Hydro additional time to decide whether or not to undertake not to call evidence it wishes to withhold from scrutiny. They did not ask for added time at discoveries, merely disputed the need to do so. They have come to this court and only asked for time after becoming aware of how I planned to rule. No cogent reason has been presented as all for the request, let alone a reason contained in evidence properly submitted to the court. To give them additional time at this point in the face of clear jurisprudence - which they filed - would create an unfortunate precedent.
- [111] To the extent that new reports are obtained, Hydro has an ongoing obligation to notify all parties and to provide the findings, opinions and conclusions within them as they are received unless they undertake at that time not to call the experts as a witnesses at trial.

**ISSUE NO. 5: provide findings of experts who prepared reports - refusal 29**

- [112] In view of my findings with respect to item 1, these shall be produced within 30 days.

**ISSUE NO. 6: summary of all witness information pursuant to Rule 31.06(2) - under advisement no. 15**

- [113] On the basis of this Rule, as qualified by the *Dionisopoulos* case, this question shall be answered within 30 days.

**ISSUE NO. 7: were the condition of service brought to the attention of Gonte - items 1 and 2**

- [114] Hydro withdrew their objection to the questions, reworded as follows: *What steps does Hydro take to bring the Conditions of Service to the attention of its clients?* They shall respond to that question within 3 days.

**ISSUE NO. 8: Technical questions about power distribution - refusals 4, 5, 8, 9, 10 and 11**

- [115] I reserved my decision regarding these questions and consider them now in the context of what I have already decided.

[116] As noted earlier, Hydro has not given an undertaking not to call any expert witness who may have already provided findings, opinions or conclusions either verbally or in writing. As a result, if they already have any information about:

- o Whether Gonte installed the correct number of heat detectors in the vault (item 4);
- o What they likely set the rate at (item 4)
- o Whether the following could or did affect the operation of the transformer at 2 Secord: power outages; branches on wires; phase imbalances on the 43M32 feeder; the explosion at Woodbine and O'Connor, and if so, how (items 8, 9, 10, and 11)

Hydro shall provide it within 30 days. My Reasons above apply here, as well.

[117] Item 5 is a factual question for Hydro which their staff should surely be able to answer. Presumably, they have a protocol for things of this kind. They shall provide the information sought within 30 days.

**ISSUE NO. 9: questions seeking to elicit Hydro's position on causation – items 16 and 17**

[118] This item was also taken under reserve.

[119] In its statement of defence, Hydro admits that white smoke or vapour emerged from the ventilation fans in the vault before this event. The explanation they provide for that is a reference to mineral oil within the transformers having evaporated, though it is not clear if this is offered as an explanation for the smoke.

[120] Hydro pleads that the superintendent or Gonte staff of 2 Secord called Toronto Fire and that the latter exacerbated events by opening the vault, causing oxygen to enter it, mix with evaporated oil and create an explosive mix.

[121] The question remains: why did the oil evaporate in the first place or was there any other reason for the smoke? It has now been some time since Hydro delivered its statement of defence and the Fire Marshall has released its report. The Fire Marshall actually speaks of an overflow rather than the evaporation of the transformer oil as a catalyst for the event.

[122] Hydro must have a theory they will advance at trial as to why the transformers overheated which led to this and there must be a factual basis for their belief. Again, if the information and belief is their own, reached independently of experts, it must be disclosed. There is no basis for claiming privilege. If, on the other hand, this belief is the result of an expert's view, whether expressed in writing or orally, the facts on which it is based, findings, opinions and conclusions must be disclosed as no undertaking to refrain from relying on that expert at trial has been given.

[123] This information shall be produced within 30 days.

**ISSUE 10: under advisements 5, 7 and 16.**

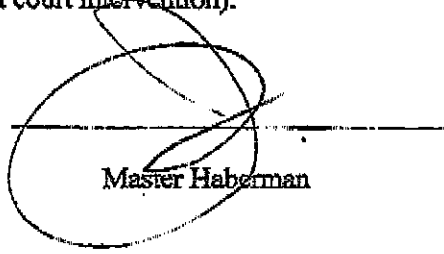
- [124] Hydro somehow neglected to provide a responding position for this chart. The motion is adjourned sine die so that process can be completed. Unless they are prepared to provide answers as sought, they shall provide a responding chart within 20 days.
- [125] As this will be a short motion, it should be brought returnable before me but on a regular motions list. As the file is an 08 file, it will likely be returned to Cooksville, so counsel will have to praecipe the file at least 10 clear days before the return of the new motion date. They should also check with the 10<sup>th</sup> floor at least 3 days before the scheduled date to ensure that the file has arrived.

**ADDITIONAL DISCOVERY of NEW WITNESS**

- [126] The parties agree that it would be appropriate to adjourn this part of the motion sine die until what has been ordered to be produced has been. It may be that the plaintiffs learn all they need from the materials ordered produced, such that a further examination is not something that needs to be considered. I therefore adjourn this aspect of the motion sine die, but I shall remain seized of it.

**COSTS**

- [127] Mr. Charney did not have a cost outline today so I was unable to deal with costs. As there were two areas in which I had reserved my decision, and a few matters remain, costs are adjourned for now. In the event that parties are unable to agree, I can be spoken to within 30 days of the end of this process (this will depend on whether or not item 10 can be resolved without court intervention).



Master Haberman

**Date:** 2012-02-16