CITATION: *Kennedy v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2582
COURT FILE NO.: CV-08-361906 CPA1
DATE: 20120430

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Lee Kennedy and Bekalla Yusuf**, Plaintiffs/Respondents

Toronto Hydro-Electric System Ltd., Defendant/Appellant

BEFORE: G.R. Strathy J.

COUNSEL: *Theodore P. Charney & Andrew J. Eckart*, for the Plaintiffs/Respondents

Ivan Y. Lavrence & Reeva M. Finkel, for the Defendant/Appellant

Elizabeth Bowker, for the Third Party, Conte Construction Limited

Christina Pangos, for the Third Party, City of Toronto

DATE HEARD: April 24, 2012

ENDORSEMENT

[1] This is an appeal from an Order of Master Haberman, requiring the defendant (Toronto Hydro) to answer certain questions that its representative refused to answer on his examination for discovery by the plaintiffs' counsel. The motion was supported before the Master and on the appeal before me by counsel on behalf of the third parties Gonte Construction Limited and City of Toronto.

Background

[2] This is a certified class action arising out of a fire and explosion on July 20, 2008 in the underground hydro vault of a real estate development located at 2 Secord Avenue in the City of Toronto (2 Secord).

[3] Toronto Hydro maintains and operates Toronto's electrical distribution system infrastructure. It owned, operated or controlled the electrical vault, which housed two electrical transformers.

[4] The development at 2 Secord includes about 300 residential apartments, adjacent townhouses and leased commercial space. The class is composed of persons who rented a unit,

ordinarily resided in a unit, were present in a unit, owned property in a unit or owned one or more units in 2 Secord.

[5] The office of the Fire Marshall investigated the fire and explosion and concluded that a major electrical storm, lasting for several hours, had likely stressed the transformers leading to their overheating. Mineral oil escaped or leaked through vents in the transformers and boiled or vaporized as a result of the heat. The gases given off by the oil and other burning substances were likely ignited when they came into contact with arcing electrical conductors within the room. Ignition of the gases was fuelled by oxygen entering the vault when the door was momentarily opened by Fire Department personnel. A powerful and destructive explosion happened shortly after.

[6] The Fire Marshall found that there was no heat detection system in the vault. The hydro transformers in the vault were equipped with a heat detection system, but it was not connected to the building's alarm system. The plaintiffs say that if the detection system had been properly connected, there would have been early warning of the overheating of the transformers and the explosion and fire would have been averted.

[7] The fire and explosion had serious consequences. Many occupants of the building were required to evacuate their units and to find alternative accommodation. They sustained damage to their units and their property.

[8] This action was certified under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, on consent, on April 23, 2009, by Lax J., who was the case management judge at the time. The common issues include whether Toronto Hydro owes a duty to the Class in relation to the design, operation, monitoring and maintenance of the hydro vault, whether it breached that duty of care and if so, how. The cause of the fire and explosion will be one of the central issues at the common issues trial.

[9] I have been case managing this proceeding since September, 2009, when I took over case management from Lax J. Master Haberman has been appointed to hear various motions arising in this proceeding.

Summary of the Questions at Issue

[10] Toronto Hydro appeals portions of the Master's order dealing with:

(a) the refusal of Toronto Hydro to provide particulars of the investigations that it carried out, either on its own or through others;

(b) the refusal of Toronto Hydro to provide the findings and conclusions of experts that it retained;

(c) the refusal of Toronto Hydro to answer certain technical questions posed by plaintiffs' counsel concerning the matters at issue;

(d) the refusal of Toronto Hydro to answer questions about its "theory" or "position" on the cause of the explosion and fire.

[11] As argued by counsel on behalf of Toronto Hydro, the appeal really broke down to two main issues: the obligation, if any, of Toronto Hydro to provide information concerning the results of investigations that it conducted internally or through experts; and the obligation of Toronto Hydro to respond to questions concerning the cause of the overheating of the transformers.

The Standard of Review

[12] The parties are in agreement that the standard of review on an appeal from the Master is set out in *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Div. Ct.) at para 40, aff'd 2009 ONCA 415. Justice Perell has described this standard of review in *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649, [2012] O. J. No. 262 (S.C.J.) at paras. 20-21 as follows:

> A Master's decision should not be interfered with unless the Master made an error of law, exercised his or her discretion on the wrong principles, or misapprehended the evidence such that there was a palpable or overriding error: *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Div. Ct.); affd. (2009), 96 O.R. (3d) 639 (C.A.).
>
> When the Master has decided a matter of law, which includes determinations of whether a question is relevant or whether evidence is privileged, the standard of review is correctness: *Leadbeater v. Ontario* [2004] O.J. No. 1228 (S.C.J.) at para. 29; *Kennedy v. McKenzie*, [2005] O.J. No. 2060 (S.C.J.) at para. 15.

The Decision of the Master

[13] In careful and thorough reasons, reported as *Kennedy v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 1088, [2012] O.J. No. 682, Master Haberman reviewed the discovery transcript, the questions at issue, the evidence before her and the positions of the parties. She ordered that Toronto Hydro answer the contentious questions. The Master clearly considered that the positions taken by Toronto Hydro on discovery were unreasonable. She was also critical of the evidence produced by Toronto Hydro on the motion – an affidavit sworn by Ms. Shauna Barwell, a lawyer in Toronto Hydro's legal division – which she described as evasive, internally inconsistent and equivocal.

[14] I would not disagree with these observations of the Master. I would add that some portions of Ms. Barwell's affidavit consisted of evidence that was clearly based on information and belief, which failed to disclose the source of the information or the fact of belief, contrary to Rules 4.06(2) and 39.01(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. As well,

some portions of the affidavit were pure argument and advocacy, which have no place in an affidavit.

[15] More to the point, however, having reviewed the evidence before her in detail, the Master made express findings of fact that Toronto Hydro had not discharged the onus of establishing that the reports in question were subject to litigation privilege – that is, that the sole or dominant purpose of the reports was for use in litigation.

[16] In this regard, the Master noted that, on the examination for discovery, Toronto Hydro's representative, Mr. La Pianta stated that Hydro would typically investigate a transformer failure that occurred in catastrophic circumstances for the purpose of determining the cause of the failure. He testified that such investigations were done in the ordinary course of business by Hydro and that "more often than not", the investigation was done by a third party. The Master's observations on Toronto Hydro's position on discovery and this evidence of Mr. La Pianta are set out at paras. 6 to 18 of her reasons.

[17] When counsel for the plaintiffs asked, on discovery, whether the witness would make inquiries concerning the nature of the investigation conducted by Toronto Hydro after this incident, the flat answer by counsel for Toronto Hydro was "no". Counsel for Toronto Hydro stated:

> ... 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] The position taken by Toronto Hydro, through its counsel, is that immediately on the retainer of external counsel, which occurred within a few days of the fire, all investigations of the fire and explosion were conducted at the request of and under the supervision of counsel and the findings, conclusions and observations of these investigations were therefore under an impenetrable cone of privilege. This position was maintained before the Master and before me. Essentially, in this case, Toronto Hydro has refused to answer any questions about its investigation, whether internal or otherwise.

[19] The Master observed, at paras. 19-20:

> 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 [sic].

> 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

[20] Against this background, the Master then made a thorough review of the affidavit of Ms. Barwell filed in response to the motion to compel answers to the refusals. The Master observed that in its third party claim against Gonte Construction Limited, Toronto Hydro had made allegations going to the issue of causation that made it clear that it must have had a theory of causation to ground these allegations and that it must have had some internal or external expertise and some sort of investigation in order to ascertain the facts upon which its theory was based. She noted that Ms. Barwell was evasive about whether Toronto Hydro had actually retained any experts

[21] The Master made express findings that the affidavit of Ms. Barwell did not discharge its onus, which Toronto Hydro admits it bears, of establishing that the information requested by the plaintiffs was subject to litigation privilege. For example:

> (a) at paras. 23 and 24, the Master observed:
>
> 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.
>
> Often, what a party has chosen not to say is equally or even more telling that [sic] 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.
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> (b) at para. 27:
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> 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.

(c) at paras. 73 and 74, the Master found that the evidence "fell short" of establishing that the dominant purpose of the investigation was for the purpose of litigation:

> 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.
>
> 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.

[22] There was ample evidence to support the Master's conclusions on this issue. She made no palpable or over-riding error in the assessment of that evidence. While a question of privilege is a question of law, the determination of the underlying facts on which the claim is based is a fact-finding exercise.

[23] Moreover, I am respectfully in complete agreement with the Master's conclusion on this issue. There was evidence before her that Toronto Hydro's usual practice was to investigate "catastrophic" transformer failures using outside personnel. Ms. Barwell did not contradict this evidence. The fire and explosion on July 20, 2008 was "catastrophic" in any meaning of the word.

[24] It makes complete sense that Toronto Hydro would conduct an investigation. A serious accident had occurred affecting a major residential complex. Toronto Hydro is a public utility responsible for the operation of several thousand hydro vaults. It would surely have an interest in investigating the incident to determine its cause and whether action needed to be taken to prevent similar accidents from occurring at other facilities. The electrical industry in Ontario is highly regulated and distributors are subject to strict performance and safety standards and audits. I agree with the Master that it is simply inconceivable that Toronto Hydro did not conduct a thorough investigation of the incident.

[25] In my view, having concluded that Toronto Hydro had not established a factual basis for the existence of privilege in connection with its investigations of the explosion, the Master made no error in her application of the law of privilege to the facts before her.

[26] The Master then observed, at para. 81 and following, that even if Toronto Hydro had established that its information about the incident had come exclusively from experts, retained for the purpose of litigation, it would still be necessary for Toronto Hydro to address the requirements of Rule 31.06(3), which provides:

> (3) A party may on an examination for discovery obtain 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, but the party being examined need not disclose the information or the name and address of the expert where,
>
> (a) the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in 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.

[27] When questions were asked on Mr. La Pianta's discovery about the findings, opinions and conclusions of Toronto Hydro's experts, the standard, glib, unhelpful and self-serving response to questions about the results of investigations was "we'll comply with the rules".

[28] The Master was highly critical, in my view rightly so, of Toronto Hydro's misinterpretation and misapplication of Rule 31.06(3) with respect to expert reports. As the Master pointed out, at para. 84 of her reasons, "[T]he 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 [not to call the expert as a witness at trial] is to be given 'by the party being examined.'"

[29] The submission of Toronto Hydro on the motion before me was, essentially, that a party does not have to disclose the findings, opinions and conclusions of an expert until such time as it

considers it appropriate to do so, in all the circumstances, having regard to the complexity of the case, the state of discovery of the various parties, the proximity of trial and the disclosure of expert reports or opinions by other parties. In the submissions before me, Toronto Hydro's position boiled down to the assertion that it did not have to comply with the rule until such time as the plaintiff had produced its own expert reports.

[30] Toronto Hydro argues that the Master's decision was wrong in law or based on an improper exercise of discretion, because Rule 31.06(3) does not specify when the election must be made. It says that flexibility is required and the election not to call the expert need not be made at the time the question is asked. It relies on *Turner (Litigation Guardian of) v. Dyck*, [2002] O.J. No. 4775 (S.C.J.) one of the authorities referred to by the Master, and *Wilson v. Young* (2008), 93 O.R. (3d) 374 (S.C.J.), a decision of Master Graham. It says that the approach taken by the Master is a technical reading of the rule which "strips a party's right to assert a recognized and well established privilege on a technical reading of the applicable rule", discourages early resort to experts and "rewards a party that elects to do nothing to define and advance the central theories of its case, but rather encourages it to go on a fishing expedition to force the defendant to disprove negligence".

[31] The reliance by Toronto Hydro on *Turner (Litigation Guardian of) v Dyck* is entirely misplaced. In that case, the party opposing disclosure under Rule 31.06(3) argued that such disclosure of expert opinions might prejudice their discovery of the opposite party by giving him an unfair advantage preparing for the examination. They argued that Rule 53.03, dealing with pre-trial disclosure of expert reports, provided the appropriate mechanism.

[32] This submission was rejected by Lofchik J., at paras. 13-17:

> With respect, plaintiffs' counsel is confusing the purposes of rule 31.06 and rule 53.03. Rule 31 relates to the disclosure of information and Rule 53 relates to the calling of expert evidence at trial. In order to comply with Rule 31, the plaintiffs are not required to produce the expert's reports but they are required to disclose the factual basis of expert evidence relied on, namely the findings, opinions, and conclusions of any experts to be called at trial that relate to a matter in issue in the action as well as the expert's name and address. The cases relied upon by the plaintiffs deal with the production of expert reports prior to trial and may be distinguished on this basis.
>
> If the findings, opinions and conclusions of the expert were made in preparation for contemplated or pending litigation and no other purpose, they need not be disclosed if the party undertakes not to call the expert as a witness at trial.
>
> I am somewhat skeptical of the plaintiffs' argument that they cannot make a decision with respect to whether an expert's

> evidence will be called at trial without first examining the defendant. The plaintiffs know now what the nature of their claim is, the case they have to make and the evidence that will have to be called to support that case. There is no reason in my view why rule 31.06(3) 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. An Order will issue that the plaintiffs, as part of their Examination for Discovery, comply with rule 31.06(3).
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> The scope of "findings, opinions and conclusions" in rule 31.06 is broad and includes information and data obtained by the expert, contained in documents or obtained through interviews on the basis of which conclusions are drawn and opinions are formed. The information and data can include research, documents, calculations and factual data and the words "findings, opinions and conclusions" are broad enough to include the field notes, raw data and records made and used by the expert in preparing his or her report to the extent that factual underpinnings in support of the opinions or conclusions are not set out in the report. To the extent that the opinions and conclusions in the report are based upon information communicated by counsel to the experts, even though the result of research and the work product of counsel, the provision of such information to the experts and the reliance upon same by the experts in coming to their opinions and conclusions waives any privilege which may attach to such information. (Ontario (Attorney General) v. Ballard Estate (1994), 20 O.R. (3d) 189; Award Developments (Ontario) Ltd. v. Novoco Enterprises Limited (1992), 10 O.R. (3d) 186; Cheaeney v. Peel Memorial Hospital (1990), 73 O.R. (2d) 794; Kaptsis v. Macias and Prochilo Brothers Auto Collision Limited (1990), 74 O.R. (2d) 189).
>
> The obligation in rule 31.06(3) is not restricted to final findings, opinions and conclusions of experts nor to written reports; it requires disclosure of any finding, opinion or conclusion of an expert that is expressed in a sufficiently coherent manner that it can be used by counsel.

[33] Nor does *Wilson v. Young* assist the defendant. That case involved an expert inspecting property under Rule 32. The Master simply held that the party conducting the inspection was required to comply with Rule 31.06(3) by either undertaking not to call the expert at trial or by disclosing the expert's findings, opinions and conclusions. The Master imposed a deadline for making the election.

[34] Toronto Hydro submitted that the practice of civil litigation in this province would be thrown into chaos if parties were required to comply with the literal requirements of Rule 31.06(3). Counsel submitted that plaintiffs and defendants would delay in obtaining expert reports for fear that they would be required to disclose them on discovery.

[35] I do not agree with this submission. Responsible counsel know the importance of retaining reputable experts at an early stage. They also know that they should go to discovery prepared to either disclose the "findings, opinions and conclusions" of their experts or to give the undertaking not to call the person as a witness. Disclosure of this kind supports the purpose of discovery, namely enabling a party to know the case it must meet, narrowing the issues and promoting settlement. The approach suggested by counsel for Toronto Hydro does just the opposite.

[36] Moreover, Rule 53.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, requires that expert reports be served at least 90 days before the pre-trial conference and Rule 50.11 provides that expert reports are to be provided to the presiding judge or case management master at the pre-trial conference. This is with a view to resolving the action, narrowing the issues and promoting the just, expeditious and least expensive disposition of the proceeding (Rule 50.01). The early disclosure of expert findings, opinions and conclusions at discovery facilitates all these objectives and allows the parties to complete their trial preparation in a timely and efficient way.

[37] I acknowledge that the rule is not always observed as carefully as it should be. Too often, however, the statement "we will comply with the Rules" is used to shirk compliance with the Rules.

[38] On some occasions, counsel – working cooperatively and with a view to discharging their obligations to their clients and the court – reach agreement on a timeline for the disclosure of the relevant information. This addresses the issue responsibly, fairly and up front.

[39] In other cases, where a party can establish a legitimate reason to delay compliance with the rule, the court has discretion to extend the time. In this regard, the Master referred to the decision of the Divisional Court in *Jones v. Niklaus*, [2002] O.J. No. 4956, in which the Court indicated that there may be scope for flexibility in the application of the strict language of Rule 31.06(3) where a party seeks to defer the election not to call an expert at trial. It stated, at paras. 11 and 12:

> On the plaintiff's motion to compel disclosure because of the defendant's refusal at the time of the discovery to give an undertaking not to call the expert as a witness at trial, defendant's counsel advised the motions judge she still needed more time to make her decision. The motions judge took away that time, and with it the defendant's option, in ordering production of the report. No reasons were given, but apparently she did not recognize she had the discretion to make any different order.

> The rule seems plain in its wording. However, we agree with Ms. Ring's submission that some flexibility is required. At the time of the examination for discovery a party may be prejudiced by the need to prematurely make the election contemplated by the rule. A strict interpretation of the rule may encourage parties to delay obtaining expert reports until after the examination for discovery, thus undermining the efficacy of the litigation process. Rule 31.06(3) recognizes the importance of early, comprehensive disclosure. The exception, for a report which may be privileged, must be positively asserted and only then upon the required undertaking not to call the expert as a witness at trial. In our view, there is a positive obligation on 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 the discovery. On a subsequent motion the party ought to present a cogent reason that would justify the exercise of judicial discretion in favour of a further delay.

[40] The Master ordered in this case that the questions be answered - at paras. 93 and 94:

> 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.
>
> To the extent that the information sought comes from non-experts, Rule 31.06(2), (as qualified by *Dionisopoulos v. Provias*, [1990] O.J. No. 30, such that summaries of their evidence must also be provided) applies. There is no basis for privilege when non-experts are involved.

[41] In the exercise of the discretion that she undoubtedly had, the Master declined to give Toronto Hydro further time to comply with Rule 31.06(3) – at paras. 107 – 111:

> 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.

> 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
>
> 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.
>
> 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.
>
> 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

[42] The Master's refusal to allow additional time was a discretionary decision within the scope of her jurisdiction. The Master was very familiar with the circumstances of this litigation and was well positioned to make such a decision. As the Master noted, Toronto Hydro had presented no cogent reason for its request. Her decision is entitled to deference. In any case, I respectfully agree with it.

[43] The remaining issue before me relates to questions having to do with Toronto Hydro's "position" on causation. The specific refusals were at questions 789 to 792:

> To advise whether Hydro developed a theory to date as to what caused the transformers to become overheated, what caused the overheating, and what is Hydro's position on why the transformers overheated. To advise what facts Hydro relies upon to support whatever theory it has as to why the transformers overheated.

[44] These questions appear to stem from Toronto Hydro's statement of defence in which it is alleged that the transformers overheated causing the mineral oil within them to heat to the point

of evaporation. The pleading states that this caused the vault room to become filled with a "thick white vapour of evaporated oil" The pleading goes on to state that seconds after the door to the vault was opened and then closed by Toronto Fire Department personnel, there were a series of explosions caused by oxygen spreading through the vault, mixing with the evaporated oil and "reaching levels that created an explosive mix."

[45] Clearly, at the time the pleading was prepared, as the Master noted, Toronto Hydro had a theory of causation that must have been based on some form of investigation.

[46] With respect to these questions, the Master concluded at paras. 121 and 122:

> 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.
>
> 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.

[47] In my view, the question is proper and the Master's conclusion is correct.

[48] In coming to this conclusion, I do not agree that a party is required to answer a question such as "tell me the theory of your case." Nor does a party have an obligation to express an opinion about the conduct of another party that he or she did not witness: see *Tilstra v. Hospital for Sick Children*, [2001] O.J. No. 3398 (S.C.J.) at para. 6; *Liebig (Litigation Guardian of) v. Guelph General Hospital*, [2008] O.J. No. 280 (Div. Ct.) at paras. 8-11. There may, however, be complex cases involving question of mixed fact and law, where a party can be required to disclose its "position" in the interests of full disclosure of the "matters in issue" in the action: see *Six Nations of the Grand River Band v. Canada (Attorney General)* (2008), 48 O.R. (3d) 377, [2000] O.J. No. 1431 (Div. Ct.); *Law v. Zurich Insurance Co.* (2002), 21 C.P.C. (5th) 280 (S.C.J.).

[49] I do agree, however, that the defendant has an obligation to answer a question such as:

> At paragraphs 8 and 14 of your statement of defence it is alleged that the mineral oil within the transformer overheated, causing it to

> evaporate. What knowledge, information and belief do you have concerning the cause of the overheating?

[50] Counsel for Toronto Hydro acknowledged that, framed this way, the question would be proper. This is, in substance, what the Master ordered Toronto Hydro to answer. I agree with her decision in this respect.

Conclusion

[51] For these reasons, the appeal is dismissed, with costs. If the parties are unable to agree on costs, written submissions, no more than five pages in length, excluding the costs outline, shall be submitted to me, care of Judges' Administration. The plaintiffs shall make their submissions within ten days of the release of this endorsement and the defendant shall have ten days to reply.

G.R. Strathy J.

DATE: April 30, 2012

ONTARIO

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FROM: Laurie Pietras, Secretary to The Honourable Mr. Justice Strathy

TOTAL PAGES (INCLUDING COVER PAGE): 15

MESSAGE:

Re: Kennedy et al v. Toronto Hydro-Electric System Ltd.
Court file: CV-08-361906 CPA1

Please find attached Endorsement released by Justice Strathy today.