

CITATION: The Corporation of the City of Thunder Bay v. Ontario Municipal Insurance Exchange, 2023 ONSC 7288
COURT FILE NO.: CV-17-0235-00
DATE: 2023-12-29

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

The Corporation of the City of Thunder Bay

Plaintiffs

- and -

Ontario Municipal Insurance Exchange, Royal & Sun Alliance Insurance Company of Canada, Catlin Canada Inc., Malik Giffen & Burnett Claims Consultants Inc., Charles Taylor Adjusting Limited

Defendants

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) *C. Jordaan*, for the Plaintiffs
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) *S. Kamayah*, for the Defendants
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) **HEARD:** November 17, 2023,
) at Thunder Bay, Ontario via Zoom

Regional Senior Justice W.D. Newton

Reasons on Motion

Overview

[1] This motion is an example of the dangers of giving undertakings when the party giving the undertaking does not understand what is required to answer the undertaking.

Background Facts

[2] This is an insurance dispute over how much the defendant insurers are required to pay for the cost to rebuild a water pollution control plant owned by the plaintiff (the “City”) which was damaged by flooding from a rainstorm in 2012.

[3] The defendants are the City’s insurers for this plant and the insurance adjusters retained by the insurers to adjust the claim.

[4] The dispute is centred on the cost allocation for upgrades as the policy is subject to a \$10 million sub-limit for building code upgrades. The defendants argue that the sub-limit has been exceeded and that no further compensation is payable under the policy of insurance.

[5] The City’s disputes the insurers’ assertion that the sub-limit has been exceeded.

[6] As stated in its factum, the City asserts that the engineering firm retained by the adjuster to allocate costs into the different coverage brackets, MKA Canada Inc. (“MKA”) initially allocated \$3.5 million of the project cost to code upgrades but later, following a meeting in 2015 with the insurers, adjusters, and MKA, MKA’s allocation to code upgrades increased to \$20.4 million.

[7] The City describes this as a motion that “seeks to compel answers to undertakings given by the defendants that relate directly to the insurers change in position”. The City’s position is that the MK analysis is a “guesstimate” and that, either there is backup to support MKA’s analysis or there is not.

[8] The three undertakings at issue are as follows:

10. (1) To ask MKA to provide, for each line item in the MKA February 8, 2017 report/table how exactly MKA determined the percentage it would say was allocated to code/bylaw upgrades and

(2) to provide full details, including if it relied on any information other than general experience, to provide the specific information and,

(3) identify a specific document relied on and where it can be found in productions and

(4) to provide specifics for each line item on exactly how it determined that any of the work in relation to that line item was a code or bylaw upgrade

11. If MKA mentions that a particular change is a code upgrade, to confirm with MKA what the pre-repair conditions were to see if in fact the item had changed from pre-repair to post repair in terms of the type of material; and in each case provide of specific photograph or drawing they say shows that there was a change that was a code or bylaw upgrade; and if they rely simply on general experience, to identify who is that that made that determination.

12. To ask MKA to provide information and provide the same inquiries with respect to MKA's June 10, 2015 Costs Assessment Schedule.

[9] These undertakings were given on the examination for discovery of Dale Hackett, a representative of the defendant XL Specialty Insurance on January 27, 2021. Counsel had agreed that all undertakings involving MKA would apply to all defendants.

[10] The responses from the defendants on December 8, 2022, were as follows:

10. The request was made and MKA advises it involves hundreds of rows of the costs for work undertaken on site. MKA advises that it no longer has access to the DropBox file, but it had a voluminous amount (216 GB) of data made available for download at various times, which volume increased considerably between late 2014 and May 2015 and beyond. Unfortunately, MKA screenshots will not provide dates of download as MKA's server was upgraded.

MKA advises that the time required to produce a line-by-line answer for each of these inquiries in 2017 would effectively duplicate the original effort done at the time when the

data was freshly received to be worked on – over five years ago. MKA’s estimated timeframe for preparation of such a task to answer questions would be five months including review by three staff.

MKA relied on work which the City/AECOM specified and is in the drawings. On the question of the specifics on how exactly MKA determined that any of the work in relation to that line item was a code or bylaw upgrade, the City/AECOM themselves advised that it was a necessary code upgrade.

AXA XL understands that this is the best information that MKA can provide short of investing a disproportionate amount of time to answer individual line by line inquiries. The City has access to the same data and more.

11. See item 10 above.

MKA advises that at the time of the preparation of the allocation estimates for code upgrades v. replication in kind, the parties were still at a stage where the City and its representatives refused to provide the majority of the drawings.

MKA relied on work which the City/AECOM specified and is in the drawings. Additionally, MKA’s Barry Milliner relied on his own experience and assessment of the AECOM design details.

12. See item 10 above.

Positions of the Parties

[11] The City submits that the defendants cannot resile from their undertakings once given.

The City relies upon the following passages from recent decisions:

Whether or not the requested undertakings are relevant or constitute a fishing expedition is now moot. Four Seasons gave undertakings to answer the questions asked. Having given the undertakings, Four Seasons cannot now resile from its obligation to answer them because it has decided part of the answer required is irrelevant. The answers provided by Four Seasons are not full answers to the undertakings given.¹

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¹ *Dependable Mechanical Systems Inc v. Four Seasons Site Development Ltd.*, 2019 ONSC 5798 (Master) at para. 21.

Undertakings given at discoveries confer a presumption of relevance and propriety, including proportionality. In *Towne v. Miller (2001)*, the court noted that an undertaking is an acknowledgment that a question is proper and that the subject matter of the undertaking is relevant. Therefore, counsel should not be permitted to renege on a production undertaking where counsel subsequently comes to the belief that a document or part of it is not relevant in the action.²

...

The TMAV Defendants cannot now resile from answering those undertakings by arguing the scope is overbroad, unnecessary, or more properly addressed by follow-up examination.³

[12] The Defendants submit that undertakings 10 – 12 have been answered through all the MKA information produced by the defendants and that the further information requested is excessive and disproportionate. The Defendants submit that the City cannot use discovery to cross-examine their expert.

Analysis

[13] MKA produced a report dated May 19, 2017. This report provided a summary of the design changes and supporting documentation for the work undertaken. The author of the report stated:

Further documentation in the form of AECOM meeting minutes, site observation records, site discussion notes and emails exist but are too extensive to provide in this report.

[14] The report summarized the code upgrades by the following building systems: HVAC mechanical; process mechanical; electrical – general, control lighting, cabling, cable trays and receptacles; instrumentation and control; building and civil works; and safety/alarm systems.

² *Koolatron v. Synergex*, 2017 ONSC 4245 at para. 21.

[15] The City retained an engineering firm, Stantec, to respond to the MKA May 19, 2017, report. That report dated April 18, 2023, is over 45 pages plus appendices, sets out Stantec assessment of the cost of code upgrades broken down by the same categories used by MKA.

[16] MKA responded to the undertaking requests by report dated June 7, 2023. MKA replied that its prior reports answered undertaking number 10 – 12 and it set out the documentation relied upon to make those calculations in those reports.

[17] Notably, the authors of the Stantec report did not say that they could not complete their analysis because of any information required from MKA.

[18] The City has not demonstrated that the line by line analysis it requests is essential for its critique of the MKA calculations or for the determination of this action on the merits. *Rule 1.04* provides that the *Rules of Civil Procedure* shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. In this case, sufficient information has been provided to allow this action to move forward.

[19] Should the defendants seek to introduce further documentation with respect to the line by line analysis the City seeks, that evidence would only be admissible with leave under *Rule 53.08* since that evidence would be in violation of *subrule 30.08 (1)*, *Rule 31.07*, and *subrule 31.09 (3)*.

[20] In concluding that the undertakings have been answered I disagree with the Defendants characterization of the City's questioning as an attempt to cross-examine another parties' expert. In this case, MKA is not a litigation expert but an agent of the insurers and their adjusters who

³ *Dibracon Ltd. v. TMAV Irene Ltd.*, 2022 ONSC 4057 at para. 15.

assisted in the adjusting of the claim. Therefore, relevant information in the possession of MKA is discoverable.

[21] I received cost submissions during argument. The City requested an order for costs in the cause and the Defendants requested costs on a partial indemnity basis. As the Defendants were substantially successful on the motion, they are entitled to their costs which I fix in a lesser amount as not all arguments made by the Defendants were helpful. The defendant shall have their costs fixed the amount of \$7,500 inclusive of HST and disbursements.

[22] During submissions I suggested that this might be an appropriate case for case management, and I direct counsel for the parties to contact the trial coordinator to arrange a case management conference before me as Regional Senior Justice.

“Original signed by”
The Hon. Justice W.D. Newton, R.S.J.

Released: December 29, 2023

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REASONS ON MOTION

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