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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JAMES DURLING, JAN ANTHONY THOMAS, JOHN SANTORO, GIUSEPPINA SANTORO, ANNA MANCO, FRANCESCO MANCO and CESARE MANCO v. SUNRISE PROPANE ENERGY GROUP INC., 1367229 ONTARIO INC., 1186728 ONTARIO LIMITED, 1452049 ONRAIO INC., VALERY BELAHOV, SHAY (SEAN) BEN-MOSHE, LEONID BELAHOV, ARIE BELAHOV, 2094528 ONTARIO INC., HGT HOLDINGS LTD., TESKEY CONSTRUCTION CO. LTD. and TESKEY CONCRETE CO. LTD.

BEFORE: Master R. Dash

COUNSEL: Ted Charney and Harvin Pitch, for the plaintiffs

Robert J. Potts and Mirilyn Sharp, for the Sunrise Propane defendants

Daniel Murdoch, for the Teskey defendants

Walter Myrka, Troy Harrison and William MacLarkey, for the non-party Her Majesty the Queen in Right of Ontario representing the Office of the Fire Marshall, Ministry of Labour, Ministry of the Environment and Office of the Chief Coroner

Lisa LaHorey and Laurie Murphy, for the non-party Technical Standards & Safety Authority

George Cowley, for the non-parties Toronto Police Services and William Blair

REASONS FOR DECISION

[1] On August 10, 2008 an explosion and fire occurred at the Sunrise Propane facility in Toronto, resulting in an evacuation of the surrounding area and damage to a large number of properties.[1] The plaintiffs herein claim losses arising from physical damage to and contamination

[1] There was also a casualty, but claims arising from that casualty are not part of this class action at this time.

of their properties, diminution in value and emotional distress. The Fire Marshall[2] and Office of the Chief Coroner[3] closed off and took custody of the site and, together with the Ministry of the Environment ("MOE")[4], the Ministry of Labour ("MOL")[5] and the Technical Standards & Safety Association ("TSSA")[6] (collectively the "Regulatory Agencies") have been conducting various investigations into the causes of the explosion and compliance or possible breaches of various statutes or regulations. The Toronto Police Services ("police") have also conducted an investigation. The site has been altered as a result of the investigations. It has been further altered as a result of clean-up efforts. Five intended class actions were commenced on August 13, 2008.[7] No motion for certification is pending. The plaintiffs move herein for an order compelling the Regulatory Agencies and the police to produce the fruits of their investigations so that their expert can prepare a report as to the cause of the explosion. Other relief claimed has been resolved by the parties.

THE DOCUMENTS AND THE POSITION OF THE PARTIES AND NON-PARTIES

[2] Although the different agencies have gathered or prepared different documentation as a result of their investigations, and at the risk of over-simplification, the fruits of these investigations include the following:

(a) photographs, aerial photos and videos taken at different times, including those depicting the condition of the site after the explosion but prior to alteration of the site for purposes of investigation and clean-up;

(b) sketches;

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[2] The Fire Marshall has a duty under section 9(2) of the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4 to "investigate the cause, origin and circumstances of any fire or of any explosion." Pursuant to section 14(2) of that Act, the Fire Marshall may close and prevent entry to lands or premises during the completion of an investigation , take photographs and videos, remove articles and take samples. Provincial or criminal offences could be initiated by the police.

[3] The coroner's involvement concerns the death of what turned out to be a Sunrise employee on site. It is common ground that the Chief Coroner has no relevant documentation respecting the plaintiffs' request.

[4] The MOE involvement concerns possible violations of the *Environmental Protection Act* ("EPA"). The MOE has power to regulate the discharge of contaminants into the environment. A provincial officer conducts an inspection, prepares an incident report and if he believes there has been a contravention of the EPA makes a referral to the Investigation and Enforcement Branch ("IEB"). If the IEB decides to lay charges in accordance with the *Provincial Offences Act*, it forwards a Crown Brief to the MOE's Legal Services Branch, which is reviewed by a Crown prosecutor to determine whether to initiate or continue a prosecution.

[5] The MOL involvement concerns possible violations of the *Occupational Health and Safety Act.* This could result in charges under the Act.

[6] The TSSA is an independent administrative authority under the *Technical Standards and Safety Act, 2000*, S.O. 2000, c. 16. Through its Fuel Safety Division the TSSA may grant, suspend and revoke licences to operate propane filling plants. It also has the power to prosecute for an offence under that Act or regulations thereunder. It initially assisted the Fire Marshall and is co-operating with the other Regulatory Agencies.

[7] After the motion was launched a new class action was commenced and all counsel agree that as this will be the action that moves forward to encompass all class plaintiffs, I should make this endorsement in the context and style of cause of the new action.

(c) witness statements and interview notes;

(d) investigation notes from investigators, provincial officers, inspectors and police officers;

(e) field reports, incident reports, activity reports and provincial officer's reports;

(f) internal memos and referral requests;

(g) research reports;

(h) Ontario Propane Association training records;

(i) internal documents from and provided by the defendants to investigators;

(j) pre-incident records from TSSA Fuel Safety Division including Sunrise propane licences and inspection documentation;

(k) TSSA documents respecting post-accident suspension to operate a propane filling plant and proposal to revoke licence;

(l) environmental assessments and clean-up documentation;

(m) correspondence and emails.

[3] The Fire Marshall, the MOE and the MOL have prepared charts identifying items or sets of items including the creator of the items, a short description and whether the agency is prepared to release the items or whether they resist production as prejudicial to the ongoing investigations and contrary to the public interest. The Fire Marshall has identified 50 items or sets of items and the MOE 197 items or sets of items, the MOL approximately 51 items or sets of items plus an additional 197 that appear to duplicate the MOE list. The TSSA has not prepared charts but has identified approximately eight documents related to licensing of the site and the provisional suspension and proposal to revoke the licence, all of which have also been provided to the Sunrise defendants. It has also identified eight documents or categories of documents relating to its investigation. The police have not provided responding material or identified what documents are or were in their possession. Several of the Regulatory Agencies however have listed as documents in their possession photographs taken or documents obtained or prepared by the police. They will be treated as documents in the possession of the Regulatory Agencies for purposes of this motion and it is unnecessary to consider a separate production order against the police. The police were represented by counsel at the hearing of this motion but did not make independent submissions, relying on the position of the Crown.

[4] The plaintiffs have produced a number of reports from their expert detailing information required from the Regulatory Agencies in order to opine as to the cause of the explosion. They have stated that "it is important to document the explosions/fire site such that all fuel sources and potential ignition sources are identified and properly examined." The expert would need to see "documentation relating to the layout of the facility including the location of bulk propane tanks,

propane trucks…" They would need to examine the damage, location and displacement of objects of interest caused by the explosion. The expert (together with the experts for various defendants) had access to the site in early October 2008. They observed that the scene had been altered resulting from the investigation by the Regulatory Agencies, some objects had been removed from the site, many objects left on site were not returned to the location they were in immediately after the explosion and some were stacked in a large pile of debris.[8]

[5] The plaintiffs' expert states that "the origin of the explosion and fires involves the coordination of information that is derived from witness information, fire patterns, arc mapping and fire dynamics." Witness information would include observations of people "who witnessed the explosion/fire or who are aware of conditions present at the time…" He adds that a "fire pattern analysis requires that all artifacts be placed in their pre-explosion/fire locations" but the expert has not been provided with the photographs, drawings and sketches that would depict the condition of the site and the location of the artifacts "in their pre-explosion/fire locations." He claims that observations of witnesses and the initial site assessment can "provide evidence that is necessary in determining the origin" of the fire/explosion. In particular, such evidence could narrow his focus to a more localized area of the site and may reduce the number of artifacts to be examined. Photographs taken during the initial site inspection "will depict burn patterns on artifacts that had not been moved or altered" and could lead to further investigation at the site. The expert therefore outlines four categories of documents taken from the Crown and TSSA motion records that he must review in order to help him recreate the site pre-disturbance and to enable him to "complete a scientific evaluation of the cause and origin of the explosions and fire", namely "witness statements, photographs/videos, exhibits (physical evidence)[9], and investigator's notes, sketches, drawings, aerial maps." The expert opines that he needs the information at this early stage for reasons that will be set out later in these reasons.

[6] The Regulatory Agencies resist the motion, supported by the operators of the propane facility, on three grounds. Firstly they argue that the plaintiffs have not met the test for non-party production under the rules. Secondly they argue that the motion is premature as it attempts to obtain "pre-discovery discovery" prior to certification of the class proceeding and before the close of pleadings. Finally the Regulatory Agencies argue that they are entitled to screen the documents prior to production pursuant to the principles enunciated in *D.P. v. Wagg*[10]. They assert public interest grounds for refusing production at this time since their investigations are ongoing and since regulatory and possibly criminal charges may be laid. They are of the view that production at this stage may prejudice the ability of the Crown to properly conduct any

[8] The plaintiffs argue that the Fire Marshall has not complied with NFPA 921 (The Guide for Fire and Explosion Investigation) which provides that every attempt should be made to "preserve the fire scene as intact and undisturbed as possible" with contents "remaining in their pre-fire locations". Evidence to be preserved is to include material or items "related to the fire ignition, development or spread." The Crown argues that the statutory duties of the Fire Marshall trump NFPA 921 and that in any event the scene pre-disturbance has been preserved by photographs and sketches and can be re-created. It matters not for purposes of this motion whether the Fire Marshall breached NFPA 921. It is evidence of the pre-disturbance state which is available and which is the subject matter of this motion.

[9] Counsel have agreed on a protocol for examining physical evidence and that is not sought as part of this motion.

[10] *D.P. v. Wagg*, [2002] O.J. No. 3808, 222 D.L.R. (4th) 97 (Div. Ct.), affirmed [2004] O.J. No. 2045, 239 D.L.R. (4th) 501 (C.A.)

prosecutions arising out of the investigation and may prejudice the right of the accused to a fair trial. They also assert that the time to be spent by the Regulatory Agencies in making production will take away from their investigation of this incident and other sites operated by Sunrise.

[7] The plaintiffs, in support of their motion to compel the non-party Regulatory Agencies to provide copies of the documents created or received by them during the course of their investigations rely on section 12 of the *Class Proceedings Act*[11] ("CPA"), rule 30.10 and rule 32.01.

INSPECTION OF PROPERTY: RULE 32.01

[8] Rule 32.01(1) and (2) provide as follows:

> **32.01** (1) The court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding.
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> (2) For the purpose of the inspection, the court may,
>
> (a) authorize entry on or into and the taking of temporary possession of any property in the possession of a party or of a person not a party;
>
> (b) permit the measuring, surveying or photographing of the property in question, or of any particular object or operation on the property; and
>
> (c) permit the taking of samples, the making of observations or the conducting of tests or experiments.

In my view rule 32.01 is of no assistance to the plaintiffs. The rule is concerned with physical evidence, and the inspection and testing thereof, not with documentary production. The rule would have been of assistance to the plaintiff in gaining access to the lands and objects remaining thereon and to objects removed from the site for the purposes of inspection and testing, but the parties have agreed to a protocol with respect thereto and any remaining issues will be dealt with at a later date. It does not apply to the issues to be decided on the motion currently before me.

SECTION 12 OF THE CLASS PROCEEDINGS ACT

[9] The plaintiffs argue that Section 12 of the CPA can be utilized to provide enhanced early discovery rights in class actions. Section 12 provides as follows:

> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[10] Section 35 of the CPA must also be considered:

> 35. The rules of court apply to class proceedings.

[11] *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

[11] Although there is a broad discretion to make any order it deems appropriate, "the discretion conferred by s. 12 of the CPA is intended to supplement the Rules by accommodating the special nature of class proceedings. However, s. 12 is not designed to circumvent the normative Rules."[12] It would take extraordinary circumstances to allow pre-discovery discovery because of the nature of class proceedings:

> It is not normal under the Rules to provide pre-discovery disclosure of information and documentation… Section 12 confers a broad discretion upon the court to depart from the Rules. This would require extraordinary circumstances due to the specific "class" nature of the proceedings. Otherwise, the usual rules of court apply.[13]

Unless there is evidence "to suggest that the alleged 'class' nature of the claim calls for any departure from the discovery procedures set out in the Rules…the plaintiff is not entitled to additional or accelerated rights of discovery under s. 12 of the CPA."[14]

[12] In my view the plaintiffs do not require the information from the Regulatory Agencies to plead. They have already delivered a fresh comprehensive statement of claim. Do they require the information in order to certify the action as a class proceeding? The Supreme Court of Canada has determined as follows:

> [T]he certification stage is decidedly not meant to be a test of the merits of the action…[A]ny inquiry into the merits of the action will not be relevant on a motion for certification…Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.[15]

[13] Section 5 of the CPA sets out requirements for certification, one of which (section 5(1)(a)) is that "the pleadings or the notice of application discloses a cause of action."[16] Although "the representative of the asserted class must show some basis in fact to support the certification order" the evidentiary requirement applies only to the appropriateness of the action proceeding as a class proceeding and not to the merits of the claim itself, so long as the pleadings disclose a cause of action. The "test for certification contained in s. 5(1)(a) is to be determined solely by reference to the pleadings, by analogy to a Rule 21 motion to strike. No evidence is admissible in support of such determination."[17]

[14] Since at the certification stage the plaintiffs do not require the information from the Regulatory Agencies in order to provide an evidentiary basis for liability, can it be said that they require the information in order to formulate a theory as to the cause of the explosion and the liability of the defendants so that they could prepare a pleading that "discloses a cause of action"? The plaintiffs have pleaded in paragraphs 31 to 37 of their statement of claim facts

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[12] *Stern v. Imasco Ltd.*, [1999] O.J. No. 4235, 38 C.P.C. (4th) 347 (S.C.J.) at paragraph 27.
[13] *Stern v. Imasco Ltd.*, supra at paragraph 28.
[14] *Stern v. Imasco Ltd.*, supra at paragraph 29.
[15] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68 at paragraph 16.
[16] *Class Proceedings Act*, paragraph 5(1)(a).
[17] *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (C.A.) at paragraph 24.

relating to unsafe truck-to-truck transfer of propane and smoking in the vicinity of propane. They have pled four causes of action. In paragraphs 76 to 85 they plead material facts and a legal theory respecting causes of action in strict liability, nuisance and trespass, all relating to the escape of dangerous gases and of contaminants. In paragraphs 86 to 90 they plead material facts in support of a cause of action in negligence respecting the unsafe storage and supply of propane and unsafe operation of the facility. In paragraph 90 they plead 20 particulars of breach of a duty of care. Other pleadings relate to the liability of related companies and officers and directors. Although it is not my function to determine and I do not determine whether the statement of claim discloses a reasonable cause of action in law, I am of the view that the plaintiffs have articulated a cause of action in their statement of claim and have been able to do so without the information sought from the Regulatory Agencies. Although the information sought may help the plaintiffs better particularize the cause of action and perhaps result in an amendment to their statement of claim and will undoubtedly provide evidence that will ultimately help the plaintiffs prove the material facts as to the cause of the explosion, I cannot say that at this stage the information is necessary to enable the plaintiffs to plead or to obtain certification.

[15] Although the cases cited refer to situations where early production may or may not be necessary to plead or obtain certification, in my view the court's "broad discretion" to depart from that rule in "exceptional" circumstances as enunciated in *Stern v. Imasco* do not appear to be limited to those situations. As is typical in many class proceedings, the production and discovery stage in this action will not take place until after determination of the motion for certification (which can be lengthy and can involve extensive cross-examinations). A motion for certification has yet to be delivered. It is only after a determination is made on certification that defences are typically delivered, followed by formal production and discovery. I do not wish to imply that pre-discovery discovery is appropriate simply because of the nature of a class proceeding and the delay in getting to the discovery stage. In fact early production is an exception to the general rule that production, including non-party production, is not appropriate until after certification and pleadings are complete. However in my view early production can also be considered where the delay can work to the prejudice of one or more parties as part of the court's "broad discretion" to depart from the Rules based on extraordinary circumstances.

[16] It is however first necessary to consider whether the plaintiffs are entitled to the relief under the ordinary rules that apply to all actions, including class proceedings.

NON-PARTY PRODUCTION UNDER RULE 30.10

[17] The plaintiffs must meet a two-part test under Rule 30.10 in order to compel documentary productions from non-parties to the action provides. The rule provides as follows:

> 30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,
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> (a) the document is relevant to a material issue in the action; and
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> (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

[18] I have no hesitation in concluding that the first part of the test is met. Even though I have not considered individually each of the many documents outlined by the Regulatory Agencies, I am satisfied based on the report of the plaintiffs' experts, that any documents received or prepared by the Regulatory Agencies that would tend to show the condition of the site prior to the explosion and the condition of the site immediately after the explosion but prior to disturbance of the site during investigation and clean-up are relevant to enabling the expert to determine the cause and origin of the explosions and fire. I agree with the plaintiffs that such evidence would include "witness statements, photographs/videos, and investigator's notes, sketches, drawings, aerial maps." In my view it would also include any documents provided to the investigators from the operators or owners of the site that would indicate the location of ignition sources, such as propane tanks. They would clearly be relevant to the issues of causation of the fire and negligence. There may be some documents listed by the Regulatory Agencies that are not responsive to the plaintiffs' requests but without more detailed information I am not in a position to make that determination.

[19] With respect to the second part of the test, the Court of Appeal in *Attorney General of Ontario v. Stavro*[18] has indicated the policy behind requiring a fairness analysis before burdening a non-party with a production order:

> In making the fairness assessment required by rule 30.10(1)(b), the motion judge must be guided by the policy underlying the discovery regime presently operating in Ontario. That regime provides for full discovery of, and production from parties to the litigation. It also imposes ongoing disclosure obligations on those parties. Save in the circumstances specifically addressed by the Rules, non-parties are immune from the potentially intrusive, costly and time-consuming process of discovery and production. By its terms, rule 30.10 assumes that requiring a party to go to trial without the forced production of relevant documents in the hands of non- parties is not per se unfair.

[20] *Stavro* set out a number of factors the court must consider in deciding whether to order non-party production in the circumstances of a particular case[19]:

> - the importance of the documents in the litigation;
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> - whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;
>
> - whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;
>
> - the position of the non-parties with respect to production;
>
> - the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;

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[18] *Attorney General of Ontario v. Stavro*, [1995] O.J. No. 3136, 26 O.R. (3d) 39 (C.A.) at paragraph 12
[19] *Attorney General v. Stavro*, supra at paragraph 15

- the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation.

[21] Four of these six factors strongly favour production. The documents are important, if not critical, to this litigation. The Fire Marshall closed off the site and only the Regulatory Agencies had access to investigate immediately after the explosion. The site was then altered and some artifacts were removed. Without the information from the Regulatory Agencies the plaintiffs would be unable to engage their expert to report on the cause of the explosion and the possible liability of the defendants. The plaintiffs must have this information well in advance of trial. They would be unable to pass even a summary judgment motion without the information, they would be unable to provide an expert report 90 days in advance of trial as required by rule 53.03(1) and they would be unable to make an informed decision as to the viability of their action. The information would be equally important to the defendants. An early determination of the cause of the fire and explosion would promote settlement. Discovery of the defendants would not be adequate. While the defendants may be able to provide information and documents about the location of propane on the site and the condition of the site generally before the explosion, they would be unable to provide any information about the condition of the site and the location of artifacts after the explosion given the restricted access by the Fire Marshall and the alteration of the site. Only the Regulatory Agencies have the necessary information. It does not appear that the informational equivalent is available from any other source accessible to the plaintiffs.

[22] The non-parties have no relationship with any of the parties to the litigation. The non-parties have a taken a position in opposition to the request, at least at this time. This will be explored more thoroughly further in these reasons, but in my view the opposition relates mainly to the timing of the production, and less with production per se.

[23] In considering all of the circumstances, I conclude that it would be unfair to require the plaintiffs to proceed to trial without production of the non-party documents. Although non-parties should be saved from "potentially intrusive and time consuming" production, production is favoured when, as here, the non-parties themselves have by active measures ensured that only they had access to that information to the exclusion of all others. Of course, I do not suggest that the Fire Marshall was wrong to take possession of the site and exclude all but the Regulatory Agencies from access. That was part of their statutory duty to secure the site and investigate. It does not however make them immune from producing the fruits of that investigation when required by the parties in litigation involving the same matters.

PRE-DISCOVERY DISCOVERY: IS THE MOTION PREMATURE?

[24] This leads us to the issue of timing. In *Hedley v. Air Canada*[20], the court noted that, "ordinarily, production and disclosure do not take place in a civil action until after the pleadings have been completed"; however there is a discretion in the court to order production as between the parties "at any time", but "this discretion is usually exercised at the pleading stage only

[20] *Hedley v. Air Canada*, [1994] O.J. No. 287, 23 C.P.C. (3rd) 352 (O.C.G.D.) at paragraph 46.

where the documents are essential to enable the party to plead." The court then noted that when dealing with productions not from a party, but from a non-party, the same considerations apply:

> Although Rule 30.10 does not impose any time parameters for such a motion, its language clearly indicates that its provisions are directed towards the "production and discovery" part of the civil litigation process --it speaks of unfairness in requiring a party "to proceed to trial" without "discovery" -- and not to the production of documents for the purpose of pleading. It may be that the Court, in the exercise of its discretion, could import by analogy the same principle that it has implied into the application of subrule 30.04(5), namely, that production may be ordered prior to pleading if it is shown to be essential for that purpose.[21]

The court held that documents to be produced under rule 30.10 "can best be assessed after statements of defence have been delivered, pleadings completed, and the issues suitably defined."[22]

[25] I have already determined that production of the documents in the possession of the non-parties, while necessary before trial, are not necessary in order to permit the plaintiffs to plead. On the other hand, barring an admission of liability by the defendants, the issues are already "suitably defined" in the statement of claim. The issue (or at least one of the issues) is the cause of the fire and explosion. Notwithstanding that pre-discovery production is "usually exercised" in order to enable a party to plead, the court's discretion to order production "at any time" could in my view be exercised on other compelling grounds.

[26] It is also worth repeating the statement from *Stern v. Imasco* in relation to class actions: "It is not normal under the Rules to provide pre-discovery disclosure of information and documentation… Section 12 confers a broad discretion upon the court to depart from the Rules. This would require extraordinary circumstances due to the specific "class" nature of the proceedings. Otherwise, the usual rules of court apply."[23]

[27] The plaintiffs' expert opines that he needs the information at this early stage for a variety of reasons. He wishes to obtain witness information before memories fade and witnesses die or disappear. Photographs, videos, aerial maps and sketches would help determine site conditions and location of artifacts immediately after the explosions and fires before site conditions were altered by the Regulatory Agencies and may indicate burn patterns on artifacts. The expert is of the view that this information will lead him to conduct further investigations based on his preliminary findings. It would focus the scope of his investigation of the site and reduce the number of artifacts to be examined. He says that the site has already been altered and if he has to wait until all investigations by the Regulatory Agencies and any resulting charges are completed there "is a significant risk" that the site will be further altered and evidence that he may have examined had he known of its significance "may be lost or destroyed." He understands that "the site evidence may not be available 6 months to one year from now."

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[21] *Hedley v. Air Canada*, supra at paragraph 48.
[22] *Hedley v. Air Canada*, supra at paragraph 49.
[23] *Stern v. Imasco Ltd.*, supra at paragraph 28.

[28] Counsel for the Regulatory Agencies points out that the "ship has already sailed" in that the site has already been altered and that the plaintiffs' expert is free to photograph and examine the site to ascertain its current condition before it is altered further. The solicitor for the site owners confirmed that there will be further clean up of the site. This will result in further site disturbance. Therefore, although the ship may have sailed, it is not yet out of sight. I am satisfied from the expert's report that early access to the documents, before further alteration to the site and possible loss of evidence, is of great importance to the expert being able to prepare a meaningful opinion as to the cause of the explosion. It appears that without knowing where artifacts were situated prior to the site alteration, the expert may not know what further investigations are necessary prior to the evidence being lost. For example, he would not know which of the many articles in the huge pile of debris are significant, requiring further investigation before the debris is removed. In my view the plaintiffs would be prejudiced in these exceptional facts if production of the documents necessary to enable the expert to conduct a meaningful, narrowed and cost efficient investigation were delayed until the production and discovery stage of this action. Even though this motion involves production of documents, the concerns are similar to those involving interim preservation or inspection of property where early inspection is necessary before physical property is destroyed.[24]

[29] I am satisfied, based on the reports from the plaintiffs' experts, that the delay in getting to the discovery stage of this class proceeding and in obtaining documents which depict the condition of the site following the explosion and fire constitutes extraordinary circumstances. In my view this is an appropriate case for early non-party production, but such productions should be as narrow as possible to minimize interruptions to the ongoing investigations being conducted by the Regulatory Agencies and should be restricted to those required at this early stage to prevent prejudice to the plaintiffs. The plaintiffs can always apply for more fulsome non-party production at the appropriate time. This determination is of course subject to the Crown first screening the documents, as they have done, for public interest privilege and allowing the court to determine production based upon a *Wagg* analysis.

THE WAGG ANALYSIS

[30] Investigations being done by the Regulatory Agencies are analogous to a police investigation. The Regulatory Agencies are considering, but have not yet determined, to initiate a prosecution for regulatory or criminal offences. If charges are laid, the documents may form part of the Crown Brief. In these circumstances the Crown has the right to screen the requested documents for purposes of determining whether to oppose or delay production based on public interest grounds pursuant to the principles enunciated in *D.P. v. Wagg*. Therefore before ordering non-party productions the court must take into account the public interest asserted by the Crown on behalf of the Regulatory Agencies and by the TSSA. The public interest asserted by the Crown often includes protection of privacy and security of victims and witnesses as well as the integrity of the investigative and criminal process itself.

[24] For example, an order may be made prior to the completion of pleadings to inspect a car involved in a motor vehicle accident before it is repaired or sold for scrap.

[31] The parties to a civil proceeding do not have a "right" to production of documents which may form part of the Crown Brief just because the documents may be relevant to that action. The Crown in its screening process however is to bear in mind that the fruits of the investigation in its possession are "not the property of the Crown for use in securing a conviction, but the property of the public to ensure that justice is done" and that "society has an interest in seeing that justice is done in civil cases as well as criminal cases, and generally speaking that will occur when the parties have the opportunity to put all relevant evidence before the court".[25] There may be circumstances where "the public interest in protecting…the integrity of the criminal investigation process itself outweighs the value we attribute to full production in a civil proceeding."[26]

[32] A court may refuse production where a police investigation is ongoing in order to "preserve the confidentiality of information where real need arises."[27] The "integrity of the criminal prosecution…is a serious policy and public interest consideration" which "must not be jeopardized" and may "take priority over the public interest of having disclosure of all relevant information…" although concerns may no longer exist after the evidence has been given in a preliminary enquiry.[28]

[33] Limits on production of documents when matters are still under investigation or in the criminal process are determined through the aforementioned screening process and by the court resolving any disputes about production. In doing so, the court balances the public interests asserted by the Crown with the interests of the parties to the litigation in securing all relevant evidence in order to obtain a correct disposition of the civil proceeding. The Court of Appeal in *D.P. v. Wagg* adopted the following summary of the court's role in balancing these considerations:

> The judge hearing the motion for production will consider whether some of the documents are subject to privilege or public interest immunity and generally whether there is a prevailing social value that overrides the public interest in promoting the administration of justice through full access of litigants to relevant information.[29]

[34] The fairness test and balancing process has been restated by the Court of Appeal in *N.G. v. Upper Canada College*:[30]

> [I]n the context of a request for production of material from a Crown brief, the fairness test under rule 30.10 encompasses balancing consideration of the needs of the moving party for access to the particular material against the interests of a third party, the interests of the public in protecting the material from disclosure, and any other relevant interests.

[35] Such balancing "is determined on a case-by-case basis in the context of specific facts."[31]

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[25] *D.P. v. Wagg* (C.A.), supra at paragraph 53.
[26] *D.P. v. Wagg* (Div. Ct.) at paragraph 14.
[27] *Gelbard v. G.A.*, [1996] O.J. No. 4633 (O.C.G.D.) at paragraphs 5 and 6.
[28] *Dixon v. Gibbs*, [2003] O.J. No. 75 (S.C.J.) at paragraphs 27-29.
[29] *D.P. v. Wagg* (C.A.), supra at paragraph 51.
[30] *N.G. v. Upper Canada College*, 2004 O.J. No. 1202, 70 O.R. (3d) 312 (C.A.) at paragraph 12.

[36] In a case where a plaintiff sought production of the Crown Brief before the statement of claim was served and no evidence was adduced other than a wish of counsel to advise their clients whether to proceed with the litigation and retain an expert, the court held that the motion was premature and that the "balancing of interest cannot occur at this stage of this proceeding with the materials filed on this motion"[32] and on the evidence before the court it was too early to assess fairness. In this case however an expert has already been retained and he has opined on the need for early production.

[37] For reasons already stated I do not believe that it is premature to consider production of the documents in the possession of the Regulatory Agencies subject to balancing the public interest in protecting the materials from disclosure against the need of the plaintiffs for access to the documents at this time. That is the key question I must resolve.

[38] Where public interest concerns are legitimately raised, courts may in an appropriate case satisfy the balancing of interests with strict terms to provide safeguards against the misuse of information such as limiting access to or use of the documents to counsel in the civil actions, preventing copying, imposing confidentiality terms and ensuring witnesses are not exposed to the documents or to influence as to their testimony.[33]

[39] The Regulatory Agencies state that the investigation into the fire is incomplete and decisions have not been made with respect to the laying of charges. I have been provided with no timeline as to when the investigation will be complete or when a determination will be made with respect to charges. Depending on the investigating agency, the limitation for instituting provincial offences ranges from 6 months to two years. They also assert generally that taking time from their investigative duties both in relation to this matter as well as other unrelated matters would unduly interfere with the investigative process. They suggest that further relevant documents may be generated further into the investigation. The Regulatory Agencies should generally be allowed to complete their work without unwarranted interruption. That cannot however be absolute or for an indefinite period given the need for production of the documents in this civil proceeding to ascertain the cause of the explosion and liability of the parties and given the fact that the documents are exclusively in the possession of the Regulatory Agencies who closed the site to all other interested persons. I have however taken their concerns into account by restricting any productions at this stage to those that the expert requires in a timely manner prior to further site alteration, leaving the production of other relevant documents to the discovery phase of this action either by agreement or by a subsequent motion.

[40] A number of other specific public interest concerns have been raised, although these interests differ somewhat among the different Regulatory Agencies and the category of the productions sought. I will consider these concerns and the balancing process by category of document.

BALANCING OF INTERESTS BY CATEGORY OF DOCUMENT

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[31] Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada*, Canada Law Book, May 2008 page 3-45.
[32] *Publicover v. Ontario (Minister of Transportation)*, [2005] O.J. No. 713 (S.C.J.) at paragraph 26.
[33] *N.G. v. Upper Canada College*, supra, Divisional Court at paragraph 17, Court of Appeal at paragraphs 4 and 16.

[41] The Regulatory Agencies assert that witness statements may be used to determine if an offence has been committed and that production would disclose names of witnesses that may be called upon to testify in provincial or criminal charges that may be instituted. They raise a fear that this could lead to a contamination of their evidence and allow pressure to be asserted on witnesses by parties who have an interest in their testimony. They state that if this were to happen it could interfere with the Crown's ability to conduct a fair trial and with the rights of potential, but as yet unnamed, accused persons to their constitutional right to a fair trial. The also state there could be a chilling effect generally on witnesses coming forward to assist in police (or regulatory) investigations.

[42] As stated by the Court of Appeal, a risk of "tainting" witnesses may be met by strict confidentiality conditions.[34] It must also be remembered that a risk of tainting comes not from production of the documents, but from the fact that the witness may testify.[35] The witnesses may have evidence that would assist the plaintiffs' expert identify the location and cause of the explosion and fire and lead him to further investigate particular evidence. The plaintiffs' solicitors have agreed that the names of the witnesses be withheld (to the extent they have not already been revealed in the lists of documents provided by the Regulatory Agencies). To further reduce concerns of tainting, they are also prepared to accept a term that would prevent the parties, or their solicitors or investigators or other persons retained by them from contacting the witnesses before they have had an opportunity to give their evidence in the criminal or quasi-criminal proceedings, for example at a trial or preliminary hearing or the Crown has determined that no charges will be laid. Once the witnesses have given and committed themselves to their evidence by testimony under oath, the risk of tainting is minimal. Further once they are called as witnesses, their identity will have been revealed. Further safeguards would also be necessary restricting the use of the statements to the plaintiffs' counsel and experts retained by them. With respect to the chilling effect, there is no evidence that any of the specific witnesses who have given a statement to the police or a regulatory official to assist in the investigation into the cause of the fire would be concerned if their statements were also to be used to assist the victims of that same fire recover their losses in a civil action. The chilling effect in this case is no more than speculation.

[43] Photographs, aerial photos and videos have been taken of and depict the condition of the site prior to its alteration as a result of the investigation and clean-up. As noted, these are particularly critical and time-sensitive documents for the plaintiffs' experts. In my view sketches prepared by witnesses and investigators to the extent that they depict the condition of the site before or during the explosion or the movement of articles thereon fall into the same category and should be produced (subject to the safeguards with respect to exposing witness names). The Regulatory Agencies assert that viewing these photographs could lead viewers to draw incorrect conclusions that may not be supported by further testing. They assert that the photos could prematurely depict something incriminating or exculpatory respecting parties to be charged and could lead to tampering with the evidence. In my view the photographic depictions of the site "are what they are". They depict the site at a critical moment in time – after the explosion and

[34] *N.G. v. Upper Canada College*, supra, Court of Appeal paragraph 16
[35] *N.G. v. Upper Canada College*, supra, Court of Appeal paragraph 16.

fire and prior to site disturbance, as well as articles removed from the site. The plaintiffs' expert should be able to rely on his own expertise to draw his own conclusions, whether they turn out to be correct or incorrect. The plaintiffs run the risk that the expert opinions may have to be revised as a result of later productions and evidence, but they should have the right at this time to see the site in the same condition as the fire marshal and other investigators saw it, in order to conduct their own further investigations before the site is further altered. These productions will be further protected by restricting access to counsel and experts retained by them, and out of the public domain.

[44] The Regulatory Agencies also assert that some of the photos or videos document the investigative process. Investigative privilege is a recognized category of public interest privilege. It is designed to "protect a genuine police interest in maintaining secrecy in respect of ongoing investigations, ongoing investigative techniques…"[36] The reference to investigative process has not been adequately explained in the material before me. To the extent that the photos and videos depict *how* the site was altered for purposes of the investigation, then in my view that forms part of the depiction of the site as it was after the explosion and how it was altered and should be produced. If there is a method to segregate the photos or videos or parts thereof that demonstrate "investigative techniques" they need not be produced, but it if they cannot be segregated from demonstrating how the site was altered then they will have to be produced at this time.

[45] Investigators' or inspectors' notes are said to contain theories and other information which may or may not be relevant to a final determination of the cause of the explosion and fire and the laying of charges. It is said they are preliminary in nature and could lead to further examinations and in their current incomplete form could lead to incorrect assumptions that may be unsupported with further investigation. They are protected by investigative privilege. They need not be produced at this time, without prejudice to a subsequent motion at a more advanced stage, such as after a criminal trial or preliminary hearing or after a decision is made not to initiate charges. The only exception I would make is this: to the extent that the notes are merely descriptive of the location of the area of the site depicted in the photographs or the location from which they were taken, then they are really an adjunct to the photos and should be produced.

[46] Investigators' research reports and preliminary reports as to theories respecting the cause of the fire may or may not be relevant, but they are not required for the limited purpose for which I am ordering pre-discovery discovery. In any event they are covered by investigative privilege. Notification documents, field reports, incident reports, activity reports, provincial officer's reports and orders, police notes, internal memos, records from the Ontario Propane Association, documents from the TSSA respecting pre-explosion licences and compliance directives, referrals for investigation, post-explosion documents from the TSSA respecting suspension and revocation proposal, emails and correspondence may all be relevant and ultimately producible, but are unnecessary for the limited purposes of this order and need not be produced at this time. Further many of the TSSA documents are also in the possession of the defendants and may ultimately be compellable from them as part of the regular discovery process. Publically available documents such as corporation profile reports need not be produced. Documents from

[36] *The Law of Privilege in Canada*, at page 3-45.

the School Board do not appear to be responsive to this motion and need not be produced. Documents respecting environmental assessments and clean-up, while they may be relevant to the issues in the action, are not necessary for the limited purposes for which I am allowing pre-certification production and need not be produced at this time.

[47] There are a number of documents over which the non-parties do not claim a public interest privilege. I understand the Regulatory Agencies do not object to producing some of those documents. I do not make nor have I been asked to make any order with respect to those documents. I may be contacted if there is an outstanding issue with respect to such documents.

[48] Documents that were the property of the defendants and that have been provided by or seized from them are more problematic. If such documents provide evidence of what was on the site, particularly propane tanks or incendiary devices and where they were stored or otherwise located, this would be important evidence of the site conditions *before* the explosion and may be even more helpful to the plaintiffs than site conditions *after* the explosion (but before site alteration). These documents however would be in the possession of the defendants (assuming they kept originals or copies) and therefore producible during the discovery process by them as parties to the action. The plaintiffs have no right to require production from the non-parties pursuant to rule 30.10 until they have first attempted to obtain them from the defendants. Production of documents from the defendants is not before me on this motion. If the non-parties have the only copies of the documents, then I would have considered ordering their production at this time, however I do not have evidence whether the defendants have retained copies.

[49] In my view the needs of the moving parties for production at this time of those documents that would provide information and depictions of the condition of the site after the explosion and fire but before disturbance of the site resulting from the investigation and clean-up, with proper safeguards, outweigh the public interests as advanced by the Regulatory Agencies. The order will be subject to the Crown further vetting the documents for privacy and other concerns not specifically addressed on this motion and is without prejudice to the plaintiffs moving for further production during the discovery stage of the action, or such other time as may be appropriate.

[50] Given the ongoing investigation and work involved I will allow the Regulatory Agencies 60 days to deliver the productions. Also, given the volume of the productions and likely duplications in the photographs I would suggest, but not direct, that the plaintiffs' expert attend at a location designated by the Regulatory Agencies to review all of the documents governed by this order and then request reproduction of only those documents required at this time. Of course, the plaintiffs will pay the costs of the Regulatory Agencies in complying with this production order.

PRODUCTION TO DEFENDANTS

[51] The Teskey group of defendants took no position on the motion but seek a copy of any productions to be given to the plaintiffs. The Sunrise group of defendants supported the position of the Regulatory Agencies and opposed the plaintiffs' motion. They did not request copies of

the documents that may be given to the plaintiffs. I make no specific order with respect to production to the defendants, although it appears that if they are they produced to the plaintiffs it would be fair to also provide copies to the defendants if requested and provided they pay their pro-rata share of the costs of the Regulatory Agencies. If there is objection by the Crown I may be contacted to resolve the issue. I will however order that if the defendants obtain production, the same safeguards that were imposed upon the plaintiffs will apply to them.

ORDER

[52] I hereby order as follows:

1. The non-parties Fire Marshall, Ministry of the Environment, Ministry of Labour and Technical Standards & Safety Association shall within 60 days produce to the plaintiffs:

   (a) Copies of all photographs, aerial photos, videos or sketches that depict (i) the condition of the site after the explosion and fire but prior to disturbance of the site, (ii) any movement of items during or following the explosion and (iii) any items removed from the site, together with any documents or portion of documents that serve to identify the photos.

   (b) Copies of witness statements, will-say statements or interview notes with witnesses if no statement or will-say statement exists. All contact information of witnesses may be redacted. Names of witnesses, unless already identified in the list of documents, may be redacted.

2. The plaintiffs may not contact any witnesses whose identities have been made known as a result of this motion until the earlier of the testimony of that witness in a proceeding related to the events described in this action, the determination by the Crown that no charges will be laid or the passage of 18 months from the date of this order unless the Crown consents or the court orders otherwise.

3. The plaintiffs shall reimburse the Regulatory Agencies for all reasonable costs of providing copies of the productions to them.

4. The plaintiffs shall not make any further copies of the documents without the consent of the non-parties or order of the court. The plaintiffs shall not allow any person, including the parties, to view the documents except the solicitors for the plaintiffs and any experts retained by them. The documents shall not be used for any purposes not related to the conduct of this action.

5. If the defendants are provided with copies of the documents from the Regulatory Agencies they shall pay their pro-rata share of the costs of production and shall be bound to the same terms as imposed upon the plaintiffs.

6. The non-parties may make additional redactions to protect genuine privacy concerns or other public interests not determined in these reasons. In the event of any dispute, a hearing will be arranged and the controverted documents produced for the court's inspection.

7. The request to produce the remaining non-party productions is refused without prejudice to any of the parties moving for further productions from the non-parties after determination of certification and close of pleadings or earlier with leave of the court.

8. Any party may move to obtain the redacted portions of documents or to vary or remove any of the restrictions on use of the documents or other terms of this order either after evidence is given in a proceeding related to the events described in this action or the determination by the Crown that no charges will be laid or earlier with leave of the court.

COSTS

[53] It appears that there has been mixed success. Although the plaintiffs were successful in obtaining an order for production of many of the items requested, many others were refused. I also note that the Crown was performing a necessary role as mandated by our jurisprudence of vetting the documents for the purpose of ascertaining and asserting a public interest privilege in relation to an ongoing investigation. They acted reasonably in so doing. Prima facie it does not appear that there should be costs of this motion to any party or non-party, however I am prepared to receive any submissions to the contrary.

[54] Any party or non-party seeking costs of this motion shall forward brief written submissions supported by a Costs Outline (Form 57B) and dockets within 14 days of release of these reasons. Any responding submissions shall be forwarded within 7 days thereafter.

Master R. Dash

DATE: December 11, 2008