

ONTARIO COURT OF APPEAL: DISCLOSURE OF “FOUNDATIONAL” INFORMATION UNDERLYING EXPERT REPORTS

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In a unanimous decision, released September 20, 2006, Justices Goudge J.A., Blair J.A. and Juriansz J.A. held that parties to a civil action are only entitled to obtain foundational information for an expert’s opinion *prior* to trial, and as it appeared they did not do so, they could not then seek this information on appeal. The court further held that Rule 31.06(3) applies to the discovery stage of litigation, which stage is closed once trial is completed. The Appellants have no right to obtain disclosure after trial.

Rule 31.06(3) of the *Ontario Rules of Civil Procedure*, governs the scope of disclosure with respect to opinions of an expert upon examination for discovery, it allows parties to obtain disclosure of findings, opinions and conclusions of an expert retained by the opposite side, except in circumstances where:

1. the findings, opinions and conclusions relating to a matter in issue where formed for the purpose of litigation, and
2. the party who retained the expert undertakes not to call him at trial.

The original decision of the Court of Appeal, written by Justice Gillese and released on July 26, 2006, stemmed from an appeal motion for the production of a 24-page “memorandum”, a transcription of a telephone conversation between former counsel for the respondent and an expert he retained on behalf of his client, a conversation that took place several months after the expert had been retained. In ruling that the memorandum is subject to disclosure, Justice Gillese focused on the contents of the document and preferred the following test with respect to types of expert findings that are subject to production: “if a finding is expressed in a sufficiently coherent manner that it can be used by counsel, then this is a finding that ought to be disclosed.”

On appeal, the panel focused on the temporal application of Rule 31.06(3) rather than content of materials sought to be disclosed. The Appeal Court concluded, “The rule does not give them the right to production of the memorandum but rather to obtain discovery of the foundational information for the findings, opinions and conclusions of Dr. Grafius contained in the memorandum. That it is a right they had right *up to trial*. There is no basis in the rule or in fairness to give them the same right, by means of the production of the memorandum, now that the trial has been concluded.”

Notably, the court held that privilege still attached to the expert documents for which foundational information was producible under Rule 31.06(3), if such information was sought on discovery.

This decision does not alter the Court's original stance with respect to disclosure of foundational information for experts' opinions. It does however limit a litigant's right to obtain secondary disclosure after trial. This decision is in keeping with our Courts' continued and ongoing mandate to prevent *res judicata* (re-litigation of issues disposed of by final judgement) and to save unnecessary litigation costs.