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FILED ELECTRONICALLY AND VIA COURIER

November 9, 2011

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
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Toronto, ON
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Michael D. Schafler

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DIRECT 416-863-4457

Dear Ms. Walli:

**RE: Application by Canadian Distributed
 Antenna Systems Coalition ("CANDAS");
 Board File No.: EB-2011-0120**

We represent CANDAS in connection with its application to the Board regarding access to the power poles of licensed electricity distributors for the purpose of attaching wireless telecommunications equipment ("**Application**").

Please find enclosed the Written Submissions of CANDAS filed pursuant to Procedural Order No. 4.

CANDAS will file two paper copies of the above-noted evidence as soon as possible.

Yours very truly,

(signed) Michael D. Schafler

MDS/ag

cc: Mr. George Vinyard
 Helen Newland
 All Intervenors

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15
(Schedule B);

AND IN THE MATTER OF an Application by the **Canadian Distributed
Antenna Systems Coalition** for certain orders under the *Ontario Energy Board
Act, 1998*.

WRITTEN SUBMISSIONS OF CANDAS

[IR Motion – Procedural Order No. 4]

(i) Introduction

1. These written submissions are filed pursuant to the Board’s Procedural Order No. 4 in this proceeding. That Order directed that the respective motions of the applicant (“**CANDAS**”) and Consumers Council of Canada (“**CCC**”) for orders compelling Toronto Hydro-Electric System Limited (“**THESL**”) to provide responsive answers to certain interrogatories (“**IRs**”) be heard in writing. Subsequent to Procedural Order No. 4, the parties attended a Technical Conference on November 4, 2011, during the course of which THESL refused a number of questions. CANDAS subsequently amended its Motion¹, asking the Board to also compel answers to those questions (the “Additional CANDAS IRs”). CANDAS submits that proceeding in this fashion is the most efficient and expedient procedure.

2. Rule 28.01 of the Board’s *Rules of Practice and Procedure* sets out the objectives underlying the IR procedure: to clarify evidence, simplify the issues, permit a full and satisfactory understanding of the matters to be considered, or to expedite the proceeding. CANDAS submits that the two categories of IRs set out in paragraph 5 of its Notice of Motion dated November 3, 2011 satisfy all of these objectives. Specifically, CANDAS has posed a number of IRs that are aimed at permitting a full and satisfactory understanding as to: (i) why THESL unilaterally adopted its “Policy Concerning Wireless Pole Attachments” as set out in its

¹ See Tab 1 hereto.

letter to the Board dated August 13, 2010 (“THESL Letter”)²; and (ii) the uses to which THESL is putting its utility poles in relation to attachers other than CANDAS. The additional CANDAS IRs (identified in paragraph 2 of the Amended Notice of Motion) also fall into category (ii).

3. Both sets of IRs, it is submitted, relate to the following issues raised in the Application:³

- (a) Whether THESL’s no wireless policy is contrary to the CCTA Decision or contrary to the common law obligation of a public utility, with a monopoly over facilities of fundamental importance to the public, to grant access to such facilities⁴; and
- (b) Whether THESL is unduly discriminating against some – but not all – telecommunications service providers and is also preferring its own interests⁵.

(ii) *The THESL Letter*

4. The THESL Letter advised the Board that “in light of many safety and operational concerns about the attachment of wireless telecommunications equipment to its pole infrastructure..., THESL has adopted a policy not to attach such equipment to its poles”⁶.

(iii) *CANDAS IRs re: THESL Letter*

5. CANDAS IRs 1(h), 1(i) and 3(d) were all refused on the grounds of litigation privilege⁷. These IRs were as follows:

1(h) Were any presentations (oral or in writing) made to the THESL Board of Directors in relation to any of the subjects discussed in the THESL Letter, prior to the letter being filed with the ...Board? If yes, provide particulars of any oral presentations and copies of any written presentations, including, without limitation, power points, notes, memoranda, executive summaries and any similar writing⁸.

² See Exhibit “A” to the Affidavit of Dina Award sworn October 29, 2011, Motion Record of CCC, Tab 2A.

³ See Application April 21, 2011, CANDAS Motion Record, Tab 4.

⁴ See Application, para. 2.1-2.9; 8.1-8.4; 10.6-10.10, 10.12, CANDAS Motion Record, Tab 4.

⁵ See Application, para. 10.11-10.25, CANDAS Motion Record, Tab 4.

⁶ CCC Motion Record, Tab 2A, p. 14, 1st para. of THESL Letter.

⁷ CANDAS Motion Record, Tab 2, p. 7, lines 10-14; p.12, lines 5-6.

⁸ CANDAS Motion Record, Tab 2, p. 5, lines 18-22.

1(i) Provide copies of all drafts, including notes to draft, of THESL Letter⁹.

3(d) Prior to adopting the “no wireless” policy did THESL seek and obtain legal advice as to the application of the CCTA Order to wireless attachments?¹⁰

6. The two categories of information sought in these IRs are as follows:

(i) the first category relates to the *process* by which THESL arrived at its conclusion to adopt the new policy (e.g. advice from THESL’s Board of Directors, its lawyers or professional managers); and

(ii) the second category relates to the *substantive*, non-privileged information that informed THESL’s decision.

7. THESL has admitted that this information is relevant, as its objection is premised on litigation privilege, which only applies to relevant information. In any event, the information is relevant in that it will assist the Board in understanding whether there is a legitimate public interest basis for THESL’s new policy; or whether that policy is motivated by other considerations that may be in conflict with THESL’s obligations as a regulated public utility.

8. As to the litigation privilege claim, the Court of Appeal for Ontario has stated that a document will be protected by litigation privilege only where the dominant purpose for the creation of the document was for use in, or advice concerning, litigation that was then actual, or reasonably contemplated.¹¹ Moreover, it is “incumbent on the party asserting the privilege to establish an evidentiary basis for it”¹².

9. THESL has failed to adduce any evidence whatsoever to support its claim for litigation privilege. As such, there is no basis for invoking it or upholding it.

⁹ CANDAS Motion Record, Tab 2, p. 5, line 23.

¹⁰ CANDAS Motion Record, Tab 2, p. 11, lines 10-11.

¹¹ *Ontario (Liquor Control Board) v. Lifford Wine Agencies*, 2005 CarswellOnt 3098 (C.A.) at para 74, Tab 2 hereto.

¹² *General Accident Assurance Co. v. Chrusz*, [1999] O.J. No. 3291 (C.A.) at p. 22 of 37, Tab 3 hereto. See also *Lifford*, *supra*, at para. 76, Tab 2 hereto.

10. As to the answer to IR 3(d), the *fact* that a party chose to seek legal advice (or not) is to be distinguished from the *nature* of the legal advice itself. The former is not protected; the latter may be. Such privilege pertains to *communications*, but not *facts*. As Sopinka notes: “the protection is for communications only and facts that exist independent of a communication may be ordered to be disclosed”¹³.

11. CANDAS IRs (4a) and 4(f) are relevant to the issue of undue discrimination. The IRs provide as follows:

4(a) Did THESL consult with any Canadian Carrier, including DAScom, Public Mobile, Rogers, Telus, Bell, prior to adopting its “no wireless” policy?

(i) If yes, with whom did THESL consult?

(ii) If yes, what feedback was received and from whom?¹⁴

4(f) Has THESL had any negotiations or discussions with any of the parties who have attached wireless equipment with respect to terms and conditions on which attachments will be available in the future?¹⁵

12. THESL’s responses to these IRs were as follows:

4(a) THESL disagrees with the premise of this question. THESL has not adopted a “no wireless” policy. Please see the response in Tab 5.3, Schedule 1¹⁶.

4(f) THESL is unable to interpret this question as worded¹⁷.

13. These answers are non-responsive. The THESL Letter indicates, unambiguously, that “THESL has adopted a policy not to attach [wireless telecommunications] equipment to its poles”. CANDAS is entitled to know whether THESL consulted with any other Canadian Carrier – this issue is relevant to the question of undue discrimination, which was the object of IR 4(a).

¹³ See Sopinka et al, *The Law of Evidence in Canada* (Toronto: LexisNexis, 2009), at 14.58, Tab 4 hereto.

¹⁴ CANDAS Motion Record, Tab 2, p. 13, lines 4-7.

¹⁵ CANDAS Motion Record, Tab 2, p. 13, lines 19-21.

¹⁶ CANDAS Motion Record, Tab 2, p. 14, lines 1-2.

¹⁷ CANDAS Motion Record, Tab 2, p. 14, line 18.

Similarly, THESL should be required to disclose what negotiations or discussions it has had with any parties who already have wireless equipment on THESL's poles (such as TTC and Cogeco and, possibly, others) regarding future installations and/or terms, which was the object of IR 4(f).

(iv) *IRs re: THESL's Poles*

14. CANDAS IRs 10(e), 32 and 20(b), and THESL's respective responses, were as follows:

Question: 10(e) What percentage of poles currently owned or controlled by THESL have wireless attachments? Please provide a breakdown by pole type and identify the number or type of wireless attachments¹⁸.

Response: Please see the response in Tab 5.1, Schedule 6¹⁹.

Question: 32(a) produce any and all documents, including contracts, evidencing the terms and conditions upon which THESL (or any affiliate) permitted the "One Zone" network to be attached to its poles.

Response: THESL does not have a contract with One Zone for pole attachments. THESI is not a party to this hearing and declines to provide this information.

Question: 32(b) How many of THESL's (or its affiliates') poles are currently utilized to hold:

(i) TTC communications equipment

(ii) "One Zone" communications equipment

(iii) Any other telecommunications equipment

Response: Please see the response in Tab 5.1, Schedules 2, 3, 15, as well as Tab 5.3, Schedule 6.

¹⁸ CANDAS Motion Record, Tab 3, p. 16, lines 5-7.

¹⁹ CANDAS Motion Record, Tab 3, p. 19, line 9.

Question: 32(c) For each of the equipment identified in operations (b)(i), (ii) and (iii) provide:

- (i) The identity of the pole (by location and alpha-numerical designation)
- (ii) A photograph of each pole, with all communications equipment clearly visible²⁰.

Response: THESL is in the process of gathering this data in the ordinary course, but due to the time consuming nature of the project, it is not possible to have this data available for the purposes of the present proceeding. In any event, THESL declines this interrogatory on the basis that production of the information sought is unduly onerous as compared with its prohibitive value, and/or not relevant²¹.

Question: 20(b) Advise whether Dr. Yatchew relies on any other sources for his understanding that wireless entities “do not require continuous corridors for placement of their wireless facilities”.

- (i) If so, provide the all relevant references and specific excerpts upon which Dr. Yatchew relies²².

Response: I arrived at this conclusion earlier in the course of reviewing various issues associated with attachments to power poles²³.

15. THESL’s response to IR 10(e), “Please see the response in Tab 5-1, Schedule 6”, is not responsive. The information set out at Tab 5.1, Schedule 6 deals with entirely different subjects. Nowhere is there an answer to the question – an important one, given the “scarcity” issue raised by THESL – as to the percentage of THESL owned or controlled poles that have wireless attachments (and ancillary information relating thereto).

²⁰ CANDAS Motion Record, Tab 3, p. 25, lines 1-14.

²¹ CANDAS Motion Record, Tab 3, p. 25, lines 16-25, p. 26, lines 1-2.

²² CANDAS Motion Record, Tab 3, p. 65, lines 12-16.

²³ CANDAS Motion Record, Tab 3, p. 67, lines 1-2.

16. The response to IR 32(a) is simply an attempt to skirt the issue. It is unclear to CANDAS whether One Zone equipment is only attached to THESI poles or also to THESL poles (including THESI poles that have been transferred to THESL pursuant to the Board's MADD Order). CANDAS and the Board are entitled to have all relevant information in relation to this issue²⁴.

17. The response to IR 32(b) refers – like other THESL responses – to a multiplicity of other IR responses and, in the process, avoids providing a clear answer, which is required.

18. The response to IR 32(c) – that providing specific information as to what communications equipment is currently located on THESL's (or its affiliates') poles would be “unduly onerous” or “not relevant” – lacks any credibility. THESL has arrangements with such customers and, it is submitted, should have no trouble locating the required information. Moreover, the information sought (i.e., which wireless equipment is on which poles) relates squarely to the issues of scarcity and discrimination.

19. Dr. Yatchew's response to IR 20(b) is nonsensical. The question required him to indicate what the source of his understanding about wireless entities not requiring continuous corridors for placement of their wireless facilities was.

(v) *The Additional CANDAS IRs*

20. These IRs (general IRs 5(e)²⁵, 10(o), 10(p), 10(q)²⁶ and Byrne IR 15(g)(iv)²⁷) all relate to the extent to which THESL or THESI (by virtue of the MADD Order as defined in paragraph 1.0(d) of the Application) have permitted third parties to use their poles for the purposes of wireless attachments.

21. These issues were pursued at the Technical Conference and questions were refused²⁸. It appears THESL is taking the position that the Board is not entitled to know what arrangements THESL (or THESI) has entered into with third party wireless carriers.

²⁴ See Reply Evidence of Lemay-Yates filed October 11, 2011, pages 5-8 and Appendix A, and CANDAS response to CEA 9 at Schedule 9-1, all of which makes clear that wireless telecommunications equipment was attached to “tops of hydro poles” [see item 3 on the drawing at p. 11-4 of 1 of 2 of CEA Schedule 9-1] attached at Tab 5 hereto.

²⁵ Copy of IR 5 attached at Tab 6 hereto.

²⁶ IRs 10(o), (p) and (q) are found at Tab 3 of the CANDAS Motion Record, p. 18.

²⁷ IR 15(g)(iv) is found at CANDAS Motion Record, Tab 3, p. 55.

²⁸ See Tr. 147, lines 5-17; Tr. 153, lines 5-14; Tr. 154, lines 19-26 attached at Tab 7 hereto.

22. CANDAS submits that this information is relevant to one of the fundamental issues in this proceeding, namely, undue discrimination. This is carefully articulated in paragraphs 10.11 – 10.25 of the Application²⁹.

23. For all of these reasons, CANDAS asks that the relief in its Amended Notice of Motion be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 9, 2011

(signed) Michael Schafler

Michael Schafler
of Counsel to CANDAS

(signed) Helen Newland

Helen Newland
of Counsel to CANDAS

²⁹ See CANDAS Motion Record, Tab 4, p. 99-103.

TAB 1

EB-2011-0120

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15
(Schedule B);

AND IN THE MATTER OF an Application by the **Canadian Distributed Antenna Systems Coalition** for certain orders under the *Ontario Energy Board Act, 1998*.

AMENDED NOTICE OF MOTION

THE CANADIAN DISTRIBUTED ANTENNA SYSTEMS COALITION (“CANDAS”) will make a motion on a date and at a time to be fixed by the Ontario Energy Board (the “**Board**”), at the Board’s Chambers at 2300 Yonge Street, Toronto, Ontario, in connection with the motion by Consumers Council of Canada (“**CCC**”) filed on October 31, 2011 for similar relief (“**CCC Motion**”).

PROPOSED METHOD OF HEARING: CANDAS proposes that the motion be heard orally.

THE MOTION IS FOR:

1. An Order of the Board directing Toronto Hydro-Electric System Limited (“**THESL**”) to provide responsive answers to the following CANDAS interrogatories: general interrogatories 1(h), 1(i), 2, 3(d), 4(a), and 4(f); Starkey interrogatories 10(e) and 32; and Yatchew interrogatory 20(b) (the “**CANDAS IRs**”); and
2. An Order of the Board directing THESL to provide responsive answers to the following CANDAS interrogatories that were also put to THESL witnesses and refused at the Technical Conference held on November 4, 2011 (the “**Additional CANDAS IRs**”): general interrogatories 5(e), 10(o), 10(p) and 10(q); and Byrne interrogatory 15(g)(iv); and

3. ~~2-~~ Such further and other relief that CANDAS may request and the Board may consider appropriate.

THE GROUNDS FOR THE MOTION ARE:

1. This motion is made pursuant to Rules 8 and 29.03 of the Board's *Rules of Practice and Procedure*;
2. THESL's responses to the CANDAS IRs and the Additional CANDAS IRs are unresponsive, incomplete or have been improperly refused;
3. Answers to the CANDAS IRs and the Additional CANDAS IRs are necessary so that CANDAS may adequately understand THESL's position and fully prepare for the hearing;
4. The CANDAS IRs and the Additional CANDAS IRs are relevant to the issues raised by this Application;
5. The CANDAS IRs may be categorized as follows:
 - a. Questions pertaining to THESL's letter to the Board dated August 13, 2010 [Application, para. 2.3, Tab 2¹]:
 - (i) General Interrogatories - 1(h), 1(i), 2, 3(d), 4(a) and 4(f);
 - b. Questions pertaining to the use of THESL's poles [Application, paras. 3.11, 10.9, 10.11-10.38]:
 - (i) Starkey Interrogatories – 10(e) and 32;
 - (ii) Yatchew Interrogatories – 20(b);
6. The Additional CANDAS IRs all relate to the use of THESL's poles [Application, paras. 3.11, 10.9]; and

¹ The references to the relevant sections in the Application are not exhaustive.

7. ~~6.~~ The CCC Motion;

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. Relevant documents forming part of the record of this proceeding and as contained in the Motion Record, filed;
2. The transcript of the Technical Conference held on November 4, 2011.
3. ~~2.~~ Such further and other evidence as counsel may advise and this Board may permit.

November 3, 2011

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Board Secretary

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AND TO: All other Intervenors

TAB 2

Case Name:
Ontario (Liquor Control Board) v. Lifford Wine Agencies

Between
Liquor Control Board of Ontario, appellant, and
Lifford Wine Agencies Limited, respondent

[2005] O.J. No. 3042

76 O.R. (3d) 401

201 O.A.C. 1

36 Admin. L.R. (4th) 192

141 A.C.W.S. (3d) 158

2005 CarswellOnt 3098

Docket: C42546

Ontario Court of Appeal
Toronto, Ontario

J.C. MacPherson, E.A. Cronk JJ.A. and
W.L. Whalen J. (ad hoc)

Heard: March 16, 2005.
Judgment: July 28, 2005.

(78 paras.)

Administrative law -- The hearing -- Order of proceedings.

Administrative law -- Natural justice -- Duty of fairness.

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Correctness.

Administrative law -- Judicial review and statutory appeal -- Stay pending -- Appeal from a Divisional Court decision reported at [2004] O.J. No. 2696 dismissed.

Administrative law -- Judicial review and statutory appeal -- Reasonableness.

Administrative law -- Liquor control -- Licensing.

Administrative law -- Liquor control -- Liquor control boards -- Liquor License Act, R.S.O. 1990, c.

Lectures (Toronto: De Boo, 1984) 163 at 164-65:

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. *Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process) while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)* [emphasis added].

74 As emphasized in this passage, litigation privilege is focused on litigation itself. A claim of litigation privilege triggers consideration of competing interests: the need for an arena of protected communications to assist the adversarial process, on the one hand, and the need for disclosure to ensure hearing fairness, on the other hand. In *Chrusz*, this court held that in order to balance these competing interests and to engage **litigation privilege**, the communication at issue must have been made when litigation was commenced or contemplated, where the **dominant purpose** for the communication was for use in, or advice concerning, the litigation. In addition, once implicated, litigation privilege is extinguished when the litigation, or the contemplation of it, comes to an end.

75 In this case, in my view, the LCBO's claim of litigation privilege cannot succeed, for several reasons. First, the LCBO is not a party to the proceedings before the Board. It enjoyed intervenor status on Lifford's stay motions for a period of only three days. As the Divisional Court observed when it quashed the Board's decision granting intervenor status to the LCBO, "[T]he LCBO has no interest in the stay motions." I agree. The Board has no jurisdiction on Lifford's stay motions to make any determination affecting the rights, privileges or liabilities of the LCBO; nor does the Board have jurisdiction on those motions to impose any sanction or penalty on the LCBO, or to grant relief in its favour.

76 Second, it is telling that Ms. Mudryk's affidavits, upon which the LCBO relied to resist the Hobbs summons, contain no assertion that the dominant purpose of the LCBO investigation was actual or contemplated litigation to which the LCBO was, or anticipated that it might be, a party. The only 'litigation' referenced in those affidavits is the proceeding before the Board. The LCBO chose, as the employer of the LCBO witnesses summonsed by Lifford, to investigate the allegation of witness-tampering. Although such action may be prudent in the context of labour and employment issues within the workplace, on the facts of this case it does not attract litigation privilege.

77 Finally, Lifford has a compelling interest in ensuring that the Board is positioned to fairly and fully evaluate the evidence given by the LCBO witnesses in relation to the witness-tampering allegation and Lifford's proposed defence to the notices of proposal, especially in light of the statements made to or by them on these issues in their interviews with Mr. Hobbs. The calling of Mr. Hobbs as a witness before the Board and the production of the transcripts or other recordings of the interviews conducted by him, as ordered by the Divisional Court, will further this important objective. In these circumstances, Lifford's interest in receiving a fair hearing before the Board on its stay motion and during the licence-hearing trumps any litigation privilege claim available to the LCBO.

V. Disposition

78 Accordingly, for the reasons given, I would dismiss the appeal. Lifford is entitled to its costs of

TAB 3

**General Accident Assurance Company et al. v. Chrusz et al.
Chrusz et al. v. General Accident Assurance Company et al.
[Indexed as: General Accident Assurance Co. v. Chrusz]**

45 O.R. (3d) 321

[1999] O.J. No. 3291

Docket No. C29463

Court of Appeal for Ontario

Carthy, Doherty and Rosenberg JJ.A.

September 14, 1999

Civil procedure -- Discovery -- Privilege -- Solicitor-client privilege -- Litigation privilege -- Common interest privilege -- Hotel destroyed by fire -- Insurance adjuster investigating fire -- Suspicion of arson -- Adjuster directed to provide reports directly to lawyer retained by insurer -- Insurer later making partial payments of insurance -- Subsequently, dismissed employee alleging that insured's claim fraudulent -- Insured's lawyer providing dismissed employee with copy of transcript of his statement -- Insurer suing insured -- Insured making counterclaim and joining employee -- Adjuster's reports before allegation of fraud not privileged -- Adjuster's reports after allegation of fraud privileged -- Insurer but not employee having right to assert privilege with respect to employee's statement.

On November 15, 1994, a fire damaged a hotel owned by C and others. The lead fire insurer, G Co., hired B, a claims adjuster, to investigate and, on November 16, he reported that he suspected arson. G Co. retained a lawyer, E, and on December 1, G Co. directed B to report directly to E. In January 1995, C delivered a proof of loss. Subsequently, G Co. made partial payments of the claim, but on May 23, 1995, P, a dismissed former employee at the hotel who stated that his conscience was bothering him, gave E a videotape and the "float sheet and additional time sheets" from the hotel, and he made a statement under oath alleging that C had fraudulently increased the insurance claim. E made a copy of the videotape, which was later returned to P, and E had a transcript prepared of C's statement.

On June 2, 1995, P was provided with a copy of the transcript on condition that he keep it confidential and that day, G Co. commenced an action for fraud against C and others. A statement of defence was filed, and it included a counterclaim against G Co., B, P and P's spouse. In those proceedings, the defendants sought production of various documents for which privilege had been claimed in the plaintiffs' affidavit of documents.

On a motion for production of the documents, Kurisko J. ruled that: (1) all communications between G Co. and E were privileged; (2) communications between B and G Co. or E before May 23, 1995 were not privileged; (3) communications between B or G Co. and third parties before May 23, 1995 were not privileged; (4) communications between B and G Co. or E after May 23, 1995 were privileged; (5) privilege in P's statement had been waived; and (6) the videotape was not privileged.

lawyer. Without client-solicitor privilege, the lawyer could not serve that role and provide that undivided loyalty. As the authors of *McCormick*, *supra*, write at pp. 316-17:

At the present time it seems most realistic to portray the attorney-client privilege as supported in part by its traditional utilitarian justification, and in part by the integral role it is perceived to play in the adversary system itself. Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business. To the extent that the evidentiary privilege, then, is integrally related to an entire code of professional conduct, it is futile to envision drastic curtailment of the privilege without substantial modification of the underlying ethical system to which the privilege is merely ancillary.

(Emphasis added)

In summary, I see the privilege as serving the following purposes: promoting frank communications between client and solicitor where legal advice is being sought or given, facilitating access to justice, recognizing the inherent value of personal autonomy and affirming the efficacy of the adversarial process. Each of these purposes should guide the application of the established criteria when determining the existence of client-solicitor privilege in specific fact situations.

The adjudication of claims to client-solicitor privilege must be fact sensitive in the sense that the determination must depend on the evidence adduced to support the claim and on the context in which the claim is made. A claim to client-solicitor privilege in the context of litigation is in fact a claim that an exception should be made to the most basic rule of evidence which dictates that all relevant evidence is admissible. It is incumbent on the party asserting the privilege to establish an evidentiary basis for it. Broad privilege claims which blanket many documents, some of which are described in the vaguest way, will often fail, not because the privilege has been strictly construed, but because the party asserting the privilege has failed to meet its burden: see *Shaughnessy Golf & Country Club v. Drake International Inc.* (1986), 26 D.L.R. (4th) 298 at pp. 302-04 and 307-08, 1 B.C.L.R. (2d) 309 (C.A.), per Esson J.A..

It is also necessary to consider the context of the claim, by which I mean the circumstances in which the privilege is claimed. For example, in this case, the insurer claims client-solicitor privilege against its insured in part in respect of the product of its investigation of a possible claim by the insured under its policy. The pre-existing relationship of the insured and insurer and the mutual obligations of good faith owed by each to the other must be considered in determining the validity of the insurer's assertion that it intended to keep information about the investigation confidential vis-à-vis its insured. The confidentiality claim cannot be approached as if the parties were strangers to each other.

The confidentiality of the communications is an underlying component of each of the purposes which justify client-solicitor privilege. In *McCormick*, *supra*, at p. 333, it is said:

It is of the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.

The centrality of confidentiality to the existence of the privilege helps make my point that the assessment of a claim to client-solicitor privilege must be contextual. Sometimes the relationship between the party claiming the privilege and the party seeking disclosure will be relevant to determining whether the communication was confidential. For example, the reciprocal obligations of an insured and an insurer to act in good faith towards each other are well-established: *Canadian Indemnity Co. v.*

TAB 4

THE LAW OF EVIDENCE IN CANADA

THIRD EDITION

Alan W. Bryant

Justice of the Superior Court of Justice for Ontario

Sidney N. Lederman

Justice of the Superior Court of Justice for Ontario

Michelle K. Fuerst

Justice of the Superior Court of Justice for Ontario



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within the usual and ordinary scope of professional employment. A concise statement of the modern rule is found in Wigmore as follows:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.⁹⁷

§14.56 The privilege is of considerable breadth and encompasses all information passed within the professional lawyer and client relationship:

... a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.⁹⁸

§14.57 Disclosure of a communication will not be compelled even though it was made at a time when the relationship between solicitor and client had not been formally established by either retainer or payment of fees. Preliminary communications made by a person to a solicitor, with the view to retaining him or her to act on his or her behalf, establishes a sufficient relationship to which privilege will attach. It is immaterial whether the solicitor agrees to take the brief and represent the client.⁹⁹ An individual should be encouraged to approach a solicitor of his or her choice, but in so doing, there can be no guarantee that the solicitor will accept employment. Therefore, the right to privilege turns not upon the existence of a contract, but upon the relationship or its potential existence when an individual seeks professional advice from the solicitor.

(b) For Communications Only

§14.58 The protection is for communications only and facts that exist independent of a communication may be ordered to be disclosed. In *Foster*

⁹⁷ 8 Wigmore, *Evidence* (McNaughton rev., 1961), § 2292, at 554, quoted by the Supreme Court of Canada in *Solosky v. Canada*, [1980] 1 S.C.R. 821, [1979] S.C.J. No. 130 (S.C.C.), and *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860, at 873, [1982] S.C.J. No. 43 (S.C.C.).

⁹⁸ *Descôteaux v. Mierzewski*, *ibid.*, at 892-93 (S.C.R.); *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45, at para. 10 (S.C.C.).

⁹⁹ *Shedd v. Boland*, [1942] O.W.N. 316 (Ont. H.C.J.), *affd* without written reasons [1942] O.W.N. 346 (Ont. C.A.); *Descôteaux v. Mierzewski*, *ibid.*; *Minter v. Priest*, [1930] A.C. 558, 99 L.J.K.B. 391 (H.L.).

Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc., LeBel J. gave the following example to demonstrate the distinction:

To illustrate, let us take the case of a lawyer who holds discussions with a client while riding as a passenger in the client's car. In the event of an accident, the lawyer would not be competent to testify about the opinion he or she was giving the client at the time of the incident, but could be forced to answer questions regarding whether the car was travelling above the speed limit.¹⁰⁰

§14.59 The distinction between “fact” and “communication” is often a difficult one and courts should be wary of drawing the line too fine lest the privilege be seriously emasculated. In *Madge v. Thunder Bay (City)*,¹⁰¹ the Court refused to force a party to disclose whether she had delivered certain minutes of a meeting to her solicitor.

(i) Physical Objects

§14.60 The solicitor-client privilege protects only communications between client and lawyer. No such privilege applies to physical objects. In *R. v. Murray*¹⁰² the accused lawyer was charged with attempting to obstruct justice by concealing videotapes that he removed from his client's home on the client's instructions. Shortly after he removed the videotapes, his client was charged with murder and related offences in the deaths of two teenage girls. The lawyer retained the tapes for 17 months without disclosing their existence to the Crown. The tapes depicted the two victims being subjected to sexual degradation. The tapes were eventually turned over to the police by counsel who took over the case from the accused and were used by the Crown at the murder trial.

§14.61 The lawyer was acquitted of obstructing justice because the trial judge had a reasonable doubt as to his criminal intent in that the lawyer may have believed that he had no obligation to disclose the videotapes before trial, but he had no intention to permanently suppress the tapes.

§14.62 Justice Gravelly held that there is a clear distinction between physical objects such as the videotapes in question and solicitor-client communications. He held that the videotapes were dramatic evidence of the commission of a crime and pre-existed the solicitor-client relationship. They were not similar, for example, to a sketch that might be prepared by a client to assist in explaining a point to his lawyer, or indeed, even to a videotape prepared for a similar communicative purpose.

¹⁰⁰ [2004] 1 S.C.R. 456, [2004] S.C.J. No. 18, at para. 39 (S.C.C.).

¹⁰¹ (1990), 44 C.P.C. (2d) 186, [1990] O.J. No. 3291 (Ont. H.C.J.).

¹⁰² (2000), 48 O.R. (3d) 544, [2000] O.J. No. 2182 (Ont. S.C.J.).

TAB 5



Internet access line (e.g. a cable or telephone line) within the user's home via a short-range wireless WiFi connection. WiFi is deployed indoors by both private consumers and in public spaces by a variety of parties, such as enterprises, restaurants, cafes, *etc.* Any organization or individual can deploy a WiFi network for convenience of access to the Internet and many have done so.⁵

We note that no Canadian mobile carrier has yet to embark on any large-scale deployment of WiFi outdoors as a means of alleviating capacity concerns on their mobile broadband networks. Cogeco Data Services and Shaw Communications currently offer or plan to offer public WiFi services over fairly large areas,⁶ but neither one is a mobile wireless carrier at the present time.

The Toronto One Zone WiFi Network Uses Utility Poles

The One Zone network initially built by Toronto Hydro Telecom Inc.⁷ is a prime example in Canada of an outdoor WiFi system providing street level blanket coverage for Internet access in downtown Toronto. This network was intended to provide blanket coverage over 6 square kilometers and 235 city blocks in downtown Toronto as explained in background materials provided by Toronto Hydro Telecom on the One Zone website (see Figure 1 below).⁸

⁵ For example, coffee shop chains, such as Starbucks and Second Cup in Toronto, provide WiFi access to their clientele, often via arrangements with Bell and Rogers respectively, who are the providers of this infrastructure for a fee to these restaurants. These WiFi access points only support data applications⁵ in a *fixed* mode, *i.e.* not mobile, and typically require a WiFi modem which is likely to be installed on top of a table. Approximately 200 locations in Toronto are supported by these carriers, a far cry from any kind of widespread geographic coverage of the city.

⁶ Cogeco does not hold any mobile spectrum licences from Industry Canada. Shaw Communications Inc. is a licensee of mobile spectrum in the AWS band in certain areas in Canada following the 2008 spectrum auction, but has recently announced that it would not build out and operate a mobile network at this point in time.

⁷ The One Zone WiFi network is now owned and operated by Cogeco Data Services.

⁸ See Nuts and Bolts Technical Briefing on Toronto Hydro Telecom's proposed WiFi network that can be found on the website of One Zone, *infra*.



Figure 2 provides an illustration of this network within one area of downtown Toronto. Each access point represents a WiFi antenna. This figure clearly illustrates the recurring nature, at regular intervals, of the support infrastructure required to provide such blanket coverage.

Figure 1 –Nuts and Bolts Technical Briefing on Proposed WiFi Network

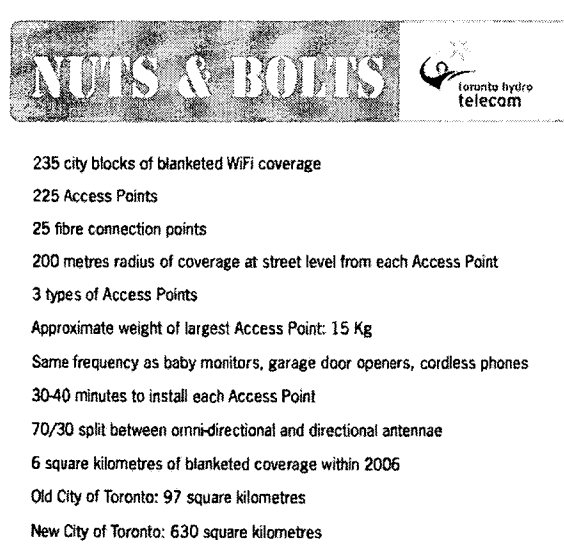
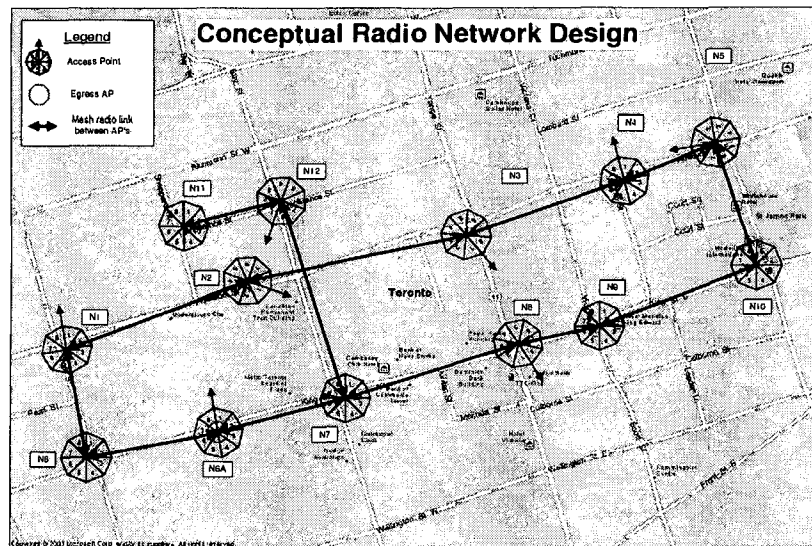




Figure 2 – Conceptual Radio Design of OneZone in Downtown Toronto⁹



Utility poles, available at fairly regular intervals, were selected by Toronto Hydro Telecom to provide blanket outdoor WiFi coverage in downtown Toronto.¹⁰

As a matter of fact, the role of utility infrastructure, in this case streetlights, was so important for this deployment that the acquisition of the City's 160,000 streetlights by Toronto Hydro Telecom was stated to be one of three catalysts for the One Zone WiFi deployment at the start of this initiative in 2006. In the words of Toronto Hydro Telecom:

⁹ http://www.onezone.ca/tech_brief/OneZone_ConceptualNetworkDesign_Phase%201_Loop%205.jpg

¹⁰ An illustration and photograph from One Zone provided in Appendix A to this Reply clearly show the deployment on utility poles in Toronto.



Figure 3 –Rationale for the deployment of the WiFi One Zone network in Toronto¹¹

Rationale: One Zone

Catalysts:

- Provincial “smart meter” legislation
- Under-utilized fibre optic network asset
- *Toronto Hydro acquisition of 160,000 street lights from the City of Toronto*

Who benefits?:

- Increased value proposition to our existing customers
- Increased value of corporate assets
- New revenue stream – new customer growth
- Increased value to shareholder
- Residents of City of Toronto via dividend to City

Based on the foregoing, we conclude the following with respect to WiFi technologies and their deployment:

- WiFi technologies do not provide for the same mobile services as those provided by outdoor DAS technology and are thus not a substitute to provide basic mobile coverage.
- When WiFi is deployed to provide blanket coverage outdoors, antenna support infrastructure that is relatively uniform, contiguous and evenly spaced at fairly regular intervals is required for efficient deployment. Utility poles such as streetlights were seen as necessary infrastructure for the One Zone network in Toronto.

2.2 *Femtocells complement and do not replace conventional macro cell networks*

Femtocell deployment is different than WiFi as it uses radiofrequency spectrum that is licensed to mobile wireless carriers. The technical standards for femtocells are developed by the same standards organisations as those developing technical standards for other mobile communications technologies.¹²

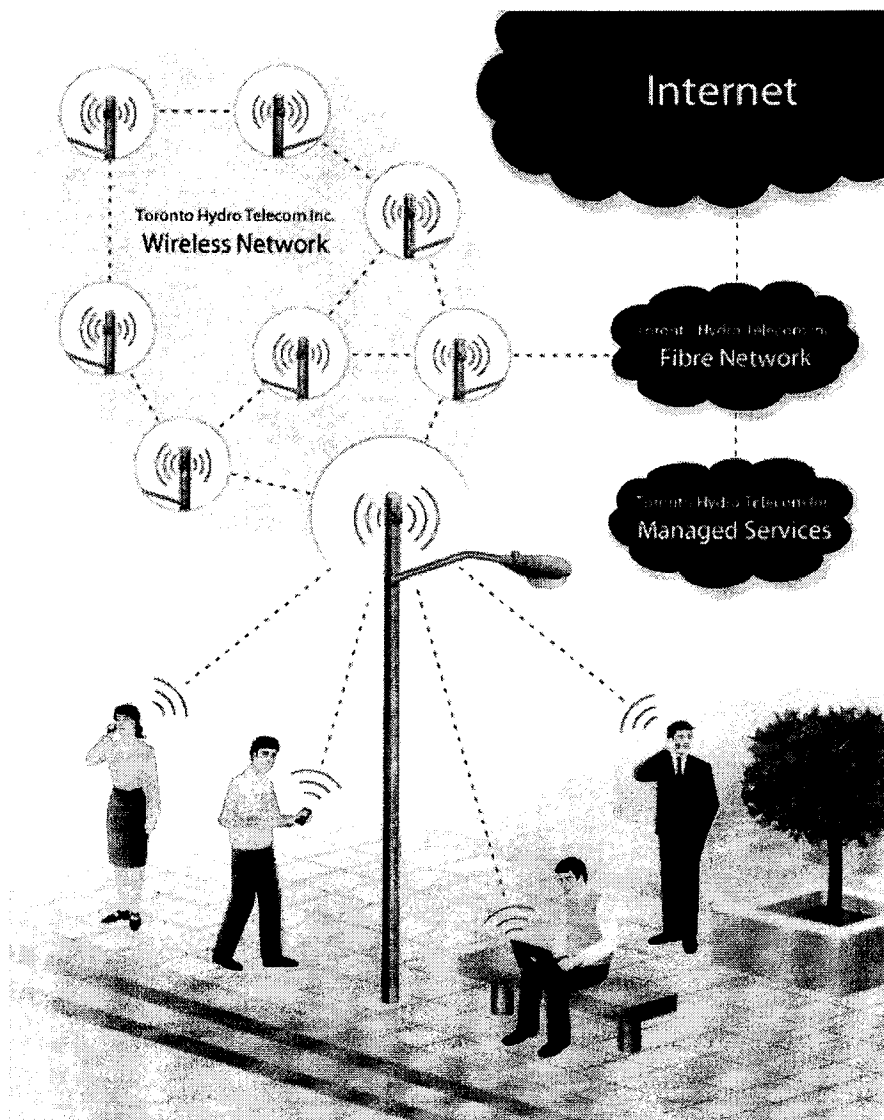
¹¹ Emphasis added. Online: http://www.One_Zone.ca/tech_brief/One_Zone_TechBriefingPPT_07-20-06.pdf

¹² For example, 3GPP is developing standards for UMTS femtocells and 3GPP2 for CDMA femtocells.



Appendix A
Additional Information on the One Zone WiFi Deployment in Toronto

Illustration of WiFi as per Toronto Hydro Telecom³⁹

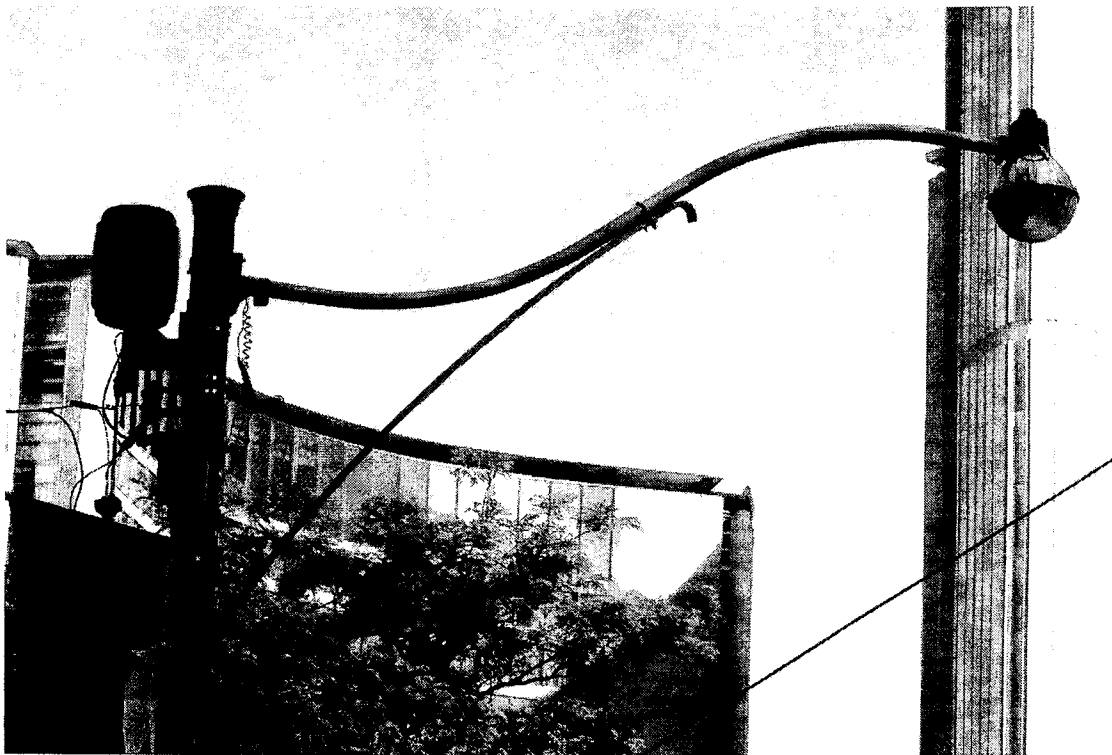


³⁹

http://www.OneZone.ca/media_photos/OneZoneWiFiIllustration_03-07-06.jpg



Photograph of a Toronto Hydro Telecom WiFi equipment located close to the top of a streetlight⁴⁰



The photograph above goes back to 2006. The Siemens cylinder at the top of the utility pole is the WiFi equipment.

⁴⁰

http://www.onezone.ca/media_photos/OneZone_AP_NewCityHall.jpg

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Toronto Hydro Telecom announces blanket Wi Fi coverage in downtown Toronto core

MAR 7, 2006 - 11:00 ET**TORONTO, ONTARIO — (CCNMatthews - March 7, 2006)**

TORONTO HYDRO TELECOM INC.

(www.thtelecom.ca) today announced plans to provide a blanket of Wi Fi coverage in the downtown core of Canada's largest city, making Toronto the largest Wi Fi zone in Canada.

"We are proud to be the first company in Canada to deliver a ubiquitous Wi Fi zone, which will provide Internet access as well as next generation applications," said David Dobbin, President, Toronto Hydro Telecom. "Wi Fi technology is the new benchmark for urban living. It's standard equipment in many electronic devices, from laptops to portable entertainment units. We think it's time to enable that technology to be used in what will be the largest Wi Fi zone in Canada. Today we're opening the door for Toronto to join the ranks of other major international cities such as San Francisco, Philadelphia and London, England."

The plan calls for Toronto Hydro Telecom - the competitive telecommunications subsidiary of Toronto Hydro Corporation - to install radio access points on streetlighting poles throughout the six square kilometer area that stretches from Jarvis Street west to Spadina Avenue, and from Front Street north to Bloor Street. Installing the access points on streetlighting poles, which are evenly situated throughout the downtown service area, will enable Toronto Hydro Telecom to avoid the pitfalls of most Wi Fi service offerings whose access points are predominantly housed in coffee shops and restaurants, making connectivity sporadic or non-existent. The streetlighting poles are assets owned by Toronto Hydro Street Lighting Inc.

"This is both an exciting and very important initiative for the City of Toronto," said Mayor David Miller. "It puts us on the leading edge of the telecommunications industry nation-wide and globally. The applications for Torontonians and our various City agencies

from libraries to public transportation and safety to economic development make this a historic moment in Toronto's development as a world-class city."

The new Wi Fi zone will be implemented in stages. The first phase - located in the City's financial core from Front Street to Queen Street, between Spadina Avenue and Church Street - is planned for completion at the end of June, 2006. The entire Wi Fi zone will be completely operational by December 31, 2006.

During the first six months of operation, Toronto Hydro Telecom will offer customers free access to its new Wi Fi zone, after which time a variety of access packages will be available at competitive rates.

An RFP for equipment vendors was issued on February 8, 2006. Once the vendor of record has been selected, installation of the radio access points will be entrusted to Toronto Hydro Streetlighting employees who are members of CUPE Local 1.

Toronto Hydro Telecom Inc. is the telecom subsidiary of Toronto Hydro Corporation, which is fully-owned by the City of Toronto. A highly specialized and innovative provider of telecom services to businesses in Toronto, Toronto Hydro Telecom owns and operates a fibre optic network that spans 450 kilometres and connects more than 450 commercial buildings in Toronto and with interconnections to utility-affiliated telecom networks bordering the GTA.

(*) A Service Area Map and Fact Sheet are available with this release and can be downloaded from www.thtelecom.ca. A photo from today's announcement is available on the CP Photo network to members of the Canadian Press.

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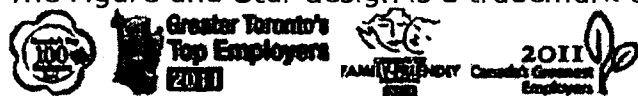
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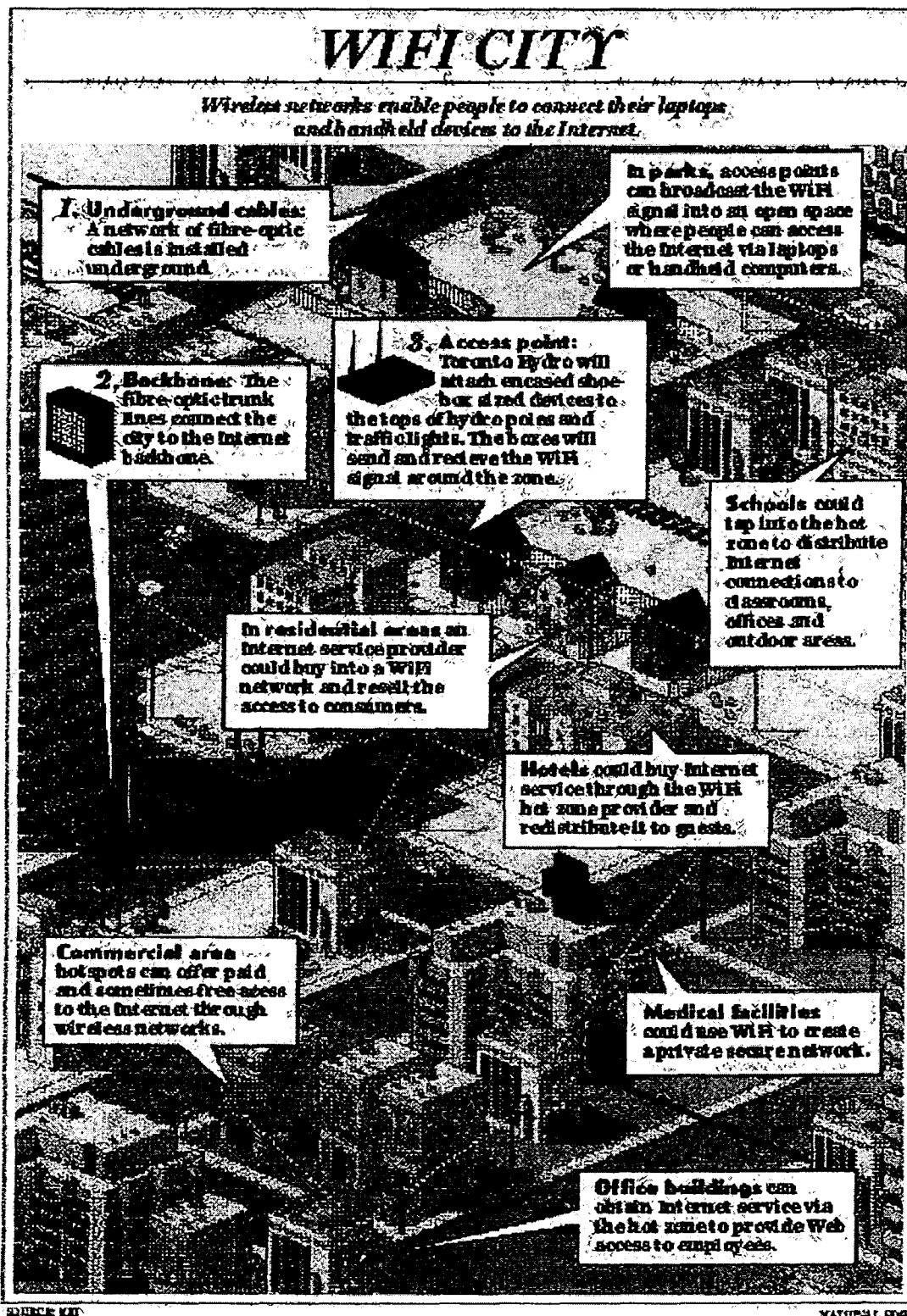


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TAB 6

RESPONSES TO CANADIAN DISTRIBUTED ANTENNA SYSTEMS COALITION INTERROGATORIES

1 **INTERROGATORY 5:**

2 **Reference(s):** **none provided**

3

4 (a) Prior to the adoption of the “no wireless” policy, had THESL entered into any form of
5 agreement or other arrangement of any type that allows for wireless equipment, antennas
6 and / or wireline attachments associated with wireless antennas similar to DAS to any
7 type of THESL owned or controlled distribution poles? If yes, please provide any such
8 agreements.

9 (b) Subsequent to the adoption of the “no wireless” policy, did THESL enter into any
10 agreement or other arrangement, of any type, permitting the attachment of antennas and /
11 or wireline attachments associated with wireless antennas on THESL poles? If yes, please
12 provide any such agreements.

13 (c) Subsequent to the adoption of the “no wireless” policy, has THESL approached, or
14 been approached by, any third party to enter into an agreement to permit wireless
15 attachments to THESL owned or controlled poles of any kind (e.g. distribution,
16 streetlight, etc.) or to otherwise allow wireless attachments to THESL poles? If yes,
17 please explain in detail any such discussions and provide any evidence thereof including
18 agreements, business terms or other arrangements.

19 (d) Prior to, or subsequent to, the adoption of the “no wireless” policy, has THESL
20 approached any third party to enter into an agreement to manage, control, use, supervise
21 or otherwise facilitate wireless attachments on THESL poles, whether for THESL’s
22 benefit or a third party’s benefit? If yes, please describe, in detail, any such discussions
23 and provide evidence thereof, including agreements, business terms or other
24 arrangements.

25 (e) Do any third parties currently have any wireless attachments on THESL owned or

RESPONSES TO CANADIAN DISTRIBUTED ANTENNA SYSTEMS COALITION INTERROGATORIES

1 controlled poles? If yes, provide all applicable agreements regarding these attachments
2 and describe, for each third party,

3 (i) What type of wireless attachment is located on the poles

4 (ii) The total number of each type of wireless attachment located on the poles

5 (iii) The attachment rate, and all other applicable fees, paid by such third party

6 (iv) The permitted term of each wireless attachment

7 (v) Whether there are also wireline attachments associated with any of the
8 wireless attachments

9 (vi) The number of associated wireline attachments

10 (f) Subsequent to, or as a result of, THESL's adoption of the "no wireless" policy, has
11 THESL terminated or otherwise allowed any attachment agreement to expire? If yes,
12 please provide all attachment agreements in place between THESL and each entity that
13 has attached wireless equipment or antenna systems to THESL poles that have been
14 canceled or terminated by THESL as a result of its "no wireless" policy.

15 (g) If THESL is unable to terminate any attachment agreements due to the terms
16 contained therein, please provide details from each of these agreements including the
17 term and termination provisions included in each agreement.

18 (h) Does THESL allow third parties to attach equipment of any kind to THESL poles
19 without the benefit of an attachment agreement? For the purposes of this question,
20 attachments include any and all attachments made by, but not limited to, municipalities,
21 affiliates, subsidiaries (either wholly or partially owned) or any other entity that THESL
22 may allow to attach to distribution poles without a formal, written agreement. If yes,
23 please

24 (i) Disclose each entity with the informal ability to attach to THESL owned or
25 controlled distribution poles

RESPONSES TO CANADIAN DISTRIBUTED ANTENNA SYSTEMS COALITION INTERROGATORIES

- 1 (ii) Disclose each entity that attaches any component or piece of equipment with
2 wireless capabilities of any type, kind or nature
- 3 (iii) Provide examples of drawings or specifications as provided by each entity
4 whose equipment has any wireless capability
- 5 (i) Either prior to or immediately following the adoption of THESL's "no wireless"
6 policy, did THESL approve and / or allow any wireless equipment or antenna systems to
7 be placed on any THESL owned or controlled distribution poles? If yes, please explain in
8 detail and provide any supporting documentation related to
- 9 (i) The name of the entity that was allowed to attach
- 10 (ii) Examples of their installations
- 11 (iii) The total number of poles onto which each entity was approved to attach
- 12 (iv) The total number of poles onto which each entity ultimately did complete
13 their attachments
- 14 (j) Does THESL or any THESL affiliate permit the attachment of any form of wireless
15 equipment or antenna systems (including, but not limited to, SCADA, SmartGrid, WiFi
16 and mobile communications) on any of THESL's distribution poles?
- 17 (i) If yes, please list each type of wireless equipment and include all hardware
18 specifications for each component, photos and locations of each type of wireless
19 installation on THESL poles.
- 20 (ii) If yes, please explain how each type of wireless attachment could be attached
21 to alternative structures including, but not limited to, buildings, cell towers, or
22 other structures. If these wireless attachments could not be attached to alternative
23 structures, please explain the reasons why not.
- 24 (k) In the event THESL allows or has allowed wireless equipment to be placed on
25 THESL owned or controlled poles (either under an attachment agreement or informally),

RESPONSES TO CANADIAN DISTRIBUTED ANTENNA SYSTEMS COALITION INTERROGATORIES

1 regardless of whether such wireless attachments are owned by THESL or by a THESL
2 affiliate or by a third party, or whether such wireless attachments are for THESL's own
3 use, third party use or public use, please describe

4 (i) THESL's policy going forward in relation to placement of THESL's SCADA,
5 SmartGrid, Mobile Communication or other wireless network elements to be
6 installed in the future

7 (ii) THESL's policy regarding existing attachment agreements with any Canadian
8 Carrier and the placement of wireless equipment under current attachment
9 agreements

10 (iii) THESL's plan to renew or terminate all forms of commercial attachment
11 agreements with Canadian Carriers as they become eligible for termination

12 (iv) THESL's policy in relation to THESL's affiliates related to allowing wireless
13 attachments, either informally or under attachment agreement, since the effective
14 date of THESL's "no wireless" policy

RESPONSE:

15
16
17
18 (a) THESL disagrees with the premise of this question. Please see the responses in
19 Tab 5.3, Schedule 1 and Tab 5.1, Schedule 11.

20
21 (b) THESL disagrees with the premise of this question. Please see the responses in
22 Tab 5.3, Schedule 1 and Tab 5.2, Schedule 18. THESL has not entered into any
23 agreement permitting wireless attachments to THESL Poles. As noted in the
24 response in and Tab 5.1, Schedule 18 16, part (a), THESL is not able to tell on the
25 face of wireline applications which applications are to support wireless.

**RESPONSES TO CANADIAN DISTRIBUTED ANTENNA SYSTEMS
COALITION INTERROGATORIES**

- 1
2
- 3 (c) THESL disagrees with the premise of this question. Please see the responses in
4 Tab 5.3, Schedules 1 and 31. To the extent that this interrogatory seeks
5 information regarding THESI streetlighting assets, THESI is not a party to this
6 proceeding and therefore the information sought is not relevant.
7
- 8 (d) THESL disagrees with the premise of this question. Please see the response in
9 Tab 5.3, Schedule 1. As stated at paragraph 21 of Ms. Byrne's affidavit, THESL
10 hired seven contract staff in 2010 to process telecommunications NDAs.
11
- 12 (e) THESL disagrees with the premise of this question. Please see the responses in
13 Tab 5.3, Schedule 1 and Tab 5.1, Schedules 11, 15 and 16. To the extent that this
14 interrogatory seeks further information than provided (in THESL's responses to
15 interrogatories, including those noted above), then production of this information
16 is unduly onerous relative to its probative value and/or irrelevant to this
17 proceeding.
18
- 19 (f) THESL disagrees with the premise of this question. Please see the responses in
20 Tab 5.3, Schedule 1 and Tab 5.2, Schedule 18.
21
- 22 (g) Please see the responses in Tab 5.2, Schedule 18 and in particular, THESL's
23 agreement with DAScom. THESL has no agreements for wireless attachments on
24 THESL poles.
25
- 26 (h) THESL's policy is to have agreements in place with all third party NDA attachers

RESPONSES TO CANADIAN DISTRIBUTED ANTENNA SYSTEMS COALITION INTERROGATORIES

1 and where these do not exist at present, THESL is seeking to establish such
2 agreements. THESL does have agreements in place with all telecommunications
3 attachers who attach their equipment on primary distribution THESL Poles.
4 Please see the response in Tab 5.1, Schedule 11.

5
6 (i) THESL disagrees with the premise of this question. Please see the responses in
7 Tab 5.3, Schedule 1 and (h) above. Please also see the response in Tab 1,
8 Schedule 12 regarding number of DAScom/Public Mobile attachments to date.

9
10 (j) See THESL response to CANDAS Byrne IR 1 and 15. To the extent that this
11 interrogatory seeks further information, THESL declines on the basis that
12 production of this information is unduly onerous in relation to its probative value,
13 irrelevant and/or in any event, confidential.

14
15 (k)

16 (i) The noted attachments are non-communications attachments and are not
17 relevant to this proceeding;

18 (ii) Please see THESL Standards in Tab 5.1, Schedule 1, Attachment 1 as well as
19 the response in Tab 5.3, Schedule 1. THESL reviews matters of contractual
20 negotiation on a case-by-case basis, and declines to speak to future contingent
21 events in this regard.

22 (iii) Please see the response in (ii) above.

23 (iv) THESL disagrees with the premise of this question. Please see the response
24 in Tab 5.3, Schedule 1. No THESL affiliate has wireless attachments on
25 THESL poles.

TAB 7

1 reason for the objection to the wireless equipment was that
2 it takes up too much room and it's not safe to install it,
3 and so we would like to understand what other similar types
4 of equipment are already attached to THESL poles.

5 And we note that we did ask this question at
6 Interrogatory 15, but that the answer provided was --
7 simply ignored that part of the question.

8 So we're taking this opportunity to ask for it again.

9 MS. SEBALJ: Sorry, Ms. Song, which sub-part of 15,
10 please?

11 MS. SONG: If you look at 15(g) sub (4).

12 MR. RODGER: Toronto Hydro is not going to produce
13 this. The company is taking the position that non-
14 communications attachments, as I say, including anything
15 that's related to the distribution system, are not relevant
16 comparators to the communications attachments you've been
17 asking about.

18 MS. SONG: Where on the pole is each component
19 attached to the pole, Ms. Byrne?

20 MS. BYRNE: So the switch part is in the power space,
21 because it's part of the power system. And the controller
22 parts are below, and they would be communication space or
23 below communication space if they can't be fit into the
24 existing communication space, if the communication space is
25 already full.

26 MS. SONG: And the antenna?

27 MS. BYRNE: The antenna is communication space or just
28 below.

1 MS. SONG: You are referring to the basis upon which
2 THESL permitted TTC to attach? Those are the
3 considerations you are talking about at 29(f)?

4 MR. RODGER: That's right.

5 MS. SONG: But you're not able to specify for me what
6 the basis is for TTC being permitted to attach?

7 MR. RODGER: I think you have our answer on this from
8 Mr. McLorg.

9 MS. SONG: I'll take it up in another form.

10 So could I ask you, Ms. Byrne, for a copy of the
11 contract between TTC and THESL?

12 MR. RODGER: No. I'll say it again, that we're not
13 going to produce private agreements between Toronto Hydro
14 and third parties.

15 MS. SONG: I just need to get it on the record. You
16 understand that, Mr. Rodger.

17 We would accept a redacted copy, Mr. Rodger, if that
18 helps.

19 MR. RODGER: No.

20 MS. SONG: Finally, Ms. Byrne, if I could ask you to
21 turn up your response to CANDAS 31; also your affidavit at
22 paragraphs 40 to 46.

23 Now, my understanding of your affidavit at paragraphs
24 40 to 46 is that it is a description of the issues, Ms.
25 Byrne, that you feel arise when considering wireless
26 attachments; correct?

27 MS. BYRNE: Correct.

28 MS. SONG: Is that correct? Sorry, I didn't hear your

1 answer.

2 MS. BYRNE: I didn't hear a question.

3 MS. SONG: Okay. Are paragraphs 40 to 46 of your
4 affidavit a description of the issues that you feel arise
5 when considering wireless attachments?

6 MS. BYRNE: Wireless attachments and attachments in
7 general.

8 MS. SONG: So these issues also arise when considering
9 non-distribution attachments in general?

10 MS. BYRNE: So there is wording in this that is
11 specific to wireless, and then there is wording that is
12 more general.

13 MS. SONG: But the issues that you have said arise
14 with respect to wireless attachments, are you saying that
15 those are unique to wireless, or that they may also arise
16 in relation to wire line or non-wireless not -- NDA?

17 MS. BYRNE: There are some considerations that are
18 unique to wireless.

19 MS. SONG: So I've been asked to make one final
20 request of you, Ms. Byrne. I would like to ask you for
21 copies of all contracts between THESL and its third party
22 attachers.

23 MR. RODGER: Refused.

24 MS. SONG: And redacted copies are fine, if that
25 helps.

26 MR. RODGER: Refused.

27 MS. SONG: Thank you.

28 MS. SEBALJ: Thank you.