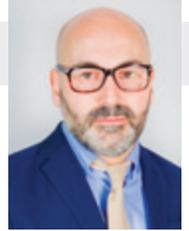


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Disclosure of an Expert's File

ONTARIO COURTS ARE ENGAGED IN A RIGOROUS DEBATE ABOUT THE SCOPE OF THE PRODUCTION OF DOCUMENTS IN AN EXPERT'S FILE DURING LITIGATION.

In *Thermapan Structural Insulated Panels Inc. v. Ottawa (City)*, 2014 ONSC 2365, the applicant sought an order of the Court requiring the City of Ottawa to issue a building permit for a construction project. Ottawa had rejected the initial application for the building permit. The applicant, Thermapan, sought production of the entire file kept by Ottawa's expert engineer during the litigation.

Thermapan argued that by serving the expert's affidavit on Thermapan, Ottawa had waived any litigation or solicitor-and-client privilege in the expert's file and accordingly, the expert's file ought to be produced. In so doing, Thermapan relied on a decision of Justice Wilson of the Ontario Superior Court, *Moore v. Getahun*, 2014 ONSC 237, in which Justice Wilson held that recent changes to the Rules of Civil Procedure governing experts required experts to be neutral and non-partisan; according to Justice Wilson, the practice of lawyers reviewing expert reports with the expert "should stop". Thermapan argued that in view of the Court's decision in *Moore*, the Court should automatically require the full disclosure of the expert's entire file as a matter of course.

Master Muir rejected Thermapan's argument and held that foundational information provided to Ottawa's expert, including the instructions to Ottawa's expert and invoices rendered by the lawyers to Ottawa, had or would have to be produced. However, in the Court's view, "nothing further" was required to be disclosed to Thermapan.

The Court held that the automatic production of the expert's file was not required in this case. Master Muir distinguished the *Moore* decision on the basis that, in the *Moore* case, there was an admission by the expert witness that he had reviewed the draft report with counsel and made "corrections" to his report as a result. In *Thermapan*, Master Muir concluded that there was no evidence of any concern about the conduct of Ottawa's expert and there was no evidence that Ottawa's expert was anything other than independent.

The *Moore* decision is currently under appeal and, in view of Master Muir's decision in *Thermapan*, will be watched closely by the Ontario Bar.