LITIGATION TIPS & TRAPS: "Southren" style

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By Jane Southren, *Lerners LLP*

This edition's tip comes from Caroline Brandow of Lerners LLP in London. Caroline has a broad practice that encompasses health law, insurance defence, commercial litigation and class proceedings. She tells us all about a rule that has always held a fascination for me: Rule 39.03. I heard about this rule in my first couple of years of practice, but I have never used it myself, nor have I actually seen anyone else use it. And that seems strange to me, because it seems to have the potential to be a powerful tool both substantively and strategically. I would be interested in any feedback you have as to the risks associated with using the rule that may explain why people don't use it more often. Wishing all of you a Happy New Year!

NOTICE FOR FRUSTRATED CROSS-EXAMINERS

By Caroline Brandow, *Lerners LLP*

All too often, affidavits for motions or applications are sworn by lawyers or law clerks based on information from others. These affidavits will sometimes attach entire reports by experts, and the grounds for the motion or application will include the opinion set out in the attached expert report. This is frequently seen to shield the author of the report, namely the expert, from cross-examination, and what may well be the key grounds supporting or disputing the request made in the motion or application from being challenged by way of cross-examination. To proceed with an examination to ask questions of someone who has no personal information can be a good way to waste your time and your client's money.

Litigators are very familiar with the provisions of Rule 39.02 which permit, in most cases, cross-examination of an affiant on an affidavit sworn in support of a motion or application. What is not often pursued, and perhaps frequently forgotten, is Rule 39.03, which permits a party to have a summons issued and served on a witness in order to have that witness attend for an examination to obtain evidence in advance of a motion or application. The witness does not need to be a party nor an affiant of an affidavit in support of the application or motion. The witness can be the expert who prepared the report attached to the affidavit served in support of the motion or application.

No leave of the court is required to have the summons issued, however, an opposing party can bring a motion to quash the summons. The courts have fairly consistently held for the past three decades that such a summons should stand and the examination should proceed if (i) the evidence that is to be adduced is relevant to the issues raised in the motion or application; (ii) the witness served with the summons has such evidence, and (iii), the examination would not amount to an abuse of process. See *Re Canada Metal Co. Ltd. et al. and Heap et al.* (1975), 7 O.R. (2d) 185 (ON C.A.) and more recently, *CanWest MediaWorks Inc.* v. *Canada (Attorney General),* 2007 ONCA 567 CanLII (ON CA).

The courts will typically require that an examination pursuant to Rule 39 be limited to facts relevant to the issues raised in the motion or application. The scope of the examination will be determined based on a review of both the nature and the grounds for the motion or application. See *Elfe Juvenile Products Inc.* v. *Bern,* [1994] O.J. No. 2840 (Ont. Div. Ct.).

With the law being so settled on the test to be applied and a relatively low threshold for the party asking for the examination, you might feel confident that you could always win any motion brought to

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quash such a summons. You should keep in mind, however, that motions to quash have been brought in several cases and some have successfully had a Rule 39.03 summons quashed. Before you have a summons issued, consider the following three issues.

First, the typical “smell test” of whether the examination might amount to a fishing expedition may be applied by a judge hearing a motion to quash the summons. If there is any appearance that the examination will not garner evidence that will be relevant to the resolution of the particular issue about to be decided (rather than just general discovery), then you may not be able to defend against a motion to quash.

Second, if you want to conduct a Rule 39.03 examination, then you should be prepared to defend the summons on a motion to quash by being able to show, on a reasonable evidentiary basis, that the proposed examination would be conducted on issues relevant to the pending application or motion and that the proposed witness is in a position to offer relevant evidence. See *Ontario Federation of Anglers & Hunters* (2002), 211 D.L.R. (4th) 741, 2002 CanLII 41606 (ON C.A.). If you successfully jump through this basic evidentiary hoop, then your client will have a *prima facie* right to conduct the examination and the tactical burden will switch to the other side to persuade the court that the examination would be an abuse of process.

Some cases suggested that to defend against a motion to quash, the proposed examiner should be able to meet a "high threshold" of proof or be able to prove that information useful to the resolution of the issues will be obtained in the examination. On two occasions, the later writing for the majority of the Court of Appeal, Justice Sharpe has rejected these suggestions and held that only the basic level of proof is required. For the majority of the Court of Appeal, Justice Sharpe commented that requiring a high onus of proof could have the effect of making Rule 39.03 "virtually redundant" as a party who requires an examination to prove his or her case may well not be able to do so prior to the examination at which the party may be able to adduce evidence to prove his or her case. See *Transamerica Life Insurance Company of Canada* v. *Canada Life Assurance Company* (1996), 27 O.R. (3d) 291 (Ont. Gen. Div.) and *Payne* v. *Ontario Human Rights Commission,* [2000] O.J. No. 2987 (ON C.A.). That being said, to pass the "smell test" of whether it would be a fishing expedition, you might be wise to be able to put forward an affidavit setting out more than just a scintilla or mere possibility that the examination will yield relevant or useful information to the determination of the issues.

Third, the issue of whether a Rule 39.03 examination is an abuse of process is raised more often than you might expect on motions to quash. Past cases suggest that Rule 39.03 examinations may be viewed to be an abuse of process where the main motion is itself an abuse (if the main motion or application is frivolous and vexatious), the examination is being used for an ulterior or improper purpose (such as general discovery on an application where there is no right to a general discovery on an application - see *Payne* v. *OHRC,* supra) and where the process itself is abusive (ex. issuing a summons to numerous public figures where the evidence is unnecessary or the summons is serving an ulterior purpose of embarrassment).

As a final note, as with a Rule 39.02 cross-examination, never forget to act with diligence to move forward with a Rule 39.03 examination or you might lose this potentially powerful tool in your litigator's toolbox ■