# THE CIVIL LITIGATOR'S SURVIVAL GUIDE TO EVIDENCE 2020

## Evidentiary Issues on Motions and Applications: Overcoming Problems and Presenting Properly

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## Index

This article will address frequently encountered evidentiary issues on motions and applications, how to overcome certain problems, and present properly. The following issues will be examined:

1. Motions vs. Applications: the key differences and their role in determining the evidence that you need;
2. How does the use of cross-examination transcripts on a motion differ from examinations for discovery in an action?
3. Effective use of motions for directions; and
4. Case conferences as evidence-gathering tools for motions.

## 1. Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need

There are two types of civil proceedings in Ontario: actions and applications. Generally, all civil proceedings are commenced by the issuing of an "originating process", which is defined in Rule 1.03 of the *Rules of the Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, to include a statement of claim (by way of an action) or a notice of application (by way of an application).

This section will focus on applications, as opposed to actions, and how they differ from motions. The discussion will conclude with an examinations of their role in determining the evidence needed for each.

*Applications*

An "application" is defined in Rule 1.03 as "a proceeding commenced by notice of application."

An application is a form of court proceeding in which the parties' evidence is tendered by way of affidavits, followed by cross-examinations on those affidavits, and then, typically, an oral hearing based upon the written record.

There is no traditional "trial" with *viva voce* evidence in an application – simply argument by counsel based upon the affidavit and transcript evidence from the cross-examinations of the parties or other examinations. A Judge may, under Rule 38.10(1)(b), order that the application or any issue proceed to trial and give such directions as are just.

This is contrasted with an "action", which is also defined in Rule 1.03 to mean:

> *a proceeding that is not an application and includes a proceeding commenced by,*
>
> *a) statement of claim;*
>
> *b) notice of action;*
>
> *c) counterclaim;*
>
> *d) crossclaim; or*

*e) third or subsequent party claim.*

Generally, every proceeding shall be commenced by action unless a statute or the Rules provide otherwise (Rule 14.02).

The circumstances in which proceedings may be taken by way of application are listed in Rule 14.05. Rule 14.05(3) permits a proceeding to be brought by way of application where the Rules authorize the commencement of a proceeding by application nor where the relief claimed is,

> *(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;*
>
> *(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;*
>
> *(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;*
>
> *(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;*
>
> *(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;*
>
> *(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;*
>
> *(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;*
>
> *(g.1) for a remedy under the Canadian Charter of Rights and Freedoms; or*
>
> *(h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3; O. Reg. 537/18, s. 2.*

Rule 38 regulates the jurisdiction and procedure on applications.

Pursuant to Rule 38.05, "*[a] notice of application shall be issued as provided by Rule 14.07 before it is served.*"

Unlike the case with a Statement of Claim in an action, there is no requirement under the Rules for the time *within which* a notice of application must be served but, rather, a deadline *by which* it must be served. Under Rule 38.06(3), a notice of application must be served at least 10 days before the date of the hearing of the Application.

Typically, a timetable is agreed-upon by the parties or set by the Court, and the Notice of Application is included in an Application Record and served well in advance of the hearing date, so as to permit the delivery of responding materials, cross-examinations to take place, and the delivery of facta and briefs of authority in advance of the hearing date.

The material to be used on an application is set out in Rule 38.09, which requires the delivery of an application record, including the notice of application, all affidavits and other material served by any party for use on the application, a list of all relevant transcripts of evidence in chronological order, and any other material in the Court file that is necessary for the hearing (Rule 38.09(2)).

A party responding to a Notice of Application *may* serve a responding application record consisting of a table of contents and any material to be used by the respondent on the application and not included in the application record (Rule 38.09(3.1)).

Although there is no requirement to serve a responding application record, respondents will typically serve responding application records, which will include affidavits that respond to the evidence of the applicant(s).

Unlike the permissive language in Rule 38.09(3.1), a party responding to an application *must* serve on every other party, at least four days before the hearing, a responding factum (Rule 38.09(3)). Facta are required for applications.

*Motions*

A "motion" is defined to include "a motion in a proceeding or an intended proceeding" (Rule 1.03). Therefore, leave to commence a proceeding, where leave is required, is obtained on a motion (Rule 14.01(3)) and in an urgent case (such as an interlocutory injunction) a motion may be made before the commencement of a proceeding (Rule 37.17). Rule 9.02(1) also provides for a pre-proceeding motion to appointment a litigation administrator.

With certain exceptions, such as a Motion for Summary Judgment, a "motion" is typically the vehicle by which a party seek certain interim or interlocutory relief from the Court. A Judge has jurisdiction to hear any motion in a proceeding (Rule 37.02(1)). A Master may hear any motion in a proceeding (subject to certain exceptions, including where jurisdiction is expressly conferred on a judge) (Rule 37.02(2)).

In a complicated proceeding, all motions may be assigned to be heard by a particular judge.

Motions on Commercial List matters are dealt with pursuant to the Commercial List practice direction and are generally scheduled at a 9:30 a.m. appointment, with certain exceptions, including Motions for Summary Judgment, which are dealt with during 30 minute case conferences at 10:00 a.m. at the Court.

A motion can be made in both an action, as well as an application.

Rule 37.10(1) sets out the circumstances in which a Motion Record must be filed and states as follows:

> ***37.10(1)*** *Where a motion is made on notice, the moving party shall, unless the court orders otherwise before or at the hearing of the motion, serve a motion record on every other party to the motion and file it, with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, and the court file shall not be placed before the judge or master hearing the motion unless he or she requests it or a party requisitions it. R.R.O. 1990, Reg. 194, r. 37.10 (1); O. Reg. 171/98, s. 14 (1); O. Reg. 438/08, s. 35 (1).*

The contents of the Motion Record are similar to those found in an Application Record, and are detailed in Rule 37.10(2) as follows:

> ***37.10(2)*** *The motion record shall contain, in consecutively numbered pages arranged in the following order,*
>
> > *(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;*
> >
> > *(b) a copy of the notice of motion;*
> >
> > *(c) a copy of all affidavits and other material served by any party for use on the motion;*
> >
> > *d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and*
> >
> > *(e) a copy of any other material in the court file that is necessary for the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.10 (2).*

Motions do not have to be heard orally. Pursuant to Rule 37.12.1(1), "*[w]here a motion is on consent, unopposed or without notice under subrule 37.07(2), the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise*."

For a motion on consent to the Court of Appeal, an affidavit or other document setting out the reasons why it is appropriate to make the order sought must be filed with the Court (Rule 37.12.1(2.1)).

As was the case with a responding application record, a party responding to a motion *may* serve a responding motion record, which if served must include a table of contents and any material to be used by the responding party on the motion and not included in the motion record.

Rule 37.10(3) sets out the contents of the Responding Party's Motion Record as follows:

> ***37.10(3)*** *Where a motion record is served a responding party who is of the opinion that it is incomplete may serve on every other party, and file, with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a responding party's motion record containing, in consecutively numbered pages arranged in the following order,*

> *(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and*
>
> *(b) a copy of any material to be used by the responding party on the motion and not included in the motion record. R.R.O. 1990, Reg. 194, r. 37.10 (3); O. Reg. 171/98, s. 14 (2); O. Reg. 438/08, s. 35 (2).*

*Evidence Used on Motions and Applications*

Rule 39 sets out how evidence may be given on motions and applications:

- by affidavit (Rule 39.01);
- by cross-examination on an affidavit (Rule 39.02);
- by the examination of a witness before the hearing of a pending motion or application (Rule 39.03(1));
- by the examination of a witness, with leave, orally at the hearing (Rule 39.03(4)); or
- by the use of an examination for discovery transcript at the hearing of a motion (Rule 39.04).

*A. Affidavit*

Evidence on both motions and applications is typically by way of affidavit – but it does not have to be. Rule 39.01(1) provides that "*[e]vidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise*."

The format for the affidavits are governed by Rule 4.06(1) which provides as follows:

> ***4.06** (1) An affidavit used in a proceeding shall,*
>
> *(a) be in Form 4D;*
>
> *(b) be expressed in the first person;*
>
> *(c) state the full name of the deponent and, if the deponent is a party or a lawyer, officer, director, member or employee of a party, shall state that fact;*
>
> *(d) be divided into paragraphs, numbered consecutively, with each paragraph being confined as far as possible to a particular statement of fact; and*
>
> *(e) be signed by the deponent and sworn or affirmed before a person authorized to administer oaths or affirmations. R.R.O. 1990, Reg. 194, r. 4.06 (1); O. Reg. 575/07, s. 1.*

The general rule as to the content of an affidavit is set out in Rule 4.06(2):

> ***4.06(2)** An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.*

But what if the deponent does not speak English? Pursuant to Rule 4.06(8):

> ***4.06(8)*** *Where it appears to a person taking an affidavit that the deponent does not understand the language used in the affidavit, the person shall certify in the jurat that the affidavit was interpreted to the deponent in the person's presence by a named interpreter who took an oath or made an affirmation before him or her to interpret the affidavit correctly.*

Although an affidavit for use on a motion may be sworn based upon "information and belief" (Rule 39.01(4)), affidavits for use on an application may only contain statements based upon "information and belief" in limited circumstances, such as where the matters are not contentious (Rule 39.01(5)).

In either case, the source of the information and the fact of belief must be specified (i.e. "I am advised by Mr. or Mrs. X and verily believe that …")

Given the more stringent requirements for affidavits used in an application, counsel must ensure that the individuals selected as deponents have the most first-hand knowledge of the matters to which they are swearing or affirming.

What about the scope of disclosure? Does it differ depending upon whether the motion or application is brought with or without notice?

For motions and applications brought without notice, the moving party or applicant must make full and fair disclosure of all material facts (good or bad). The failure to do so is a sufficient ground to set aside the order obtained. Rule 39.01(6) provides as follows:

> ***39.01(6)*** *Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.*

In *Natale v. Testa*, 2018 ONSC 4541, 2018 CarswellOnt 12184 (S.C.J.), although the defendant specifically requested notice of a motion to be brought by the plaintiff, the plaintiff brought an *ex parte* motion without disclosing the defendant's request. The Court not only set aside the *ex parte* order, but also a subsequent consent order.

The Court also set aside an *ex parte* Mareva injunction where the plaintiff failed to disclose a prior settlement agreement (*Elsley v. Bordynui*, 2013 ONSC 1210, 2013 CarswellOnt 2329).

For motions or applications brought without notice, the moving parties must ensure that full and fair disclosure is made, otherwise they will face serious consequences by the Court.

*B. Evidence by Cross-Examination on an Affidavit*

Cross-examination is not an absolute right and Courts have refused adjournment requests to permit cross-examinations on the eve of a hearing (*Ridley v. Ridley* (1989), 37 C.P.C. (2d) 167

(Ont. H.C.); *A.H. Al-Sagar & Bros. Engineering Project Co. v. Al-Jabouri* (1984), 47 C.P.C. 33 (Ont. H.C.)).

If you are going to cross-examine a deponent, serve all materials and then schedule the examinations at the earliest opportunity. A failure to promptly do so and then a request an adjournment to permit cross-examination may result in the Court refusing the adjournment request.

The right to cross-examination on a motion or application only arises once a party has served every affidavit on which they intend to rely and has completed all Rule 39.03 examinations. Rule 39.02(1) provides as follows:

> ***39.02(1)*** *A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application.*

A party preparing affidavit materials must know the case to be met at the outset and must include sufficient affidavit evidence to meet their case. Subject to limited exceptions, a party will not have a second-chance to file materials after they have conducted cross-examinations.

Once a party cross-examines an adverse party on their affidavit, they cannot subsequently deliver an affidavit for use at the hearing or conduct a Rule 39.03 examination without leave or consent. Rule 39.02(2) states as follows:

> ***39.02(2)*** *A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.*

The purpose behind this rule is to prevent a party from bolstering their case after cross-examinations without obtaining leave from the Court or the consent of the parties.

There may be instances where the evidence of the deponent in the affidavit is significantly contradicted by the very same deponent on cross-examination, therefore evidence from another witness is necessary to address the fact or issue in question.

In those types of cases, the Court will look to the test for leave under this Rule as set out by the Divisional Court in *First Capital Realty v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492. At paragraph 9 of *First Capital, supra*, the Divisional Court set out the four-part test to be satisfied to obtain leave under Rule 39.02(2):

1. is the evidence relevant?
2. does the evidence respond to a matter raised on the cross-examination – not necessarily raised for the first time?

3. would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs/terms/an adjournment?
4. did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

As set out above, the proposed new evidence has to be relevant and respond to a matter raised on cross-examination, and there must be a reasonable explanation for why the evidence was not included at the outset. This is, of course, in addition to the non-compensable prejudice prong of the test.

*C. Examination of a Witness on a Pending Motion or Application*

Rule 39.03 permits the examination of a person as a witness before the hearing of a pending motion or application and having a transcript of their evidence available at the hearing. This rule states as follows:

> ***39.03(1)*** *Subject to subrule 39.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.*

Rule 39.03 is often used where a party to an action requires the evidence of a third-party witness and, in particular, a witness who may not be prepared to swear an affidavit or may otherwise be adverse in interest to the party requiring the examination.

Note that where the proceeding is an application, Rule 39.03(1) should not be used to conduct a general discovery (*Teranet Inc. v. Canarab Marketing Corp*. (2007), 44 C.P.C. (6th), 51 (Ont. S.C.J. [Commercial List]).

*D. Examination of a Witness, with Leave, Orally at the Hearing*

Under certain circumstances, a witness may be examined orally at the hearing of a motion or application. Rule 39.03(4) states as follows:

> ***(4)*** *With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial.*

This situation can arise during a "mini-trial" on a motion for summary judgment under Rule 20.04(2.2) which provides as follows:

> ***(2.2)*** *A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.*

*E. Examination for Discovery Transcript at the Hearing*

On the hearing of a *motion*, a party may use in evidence an adverse party's examination for discovery, but not the party's own examination for discovery transcript (Rules 39.04(1) & (2)). These two Rules state as follows:

***Adverse Party's Examination***

***39.04 (1)*** *On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.*

***Party's Examination***

***(2)*** *On the hearing of a motion, a party may not use in evidence the party's own examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the party unless the other parties consent. O. Reg. 534/95, s. 1.*

Note that these Rules only apply to motions (as there are no examinations for discovery permitted in applications).

*Expert Witness Evidence*

Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03(2.1) (Rule 39.01(7)).

Rule 53.03(2.1) outlines the contents that a report from an expert must include as follows:

***53.03(2.1)*** *A report provided for the purposes of subrule (1) or (2) shall contain the following information:*

*1. The expert's name, address and area of expertise.*

*2. The expert's qualifications and employment and educational experiences in his or her area of expertise.*

*3. The instructions provided to the expert in relation to the proceeding.*

*4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.*

*5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.*

*6. The expert's reasons for his or her opinion, including,*

*i. a description of the factual assumptions on which the opinion is based,*

*ii. a description of any research conducted by the expert that led him or her to form the opinion, and*

*iii. a list of every document, if any, relied on by the expert in forming the opinion.*

*7. An acknowledgement of expert's duty (Form 53) signed by the expert.*

When an expert is to be relied upon at a motion or application, the expert themselves has to swear an affidavit appending their own report to it as an exhibit. The affidavit should include, among other things, a statement that the report attached to the affidavit as an exhibit accurately sets out the expert's qualifications, work responsibilities, and a representative sample of their work experience.

The Acknowledgement of Expert's Duty form should also be a separate exhibit to the affidavit.

*Filing of Transcripts*

Pursuant to Rule 34.18(1) "*[i]t is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the Court*."

Where a party intends to refer to a transcript at the hearing of a motion or application, a copy of the transcript shall be filed at least four days before the hearing (Rule 34.18(2)). Note that a portion of the transcript can only be filed on a motion or application if the other parties consent (Rule 34.18(3)).

The entirety of the transcript is typically filed for a motion nor application in advance of the hearing. For a trial; however, the transcript is not filed until a party refers to it at trial, and the Judge may then read only the portion to which the party refers (Rule 34.18(4)).

## 2. How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action?

To better understand the difference between how transcripts are used from cross-examinations as opposed to examinations for discovery, a brief overview of the key differences between the two examinations is warranted.

*Key Differences Between Cross-Examinations and Examinations for Discovery*

*A. Purpose*

The purpose of cross-examination is to attack the credibility of the deponent's evidence and to test their evidence. It is surgical in nature. Questions should be close-ended and leading.

The purpose of an examination for the discovery is to gather relevant evidence and ensure that the parties' productions are complete. Questions are typically open-ended and elaborate on previous answers. Pursuant to Rule 31.02, an examination for discovery may be oral or by written questions and answers, but not both except with leave.

*B. Scope*

Generally, the scope of cross-examination is determined by the issues on the motion or application and the issues raised in the affidavit.

Under Rule 31.06(1), on an examination for discovery,

> *[a] person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) and (4) and no question may be objected to on the ground that,*
>
> *(a) the information sought is evidence;*
>
> *(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or*
>
> *(c) the question constitutes cross-examination on the affidavit of documents of the party being examined.* (emphasis added)

For examinations for discovery, the findings, opinions and conclusions of experts retained by a party are expressly made discoverable, but this information, and the identity of the expert, need not be disclosed if the information was obtained in preparation for contemplated or pending litigation and if the party undertakes not to call the expert as a witness at trial (Rule 31.06(3)).

*Evidence Act Implications re: Transcript Evidence*

Regardless of whether a transcript is being used on a motion, application or at trial, section 48(2) of the *Evidence Act*, R.S.O. 1990, c. E.23, as amended, makes the following presumption:

> ***(2)*** *An examination or deposition received or read in evidence under subsection (1) shall be presumed to represent accurately the evidence of the party or witness, unless there is good reason to doubt its accuracy.*

*Use of Cross-Examination Transcripts on a Motion or Application*

At a motion or application, any party may use anyone's transcript evidence, whether obtained by cross-examination or an examination of a witness on a pending motion under Rule 39.03(1) which provides that:

> ***39.03(1)*** *Subject to subrule 30.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.*

A party who intends to refer to a transcript of evidence at the hearing of a motion shall file a copy of the transcript as provided by Rule 34.18 (Rule 37.10(5)).

Rule 34.18 states that:

> ***34.18****(1) It is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the court. R.R.O. 1990, Reg. 194, r. 34.18 (1).*

Additionally, there are permitted uses of an adverse party's examination for discovery evidence on a motion as follows:

> ***39.04****(1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.*

A party's own examination for discovery evidence cannot be relied upon by that party on the hearing of a motion, unless the other parties consent (Rule 39.04(2)).

Once cross-examination transcripts are filed with the Court, they are not subject to the deemed undertaking rule (Rule 30.1.01(5)(a)).

*Use of Examination for Discovery Transcripts at a Trial*

A party may not rely upon its own examination for discovery evidence at trial.

At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of (a) an adverse party; or (b) a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise, if the evidence is otherwise admissible, whether the party or other person has already given evidence or not (Rule 31.11(1)).

Additionally, Rule 31.11(2) provides that "*[t]he evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness*."

In the event of impeaching a witness, ss. 20 and 21 of the *Evidence Act*, R.S.O. 1990, c. E.23, as amended, require that a prior inconsistent statement be put to the witness before it is introduced as evidence.

Just as parties can examine a non-party as a witness on a pending motion or application under Rule 39.03(1), Rule 31.10(1) permits the examination for discovery of a non-party with leave as follows:

> ***31.10(1)*** *The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation. R.R.O. 1990, Reg. 194, r. 31.10 (1).*

The ability to examine a non-party under Rule 31.10 is not as of right (as it is under Rule 39.03). The test for granting leave is set out in Rule 31.10(2), which provides as follows:

> ***(2)*** *An order under subrule (1) shall not be made unless the court is satisfied that,*
>
> > *(a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;*
> >
> > *(b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and*
> >
> > *(c) the examination will not,*
> >
> > > *(i) unduly delay the commencement of the trial of the action,*
> > >
> > > *(ii) entail unreasonable expense for other parties, or*
> > >
> > > *(iii) result in unfairness to the person the moving party seeks to examine. R.R.O. 1990, Reg. 194, r. 31.10 (2).*

The use of the evidence obtained under Rule 31.10 is limited. Pursuant to Rule 31.10(5) "*[t]he evidence of a person examined under this rule may not be read into evidence at trial under subrule 31.11(1)*."

*What if Answers from an Examination for Discovery are Incorrect?*

A part who subsequently discovers that an answer given on an examination was incorrect or incomplete when made, or is no longer correct and complete, is under a duty to provide the information in writing to every other party.

Rule 31.09(1) states as follows:

> ***Duty to Correct Answers***
>
> ***31.09*** *(1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,*
>
> > *(a) was incorrect or incomplete when made; or*
> >
> > *(b) is no longer correct and complete,*
> >
> > *the party shall forthwith provide the information in writing to every other party. R.R.O. 1990, Reg. 194, r. 31.09 (1).*

This Rule applies to answers given on an examination for discovery and does not reference answers given on cross-examination.

Parties should be cautious that when an answer is corrected. Both the original and corrected answers are admissible at the hearing and the original answer is not expunged (*Capital Distributing Co. v. Blakey* (1997), 33 O.R. (3d) 58, 10 C.P.C. (4th) 109).

There are consequences to correcting an answer on discovery. Not only can the answer be treated at the hearing as forming part of the original examination (Rule 31.09(2)(a)), but any adverse party may require that the information be verified by affidavit or subject to further examination for discovery (Rule 31.09(2)(b)).

*Filing of Transcript Evidence: Motions and Applications*

Transcripts on motions and applications are generally filed in their entirety in advance of the hearing and the filing requirements are set out in Rule 34.18(2) which states as follows:

> ***34.18(2)*** *Where a party intends to refer to a transcript on the hearing of a motion or application, a copy of the transcript for the use of the court shall be filed in the court office where the motion or application is to be heard, at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 34.18 (2); O. Reg. 171/98, s. 11; O. Reg. 394/09, s. 14.*

Per Rule 34.18(3) a party may file a portion of the transcript if the other parties consent.

*Filing of Transcript Evidence: Trial*

Unlike the procedure for filing transcripts in advance of motions and applications, "*[a] copy of the transcript for the use of the court at trial shall not be filed until a party refers to it at trial, and the trial judge may read only the portions to which a party refers*." (Rule 34.18(4)).

Transcripts for use at trial are not filed in advance. When they are filed, the Judge *may* only read the portions to which a party refers.

*Use of Examination for Discovery Evidence in a Subsequent Action*

Discovery transcripts can also be used in subsequent actions (in limited circumstances). Where an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, the evidence given on an examination for discovery taken in the former action may be read into or used in evidence at the trial of the subsequent action as if it had been taken in the subsequent action (Rule 31.11(8)).

## 3. Effective Uses of Motions for Directions

*Applicable Rules of Civil Procedure*

Rule 1.05 of the Rules grants the Court a general power to impose terms in the making of any order. The prescribed forms are to be used where applicable and with such variations as the circumstances required (Rule 1.06).

Rule 1.05 states as follows:

> ***Order on Terms***
>
> ***1.05*** *When making an order under these rules the Court may impose such terms and given such directions as are just.*

Rule 1.05 provides for early judicial involvement in a matter, which allows for a Motion for Directions, to manage the time and cost of a Summary Judgment Motion.

Rule 50.13 must be read in conjunction with Rule 1.05. As per Justice Firestone's comments in *Griva v. Griva*, 2016 ONSC 1820 (CanLII) at para. 10:

> *"Rule 50.13 is to be read and applied in conjunction with Rule 1.05 which states: "[W]hen making an order under these rules the court may impose such terms and give such directions as are just."*

Rule 50.13(1) stipulates that: "*[a] judge may at any time, on his or her own initiative or at a party's request, direct that a case conference be held before a judge or case management master*."

With respect to the powers afforded to a Judge or case management master at a case conference, Rule 50.13(6) provides that:

> ***(6)*** *At the case conference, the judge or case management master may, if notice has been given and it is appropriate to do so or on consent of the parties,*
>
> *(a) make a procedural order;*
>
> *(b) convene a pre-trial conference;*
>
> *(c) give directions; and*
>
> *(d) in the case of a judge,*
>
> *(i) make an order for interlocutory relief, or*
>
> *(ii) convene a hearing. O. Reg. 170/14, s. 16. (emphasis added)*

Motions for Directions determine whether a proposed summary judgment motion should proceed.

They should be expedient and include a tight timetable for the completion of the necessary steps.

*Motions for Directions as a Tool to Promote Access to Justice*

The importance of a Motion for Directions was underscored by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 where the Court was discussing the scope of a Summary Judgment Motion as follows:

"***C. Tools to Maximize the Efficiency of a Summary Judgment Motion***

*(1) Controlling the Scope of a Summary Judgment Motion*

*[69] The Ontario Rules and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.*

*[70] The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.*

*[71] Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.*

*[72] I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.*

*[73] A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case."*

In *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, the Court of Appeal allowed an appeal concerning the interpretation of s. 7(1)(a) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, as amended, and granted summary judgment dismissing the action. In so doing, the Court cited what Karakatsanis J. described in *Hryniak, supra*, as a "culture shift" in Courts deciding

summary judgment motions to create an environment promoting timely and affordable access to the civil justice system. Para. 131 from the Court of Appeal's decision in *Carmichael, supra*, is as follows:

> *"[131] At the same time, the Supreme Court of Canada's decision in Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 2,* per *Karakatsanis J., called for a "culture shift" in courts deciding summary judgment motions "in order to create an environment promoting timely and affordable access to the civil justice system". Moreover, as Brown J.A. has noted, because "the court's comments [at para. 2 of Hryniak] apply equally to civil appellate courts", this court's exercise of its powers under s. 134 must also strive to promote "timely and affordable access to the civil justice system":* Cook, *at para. 78."*

Accessibility is achievable through justice that is proportionate, timely and affordable (*Hryniak, supra*). Motions for summary judgment are a vehicle for increased access to the civil justice system, as they promote a timely and affordable means to determine disputes. This, in turn, should increase the frequency of motions for directions before the Courts.

*Factors to Consider on a Motion for Directions*

In *1318214 Ontario Limited v. Sobeys Capital Incorporated*, 2012 ONSC 2784 (CanLII), Justice Brown identified at paragraphs 18 and 19 of the decision the issues that a Court should consider when weighing a request for a lengthy post-discovery motion against setting an action down for trial. These issues are also instrumental to any Judge faced with a motion for directions concerning the scheduling of a motion for summary judgment and are summarized as follows:

1. Length of motion versus length of trial
2. What specific issues will the court be asked to determine on the motion?
3. Who will the affiants be and what issues will they address? How long with their affidavits be?
4. Which witnesses will be called at trial and the anticipated length of examinations?
5. How many documents will be marked as exhibits and/or introduced at trial? Will there be any agreement on the admissibility of documents?
6. Will there be expert reports? If so, how many and on what issues?
7. What is the volume of transcripts to be filed with the court or put before the Judge?
8. Do the parties anticipate any in-trial motions? If so, how many and on what issues?
9. What legal issues will be addressed in the parties' facta, and how many authorities will be relied upon?

Parties are well-advised to be prepared to make submissions on the above at any motion for directions concerning the scheduling of a motion for summary judgment.

On a motion for directions, the Judge will weigh the costs and benefits of scheduling a motion for summary judgment, all with a view to respecting the principles of proportionality, timeliness and affordability.

The Judge may provide directions with respect to the timelines for filing affidavits, the length of cross-examinations, and the nature and extent of evidence that will be filed. At the same time,

the Judge needs to be cautious not to impose administrative measures that add unnecessary costs to the process.

It should be noted that as per the Supreme Court of Canada's comments in *Hryniak, supra*, not all summary judgment motions require a motion for directions. But, the failure to bring such a motion where it was evident that the record will be complex or voluminous will be considered when dealing with cost consequences under Rule 20.06(a) which provides as follows:

> ***Costs Sanctions for Improper Use of Rule***
>
> ***20.06*** *The Court may fix and order payment of the costs of a Motion for summary judgment by a party on a substantial indemnity basis if,*
>
> *(a) the party acted unreasonably by making or responding to the motion; or*
>
> *(b) the party acted in bad faith for the purpose of delay.*

<u>*A Tool for Responding Parties*</u>

As set out in para. 72 in *Hryniak, supra*, a motion for directions can provide the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment – thereby saving their client costs and arguably delaying the determination of the issues to be decided. I can be used as a tool by a responding party to challenge or even end the scheduling of a proposed motion for summary judgment.

When faced with a motion for directions, a responding party would be well-advised to consider the following decisions:

In the 2016 decision n *Griva, supra*, Justice Firestone commented on whether the Court can refuse, and if so under what circumstances, a party's request to schedule a motion for summary judgment. In refusing to schedule and allow the plaintiff's requested motion for summary judgment to proceed, Justice Firestone highlighted the Court's considerations and gatekeeping function as follows:

> *"[15] In this case the requested motion for partial summary judgment will not resolve the damages issues in their entirety. The plaintiff's other damages claims will still be proceeding to trial. Those additional damage claims are based on the same factual matrix and evidentiary record as the general damages claim for which the plaintiff now seeks partial summary judgment.*
>
> *[16] In this case to allow some of the damages claims to be determined by way of summary judgment and others to proceed to trial would risk inconsistent factual findings and a duplication of evidence from not only the plaintiff but also from the many other experts who will give evidence both on this summary judgment motion and at trial regarding the injuries sustained and the effect of those injuries. A complete evidentiary record is necessary in order to properly assess the plaintiff's claim for general non-pecuniary damages.*

> *[17] In Baywood Homes Partnership v. Haditaghi, 2014 ONCA 450, at para 33, the court confirmed that the motions judge must "assess the advisability of the summary judgment process in the context of the litigation as a whole." In Hryniak the Supreme Court at para. 60 specifically stated that "`the interest of justice' inquiry goes further and also considers the consequences of the motion in the context of litigation as a whole."*
>
> *[18] Given the Supreme Court's pronouncement at para. 72 in Hryniak, these considerations are equally applicable to all procedural orders and directions made by the court at a case conference in exercising its gate-keeping role."*

In *Griva, supra*, Justice Firestone also adopted Justice Myers' reasoning in *2287913 Ontario Inc. v. Blue Falls Manufacturing Ltd*., 2015 ONSC 7982 where at para. 17 Justice Myers stated in part:

> *"[W]here a party advances a small number of discrete issues that may resolve the entire case, it is much easier to conclude that a thorough investigation of those issues may be the most proportional process even though the issues may be complex or have some facts in dispute."*

As such, discreet issues may not always warrant the scheduling of a motion for summary judgment. In the words of Justice Karakatsanis in *Hryniak, supra*, at para. 59:

> *"[W]hat is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure."*

The concerns expressed by Justice Firestone were re-visited a year later by the Ontario Court of Appeal in *Butera v. Chown, Carins LLP*, 2017 ONCA 783 (CanLII), where the Court highlighted several concerns with motions seeking partial summary judgment as follows:

> *"[30] First, such motions cause the resolution of the main action to be delayed. Typically, an action does not progress in the face of a motion for partial summary judgment. A delay tactic, dressed as a request for partial summary judgment, may be used, albeit improperly, to cause an opposing party to expend time and legal fees on a motion that will not finally determine the action and, at best, will only resolve one element of the action. At worst, the result is only increased fees and delay. There is also always the possibility of an appeal.*
>
> *[31] Second, a motion for partial summary judgment may by very expensive. The provision for a presumptive cost award for an unsuccessful summary judgment motion that existed under the former summary judgment rule has been repealed, thereby removing a disincentive for bringing partial summary judgment motions.*
>
> *[32] Third, judges, who already face a significant responsibility addressing the increase in summary judgment motions that have flowed since Hryniak, are required to spend time hearing partial summary judgment motions and writing comprehensive reasons on an issue that does not dispose of the action.*

> *[33] Fourth, the record available at the hearing of a partial summary judgment motion will likely not be as expansive as the record at trial therefore increasing the danger of inconsistent findings.*
>
> *[34] When bringing a motion for partial summary judgment, the moving party should consider these factors in assessing whether the motion is advisable in the context of the litigation as a whole. A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner. Such an approach is consistent with the objectives described by the Supreme Court in Hryniak and with the direction that the Rules be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.*
>
> *[35] Lastly, I would observe the obvious, namely, that a motion for partial summary judgment differs from a motion for summary judgment. If the latter is granted, subject to appeals, it results in the disposal of the entire action. In addition, to the extent the motion judge considers it advisable, if the motion for summary judgment is not granted but is successful in part, partial summary judgment may be ordered in that context."*

On April 5, 2019, Justice McEwen released his Honour's decision in *1511419 Ontario Inc. v. KPMG*, 2019 ONSC 228 (CanLII), in which motions for summary judgment brought by the defendants in three separate but related actions based upon the expiry of the two year limitation period were dismissed.

At paragraph 48 of the decision, Justice McEwen cited Mew J., Debra Rolph & Daniel Zacks, *The Law of Limitations*, 3d ed. (Markham: LexisNexis Canada, 2016) at s. 5.36 and stated:

> *"A full trial will still be required where a summary record cannot fairly be used to decide legal issues that are unsettled, complex, or intertwined with the facts."*

The decision in *1511419, supra*, is a good example of the Courts refusing to grant summary judgment where the legal issues were unsettled, complex or intertwined with the facts.

Accordingly, responding parties on a motion for directions that want to challenge the request to schedule a motion for summary judgment, would be well-advised to incorporate the concerns raised by the Courts, above, including:

- **Delay**: the underlying action generally does not proceed in the face of a motion for summary judgment, thereby causing the opposing party to incur time and costs on a motion that will not ultimately determine the action;
- **Cost**: the parties can incur significant costs on a motion that will not finally determine the issues in dispute in the action;

- **Judicial Considerations**: Judges, who already face a considerable volume of summary judgment motions, will be required to spend time hearing partial summary judgment motions and writing comprehensive reasons on issues that do no dispose of actions;
- **Inconsistent Findings**: There is a risk of inconsistent findings, given that the record available at the hearing on a partial summary judgment motion will likely not be as expansive as the record at trial;
- **Intertwined Facts**: When issues are complex and intertwined with the facts, a summary record may not be the most appropriate means in which to resolve disputes. In such cases, the scheduling of such motions (or the motions themselves) should be refused or otherwise dismissed;
- **Bifurcation**: Partial summary judgment motions should be a rare procedure, limited to those issues that can be readily bifurcated from those in the main action; and
- **Lack of Finality**: Subject to any appeals, the granting of a motion for summary judgment should dispose of the entire action. That is not the case with partial summary judgment motions and is contrary to the guidance from the Supreme Court of Canada in *Hryniak, supra*, that the Rules should be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.

More recently, on August 19, 2020, Justice Sweeny released a decision in *Sheldon v. Beaulieu*, 2020 ONSC 4908 (CanLII) whereby partial summary judgment was granted in a case involving a motor vehicle accident that occurred on January 28, 2016 in Thorold, Ontario.

At paras. 15 to 17 of *Sheldon, supra,* Justice Sweeny addressed the law surrounding the appropriateness of summary judgment motions as follows:

> *"[15] Although the Supreme Court of Canada in Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87 and the Court of Appeal in Butera v, Chown, Cairns LLP, 2017 ONCA 83, 137 O.R. (3d) 561 warned against the dangers of granting partial summary judgment, I am satisfied that the comments of the court in Butera do not preclude the granting of this partial summary judgment. The liability of this defendant can be readily bifurcated from those in the main action and may be dealt with expeditiously and in a cost-effective manner. This will not delay the main action and expend resources for a motion that does not determine all of the issues of the action. This is a discrete issue that has been brought to me for determination cost-effectively. The amount of judicial time expended is not out of proportion to the result obtained. There is unlikely to be any inconsistent findings. The fact that the bus driver may be an important witness at the trial does not mean that she needs to be a party or that there will be any inconsistent findings.*
>
> *[16] In Butera, at para. 34, the court noted that "[a] motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner."*
>
> *[17] That is the exact situation on this motion for summary judgment."*

In finding that the liability of the defendant could be easily bifurcated from those in the main action and would be dealt with expeditiously and in a cost-effective manner, summary judgment would not delay the main action. As the liability of the defendant was a discreet issue to be determined on a cost-effective basis and the likelihood of no inconsistent findings, Justice Sweeny granted summary judgment.

The above-noted cases canvass the considerations undertaken by the Courts when determining the appropriateness of summary judgment motions, and should be incorporated in the arguments of both sides during motions for directions concerning the scheduling of summary judgment motions.

*Use in Complicated Proceedings or Series of Proceedings*

Motions for directions can also be used under Rule 37.15 – Motions in a Complicated Proceeding or Series of Proceedings.

> ***37.15(1)*** *Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (place of hearing of motions) does not apply to those motions. R.R.O. 1990, Reg. 194, r. 37.15 (1); O. Reg. 292/99, ss. 2 (3), 4.*
>
> ***(1.1)*** *A judge who is directed to hear all motions under subrule (1) may refer to a master any motion within the jurisdiction of a master under subrule 37.02 (2) unless the judge who made the direction under subrule (1) directs otherwise. O. Reg. 348/97, s. 2.*
>
> ***(1.2)*** *A judge who is directed to hear all motions under subrule (1) and a master to whom a motion is referred under subrule (1.1) may give such directions and make such procedural orders as are necessary to promote the most expeditious and least expensive determination of the proceeding. O. Reg. 438/08, s. 37 (1); O. Reg. 394/09, s. 16.*
>
> ***(2)*** *A judge who hears motions pursuant to a direction under subrule (1) shall not preside at the trial of the actions or the hearing of the applications except with the written consent of all parties. R.R.O. 1990, Reg. 194, r. 37.15 (2); O. Reg. 438/08, s. 37 (2).*

In *Trade Capital Finance Corp. v. Cook*, 2017 ONSC 3606, 2017 CarswellOnt 11797 (S.C.J.), the Court held that a Judge appointed to hear Motions under Rule 37.15 should not hear a motion for summary judgment without the consent of the parties.

*Commercial List Motions for Summary Judgment*

For those matters on the Commercial List, the Court will not schedule Motions for Summary Judgment at a 9:30 a.m. appointment.

Instead, parties should schedule a 30-minute case conference at 10:00 a.m. through the scheduling office and be prepared to address the issues set out above (Commercial List Users' Committee Newsletter Issue No. 11 – A Year in Review – January 2019).

## 4. Case Conferences as Evidence-Gathering Tools for Motions

Pursuant to the *Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model*, effective February 1, 2019, parties can apply to participate in a pilot project where one Judge both manages the case and conducts the trial.

For those parties that do not want to participate in a fully case-managed process (as per the above-noted practice advisory), the benefits of the Commercial List are now available for all civil actions in Toronto under Rule 50.13 of the Rules, which permits case conferences in advance of, among other steps, motions.

As in the case of a pre-trial conference, a Judge may direct a case conference in either an action or application at any time, either on his or her initiative or at the request of a party.

The same rules regarding attendance and lawyer preparedness that apply to pre-trial conferences also apply to case conferences.

*Guidance Provided by Rule 50.13*

Rule 50.13(1) provides that a case conference may be initiated by the Judge alone or upon the request of a party:

> ***50.13(1)*** *A judge may at any time, on his or her own initiative or at a party's request, direct that a case conference be held before a judge or case management master. O. Reg. 170/14, s. 16.*

Unless the Judge or case management master directs otherwise, counsel and the parties shall participate in person or via telephone. This is addressed in Rule 50.13(2):

> ***Attendance***
>
> ***(2)*** *The lawyers for the parties shall appear at the case conference and, unless the judge or case management master orders otherwise, the parties shall participate,*
>
> > *(a) by personal attendance; or*
> >
> > *(b) under rule 1.08 (telephone and video conferences), if personal attendance would require undue amounts of travel time or expense. O. Reg. 170/14, s. 16.*

As a result of the COVID-19 pandemic, the majority of case conferences are proceeding via the Zoom videoconferencing platform.

In order for the case conference to be as productive and efficient as possible, Rule 50.13(4) requires that the lawyer attending has the authority to deal with the matters set out in subrule (5) below:

> ***(4)*** *Every lawyer attending the case conference shall ensure that he or she has the authority to deal with the matters referred to in subrule (5) and that he or she is fully acquainted with the facts and legal issues in the proceeding. O. Reg. 170/14, s. 16.*

The matters to be dealt with at the case conference are outlined in subrule (5) as follows:

> ***Matters to be Dealt With***
>
> ***(5)*** *At the case conference, the judge or case management master may,*
>
> > *(a) identify the issues and note those that are contested and those that are not;*
> >
> > *(b) explore methods to resolve the contested issues;*
> >
> > *(c) if possible, secure the parties' agreement on a specific schedule of events in the proceeding;*
> >
> > *(d) establish a timetable for the proceeding; and*
> >
> > *(e) review and, if necessary, amend an existing timetable. O. Reg. 170/14, s. 16.*

The list of matters to be dealt with under subrule (5) are not exhaustive. Accordingly, the Judge or case management master can, in accordance with Rule 1.05, make sure others or give such directions as are just in the circumstances.

<u>*Case Conferences as a Gate-Keeping Tool for the Court*</u>

In *Adam et al. v. Ledesma-Cadhit et al*., 2015 ONSC 3043 (CanLII), Justice Myers presided over a case conference to deal with the production of witnesses for cross-examination in relation to a

motion for summary judgment to dismiss a medical malpractice case against one of the defendants.

At para. 9 of the decision in *Adam, supra*, Justice Myers underscored the gatekeeping function of the Court at a case conference to regulate the amount and scope of evidence as follows:

> *"The court can exercise some control over the amount and scope of evidence and, especially, reign in cases of abuse, by using Case Conferences under Rule 50.13 and motions for directions under Rule 1.05 as expressly recognized in Hryniak at para. 70."*

*Case Conferences as an Evidence-Gathering Tool*

As was the case with a motion for directions, a Judge or case management master may also give directions at a case conference pursuant to Rule 50.13(6)(c):

> ***Powers***
>
> ***(6)*** *At the case conference, the judge or case management master may, if notice has been given and it is appropriate to do so or on consent of the parties,*
>
> *(a) make a procedural order;*
>
> *(b) convene a pre-trial conference;*
>
> *(c) give directions; and*
>
> *(d) in the case of a judge,*
>
> *(i) make an order for interlocutory relief, or*
>
> *(ii) convene a hearing. O. Reg. 170/14, s. 16.* (emphasis added)

Aside from the identification of issues, the resolution of contested issues, scheduling and addressing timetables, the case conference is also an opportunity for the parties to gather evidence for use on subsequent motions.

Unlike a pre-trial conference where statements made therein cannot be used or disclosed at any other step or stage of the proceeding (except as disclosed in an order under Rule 50.07 or in a pre-trial conference report under Rule 50.08) (Rule 50.09), a case conference held under Rule 50.13 does not afford the same protections.

All counsel must know their case and the evidence that they will rely upon in advance of attending any case conference, particularly when directions are sought or an order for interlocutory relief is sought.

On any contested issue at a case conference, counsel must be prepared to make submissions on their evidence and any applicable caselaw. But just as examinations for discovery or cross-examinations permit a party to test the evidence of the opposing party, so too does a case conference with the added benefit of judicial feedback.

At a case conference to sort out preliminary issues and scheduling for a contested motion, parties must be prepared to make submissions on their evidence. This will give all parties insight into the anticipated evidence of the other parties, thereby permitting them to better prepare their materials and strategy for cross-examinations and the eventual motion.