

## **RULE 28 – PRE-TRIAL EXAMINATION OF WITNESS**

### **Order for**

- (1) (a) Where a person, not a party to an action, may have material evidence relating to a matter in question in the action, on application, the court may order that the person be examined on oath, or affirmation on the matters in question in the action and may, either before or after the examination, order that the examining party pay reasonable lawyer's costs of the person relating to the application and the examination.
- (b) An order under paragraph (a) shall not be made unless the court is satisfied that:
  - (i) the applicant has been unable to obtain the information from other persons whom the applicant is entitled to examine for discovery, or from the person the party seeks to examine;
  - (ii) it would be unfair to require the applicant to proceed to trial without having the opportunity of examining the person; and
  - (iii) the examination will not
    - (A) unduly delay the commencement of the trial of the action;
    - (B) entail unreasonable expense for other parties; or
    - (C) result in unfairness to the person the applicant seeks to examine.

### **Expert**

- (2) An expert retained or specially employed by another party in anticipation of litigation or preparation for trial may not be examined under this rule unless the party seeking the examination is unable to obtain facts and opinions on the same subject by other means.

### **Affidavit in support of application**

- (3) An application for an order under subrule (1) shall be supported by an affidavit setting out:
  - (a) the matter in question in the action to which the applicant believes that the evidence of the proposed witness may be material; or
  - (b) where the proposed witness is an expert retained or specially employed by another party in anticipation of litigation or preparation for trial, that the applicant is unable to obtain facts and opinions on the same subject by other means.

### **Notice of application**

- (4) The applicant shall serve notice on the proposed witness at least 7 days before the hearing of the application.

### **Subpoena**

- (5) Where a party is entitled to examine a person under this rule, by serving on that person a Subpoena in Form 25, the party may require the person to bring to the examination:
  - (a) any document in the person's possession, control or power relating to the matters in question in the action, without the necessity of identifying the document; and
  - (b) any physical object in the person's possession, control or power which the party contemplates tendering at the trial as an exhibit, but the subpoena must identify the object.

### **Notice of examination**

- (6) The examining party shall give notice of examination of a person under this rule by delivering copies of the subpoena to all parties of record not less than 7 days before the day appointed for the examination.

### **Mode of examination**

- (7) The proposed witness shall be cross-examined by the party who obtained the order, then may be cross-examined by any other party, and then may be further cross-examined by the party who obtained the order.

### **Application of examination for discovery rules**

- (8) Rules 27(14), (18) and (20) to (29) apply to an examination under this rule.