

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JOANNE ST. LEWIS

Plaintiff

and

DENIS RANCOURT

Defendant

RESPONDING PARTY'S FACTUM
(Compelling answers and document production, affidavit on motion)

Denis Rancourt

Defendant
(and Responding Party)

I. FACTS

1. The plaintiff (moving party) served the defendant (responding party) the Statement of Claim in the instant defamation action on June 23, 2011.
2. The defendant served and filed the Statement of Defence on July 22, 2011.
3. The plaintiff filed a Reply on August 5, 2011.
4. The plaintiff filed a Motion (the “original motion”) to force early Mandatory Mediation prior to the foreseen 180 day Rule limit and to impose the plaintiff’s non-list mediator without the defendant’s consent on August 18, 2011.
5. The plaintiff’s Motion (original motion) stressed urgency to reduce alleged impending harm allegedly expected to occur in September 2011 (at the start of a new academic semester).
6. The defendant filed a responding party’s Motion Record with three affidavits (two from the defendant, one from an expert witness) and a Factum on August 29, 2011, in view of a motion (original motion) hearing date of September 2, 2011.
7. The plaintiff cancelled the motion (original motion) hearing date and on August 30, 2011, served the defendant and his affiant expert witness Notices of Examination to appear on September 6, 2011, for cross-examinations on the affidavits on the motion (original motion).
8. The cross-examinations were held, consecutively, on September 6, 2011.
9. The plaintiff served the defendant a Notice of Motion and Motion Record on September 23, 2011, regarding the instant motion to compel answers and document productions arising from the cross-examinations on the affidavits on the motion (original motion).
10. The defendant duly served the plaintiff a Notice of Motion for discovery on September 28, 2011, with examination date of November 8, 2011.
11. The defendant, in his affidavit for the instant motion, presented evidence supporting: (i) that the original motion is *prima facie* not tenable at law, irrespective of all outstanding issues, and (ii) that counsel for the plaintiff did not exercise reasonable diligence in the cross-examinations on the affidavits.

II. LAW

Plaintiff's original motion is *prima facie* not tenable at law

12. There are two glaring and individually fatal legal flaws in the plaintiff's original motion which are immediately apparent to even non-lawyers:
 - (i) The first is that the requested Orders (in the original motion) contradict the *Rules of Civil Procedure* without justification (and contradict foundational principles of mediation).
 - (ii) The second is that the original motion is advanced effectively as a proxy for a Motion for an Interim Injunction and as such is an improper use of a motion about Mandatory Mediation.
13. These fatal legal flaws are independent of the matters at issue in the instant motion but rather stem directly from the stated relief sought in the original motion, in the factual and evidentiary context that has already been established.
14. In particular, the above fatal flaws (i and ii; and see below) are not impacted by the degree of independence of the expert witness, or by the defendant's asset holdings, or by the defendant's acceptance by Law Help Ontario, or by the defendant's liability insurance status, or by the expert witness' qualifications or methods – which are all the matters at issue in the instant motion.
15. Indeed, unless one accepts the aberrant notion (case law below, and Rules) that forcing premature mediation and imposing one party's mediator without consent is admissible, the material facts of the defamation action (alleged: egregious nature, urgency, imminent damage, etc) are not relevant to the original motion.

Original motion contrary to Rules and contrary to case law

Contrary to Rule 24.1.09(2)(d)

16. The Rules of Procedure foresee that the parties can voluntarily agree to postpone the mediation (Rule 24.1.09(3)), with the main goal as always to avoid pre-trial and trial; and foresee that extensions can be usefully ordered to allow further discovery (Rule 24.1.09(2)(c)); but the Rules foresee forcing a party to comply with Mandatory Mediation before 180 days by order of a judge exclusively in the circumstances that “*given the nature of the case or the circumstances of the*

parties, the mediation will be more likely to succeed if the 180-day period is extended or abridged” (Rule 24.1.09(2)(d)).

17. It is obvious that the original motion requests, of forcing immediate Mandatory Mediation and imposing one party’s mediator to which the other party does not consent, if granted would only *reduce* the likelihood of success of the mediation.
18. The plaintiff believes that forcing immediate Mandatory Mediation and imposing the plaintiff’s mediator to which the defendant does not consent would *reduce* the likelihood of success of the mediation (e.g., defendant’s affidavit).
19. This Honourable Court has concurred, as follows (in parts):

6 [5] Mandatory Mediation is seen as controversial and may even be considered by some as a contradiction in terms. The Court agrees. [...]

7 [...] The Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months, March 12, 2001 states the opposite. In Chapter 5: Outcomes, at page 80, the authors of the Report conclude:

Mediations in which the mediator was selected by the parties had a significant higher likelihood of complete settlement at mediation - compared to mediations in which the mediators were assigned by the local Mediation Coordinator.

12 [...] If the parties are forced to attend and pay for the Mediation session, it is reasonable for the Court to encourage those conditions that will foster a more positive view of the process. Familiarity with a mediator is a totally reasonable basis for the selection of a mediator. [...] In this case, to accede to Mr. Price's argument would require the parties to attend a mediation session before a mediator that they do not want. It is difficult to understand how even the most skilled mediator could overcome the negative reaction of the parties.

17 [...] The purpose of this Rule [Mandatory Mediation] and of Case Management is to foster and to promote the earlier and less costly resolution of disputes. It is contrary to those objectives to force the parties to attend a mediation session they before a mediator that they do not want.

18 [...] To otherwise force the parties to proceed with a mediator when they have a clear preference for another would compromise the process from the outset and minimize the changes of a successful outcome at the mediation. [...]

(emphasis added)

Bourguignon v. Wardle [2002] O.J. No. 448 (S.C.O. Master Beaudoin)

Contrary to Rule 24.1.08(2)(c)

20. Rule of Civil Procedure **24.1.08(2)(c)** specifies the condition under which a non-Roster mediator can act in Mandatory Mediation as:

24.1.08 (1) The mediation co-ordinator for a county shall maintain a list of mediators for the county, as compiled and kept current by the local mediation committee. O. Reg. 453/98, s. 1.

(2) A mediation under this Rule shall be conducted by,

(a) a person chosen by the agreement of the parties from the list for a county;

(b) a person assigned by the mediation co-ordinator under subrule 24.1.09 (6) or (6.1) from the list for the county; or

(c) a person who is not named on a list, if the parties consent. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 19.

(emphasis added)

21. The defendant does not consent (e.g., defendant's affidavit, paragraph-5).

Contrary to Rule 24.1.01

22. The original motion seeks Mandatory Mediation under forced conditions that would avert alleged perceived harm to the plaintiff. Presumably, for the risk of the alleged perceived harm to be removed the mediation would be required to achieve a sufficient degree of the plaintiff's wishes therefore the sought Order implies and is based on a certain required result from mediation expected by the plaintiff. Such an imposed (implied by the sought Order) pre-condition is contrary to the concept of mediation. Indeed, it is contrary to Rule **24.1.01**:

24.1.01 This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes. O. Reg. 453/98, s. 1; O. Reg. 198/05, s. 2; O. Reg. 438/08, s. 15.

(emphasis added)

One cannot characterize an ordered "mediation" that in this way presupposes results up to an acceptable mark for one party as a "fair" mediation. The Order would be contrary to Rule 24.1.01.

23. The Orders sought in the original motion are incompatible with the intent and spirit of the Mandatory Mediation Program, as is evident from the Attorney General's Fact Sheet about the Mandatory Mediation Program (in parts):

“disputing parties look for a solution that works for them...”

“to gain a better understanding of the interests of all parties, and to find a resolution based on common understanding and mutual agreement...”

“to develop creative solutions to disputes in a way that is not possible at a trial...”

“to craft a solution that meets their needs...”

“mediation a more comfortable and constructive process than a trial...”

“explore settlement options and may be able to avoid the pre-trial and trial process...”

“It is important that all parties are comfortable with their mediator.”

Defendant's original motion Motion Record first-affidavit exhibit “K”: Fact Sheet

24. The plaintiff's original motion is unreasonable and is an abuse of process. It is contrary to the intended purpose of Mandatory Mediation.

Original motion improper as Interim Injunction

25. The original motion has the following characteristics which are those of a request for an Interim Injunction in a defamation action:

- (i) It seeks to immediately reduced alleged damage from an alleged-defamatory broadcast before trial,
- (ii) It argues that the alleged defamation is egregious, and
- (iii) It claims that the alleged damage is obviously undeserved and significant enough to justify ordering an immediate mitigatory action,
- (iv) significant enough to over-ride the defendant's rights.

Plaintiff's original-motion Notice of Motion and original-motion Factum

26. As such, the original motion is an attempt to use a motion about Mandatory Mediation as a proxy for a motion for an Interim Injunction in a defamation action.

27. Such an attempt is improper and is an abuse of process for at least three reasons: (i) If successful, it would damage the integrity of the Rules of Civil Procedure and their intent regarding Mandatory Mediation, (ii) If successful, it would damage the Mandatory Mediation Program, (iii) If successful, it would disregard the established case law regarding the high-barrier for Interim Injunctions in defamation cases (complete paragraphs-[8] and [10]):

[8] It is not easy to obtain an injunction in response to defamation. We respect the principle of freedom of speech and are careful when asked to limit the freedom of anyone to express their views. This concern for the freedom of expression is itself expressed in the following:

The granting of injunctions to restrain publication of alleged libels is an exceptional remedy granted only in the rarest and clearest cases. That reluctance to restrict in advance publication of words spoken or written is founded, of course, on the necessity under our democratic system to protect free speech and unimpeded expression of opinion. The exceptions to this rule are extremely rare.

(Canadian Metal Co v. Canadian Broadcasting Corp. (1975), 7 O.R. (2d) 261, 55 D.L.R. (3d) 42 at p. 261 quoted in Mcleod (c.o.b. Malask Mcleod Gallery) v. Sinclair, [2008] O.J. No. 5242 at para. 19)

[10] This has been repeated in the following terms:

According to the test, the Court must consider the likelihood of a finding of defamation at trial. The words in question must be clearly defamatory and obviously impossible to justify, such that the trial judge's acceptance of a defence of justification would of necessity have to be set aside as some perverse finding on appeal.

(Canada (Human Rights Commission) v. Canadian Liberty Net, supra, at para. 49, referred to in Henderson v. Pearlman, [2009] O.J. No. 3444 at para. 37)

(emphasis added)

Canadian National Railway Company v. Google Inc., 2010 ONSC 3121 (CanLII)

28. The later case law, in conjunction with the plaintiff's disregard for the underlying principles of mediation, suggest the extent to which the plaintiff's original motion is ill-conceived.

Instant cross-examinations as prejudicial

29. The defendant is of the position that the September 6, 2011, cross-examinations on affidavits on a motion were an improper attempt to obtain premature discovery; that the outstanding items go beyond reasonable relevancy to the original motion, beyond testing the affidavits, and far beyond what is needed to fairly rule on the original motion given its aberrant legal posture.

30. In this regard, there has been this year (2011) a landmark ruling from this Honourable Court focussing on limits to the scope of a cross-examination of a deponent in a motion. The 187-paragraph ruling (“Rothmans”, Perell J. presiding) reviewed the case law and developed the legal metrics in establishing just limits for cross-examinations on affidavits on motions, in relation to other examinations (entire paragraph-[106]):

[106] In this part of my Reasons for Decision, I will describe, compare, and contrast the Rules of Civil Procedure, the law of evidence, and the jurisprudence about: (a) examinations at trial; (b) examinations for discovery; and (c) examinations of a deponent swearing an affidavit for an application or motion. In the next section of these Reasons, I will consider the role of the proportionality principle.

(emphasis added)

Ontario v. Rothmans Inc., 2011 ONSC 2504 (CanLII)

31. In “Rothmans”, Perell J. over-ruled a Master’s ruling and dismissed the Crown’s refusal motion in its entirety, all ninety nine (99) refusals arising from cross-examinations on affidavits on a motion. The great majority of the refusals were upheld not for the reason “Relevancy not established” (indeed the majority of the refusals were evidently relevant to the jurisdictional motion) but rather were upheld for the reason “Premature discovery request”, so as not to prejudice future development of the action (entire paragraph-[144], following an extensive review of the case law):

[144] There are some subtle points about these principles that are worth noting. First, although the case law establishes that a cross-examination question must be “fair,” the nature of fairness is not explained in the case law. This principle would appear to be the source of the court’s jurisdiction to stop abusive questioning and questioning designed to discomfort a witness but having little probative value. In my opinion, the fairness principle would also provide the court with the jurisdiction to stop a party from using a cross-examination in a way that disturbed the fairness of the procedure or the fairness of the adversary system under which justice is administered in Ontario.

(emphasis added)

32. Under the adversary system under which justice is administered in Ontario, the defendant is entitled to select the evidence he puts forward at different stages of the action, up to the discovery process, and in presenting evidence; especially in dealing with motions which are procedural in character. A motion about the conditions of Mandatory Mediation is a procedural motion. It should not be

allowed to be used, against a defendant's consent, as a vehicle for discovery on material matters in the action or as an advance in discrediting a key witness.

33. The defendant submits that it is clear from the plaintiff's questions that were abandoned prior to the instant motion and from all the refusals complained about in the instant motion that the cross-examinations were an attempt to engage in premature discovery (see transcripts and defendant's affidavit). None of the outstanding questions are fair questions.
 34. The defendant's answer or basis for refusal for each (numbered) question in the **Refusals and Undertakings Chart (Denis Rancourt)** is as follows.
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1. All records of communications with expert witness.

Unfair question: Premature discovery request.

The defendant protested this question or request for documents (and gave grounds for refusals) at cross-examination transcripts paragraphs: 30, 32-34, 63, 76, 78-79 (Rancourt) and 28, 29, 33, 45 (Lamontagne).

The defendant and defendant's affiant Dr. Lamontagne have volunteered somewhat extensive statements in cross-examination that, together, answer the expert witness independence question: Transcript paragraphs 29, 35-36, 38-39, 43, 50-57, 59-62 (Rancourt) and paragraphs 18-26, 29 (here, note transcript error, as reported in defendant's affidavit for the instant motion, exhibit "I"), 30-32, 34-44, 47-48 (Lamontagne).

The refusal requested records are listed in Schedule A of the defendant's Affidavit of Documents for discovery (defendant's affidavit for instant motion, exhibit "G").

An Order to disclose at this stage in the process would prejudice the case by allowing independence of a key expert witness to be too-broadly probed in a procedural motion (original motion) without the benefits and protections of completed discovery and trial.

The refusal and the independence question have no bearing on the fatal legal flaws of the original motion.

2. Did expert witness provide third-party letters to defendant in separate matter?

Relevancy not established

AND (in the alternative)
Unfair question: Premature discovery request.

The defendant's affiant has stated that he was a supporter in the dismissal case of the defendant and that he collected letters of support. See refusal-1.

There is no apparent or plaintiff-presented mechanism whereby this question is relevant to the original motion, to the defendant's affidavits on the original motion, or even to the question of expert witness independence. The question is not probative because it does not further or significantly "increase or decrease the probability of the truth" about the expert witness' independence (paragraph-[110] of "Rothmans").

In the alternative, if the question is judged to be relevant, then an Order to disclose at this stage in the process would prejudice the case by allowing independence of a key expert witness to be too-broadly probed in a procedural motion (original motion) without the benefits and protections of completed discovery and trial.

The refusal and the independence question have no bearing on the fatal legal flaws of the original motion.

3-9. Financial or property assets of defendant.

Unfair question: Premature discovery request.

The defendant has affirmed both in affidavit and at cross-examination that he has no income or salary of any kind. The defendant has been unemployed since April 2009. The defendant is self-represented in the instant action. The defendant has affirmed that he was duly accepted in the Law Help Ontario program for free legal help and free mediation.

The defendant has affirmed "I cannot financially afford such high fees as a basis for initiating a mediation process." (Original motion affidavit of August 25, 2011, paragraph-16). A relevant dictionary definition (on-line free dictionary) of "afford" is:

afford: (preceded by can, could, etc.) to be able to do or spare something, esp without incurring financial difficulties or without risk of undesirable consequences.

The defendant is the best assessor of what constitute "undesirable consequences" to him and of what he can afford "as a basis for initiating a mediation process" in his active quest for re-employment.

The financial or property assets questions have effectively no legal value in the original motion, are conspicuously premature discovery questions, and have no bearing on the fatal legal flaws of the original motion.

10-13. All information and documents about the Law Help Ontario application.

Unfair question: Premature discovery request
AND
Impeachment of deponent's character

The plaintiff's claimed relevance of the questions about the Law Help Ontario application is "Application and Status with Law Help Ontario" (plaintiff's Refusals and Undertakings Chart).

The defendant has affirmed that his Law Help Ontario application was duly and completely filed and that his application was authoritatively accepted (original motion affidavit of August 26, 2011, and cross-examination affirmations).

The defendant has disclosed his Mediation Assistance Project of Pro Bono Law Ontario application for free mediation (original motion affidavit of August 26, 2011, exhibit "BB"). Law Help Ontario has a strict policy to only allow the application for free mediation to individuals who qualify and have been approved for Law Help Ontario legal help. This policy of Law Help Ontario is readily verifiable by any member of the public. Therefore, the status with Law Help Ontario is established.

Likewise, the application form for Law Help Ontario is publicly available and is detailed. The defendant has affirmed at cross-examination that he co-owns a residential property (paragraphs 90-92).

The plaintiff's Law Help Ontario questions, which are not relevant to the original procedural motion, improperly "extend to a cross-examination to impeach the character of the deponent" (paragraph-[143], ninth-bullet, "Rothmans").

An Order to disclose the Law Help Application at this stage in the action would prejudice the case by providing detailed premature discovery in a procedural motion (original motion) without the benefits and protections of the discovery process, which is meant to be equitably applied to both parties.

The plaintiff's Law Help Ontario questions have effectively no legal value in the original motion, are conspicuously premature discovery questions, and have no bearing on the fatal legal flaws of the original motion.

14. CURIE insurance liability coverage.

Unfair question: Premature discovery request

The defendant has affirmed that he believes based on facts that he is entitled to be covered by the University's CURIE liability insurance policy and that he is actively pursuing the matter and that **not** having an imposed immediate Mandatory Mediation would increase the likelihood of the matter or the required CURIE attendance at mediation (Rule 24.1.11(1.1)) being resolved before the regular Mandatory Mediation foreseen by the Rules of Procedure (defendant's affidavit of August 25, 2011).

The defendant has stated in his Factum on the original motion that (paragraph-43) "Based on the Rules of Procedure, the Defendant expected to have more time to resolve this difficulty before Mandatory Mediation would be imposed. The Defendant expects to make an action and/or motion in this matter of liability insurance."

The plaintiff's questions about CURIE are a departure from the adversarial system into an inquisitional system of adjudication. Requiring an affirmed answer of "intent" regarding the future is dubious in any examination. The answer depends on resources and future and evolving circumstances, all prerogatives under our adversarial system of justice.

The plaintiff's CURIE cross-examination questions about the defendant's "intent" have no legal basis in the original motion, are conspicuously unfair, and have no bearing on the fatal legal flaws of the original motion.

15. Home owners insurance company.

Relevancy not established

AND

Unfair question: Premature discovery request.

The question (question-15) about the defendant's home insurance was not a matter in the defendant's affidavits nor did it arise from the defendant's answers in cross-examination. It arose from a third-party (CURIE) passing comment in an affidavit exhibit. It is not relevant.

If the defendant tried to introduce the home insurance matter into the hearing of the original motion, the plaintiff would be justified in objecting and the Honourable Court would have the discretion to refuse the new and not previously submitted evidence.

The plaintiff's question about home insurance is a departure from the adversarial system into an inquisitional system of adjudication. It is the prerogative of the

defendant under our adversarial system of justice to not introduce this (irrelevant) matter.

The question “Did you report the libel action to your personal home owners insurance company?” is premised on the defendant owning a home, which itself was not a proper cross-examination question on the affidavits on the original motion (see above).

An Order to answer the question “Did you report the libel action to your personal home owners insurance company?” would inevitably lead to more questions, thereby amplifying the impropriety of the first question and further harming procedural fairness.

The plaintiff’s question about home insurance has no legal value in the original motion, is not relevant, did not properly arise, is a premature discovery question, would lead to amplification of procedural unfairness, and has no bearing on the fatal legal flaws of the original motion.

35. The defendant’s answer or basis for refusal for each (numbered) question in the **Refusals and Undertakings Chart (Claude Lamontagne)** is as follows.

1. (Refusal) All records of exchanges with Mr. Rancourt.

same legal argument as above for cross-examination of the defendant (refusal-1):

Unfair question: Premature discovery request.

The defendant protested this question or request for documents (and gave grounds for refusals) at cross-examination transcripts paragraphs: 30, 32-34, 63, 76, 78-79 (Rancourt) and 28, 29, 33, 45 (Lamontagne).

The defendant and defendant’s affiant Dr. Lamontagne have volunteered somewhat extensive statements in cross-examination that, together, answer the expert witness independence question: Transcript paragraphs 29, 35-36, 38-39, 43, 50-57, 59-62 (Rancourt) and paragraphs 18-26, 29 (here, note transcript error, as reported in defendant’s affidavit for the instant motion, exhibit “I”), 30-32, 34-44, 47-48 (Lamontagne).

The refusal requested records are listed in Schedule A of the defendant's Affidavit of Documents for discovery (defendant's affidavit for instant motion, exhibit "G").

An Order to disclose at this stage in the process would prejudice the case by allowing independence of a key expert witness to be too-broadly probed in a procedural motion (original motion) without the benefits and protections of completed discovery and trial.

The refusal and the independence question have no bearing on the fatal legal flaws of the original motion.

*NOTE (below): Regarding the plaintiff's undertakings chart for Claude Lamontagne, the defendant denies that affiant Dr. Claude Lamontagne made any undertakings for disclosures or answers: **See evidence in paragraph-34 of the defendant's affidavit on the instant motion, citing the cross-examination transcript (affidavit exhibit "C").**

1. ("Undertaking"*) Dictionary entries.

Unfair question

AND (in the alternative)

Unfair question: Premature discovery request.

The defendant's affiant Dr. Claude Lamontagne contemplated additional post-examination information about the dictionary entries in question in the cross-examination. However, the unrepresented affiant for the unrepresented defendant denied all "undertakings" to disclose or answer in the conclusion of the cross-examination (**Paragraphs-160-161 of the cross-examination transcript and paragraph-34 of the defendant's affidavit in the instant motion.**)

Affiant and expert witness Dr. Claude Lamontagne provided an overview and many details at cross-examination about how he arrived at his affidavit definition of "racist communication" using several dictionary entries for "racism" and "racist" (**paragraphs 51 to 65 of the cross-examination transcript**).

Claude Lamontagne indicated in cross-examination (**paragraphs 57 and 61 of the cross-examination transcript**) that he did not make copies of consulted documents or make notes of his work in arriving at the definition in question. In addition, he does not recall more details about which on-line dictionaries were consulted, beyond the particulars he provided at cross-examination. (**Paragraphs 4 and 5 of the defendant's affidavit in the instant motion.**)

In this refusal question, the requirements in addition to what was provided at cross-examination exceed even what would be allowed in an examination for

discovery; namely to attempt to retrace one's work for which one has no further memory and find or make copies that one does not have and has never had.

If the Honourable Court finds that this is a fair question or that this was an undertaking* which must be honoured, then in the alternative an Order at this stage in the process would prejudice the case by allowing the qualifications and/or independence of a key expert witness to be too-broadly probed in a procedural motion (original motion) without the benefits and protections of completed discovery and trial.

The refusal and the dictionary question have no bearing on the fatal legal flaws of the original motion.

2. (“Undertaking”*) Names of the people on support committee.

Relevancy not established

AND (in the alternative)

Unfair question: Premature discovery request.

The defendant's affiant Dr. Claude Lamontagne contemplated additional post-examination information about the committee in question in paragraph-106 of the cross-examination transcript. However, the unrepresented affiant for the unrepresented defendant denied all “undertakings” to disclose or answer in the conclusion of the cross-examination (**Paragraphs-160-161 of the cross-examination transcript and paragraph-34 of the defendant's affidavit in the instant motion.**)

The committee in question has no relevance to the defendant affiant's affidavit and the identity of the committee members has no relevance to the independence of the expert witness, to the expertise of the witness or to any aspect of the instant motion.

The question of the identity of third-persons on a committee not related to the affiant's expertise is not relevant because it is not probative in that it does not “increase or decrease the probability of the truth” about the expert witness' independence or expertise (**paragraph-[110] of “Rothmans”**).

If the Honourable Court finds that this is a relevant question or that this was an undertaking* which must be honoured, then in the alternative an Order at this stage in the process would prejudice the case by allowing the qualifications and/or independence of a key expert witness to be too-broadly probed in a procedural motion (original motion) without the benefits and protections of completed discovery and trial.

The refusal and the names of third-person committee members question have no bearing on the fatal legal flaws of the original motion.

In the alternative, original motion is moot

36. In the alternative, the original motion is moot, as is the instant motion therefore.

37. The Notice of Motion of the original motion states (entire paragraph-1):

THE MOTION IS FOR:

1. An Order that the mandatory mediation of this action take place during the month of September, 2011 and prior to the exchange of affidavits of documents and the conduct of the examinations for discovery;

(emphasis added)

38. The stated motivation for the plaintiff's original motion was related to "the Fall 2011 term that commences on September 6, 2011." (Paragraph-9, in part, Notice of Motion of the original motion.)

39. The hearing date for the original motion is October 7, 2011 (the day after the hearing date for the instant motion) and the plaintiff is asking to postpone the hearing on the original motion to December 2011 (instant motion defendant's affidavit paragraph-23 and affidavit-exhibit "J").

40. The defendant has not contested any of the plaintiff's unilaterally imposed (with consultation) extreme dates in the original motion, in the cross-examinations, or in the instant motion.

41. The discovery process has been delayed by the plaintiff and is now scheduled to have examinations commence in November 2011 (**instant motion defendant's affidavit paragraphs-19-20-21**).

Conclusion

42. The defendant submits that in following Rule 1.04(1), it would "secure the just, most expeditious and least expensive determination of [this] civil proceeding on its merits" if this Honourable Court were to stop the plaintiff's premature

- discovery adventure and quash the plaintiff's ill-conceived and untenable-at-law original motion to force immediate Mandatory Mediation with imposed plaintiff's mediator.
43. The defendant also seeks different or further directives which this Honourable Court deems beneficial in a just and efficient administration of the case.
 44. The defendant requests that the Honourable Court refuse an adjournment of either motion (instant or original) for the purpose of cross-examination if the plaintiff seeks an adjournment because the plaintiff has failed to act with reasonable diligence, following Rule 39.02(3), and refuse to allow further cross-examinations because the plaintiff has failed to act with reasonable diligence in cross-examination (**instant motion defendant's affidavit paragraphs 24 to 36**).
 45. The hearing for the instant motion is scheduled for October 6, 2011. The hearing for the original motion is scheduled for October 7, 2011. It is the defendant's intent that the Motion Record material (affidavit and Factum) of the instant motion be available and apply to the original motion hearing, as needed.

Costs

46. The defendant requests the costs in respect of the cross-examinations for both affiants following Rule 39.02(4)(b).
47. The defendant further requests the costs of both motions on a substantial indemnity basis; and such further and other relief as the Defendant may advise, and this Honourable Court deems just, justly taking into account that the Defendant is self-represented.
48. In the alternative, the defendant submits on the Charter grounds raised in the Statement of Defence (**Statement of Defence paragraphs 61 to 67**) that the unemployed defendant should not be submitted to paying motion costs until the Charter question has been answered in favour of an authentically independent plaintiff.
49. In the alternative, the defendant submits that any motion cost liabilities to the defendant should be justly reduced based on the "equality of arms" principle for an unemployed defendant, especially if the Honourable Court establishes that the University of Ottawa is paying the plaintiff's legal costs (**Statement of Defence paragraphs 61 to 67**).

Case Law Cited (with cases cited therein)

Bourguignon v. Wardle [2002] O.J. No. 448 (S.C.O. Master Beaudoin)

Canadian National Railway Company v. Google Inc., 2010 ONSC 3121 (CanLII)

Ontario v. Rothmans Inc., 2011 ONSC 2504 (CanLII)

Date: September 30, 2011

Denis Rancourt
(Defendant)