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## Putting Your Best Case Forward: Tips for Preparing for a Summary Judgment Motion

By Caroline E. Abela

### ***1. Strategy and Evidence: It is all about Timing***

Generally, parties may bring a motion for summary judgment any time after the delivery of the statement of defence and before the matter has been set down for trial. Within these time periods, a Moving Party should ensure he or she has the necessary evidence available for bringing the motion.

Timing also determines if it is worthwhile for your client to pursue summary judgment. Leaving aside the permissibility of bringing a summary judgment before trial, in complex cases the costs of making a full summary judgment motion may be prohibitive.

### ***2. To Bring or Not to Bring: Exercise Caution when Making a Recommendation***

A Moving Party should consider whether summary judgment is an appropriate step in the case. The court retains the power to penalise unreasonable motions and bad faith conduct of either party. In assessing whether to recommend summary judgment, examine the evidence and the law to determine if summary judgment is the most efficient and effective way to advance the case.

### ***3. All or Nothing? Consider the Opportunity for Partial Summary Judgment***

With the greater flexibility afforded to judges hearing summary judgment motions, a motion granting partial judgment will expedite a hearing on more substantial issues and will lessen costs for the client. This can be a useful way of narrowing the issues at trial.

If the cost consequences are daunting, consider serving an offer to settle at the same time you serve the motion material.

### ***4. Walking a Fine Line: This is Not Discovery but You Must Put Your Best Foot Forward***

A Moving Party should ensure all relevant evidence is before the Court to allow a judge to fairly decide the issues raised on a summary motion. Otherwise, a Moving Party risks having the summary judgment motion dismissed. Remember that a mini-trial may be required.

As a Responding Party, if disclosure is not provided, put your request for documents on the record and consider moving on the issue as a refusal on an examination. The Master or Judge will decide the relevance

of the disclosure request on a refusal motion. Do not wait until you are at the summary judgment motion to allege that the other party did not provide the information.

Courts will not take pity on a party where there is further or better evidence which, though unavailable at the motion, would be available for trial. Remember each party must “lead trump or risk losing”.

### **5. Expert Required? Consider the Need for Expert Evidence**

Where the matter is a technical one outside the knowledge of the Court, expert evidence will be required before the Court will award summary judgment. The Court will dismiss the motion where expert evidence is required at trial but not produced on the motion, or it may dismiss the action where a plaintiff does not produce a required report. For example, in medical malpractice cases, expert evidence will usually be required to show causation or negligence. Without an expert report, a plaintiff cannot establish negligence at trial.

### **6. Don't Solely Rely on the Opposing Party's Evidence and Cross-examination: The Danger of Adverse Inferences**

Affidavits can be used in summary judgment motions based on information and belief. Adverse inferences can be drawn for failing to provide evidence of persons having personal knowledge of contested facts or for failing to provide the best evidence. Controversial issues can be ignored if there is no direct evidence to the contrary.

A failure to answer questions on cross-examination may lead to an adverse inference even if a party does not move to have the question answered.

### **7. Make it Relevant: Affidavits and their Content**

A plaintiff's affidavit should speak to (a) each element of a cause of action; and (b) the spurious basis of the defence. A respondent's affidavit must show material facts or documents that illustrate that the issue of material fact or credibility is genuine. An affidavit should not contain bald assertions or simply

be a self-serving attempt to assert defences or claims. The evidence must be demonstrated. It should also be corroborated as much as possible and in some cases it must be corroborated or risk losing.

### **8. What do you Need: Rule 39 Witnesses and Cross-Examinations**

When assessing the evidence, a party should think about what admissions are needed in order to prove or disprove the case. Who can provide the evidence? What do you think they will say? Remember cross-examination is not discovery. It should not be a fact finding mission.

Parties have a right to cross-examine any deponent of an affidavit. Although parties may cross-examine on issues not raised by the motion but relevant to the entire action, cross-examinations should be restricted to the issues framed by the motion. Ask: (1) Does the question relate to an issue raised in the affidavit? (2) Does it relate to any of the issues raised by the motion? or (3) Does it relate to the witness' credibility on an issue relevant to the motion?

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