

CITATION: City of Hamilton v. Intact Insurance Company, 2026 ONSC 3805
COURT FILE NO.: CV-25-92306
DATE: 20260629

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

City of Hamilton

Plaintiff

- and -

Intact Insurance Company

Defendant

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) Justine Ajandi, for the Plaintiff
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) Adam Casey, for the Defendant
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) Luigi Iantosca, for the non-party,
) Seawaves Development Services Inc.
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) **HEARD:** May 21, 2026

REASONS FOR DECISION

Associate Justice J. Kriwetz

The Motion

[1] This is a motion by the defendant, Intact Insurance Company (“**Intact**”).

[2] Intact examined a representative of the non-party, Seawaves Development Services Inc. (“**Seawaves**”) as a witness on a pending motion which has been made by the plaintiff, City of Hamilton (the “**City**”). This motion is for an order compelling Seawaves to answer one question which it refused to answer at the said examination.

Background

[3] To address the issue on this motion, it is necessary to provide some context by briefly setting out some of the background.

[4] It is alleged that, on November 18, 2020, Seawaves entered into an indemnity agreement (the “**Indemnity Agreement**”) with a predecessor of Intact whereby Seawaves was to indemnify Intact for any expenses or losses it incurs which arise from any bonds issued to Seawaves.

[5] On February 22, 2022, Intact issued a performance bond in the amount of \$2,609,969.25 (the “**Bond**”) for a contract between Seawaves and the City regarding a certain construction project. The Bond listed Intact as surety, the City as owner, and Seawaves as the contractor.

[6] On October 11, 2023, the City provided Intact with a notice that it was making a claim under the Bond. Intact responded to the City on November 8, 2023, that it did not have sufficient information to accept liability under the Bond.

[7] On October 3, 2025, Intact issued a notice of action against Seawaves seeking indemnity for any claims or potential claims under several bonds, including the Bond. Intact then issued its statement of claim on October 31, 2025 (“**Intact’s Action**”).

[8] In response to a question from the Court during this hearing, it appears that Seawaves has been noted in default in Intact’s Action. That information came as a surprise to Seawaves’ counsel. However, that issue is not before this Court.

[9] The City issued a notice of action in this proceeding on October 10, 2025, seeking damages from Intact as outlined in its notice of claim (“**this Action**”). However, the City did not file the statement of claim within 30 days of the date of the issuance of the notice of action as required under the *Rules of Civil Procedure*. Consequently, the City has moved for an order permitting it to file the statement of claim (“**the City’s Motion**”). Though the City sought Intact’s consent to such order, Intact refused because, it argues, that doing so would prejudice its rights under the Indemnity Agreement.

[10] On February 19, 2026, Justice Bordin issued an endorsement which set out a timetable with respect to the City’s Motion. His Honour’s endorsement also noted that, if Seawaves was of the view that it is entitled to participate in that motion, it shall seek leave to do so. Seawaves has, thus far, not done so.

[11] In the context of the City’s Motion, Intact examined a representative of Seawaves as a witness under rule 39.03. Seawaves refused to answer the following question at the examination:

“If the City succeeds in its motion, and the court gives the City permission to make a late filing of its statement of claim against Intact, would Seawaves indemnify Intact for the City’s action against Intact?”

[12] Intact seeks an order in this motion requiring Seawaves to answer that question.

[13] The City’s Motion has not yet been heard.

Law and Analysis

[14] I heard and considered the submissions made by counsel for Intact and Seawaves. Counsel for the City appeared at hearing but made no submissions.

[15] Rule 39.03 itself does not provide any guidance as to the scope of questions a witness who is being examined under that rule is required to answer. The caselaw, however, makes it clear that the scope of an examination under rule 39.03 is more limited than an examination for discovery. Under rule 39.03, a witness is not required to take reasonable steps to inform himself or herself or make inquiries of others if the information is not within his or her knowledge: *Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 3174 at para. 21.

[16] Questions under rule 39.03 are limited to those relevant on the motion to which the examination relates: *Elfe Juvenile Products Inc. v. Bern*, [1994] O.J. 2840, at para 30.

[17] The motion to which the examination of Seawaves' representative is relevant is the City's Motion. However, none of the materials on the City's Motion was before the Court on this motion.

[18] Intact and Seaway disagree as to whether the question in issue is hypothetical. I am of the view that it is.

[19] There seem to be no cases directly on point as to whether a hypothetical question falls within the scope of questions permitted under rule 39.03.

[20] I was referred to the decision of Master McGraw (as he then was) in *The Estate of Maryam Asharzadeh v. Amin*, 2019 ONSC 1024. That was a medical malpractice case in which the plaintiff sought, among other things, to compel answers from the defendant physicians to certain questions which were refused at discoveries. Among the points argued by the defendants was that many of the questions were improper hypotheticals which would require the defendants to provide an opinion on the standard of care. Master McGraw reviewed the scope of examinations for discovery under rule 31.06 and the proportionality factors set out in rule 29.2.03. He then reviewed the case authorities relating to hypothetical questions on examinations for discovery and, at paragraph 22, set out the following summary of principles:

- (i) *'hypothetical questions necessarily elicit opinions and are not per se improper,*
- (ii) *a hypothetical question must be within the knowledge and expertise of the witness,*

- (iii) *a hypothetical question must be relevant and proportionate,*
- (iv) *a hypothetical question cannot be so vague or overbroad as to be unanswerable,*
- (v) *a hypothetical question must have some factual foundation in the evidence,*
- (vi) *a hypothetical question must not elicit a response regarding the acts or omissions of others or require the witness to defend the actions of others,*
- (vii) *a hypothetical question which requires the witness to opine on the standard of care or the ultimate issue is a legal opinion which is outside the expertise of the witness. This would include whether the witness' conduct met or fell below the standard of care. These are questions for the trier of fact and the subject of expert reports and opinions. However, this is distinguishable from questions which are relevant to the standard of care, including the witness' understanding of the standard of care, acts or omissions which are probative of the standard of care or those which otherwise inform or provide evidence relevant to the standard of care on the condition that the questions are within the witness' expertise, and*
- (viii) *hypothetical questions which elicit answers regarding what "could" have caused certain outcomes are proper as opposed to what "would" have caused certain outcomes."*

[21] Those principles were later cited with approval in *Metis National Council Secretariat Inc. v. Chartier*, 2023 ONSC 5469, at para. 140.

[22] The question in issue would require Seawaves witness to provide an answer which would have significant legal implications. Such information is not within his knowledge and expertise.

[23] Based on the material before me, I also cannot see what relevance an answer to the question in issue would have to the City's Motion. Intact intends to argue that it will suffer prejudice if the City's Motion succeeds. Undoubtedly, an affirmative answer to the question from the witness would give Intact some comfort with respect to its action against Seawaves, but there is no evidence to suggest that any answer to that question would determine the position Intact would take on the City's Motion. Moreover, an affirmative answer to the question would, in effect, be an admission to Intact's claim for indemnity from Seawaves in relation to the Bond. This, in my view, would result in significant and disproportionate prejudice to Seawaves.

[24] Furthermore, the question in issue asks whether Seawaves "would" indemnify Intact if the City's Motion succeeds. The answer to that question will, in all likelihood, be the ultimate legal issue in the Intact Action.

Disposition

[25] Therefore, I am of the view that the question is beyond the scope of what the Seawaves' representative is required to answer on an examination under rule 39.03 and it need not be answered.

[26] Consequently, Intact's motion is dismissed.

Costs

[27] Both Intact and Seawaves filed cost outlines and made submissions on costs at the hearing. Intact seeks costs fixed at \$5,000.00, if it was successful. Seawaves seeks costs of \$7,500.00, if it was successful.

[28] Seawaves was successful on the motion and is entitled to its costs. Having reviewed the cost outlines and considered the principles set out in rule 57.01(1), Intact is ordered to pay the costs of this motion to Seawaves on a partial indemnity scale fixed at \$6,000.00, inclusive of disbursements and taxes, within 30 days.

Associate Justice J. Kriwetz

Released: June 29, 2026

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