

**CITATION:** Openware v. Arab, 2025 ONSC 5815  
**COURT FILE NO.:** CV-22-00689172-0000  
**DATE:** 20251015

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** *Openware Information Systems Consulting Company v. Eyad Mohammad Arab et al*

**BEFORE:** Associate Justice Rappos

**COUNSEL:** *Paola Ramirez*, for the Plaintiff

*Samir Gebrael*, for the Defendants

**HEARD:** October 1, 2025 (via teleconference)

**REASONS FOR DECISION**

**Overview**

[1] The Defendant, Eyad Mohammad Arab, was formerly an employee of the Plaintiff, Openware Information Systems Consulting Company. Mr. Arab resigned from his position in 2020. The Plaintiff alleges that Mr. Arab has misused the Plaintiff's confidential or proprietary information, technology or property, and breached his duty to keep all confidential information belonging to the Plaintiff in strict confidence. In this action, the Plaintiff seeks declarations that Mr. Arab engaged in such misuse and breached such duty.

[2] The Plaintiff has brought a motion for an order under subrule 32.01 of the *Rules of Civil Procedure* requiring Mr. Arab to make available for inspection a 15-inch MacBook Pro – Space Grey laptop in his possession.

[3] Subrule 32.01 provides that the court may make an order for inspection where it appears to be necessary for the proper determination of an issue in the proceeding. That motion is scheduled to be heard by me on November 14, 2025.

[4] In support of the rule 32.01 motion, the Plaintiff relies on three affidavits sworn by law clerks, an affidavit of legal practitioner in Kuwait, and an affidavit from the Plaintiff's Chief Financial Officer. Mr. Arab has sworn two affidavits in response to the rule 32.01 motion.

[5] The Defendants bring a motion for an order compelling the Plaintiff to produce Ms. Sanaa Salman as a necessary witness pursuant to rule 39.03 of the *Rules*. Ms. Salman is the Plaintiff's

Chief Executive Officer. The Defendants argue that she possesses essential information directly related to the issues to be determined on the rule 32.01 motion.

[6] The Plaintiff argues that Ms. Salman’s evidence is not necessary to resolve the rule 32.01 motion, and that the request made by the Defendants is an attempt to conduct “mini-discoveries”, mount collateral attacks, and litigate issues destined for trial. The Plaintiff also argues that the real objective of the Defendants is to challenge a criminal conviction in Kuwait through this interlocutory motion.

[7] For the reasons that follow, the Defendants’ motion is dismissed.

### **Legal Principles**

#### *Rule 39.03 Examinations*

[8] Subrule 39.03(1) of the *Rules* provides that a person may be examined as a witness before the hearing of a pending motion for the purpose of having a transcript of her evidence available for use at the hearing.

[9] An examination under rule 39.03 is appropriate when the evidence sought is relevant to any issue raised on the motion. The onus is on the party seeking to conduct the examination to show on a reasonable evidentiary basis that the examination would be conducted on issues relevant to the pending motion and that the proposed witness is able to offer relevant evidence.<sup>1</sup>

[10] Courts have generally set the bar low for what constitutes a “reasonable evidentiary basis” that the examination would be conducted on issues relevant to the underlying motion.<sup>2</sup>

[11] The nature and grounds of the underlying motion is an important consideration to be weighed. The evidence sought should be necessary, useful, relevant, and/or enhance the record in the underlying motion.<sup>3</sup>

[12] The examination must not be used for an ulterior or improper purpose and must not constitute an abuse of process.<sup>4</sup> An examination is improper if it is to prematurely inquire into a party’s defences or otherwise commence the discovery process.<sup>5</sup> If the party seeking the examination cannot satisfy the relevancy and evidentiary screening, then the examination is regarded as a fishing expedition and an abuse of process.<sup>6</sup>

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<sup>1</sup> *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, 2002 CanLII 41606 (ON CA), para. 30 (“*OFAH*”).

<sup>2</sup> *Derenzis v. Scoburgh*, 2021 ONSC 3286, para. 42.

<sup>3</sup> *Ibid.*, paras. 40, 45, and 54.

<sup>4</sup> *OFAH*, para. 57; *Payne v. Ontario Human Rights Commission*, 2000 CanLII 5731 (ON CA), para. 162.

<sup>5</sup> *Elmaati v. Canada (Attorney General)*, 2013 ONSC 3176, para. 64.

<sup>6</sup> *Ibid.*, para. 63.

*Rule 32.01 Motions*

[13] Subrule 32.01(1) of the *Rules* provides that the court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding.

[14] The factors that the court considers on a motion under rule 32.01 are: (a) whether the inspection appears to be necessary for the proper determination of an issue in the proceeding; (b) whether the party in possession of the property will be prejudiced by the inspection, such as through the impairment of the integrity of the property to be inspected; and (c) the balance of the prejudice, if any, against the benefit to be derived from the inspection.<sup>7</sup>

**Analysis**

[15] In its claim, the Plaintiff alleges that Mr. Arab misused its confidential or proprietary information, technology or property, and breached his duty to keep all confidential information belonging to the Plaintiff in strict confidence.

[16] The Defendants deny these allegations and argue that Ms. Salman possesses essential evidence necessary for the rule 32.01 hearing, because she was directly involved in decisions concerning Mr. Arab's access to the Plaintiff's systems, was his primary point of contact during the period starting when he resigned (August 16, 2020) and ending on his last day providing services to the Plaintiff (November 25, 2020) (the "**Relevant Period**"), and Ms. Salman personally addressed the access to, and subsequent deactivation of Mr. Arab's access to, the Plaintiff's systems.

[17] In preparing a response to the Plaintiff's rule 32.01 motion, Mr. Arab produced a copy of a criminal indictment in Kuwait that was initiated at the request of Openware. Mr. Arab notes that it was Ms. Salman that signed a power of attorney that ultimately led to the commencement of a criminal investigation regarding his alleged illegal access to the Plaintiff's systems. This investigation ultimately led to a judgment of the State Kuwait Court of First Instance (Criminal Department) as against Mr. Arab issued on May 28, 2024. This judgment found Mr. Arab guilty of unlawfully accessing the Plaintiff's electronic system between October 26, 2020 and September 28, 2023.

[18] The Defendants argue that the criminal judgment, Mr. Arab's access to the Plaintiff's systems during the Relevant Period, matters related to tenders that certain of the Defendants competed in against the Plaintiff, and matters related to the alleged misuse performed by the Defendants are issues that are relevant to the rule 32.01 motion and only Ms. Salman has direct evidence regarding these issues.

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<sup>7</sup> *Ma et al. v 1835942 Ontario Inc. et al.*, 2024 ONSC 725, para. 9.

[19] The Defendants also argue that the examination of Ms. Salman is necessary since she can provide evidence of the files that Mr. Arab was tasked to work on, what documents and information Mr. Arab had access to, and the contents of the criminal indictment file and documents that were sent to the Kuwait prosecutor.

[20] In their factum, the Defendants state that they believe that “Ms. Salman’s examination will provide the necessary evidence that will *exculpate* Mr. Arab on the allegations made against him, and/or are being used to justify the relief being sought in the Rule 32 Motion” (*emphasis in original*).

[21] The Defendants rely on the decision of Master Sandler in *Praendex Inc. v. Gump*, where the plaintiff had brought an injunction motion to enforce a non-competition business clause in a product license agreement between the plaintiff and the defendants. The defendants sought to examine the chairman of the plaintiff and designer/creator of the product at issue in the litigation. The individual, who lived in the United States, had not sworn an affidavit for the injunction motion. Master Sandler directed that the individual be examined, holding that “If a foreign plaintiff comes to Ontario and seeks the assistance of this court and then refuses to produce a member of the management to give proper evidence here, then it seems obvious that its attempt to obtain an injunction should fail.”<sup>8</sup>

[22] The Defendants also rely on the decision of Justice Newbould in *1632842 Ontario Limited v. Great Canadian Gaming Corp.* In that case, the respondent brought a motion that included affidavits that relied upon evidence given by way of information and belief from two of the respondent’s senior officers and its external counsel. The applicant wished to examine these three individuals for the respondent’s motion. Justice Newbould held that the evidence of the three individuals was relevant, since the respondent had already introduced evidence by way of hearsay statements of these three witnesses in support of the affidavits. Justice Newbould determined that it would be unfair to deny the applicant the opportunity to test the evidence by examining the persons who were the source of the hearsay.<sup>9</sup>

[23] In my view, neither of these decisions assist the Defendants, and the Defendants have failed to establish that Ms. Salman has evidence on issues relevant to the pending motion that warrants this Court exercising its discretion to direct Ms. Salman to be examined in connection with the rule 32.01 motion.

[24] The arguments made by the Defendants are focused on defending and challenging the allegations contained in the statement of claim that they misused the Plaintiff’s confidential information. They are also focused on challenging the criminal judgment obtained in Kuwait as against Mr. Arab. In my view, issues such as whether Mr. Arab was properly authorized by Ms. Salman to use the Plaintiff’s systems during the Relevant Period, whether or not there was any misuse by the Defendants, and the role Ms. Salman played in the criminal indictment are not

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<sup>8</sup> *Praendex Inc. v. Gump*, 1992 CarswellOnt 457 (SC), para. 13.

<sup>9</sup> *1632842 Ontario Limited v. Great Canadian Gaming Corp.*, 2008 CanLII 39608 (ON SC), paras. 5-10.

relevant to the rule 32.01 motion. They are issues in the underlying action that will be determined by the trial judge or judge on a summary judgment motion.

[25] I fail to see how any evidence that Ms. Salman may be able to provide on the issues that the Defendants wish to probe her on in any way will assist the Court in determining whether it should grant the Plaintiff's rule 32.01 motion. That motion is a narrow one and will be focused on whether the Plaintiff is able to satisfy the Court that the inspection of the laptop by an arm's length third party is necessary for a proper determination of an issue in the proceeding. The information sought by the Defendants from Ms. Salman do not relate to those issues.

[26] Both decisions relied on by the Defendants contain rulings made by the Court that the witnesses to be examined had relevant evidence concerning the issues to be determined at the underlying motion. In the case before me, I have concluded that the information sought by the Defendants from Ms. Salman during an examination will not be relevant to the issues to be determined at the rule 32.01 motion. As a result, those cases are not helpful to the Defendants in this motion.

[27] To allow the Defendants to examine Ms. Salman on the issues raised in their materials would result in the exact type of conduct that this Court has said is not a proper purpose of a rule 39.03 examination (e.g. the information sought deals with the underlying claim instead of the motion itself, and the examination is to be used as a substitute for discovery).

[28] As I have concluded that the Defendants have failed to satisfy me that an examination of Ms. Salman would be conducted on issues relevant to the pending motion, it was not necessary for me to consider other arguments raised by the Plaintiff in opposition to the motion (such as that the Defendants brought this motion for improper purposes and without reasonable diligence).

### **Disposition and Costs**

[29] For the reasons set out above, the Defendants' motion for an order requiring the Plaintiff to produce Ms. Salman to be examined under subrule 39.03 is dismissed.

[30] With respect to costs, the parties shall prepare, serve and file written submissions. The submissions shall be no more than 10 pages in length plus a costs outline. The Plaintiff shall serve, file, and send copies of its materials by email to my Assistant Trial Coordinator by October 29, 2025. The Defendants shall serve, file and send copies of its responding materials by email to my Assistant Trial Coordinator by November 12, 2025.

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Associate Justice Rappos

**DATE:** October 15, 2025