

## **RULE 39**

### **EVIDENCE ON MOTIONS AND APPLICATIONS**

#### **EVIDENCE BY AFFIDAVIT**

##### **Generally**

- 39.01** (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

##### **Service and Filing**

- (2) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served with the notice of motion or notice of application and shall be filed with proof of service in the court office where the motion or application is to be heard at least ten days before the hearing.
- (3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed with proof of service in the court office where the motion or application is to be heard at least four days before the hearing.
- (3.1) The moving party or applicant only may file a reply affidavit which shall be concise and filed with proof of service in the court office where the motion or application is to be heard one clear day before the hearing.

##### **Contents - Motions**

- (4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

##### **Contents - Applications**

- (5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

##### **Full and Fair Disclosure on Motion or Application Without Notice**

- (6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

##### **Expert Witness Evidence**

- (7) Opinion evidence provided by an expert witness for the purpose of a motion or application shall include the information listed under subrule 53.03(3).

## **EVIDENCE BY CROSS-EXAMINATION ON AFFIDAVIT**

### **On a Motion or Application**

- 39.02** (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under Rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application.
- (1.1) Subrule (1) does not apply to an application made under subsection 65(1) of the *Judicature Act*.
  - (2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under Rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under Rule 39.03.

### **To be Exercised with Reasonable Diligence**

- (3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence.

### **Additional Provisions Applicable to Motions**

- (4) On a motion other than a motion for summary judgment or a contempt order, a party who cross-examines on an affidavit,
  - (a) shall, where the party orders a transcript of the examination, purchase and serve a copy on every adverse party on the motion, free of charge; and
  - (b) is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise.

## **EVIDENCE BY EXAMINATION OF A WITNESS**

### **Before the Hearing**

- 39.03** (1) Subject to Rule 39.02(2) a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.
- (2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination.
- (2.1) Subrules (1) and (2) do not apply to an application made under subsection 65(1) of the *Judicature Act*.

**To be Exercised with Reasonable Diligence**

- (3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence.

**At the Hearing**

- (4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial.

**Summons to Witness**

- (5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial.

**EVIDENCE BY EXAMINATION FOR DISCOVERY**

**Adverse Party's Examination**

- 39.04** (1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and Rule 31.11 (use of discovery at trial) applies with necessary modifications.

**Party's Examination**

- (2) On the hearing of a motion, a party may not use in evidence the party's own examination for discovery or the examination for discovery of any person examined on behalf or in place of, in addition to, the party unless the other parties' consent.

*Estate of Gavin v. Gavin*, 2023 PECA 8

The appellant argued the motions judge erred by admitting into evidence a bankruptcy and insolvency trustee's report as it was not in the form of an affidavit and contained information based on belief but did not identify the source of the belief. The court determined that while Rule 39.01 directs that evidence on motions is intended to be documentary rather than *viva voce*, and primarily by way of affidavit, it does not limit the type of evidence that may be admitted by a judge hearing the motion.

*Ayangma v. FLSB et al*, 2022 PESC 30

The plaintiff moved for an interprovincial subpoena in support of their motion for summary judgment under Rule 20. The court denied the motion, as it would not make a material contribution to the Rule 20 motion. In addition, the plaintiff's "reply factum" was not accepted by the court, as such a document is not permitted under the Rules.

*TMC Avion Inc. v. Lapegna et al v. Holland et al*, 2020 PESC 13

The moving party included an affidavit sworn by the opposing party, which affidavit had been filed by the opposing party in support of a different motion. The moving party suggested in oral submissions that only certain paragraphs of the affidavit could be relied on by the court as evidence, the remainder of the affidavit being inadmissible as hearsay. The court rejected this position and held that the moving party could have cross-examined the affiant given that the opposing party had also filed the affidavit in its motion record. After reviewing the burden of proof, the court held the burden had not been met and dismissed the motion.

*Ayangma v. The SaltWire Network Inc.*, 2020 PECA 1

An affidavit for use on a motion may contain statements of the deponent's information and belief if the source of the information and the fact of the belief is specified. The rule is intended to allow hearsay evidence where the deponent states the source of the information and the fact that he believes. This allows the Court to assess the reliability of the hearsay and helps determine the weight the evidence is to be given.

*Fraser v. Runighan*, 2018 PESC 26

The plaintiff sought an advance payment relating to psychological injuries. Taking into consideration context and chronology, the court permitted the defendants to cross-examine the plaintiff, but not the plaintiff's spouse and another.

*DCP v. A.D.D. and J.D.*, 2018 PESC 16

The court reviewed criteria for admission of hearsay and affidavits of the director's witnesses, as well as other documents.

*PEI Atlantic Baptist v. CUPE, et al*, 2018 PESC 39

The applications judge allowed *viva voce* evidence at the hearing of the application pursuant to Rule 39. The court disregarded portions of an affidavit that were mere speculation or legal argument. The court denied the employer's motion for a stay of an arbitrator's decision, concluding the employer had failed to meet the applicable three-part test.

*DCP v. J.B. and D.J.*, 2017 PESC 16

The court refused to consider portions of the affidavits and *viva voce* evidence provided on the basis of hearsay.

*CASP et al. v. AG of Canada*, 2015 PESC 9

In a motion for recusal, the judge reviewed the rules relating to the submission of evidence. The Court struck the affidavits of one of the affiants in its entirety as it contained substantial commentary, and were replete with hearsay, speculation, scandalous allegations, illogical conclusions, and improper opinion.