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GENERAL MATTERS**RULE 1****CITATION, APPLICATION AND INTERPRETATION****CITATION****Short Title**

- 1.01** (1) These rules may be cited as the Rules of Civil Procedure.

Subdivision

- (2) In these rules,
- (a) all the provisions identified by the same number to the left of the decimal point comprise a Rule (for example, Rule 1, which consists of Rules 1.01 to 1.06);
 - (b) a provision identified by a number with a decimal point is a rule (for example, Rule 1.01); and
 - (c) a rule may be subdivided into,
 - (i) subrules (for example, subrule 1.01(2)),
 - (ii) clauses (for example, clause 1.01(2)(c) or 2.02(a)),
 - (iii) subclauses (for example, subclause 1.01(2)(c)(iii) or 7.01(c)(i)), and
 - (iv) paragraphs (for example, 1 of Rule 1.03).

Alternative Method of Referring to Rules

- (3) In a proceeding in a court, it is sufficient to refer to a rule or subdivision of a rule as "rule" followed by the number of the rule, subrule, clause, or subclause (for example, Rule 1.01, Rule 1.01(2), Rule 1.01(2)(c), or Rule 1.01(2)(c)(iii)).

APPLICATION OF RULES

- 1.02** (1) These rules, subject to subrule (2), apply to all proceedings in the Supreme Court and the Court of Appeal except that only Rule 74 applies to proceedings in the Small Claims Section of the Supreme Court.

DEFINITIONS

- 1.03** (1) In these rules, unless the context requires otherwise,
- (a) "Act" means the *Judicature Act*;
 - (b) "action" means a proceeding that is not an application and includes a proceeding commenced by,
 - (i) statement of claim,

- (ii) notice of action,
- (iii) counterclaim,
- (iv) crossclaim,
- (v) third or subsequent party claim, or
- (vi) divorce petition or counter petition;
- (c) "affidavit" includes a statutory declaration and an agreed statement of facts;
- (d) "appellant" means a person who brings an appeal;
- (e) "appellate court" means the Prince Edward Island Court of Appeal;
- (f) "applicant" means a person who makes an application;
- (g) "application" means a proceeding commenced by notice of application as referred to in Rule 38;
- (g.1) "case management coordinator" is the deputy registrar designated by the Supreme Court of Prince Edward Island to coordinate and schedule case management conferences, pre-trial conferences, settlement conferences, and status hearings;
- (h) "court" means the court in which a proceeding is pending and,
 - (i) In the Prince Edward Island Court of Appeal, the court or judge or the judges thereof whether sitting in court or chambers; and
 - (ii) In the Supreme Court, the court or a judge thereof whether sitting in court or chambers; and
 - (iii) Where the Prothonotary has the power to act means the Prothonotary;
- (i) "decision" means the reasons given by the court for its judgment or order;
- (j) "defendant" means a person against whom an action is commenced;
- (k) "deliver" means serve and file with proof of service, and "delivery" has a corresponding meaning;
- (l) "disability", where used in respect of a person, means that the person is,
 - (i) a minor, or
 - (ii) lacking capacity to manage their financial matters and/or personal matters, whether or not so declared by a court;
- (m) "discovery" means discovery of documents, examination for discovery, inspection of property and medical examination of a party as provided under Rules 30 to 33;
- (m.1) "document" includes data and information in electronic form;

- (m.2) "electronic" includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means, and "electronically" has a corresponding meaning;
- (n) "hearing" means the hearing of an application, motion, reference, appeal, assessment of costs, or a trial;
- (o) "holiday" means,
 - (i) any Saturday or Sunday,
 - (ii) New Year's Day,
 - (iii) Islander Day,
 - (iv) Good Friday,
 - (v) Easter Monday,
 - (vi) Victoria Day,
 - (vii) Canada Day,
 - (viii) Civic Holiday,
 - (ix) Labour Day,
 - (x) National Day for Truth and Reconciliation,
 - (xi) Thanksgiving Day,
 - (xii) Remembrance Day,
 - (xiii) Christmas Day,
 - (xiv) Boxing Day, and
 - (xv) any special holiday proclaimed by the Governor General or the Lieutenant Governor,and where New Year's Day, Canada Day, National Day for Truth and Reconciliation or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are holidays, and where Christmas Day falls on a Friday, the following Monday is a holiday;
- (p) "judgment" means a decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party;
- (q) "judgment creditor" includes a party entitled to a payment of money and costs, or either, under an order, and any executor, administrator or assign of a judgment creditor;

- (r) "judgment debtor" includes a party required to make a payment of money and costs, or either, under an order, and any executor, administrator or assign of a judgment debtor;
- (s) **Revoked.**
- (t) "motion" means a motion in a proceeding or an intended proceeding as referred to in Rule 37;
- (u) "moving party " means a person who makes a motion;
- (v) "order" includes a judgment or decree;
- (w) "originating process" means a document, the issuing of which commences a proceeding under these rules, and includes,
 - (i) a statement of claim,
 - (ii) a notice of action,
 - (iii) a petition,
 - (iv) a notice of application,
 - (v) a counterclaim against a person who is not already a party to the main action,
 - (vi) a third or subsequent party claim, and
 - (vii) a counterpetition against a person who is not already a party to the main action,

but does not include a counterclaim or counterpetition that is only against persons who are parties to the main action, a crossclaim, or a notice of motion;
- (w.1) "partial indemnity costs" mean costs awarded in accordance with Part I of Rule 57 Tariff, and "on a partial indemnity basis" has a corresponding meaning;
- (w.2) "person" includes a party to a proceeding;
- (x) "plaintiff" means a person who commences an action;
- (y) "proceeding" means an action or application;
- (y.1) "Prothonotary" means the Prothonotary of the Prince Edward Island Court of Appeal and the Supreme Court of Prince Edward Island, and includes the Deputy Prothonotary;
- (z) "Public Guardian and Trustee" means the Public Guardian and Trustee as defined in the *Public Guardian and Trustee Act*, SPEI 2023, c. 35;
- (aa) "referee" means the person to whom a reference in a proceeding is directed;
- (bb) "registrar" means the Registrar and a deputy registrar of the Supreme Court or Court of Appeal;

- (cc) "respondent" means a person against whom an application is made or an appeal or a divorce action is brought, as the circumstances require;
- (dd) "responding party" means a person against whom a motion is made; and
- (ee) "statute" includes a statute passed by the Parliament of Canada;
- (ff) "substantial indemnity costs" mean costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Rule 57 Tariff, and "on a substantial indemnity basis" has a corresponding meaning.
- (gg) "trial coordinator" is the deputy registrar designated by the Supreme Court of Prince Edward Island to schedule matters for hearing in the Supreme Court of Prince Edward Island.

INTERPRETATION

General Principle

- 1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

- (2) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Matters Not Provided For

- (3) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

Party Acting in Person

- (4) Where a party to a proceeding is not represented by a lawyer but acts in person in accordance with subrule 15.01(c), anything these rules require or permit a lawyer to do shall be done by the party.

Party and Party Costs

- (5) If a statute, regulation or other document refers to party and party costs, these rules apply as if the reference were to partial indemnity costs.

Lawyer and Client Costs

- (6) If a statute, regulation or other document refers to lawyer and client costs, these rules apply as if the reference were to substantial indemnity costs.

ORDERS ON TERMS

- 1.05** When making an order under these rules the court may impose such terms and give such directions as are just.

FORMS

- 1.06** The forms prescribed in the Appendix of Forms shall be used where applicable and with such variations as the circumstances require.

PRACTICE DIRECTIONS

- 1.07** (1) In this rule, “practice direction” means a direction, notice, guide or similar publication for the purpose of governing, subject to these rules, the practice for proceedings.
- (2) A practice direction for proceedings in the Court of Appeal shall be signed by the Chief Justice of Prince Edward Island.
- (3) A practice direction for proceedings in the Supreme Court shall be signed by the Chief Justice of the Supreme Court.

TELEPHONE AND VIDEO CONFERENCES WHERE AVAILABLE

- 1.08** (1) If facilities for a telephone or video conference are available at the court or are provided by a party, all or part of any of the following proceedings or steps in a proceeding may be heard or conducted by telephone or video conference as permitted by subrules (2) to (5):
- (a) a motion (Rule 37);
 - (b) an application (Rule 38);
 - (c) a status hearing (Rule 48.13);
 - (d) at trial, the oral evidence of a witness and the argument;
 - (e) a pre-trial conference, case conference or settlement conference;
 - (f) an appeal or a motion for leave to appeal;
 - (g) a proceeding for judicial review; and
 - (h) such other conferences as may be directed by the court or as agreed to by the parties.

Consent

- (2) If the parties consent to a telephone or video conference and if the presiding judge permits it, one of the parties shall make the necessary arrangements.

Order, No Consent

- (3) If the parties do not consent, the court on motion may make an order directing a telephone or video conference on such terms as are just.
- (4) The judge presiding at a proceeding or step in a proceeding may set aside or vary an order made under subrule (3).

Factors to Consider

- (5) In deciding whether to permit or to direct a telephone or video conference, the court shall consider,
- (a) the general principle that evidence and argument should be presented orally in open court;
 - (b) the importance of the evidence to the determination of the issues in the case;
 - (c) the effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;
 - (d) the importance in the circumstances of the case of observing the demeanour of a witness;
 - (e) whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;
 - (f) the balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and
 - (g) any other relevant matter.

Arrangements for Conference

- (6) Where the court permits or directs a telephone or video conference, the court may direct a party to make the necessary arrangements and to give notice of these arrangements to the other parties and to the court.

TRANSITION CLAUSE

- 1.09 (a)** Subject to clause 1.08(d), references in these Rules of Court and Forms to "Trial Division," or "division," which are in effect immediately before the day the *Judicature Act*, S.P.E.I. 2008 Cap. 20 comes into force, are deemed to refer to the Supreme Court of Prince Edward Island immediately upon the coming into force of the *Judicature Act*, until they are amended, revoked, or replaced under these Rules of Court.
- (b) References in the Rules of Court and Forms to "Appeal Division," which are in effect immediately before the day the *Judicature Act*, S.P.E.I. 2008 Cap. 20 comes into force, are deemed to refer to the Prince Edward Island Court of Appeal immediately upon the coming into force of the *Judicature Act*, until they are amended, revoked, or replaced under these Rules of Court.
- (c) Effective January 1, 2009, the references to "the *Supreme Court Act*" and sections thereof shall refer to the *Judicature Act* and equivalent sections of the *Judicature Act*.
- (d) Effective January 1, 2009, the word "division" in the first line of Rule 1.03(1)(h) is replaced by the word "court."

COMMUNICATIONS OUT OF COURT

1.10 When a proceeding is pending before the court, no party to the proceeding and no party's lawyer shall communicate about the proceeding with a judge out of court, directly or indirectly, unless:

- (a) all the parties consent, in advance, to the out-of-court communication; or
- (b) the court directs otherwise.

Drummond v. O'Brien, 2021 PESC 28

In declining to discharge a lien, the court gave the *Mechanics Lien Act* a liberal interpretation, consistent with Rule 1.04, despite deficiencies in the respondent's statement of claim.

Marques v. Bambrick, 2018 PECA 4

Action is defined to include "counterclaim." It is the basis of the claim which must be assessed, not the damages or relief requested. If the underlying action is valid, it cannot be frivolous and vexatious notwithstanding the damages or relief claimed is excessive.

McQuaid v. Trainor, 2018 PECA 30

The appeal considered the question of whether the language of an order falls within the scope of the reasons and accurately reflects the judgment or exceeds the scope of the reasons. The Court found that the terms of an order should remain within the scope of the reasons for judgment upon which it is based.

Dash 224, LLC v. Vector Aerospace Engine Services, 2016 PECA 4

A "proceeding" begins with the filing of an action or application which creates a lis between the parties and seeks final relief. Steps taken before proceedings commence are not a step in the proceeding.

Kurylk v. Gallagher (1995), 129 Nfld. & P.E.I.R. 306 (PEISCAD)

Rule 1.04(1) was considered in the context of the interpretation of Rule 31. The Court applied the Rule and directed a liberal construction of Rule 31 so as to meet the objectives of full disclosure of facts and issues prior to trial.

RULE 2**NON-COMPLIANCE WITH THE RULES****EFFECT OF NON-COMPLIANCE**

- 2.01** (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
- (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
 - (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.
- (2) The court shall not set aside an originating process on the grounds the proceeding should have been commenced by an originating process other than the one employed.

ATTACKING IRREGULARITY

- 2.02** A motion to attack a proceeding or a step, document or order in a proceeding for irregularity shall not be made, except with leave of the court,
- (a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity; or
 - (b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity.

COURT MAY DISPENSE WITH COMPLIANCE

- 2.03** The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

Dykeman v. MacVarish, 2020 PESC 38

The court found that Rule 2.01(2) could not be invoked to cure notice defects where a petitioner for divorce was seeking partition under the *Real Property Act* without having met the requirements. The import of Rule 2.01 is not to dispense with the requirement that parties responding to a motion have even a rudimentary sense of what their opponents are requesting.

Read v. Read et al. (No. 1) (1995), 131 Nfld. & P.E.I.R. 91 (PEISCTD)

When documentation filed to initiate prejudgment garnishment proceedings does not comply with the Rules of Court the irregularities cannot be cured and it is necessary, in the interests of justice to set aside the proceedings.

Island Opry Inc. et al. v. Tweedy Ross (1996), Nfld. & P.E.I.R. 36 (PEISCTD)

The purpose of Rule 2.01(1)(a) is to secure the just determination of the real matter in dispute and accordingly, the defendant was granted an adjournment to amend the statement of defence.

Dunphy v. Registrar of Motor Vehicles, 2001 PESCTD 28

The applicant, a minor, made an application for judicial review without the assistance of a litigation guardian. The trial judge applied Rule 2.03 and dispensed with the requirement of Rule 7.01 that a proceeding by a minor shall be commenced by a litigation guardian.

Wood v. Bonnell (1993), 104 Nfld. & P.E.I.R. 291 (PEISCAD)

Rule 2.03 was relied upon to cure non-compliance with Rule 61 relating to the filing of documentation on an appeal.

2.1.01 GENERAL POWERS TO STAY OR DISMISS IF VEXATIOUS, ETC.

RULE 2.1

GENERAL POWERS TO STAY OR DISMISS IF VEXATIOUS, ETC.

STAY, DISMISSAL OF FRIVOLOUS, VEXATIOUS, ABUSIVE PROCEEDING

Order to Stay, Dismiss Proceeding

- 2.1.01** (1) The court may, on its own initiative, stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

Summary Procedure

- (2) The court may make a determination under subrule (1) in a summary manner, subject to the procedures set out in this rule.
- (3) Unless the court orders otherwise, an order under subrule (1) shall be made on the basis of written submissions, if any, in accordance with the following procedures:
- (a) The court shall direct the Registrar to give notice (Form 2.1 A) to the plaintiff or applicant, as the case may be, that the court is considering making the order.
 - (b) The plaintiff or applicant may, within 15 days after receiving the notice, file with the court a written submission, no more than 10 pages in length, responding to the notice.
 - (c) If the plaintiff or applicant does not file a written submission that complies with paragraph (b), the court may make the order without any further notice to the plaintiff or applicant or to any other party.
 - (d) If the plaintiff or applicant files a written submission that complies with paragraph (b), the court may direct the Registrar to give a copy of the submission to any other party.
 - (e) A party who receives a copy of the plaintiff's or applicant's submission may, within 10 days after receiving the copy, file with the court a written submission, no more than 10 pages in length, responding to the plaintiff's or applicant's submission, and shall give a copy of the responding submission to the plaintiff or applicant and, on the request of any other party, to that party.
 - (f) Where notice under clause (3)(a) has been given, the proceeding shall be stayed until the court has made a determination under subrule (1), except that the parties may file the submissions

2.1.02 GENERAL POWERS TO STAY OR DISMISS IF VEXATIOUS, ETC.

referred to in clauses 3(b) to (c).

- (4) A document required under subrule (3) to be given to a party shall be mailed in the manner described in subclause 16.01(4)(b)(i), and is deemed to have been received on the fifth day after it is mailed.

Copy of Order

- (5) The Registrar shall serve a copy of the order by mail on the plaintiff or applicant as soon as possible after the order is made.

Request for Order

- (6) Any party to the proceeding may file with the Registrar a written request for an order under subrule (1).

Notification of Court by Registrar

- (7) If the Registrar becomes aware that a proceeding could be the subject of an order under subrule (1), the Registrar shall notify the court.

STAY, DISMISSAL OF FRIVOLOUS, VEXATIOUS, ABUSIVE MOTION

Order to Stay, Dismiss Motion

- 2.1.02 (1) The court may, on its own initiative, stay or dismiss a motion if the motion appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.
- (2) Subrules 2.1.01(2) to (7) apply, with necessary modifications, to the making of an order under subrule (1) and, for the purpose,
- (a) a reference to the proceeding shall be read as a reference to the motion; and
- (b) a reference to the plaintiff or applicant shall be read as a reference to the moving party.

Prohibition on Further Motions

- (3) On making an order under subrule (1), the court may also make an order under Rule 37.15 prohibiting the moving party from making further motions in a proceeding without leave.

STAY, DISMISSAL OF PROCEEDING IF NO LEAVE UNDER JUDICATURE ACT

Order for Stay, Dismissal

- 2.1.03 (1) If the court determines that a person who is subject to an order under subsection 65(1) of the **Judicature Act** has instituted or continued a proceeding without the order having been rescinded or leave granted for the proceeding to be instituted or continued, the court shall make an order staying or dismissing the proceeding.

Request for Order

- (2) Any party to the proceeding may file with the Registrar a written request for an order under subrule (1).

2.1.03 GENERAL POWERS TO STAY OR DISMISS IF VEXATIOUS, ETC.

Copy of Order

- (3) An order under subrule (1) may be made without notice, but the Registrar shall serve a copy of the order by mail on every party to the proceeding for whom an address is provided in the originating process as soon as possible after the order is made.

Phalen v. Prince Edward Island Humane Society, Animal Welfare Act Appeal Board PEI, and the Attorney General of Canada, 2025 PESC 27

The court dismissed the application for judicial review against the Attorney General of Canada under Rule 2.1 as it should have been brought in a different court. The court allowed the judicial review against the other defendants to proceed.

Olumide v. Police Commissioner and Human Rights Commission, 2021 PECA 4

While Rules 21 and 25 permit striking out frivolous or vexatious proceedings, these Rules apply to actions only. In this application for judicial review, Rule 2.1 was applied to scrutinize the face of the pleading. Although Rule 2.1 permits no evidence, it is sometimes necessary to review reasons and pleadings from other proceedings to make a determination.

A.G. of PEI v. Taha, 2021 PESC 43

In declaring the respondent a vexatious litigant under section 65 of the *Judicature Act*, the court relied on the factual litigation record.

Olumide v. Police Commissioner and Human Rights Commission, 2020 PESC 31

After assessing the documents filed by the applicant the court found the application for judicial review to be one of the “clearest of cases” for a finding that it is, on its face, frivolous, vexatious or otherwise an abuse of the process of the court, and should be dismissed.

Olumide v. Police Commissioner and Human Rights Commission, 2021 PECA 4

Although the case involved a motion to quash an appeal, it set out in detail the history and procedure to be followed on a Rule 2.1 motion. Further, the court found that an application for judicial review is a proceeding and thus subject to Rule 2.1.

Callow v. West Vancouver Teachers Assoc., 2019 PESC 55

The application was dismissed pursuant to Rule 2.1 after the court held that it had no jurisdiction. There was no discernible cause of action set out, and the application had all the hallmarks of a vexatious proceeding.

Taha v. National Bank of Canada, 2018 PESC 29

The Plaintiff commenced an action against the Defendant seeking general damages of \$100 Million and punitive damages of \$246 Billion. The court initiated the procedure under Rule

2.1.03 GENERAL POWERS TO STAY OR DISMISS IF VEXATIOUS, ETC.

2.1.01. Upon review of the 75 page Statement of Claim, the court held that the claim consisted of hyperbole, exaggeration, opinion, rhetoric and scandalous allegations against the Defendant and that it was one of the “clearest of cases” where the claim should be struck on the basis of that is frivolous, vexatious or an abuse of process of the court. See also: *Taha v. Williams*, 2018 PESC 33; *Taha v. Williams*, 2019 PESC 4; *Taha v. Henry*, 2019 PESC 11; *Taha v. Clements*, 2019 PESC 23.

Olumide v. PEI Human Rights Commission, 2019 PESC 1

The court dismissed the plaintiff’s claim, finding no merit in the plaintiff’s action against the defendant which was a vexatious attempt to force the commission to do what it is not legislatively permitted to and is an abuse of the process of the court.

Taha v. Government of P.E.I., 2018 PECA 18

The Rule introduces changes to the procedures for disposing of vexatious litigation. The Rule provides summary procedures that: (a) minimize the expense to which the parties joined to vexatious litigation are put to resolve such litigation; and (b) are consistent with the principles of fairness and natural justice.

RULE 3**TIME****COMPUTATION**

- 3.01** (1) In the computation of time under these rules or an order, except where a contrary intention appears,
- (a) where there is a reference to time expressed as clear days, weeks, months, or years, or as "at least" or "not less than" a number of days, weeks, months, or years, the first and last day, week, month or year shall be excluded.
 - (b) in the calculation of time not expressed as clear days, or other period of time not referred to in clause (a), the first day shall be excluded and the last day included.
 - (c) where a period of seven days or less is prescribed, holidays shall not be counted;
 - (d) where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday; and
 - (e) service of a document, other than an originating process, made after 4 p.m. or at any time on a holiday shall be deemed to have been made on the next day that is not a holiday.
- (2) Where a time of day is mentioned in these rules or in any document in a proceeding, the time referred to shall be taken as the time observed locally.

EXTENSION OR ABRIDGMENT**General Powers of Court**

- 3.02** (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.
- (2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Times in Appeals

- (3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to the Court of Appeal may be made by a panel or by one judge of the Court of Appeal.

Consent

- (4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

WHEN PROCEEDING MAY BE HEARD**Hearings Throughout the Year**

- 3.03** Proceedings may be heard throughout the year, except that during July and August and from December 24th to the following January 6th, both dates

inclusive, no trial of an action shall be held unless the consent of all parties is filed or the court orders otherwise.

Court Office Hours

- 3.04** (1) In these rules, “summer months” means the period of time that the Government of Prince Edward Island operates on summer hours of work, being 8:00 A.M. to 4:00 P.M. every day except a holiday.
- (2) Court offices shall be open for business between 8:30 A.M. and end at 5:00 P.M. every day except a holiday and except during the summer months. During the summer months, court offices shall be open between 8:00 A.M. and 4:00 P.M. every day except a holiday.

Court Filing Hours

- 3.05** Filing hours for court documents shall begin at 8:30 A.M. and end at 4:00 P.M. every day except a holiday and except during the summer months. During the summer months, filing hours shall begin at 8:00 A.M. and end at 3:30 P.M. every day except a holiday.

Urgency

- 3.06** With the consent of the Prothonotary, a court office may be open at any time where the relief sought requires urgency.

Pitre & Richards v. Shea and Jinks, Island Regulatory & Appeals Commission, 2024 PECA 7

The court denied a request for an extension of time to file an appeal under Rule 3.02(3). The court found that while the applicants did prove that they had a *bona fide* intention to appeal, they did not prove that the appeal had merit, or that there was a reasonable excuse for a delay in not filing within the prescribed timelines. The court found no exceptional or special circumstances to justify an extension of time.

Riley-MacFadyen v. Greaves, Rogerson and Island Regulatory and Appeals Commission, 2024 PECA 5

The court denied the appellant’s request for an extension to extend time for the filing of their notice of appeal. As an appeal under the *Residential Tenancy Act* is limited to a question of law only, the court determined that the appeal did not have merit as no arguable question of law was raised.

R. v. R., 2023 PECA 1

The court granted an extension of time for the appellant to file a notice of appeal. The court found that the appellant had a *bona fide* intention to appeal, that the appeal was arguable, the appellant provided a reasonable excuse for their delay in not filing within the prescribed time, and that there were special circumstances that justified granting an extension of time to file an appeal.

Integrity Wind v. Mercantile Finance, 2020 PECA 11

The court disallowed an extension of time to file an appeal, on the basis that the appeal has no merit.

Estate of Harry Lewis, 2019 PECA 1

The decision of the motions judge to abridge the time was warranted. Although the reasons are not recorded, it is clear in the circumstances it was judicially considered and granted.

Ayangma v. City of Charlottetown, 2016 PECA 14

The court granted an application for an extension of time to file a Notice of Appeal. The court found that while the applicant did not meet the factors to be considered when granting an extension, it was in the interests of justice to do so.

Thomas v. Thomas Estates, 2016 PECA 13

The court denied an application for an extension of time to commence two appeals. The court again cited the applicable factors:

1. Does the appeal have merit?
2. Was there a *bona fide* intention to appeal?
3. Is there a reasonable excuse for a delay in not filing within the prescribed time?
4. Are there exceptional or special circumstances justifying the extension of time?

Additionally, the court treats the question of whether the “*justice of the case*” requires that an extension be given as the governing principle and employs all of the mentioned factors, as well as prejudice to the other party, as factors. This approach facilitates a full assessment of the competing interests.

Ellis v. Callahan & Camp Abegweit, 2006 PESCTD 52

The court granted an order extending the time for service of the statement of claim on a defendant. If the defendant is alleging prejudice to him as the basis to oppose the extension of time, he must show it is prejudice which has been caused by the delay.

Bentham v. Bentham (1999), 170 Nfld. & P.E.I. R. 273 (PEISCAD)

Application for an extension of time to file a Notice of Appeal. The decision of Mitchell J.A. in *Bryant v. Fenton* (1998) 166 Nfld. & P.E.I. R. 109 (P.E.I.S.C.-A.D.) was applied. Despite the fact the time for filing an appeal had elapsed twelve months prior to the application, an extension was granted on certain conditions.

Bryant v. Fenton (1998) 166 Nfld. & P.E.I. R. 109 (PEISCAD)

The appellant sought an order, pursuant to Rule 3.02, to extend the time prescribed by Rule 61.07(1) for perfecting an appeal. Although a motion had been made to the Prothonotary pursuant to Rule 61.11(1) to dismiss the appeal, the Court extended the time for perfecting the appeal because it is desirable to have appeals decided on their merits and because the respondent would not suffer any prejudice by the granting of the extension. The appellant was, however, ordered to pay the costs of the respondent in making the motion for dismissal to the Prothonotary.

In the Matter of the Estate of Duncan MacCannell, [1995] 2 P.E.I.R. 87 (PEISCAD)

The court denied an application for an extension of time to file a notice of appeal because the applicant did not demonstrate he had an arguable case on appeal.

Ellis and Birt Ltd. v. Island Regulatory and Appeals Commission (P.E.I.) (1993), 105 Nfld. & P.E.I.R. 65 (PEISCAD)

The Rule is applicable to an application to extend or abridge the time for filing a notice of appeal pursuant to s.13 of the *Island Regulatory and Appeals Commission Act*, R.S.P.E.I. 1988 Cap. I-11.

RULE 4**COURT DOCUMENTS****FORMAT****Standards**

- 4.01** (1) Every document in a proceeding shall meet the following standards:
1. The text shall be printed, typewritten, written or reproduced legibly, with double spaces between the lines and a margin of approximately 40 millimetres on the left-hand side.
 2. The characters used shall be of at least 11 or 12 pitch size, with the exception of footnotes and citations, which may be of a 10 pitch size.
 3. Good quality white paper 216 millimetres by 279 millimetres shall be used.

One Side or Both

- (2) The text may appear on one side or on both sides of the paper.

CONTENTS**General Heading**

- 4.02** (1) Every document in a proceeding shall have a heading in accordance with Form 4 A (actions) or 4 B (applications) that sets out,
- (a) the name of the section of the court and the court file number; and
 - (b) the title of the proceeding in accordance with Rule 14.06 (action or application) or subrule 70.03(3) (divorce action), but in a document other than an originating process, pleading, record, order or report, where there are more than two parties to the proceeding, a short title showing the names of the first party on each side followed by the words "and others" may be used.

Body of Document

- (2) Every document in a proceeding shall contain,
- (a) the title of the document;
 - (b) its date;
 - (c) where the document is filed by a party and not issued by the registrar or is an originating process, the name, address and telephone number of the lawyer filing the document or, where a party acts in person, his or her name, address for service and telephone number; and
 - (d) the signature of the lawyer filing the document or of the party acting in person.

Backsheet

- (3) Every document in a proceeding shall have a backsheet in accordance with Form 4 C that sets out,
- (a) the short title of the proceeding;
 - (b) the name of the section of the court and the court file number;
 - (c) the location of the court office in which the proceeding was commenced;
 - (d) the title of the document; and
 - (e) the name and address of the lawyer serving or filing the document or, where a party acts in person, his or her name, designated address(es) for service and telephone number.

CERTIFIED COPIES OF COURT DOCUMENTS

- 4.03** On the requisition of a person entitled to see a document in the court file under subsection 62.(1) of the *Judicature Act* and on payment of the prescribed fee, the registrar shall issue a certified copy of the document.

NOTICE TO BE GIVEN IN WRITING OR ELECTRONICALLY

- 4.04(1)** A notice required to be given by these rules shall be given,
- (a) in writing; or
 - (b) electronically, if the use of electronic means is authorized.

ISSUING AND FILING OF DOCUMENTS**Issuing Documents**

- 4.05** (1) A document may be issued only on personal attendance in the court office by the party seeking to issue it, by someone on the party's behalf or by facsimile transmission.

Issuing Originating Process

- (2) Except as provided in subrules (3) and (4), an originating process may be issued in the court office in Charlottetown.
- (3) An originating process in the Supreme Court, General Section or Small Claims Section may be issued in the court office in Summerside with the original copy of the document being sent to the court office in Charlottetown and a copy left in the court office in Summerside.

Place of Filing

- (4) All documents required to be filed in a proceeding shall be filed in the court office in which the proceeding was commenced, except where they are filed in the course of a hearing or where the rules provide otherwise, and any document filed in Summerside or Georgetown will have the original thereof forwarded to the court office in Charlottetown.

- (5) An affidavit, transcript, record or factum to be used on the hearing of a motion or application shall be filed, in the court office where the motion or application is to be heard.

Court File Number

- (6) a. Every proceeding commenced in the Court Office in Charlottetown shall be assigned the following identification to identify the Charlottetown Court Office:

S1

- b. Every proceeding commenced in the Court Office in Summerside shall be assigned the following identification to identify the Summerside Court Office:

S2

- c. Every proceeding commenced in a Court Office shall also be assigned the appropriate identification as follows:

- (1) the letters "CA" for a proceeding in the Court of Appeal;
- (2) the letters "GS" for General Civil proceedings;
- (3) the letters "GC" for Criminal proceedings;
- (4) the letters "DV" for Divorce Petitions;
- (5) the letters "FS" for Family proceedings;
- (6) the letters "ES" for Estate proceedings;
- (7) the letter "ME" for a Maintenance Enforcement proceeding;
- (8) the letters "SC" for Small Claims proceedings;
- (9) the letters "YA" for Young Offenders Appeals in the Supreme Court; and
- (10) the consecutive number of the proceeding in order of filing in that office.
- (11) i.e., a general civil filing in the Charlottetown Court Office would have the following identification:

S1GS16000

Filing by Leaving in Court Office or by Mail or by Facsimile Filing

- (7) (a) Any document, other than an originating process, may be filed by leaving it at a court office, by mailing it to a court office accompanied by the prescribed fee or by facsimile transmission.
- (b) Subject to Rule 4.02, a document which is issued or filed by facsimile transmission shall include a cover page indicating:
- (i) the sender's name, address and telephone number;
 - (ii) the date and time of transmission;
 - (iii) the names of the parties in the proceeding and the file number, if one is assigned;

- (iv) the total number of pages transmitted, including the cover page;
 - (v) the telephone number from which the document is transmitted;
 - (vi) the name and telephone number of a person to contact in the event of transmission problems;
- (c) Subject to clause (d), the issuing or filing of a document shall be deemed complete at the time the facsimile transmission is issued or filed by the court and the issued or filed facsimile shall have the same force and effect as the original;
 - (d) Documents received by facsimile transmission shall only be issued or filed on working court days and all documents received after court office hours will be issued or filed the following court office business day after receipt and clearly marked on their face "RECEIVED BY FAX".
 - (e) The original of any document issued or filed by facsimile transmission shall be filed in the court file within three days of the original facsimile transmission and the Registrar shall destroy the facsimile and only maintain the original copy in the file. All fees must be paid at the time the original document is filed with the court.
 - (f) Upon failure to comply with any of the requirements of this rule, the court may make such orders as are just, including but not limited to, an order striking pleadings or parts thereof, staying further proceedings until compliance is complete or dismissing the proceeding or any part thereof.
 - (g) Any certified document sent by the court by facsimile transmission in accordance with clause (b) shall be deemed to be a certified original document notwithstanding the seal of the court is not impressed thereon. Such transmitted document may be further certified at an office of the court by its proper officer.

Date of Filing Where Filed by Mail

- (8) Where a document is filed by mail, the date of the filing stamp of the court office on the document shall be deemed to be the date of its filing, unless the court orders otherwise.

Where Document Filed by Mail not Received

- (9) Where a court office has no record of the receipt of a document alleged to have been filed by mail, the document shall be deemed not to have been filed, unless the court orders otherwise.

AFFIDAVITS**Format**

- 4.06** (1) An affidavit used in a proceeding shall,

- (a) be in Form 4 D;
- (b) be expressed in the first person;
- (c) state the full name of the deponent and, if the deponent is a party or a lawyer, officer, director, member or employee of a party, shall state that fact;
- (d) be divided into paragraphs, numbered consecutively, with each paragraph being confined as far as possible to a particular statement of fact; and
- (e) be signed by the deponent and sworn or affirmed before a person authorized to administer oaths or affirmations.

Contents

- (2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

Exhibits

- (3) An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit and where the exhibit,
 - (a) is referred to as being attached to the affidavit, it shall be attached to and filed with the affidavit;
 - (b) is referred to as being produced and shown to the deponent, it shall not be attached to the affidavit or filed with it, but shall be left with the registrar for the use of the court, and on the disposition of the matter in respect of which the affidavit was filed, the exhibit shall be returned to the lawyer or party who filed the affidavit, unless the court orders otherwise; and
 - (c) is a document, a copy shall be served with the affidavit, unless it is impractical to do so.

By Two or More Deponents

- (4) Where an affidavit is made by two or more deponents, there shall be a separate jurat for each deponent, unless all the deponents make the affidavit before the same person at the same time, in which case one jurat containing the words "Sworn (or affirmed) by the above-named deponents" may be used.

For a Corporation

- (5) Where these rules require an affidavit to be made by a party and the party is a corporation, the affidavit may be made for the corporation by an officer, director or employee of the corporation.

For a Partnership

- (6) Where these rules require an affidavit to be made by a party and the party is a partnership, the affidavit may be made for the partnership by a partner or employee of the partnership.

By an Illiterate or Blind Person

- (7) Where it appears to a person taking an affidavit that the deponent is illiterate or blind, the person shall certify in the jurat that the affidavit was read in his or her presence to the deponent, that the deponent appeared to understand it, and that the deponent signed the affidavit or placed his or her mark on it in the presence of the person taking the affidavit.

By a Person Who Does not Understand the Language

- (8) Where it appears to a person taking an affidavit that the deponent does not understand the language used in the affidavit, the person shall certify in the jurat that the affidavit was interpreted to the deponent in the person's presence by a named interpreter who took an oath or made an affirmation before them to interpret the affidavit correctly.

Alterations

- (9) Any interlineation, erasure or other alteration in an affidavit shall be initialled by the person taking the affidavit and, unless so initialled, the affidavit shall not be used without leave of the presiding judge or officer.

BINDING OF RECORDS, APPEAL BOOKS, FACTUMS, TRANSCRIPTS

- 4.07** (1) Subject to subrule (2), in the Supreme Court, records, factums, memorandums, and books of authorities shall have a frontsheet and backsheet of 176g/m5 weight cover stock,
- (a) in the case of a plaintiff, applicant or appellant, in blue;
 - (b) in the case of a defendant (including a third or subsequent party) or respondent, in yellow;
 - (c) in the case of a tribunal on an application for judicial review, in white; and
 - (d) in the case of an intervener, in orange.
- (2) Except where filed as part of a record or other document, transcripts of evidence for use in the Supreme Court shall have a frontsheet and backsheet of 176g/m5 weight cover in light gray, and where there is more than one volume of transcripts, the volumes shall be clearly numbered.
- (3) Subject to subrule (4), in the Court of Appeal, appeal books, records, factums, memorandums, and books of authorities shall have a frontsheet and backsheet of 176g/m5 weight cover stock,
- (a) in the case of an appellant or applicant, in buff;
 - (b) in the case of a respondent, in green;
 - (c) in the case of a tribunal on an appeal from an application for judicial review, in white;

- (d) in the case of an intervener, in orange.
- (4) Except where filed as part of the appeal book, transcripts of evidence for use in the Court of Appeal shall have a frontsheet and backsheet of 176g/m² weight cover in red, and where there is more than one volume of transcripts, the volumes shall be clearly numbered.

REQUISITION

- 4.08** Where a party is entitled to require the Registrar to carry out a duty under these rules, the party may do so by filing a requisition (Form 4 E) and paying the prescribed fee, if any.

TRANSCRIPTS

Paper Size

- 4.09** (1) Evidence shall be transcribed on paper 8 1/2 inches by 11 inches in size with a margin of approximately 1 inch wide on the left side delimited by a vertical line.

Heading

- (2) The name of the court or, in the case of an examiner, the examiner's name, title and location shall be stated on the first page.

Standards

- (3) The text shall be typewritten on thirty-two lines numbered in the margin at every fifth line.
- (4) Headings, such as swearing of a witness, direct examination and cross-examination, shall be capitalized and separated from the preceding text by the space of a numbered line, and the number of lines of text on the page may be reduced by one for each heading that appears on the page.
- (5) Every question shall commence on a new line and shall begin with the designation "Q.", followed, within 1/2 inch, by the question.
- (6) Every answer shall commence on a new line and shall begin with the designation "A.", followed, within 1/2 inch, by the answer.
- (7) Each page of the transcript shall have on a line one-half inch from the top of the page the name of the witness, and whether the witness is on "direct", "cross-examination", "re-direct" or "by the Court". To be usable in digital technology mode, transcripts shall be consecutively numbered.
- (8) In a transcript of evidence taken in or out of court, every line of question or answer shall begin 1/2 inch from the margin and shall be 5 1/2 inches in length.
- (9) Lines of text other than questions and answers shall be indented 1 1/2 inches from the margin and shall be 5 inches in length.
- (10) Every transcript of evidence taken in court or out of court shall have,
 - (a) a cover page setting out,

- (i) court,
- (ii) title of the proceeding,
- (iii) the nature of the hearing or examination,
- (iv) the place and date of the hearing or examination,
- (v) the name of the presiding judge or officer, and
- (vi) names of lawyers; and
- (b) a table of contents setting out,
 - (i) the name of each witness with the page number at which the examination, cross-examination and re-examination of the witness commence,
 - (ii) page number at which the charge to the jury, the objections to the charge and the re-charge commence,
 - (iii) the page number at which the reasons for judgment commence,
 - (iv) a list of the exhibits with the page number at which they were made exhibits, and
 - (v) at the foot of the page, the date the transcript was ordered, the date it was completed and the date the parties were notified of its completion.

TRANSMISSION OF DOCUMENTS

- 4.10** (1) Where documents filed with the court or exhibits in the custody of an officer are required for use at another location, the registrar shall send them to the registrar at the other location on a party's requisition, on payment of the prescribed fee.
- (2) Documents or exhibits that have been filed at or sent to a location other than where the proceeding was commenced for a hearing at that location shall be sent by the registrar, after the completion of the hearing, to the registrar at the court office where the proceeding was commenced.

NOTICE OF CONSTITUTIONAL QUESTION

- 4.11** The notice of a constitutional question referred to in section 49 of the *Judicature Act* shall be in Form 4 F.

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.

RULE 4.1**DUTY OF EXPERT****DUTY OF EXPERT**

- 4.1.01(1)** It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
- (a) to provide opinion evidence that is fair, objective and non-partisan;
 - (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
 - (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Duty Prevails

- (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf they are engaged.

MacWilliams v. Connors, 2014 PESC 12

The Court declined to grant an Order disqualifying the expert. There may be cases in which a motions judge could disqualify an expert but only where it is clear from the evidence that the proposed expert would be biased.

The weight to be given to the evidence of an expert witness falls within the province of the trial judge, not a pre-trial motions judge.

PARTIES AND JOINDER**RULE 5****JOINDER OF CLAIM AND PARTIES****JOINDER OF CLAIMS**

- 5.01** (1) A plaintiff or applicant may in the same proceeding join any claims the plaintiff or applicant has against an opposite party.
- (2) A plaintiff or applicant may sue in different capacities and a defendant or respondent may be sued in different capacities in the same proceeding.
- (3) Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding.

JOINDER OF PARTIES**Multiple Plaintiffs or Applicants**

- 5.02** (1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,
- (a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
- (b) a common question of law or fact may arise in the proceeding; or
- (c) it appears that their joining in the same proceeding may promote the convenient administration of justice.

Multiple Defendants or Respondents

- (2) Two or more persons may be joined as defendants or respondents where,
- (a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
- (b) a common question of law or fact may arise in the proceeding;
- (c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;
- (d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or

- (e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

JOINDER OF NECESSARY PARTIES

General Rule

- 5.03** (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

Claim by Person Jointly Entitled

- (2) A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled.

Claim by Assignee of Chose in Action

- (3) In a proceeding by the assignee of a debt or other chose in action, the assignor shall be joined as a party unless,
 - (a) the assignment is absolute and not by way of charge only; and
 - (b) notice in writing has been given to the person liable in respect of the debt or chose in action that it has been assigned to the assignee.

Power of Court to Add Parties

- (4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

Party Added as Defendant or Respondent

- (5) A person who is required to be joined as a party under subrule (1), (2) or (3) and who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent.

Relief Against Joinder of Party

- (6) The court may by order relieve against the requirement of joinder under this rule.

MISJOINDER, NON-JOINDER AND PARTIES INCORRECTLY NAMED

Proceeding not to be Defeated

- 5.04** (1) No proceeding shall be defeated by reason of the misjoinder or non-joinder of any party and the court may, in a proceeding, determine the issues in dispute so far as they affect the rights of the parties to the proceeding and pronounce judgment without prejudice to the rights of all persons who are not parties.

Adding, Deleting or Substituting Parties

- (2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

Adding Plaintiff or Applicant

- (3) No person shall be added as a plaintiff or applicant unless the person's consent is filed.

RELIEF AGAINST JOINDER

5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

- (a) order separate hearings;
- (b) require one or more of the claims to be asserted, if at all, in another proceeding;
- (c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;
- (d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or
- (e) make such other order as is just.

TMC Avion v. Lapegna, 2024 PECA 14

The lower court had allowed a motion to add the appellants as defendants to a counterclaim after the limitation period expired. The court of appeal agreed with the motions judge that the special circumstances doctrine is derived from Rules 5.04(2) and 26.01 and exists in Prince Edward Island. The court found that in the face of a lapsed limitation period, the respondents to the appeal had to provide evidence as to their conduct in pursuing their counterclaim. They had not, and the appeal was allowed.

CMT et al. v. Government of P.E.I. et al., 2018 PECA 28

The motions judge granted a motion to allow defendants to be joined to a proceeding on the condition that the plaintiffs provide security for costs the new defendants. The Court of Appeal confirmed the motion judge's quantum of security for costs stating it is justified and reasonable.

Diversified Metal v. Trivett, 2014 PESC 25

The Defendant sought to add his corporation of which he is the sole shareholder, as a party, arguing no prejudice will result. The Court agreed and granted the motion.

Mercier v. Summerside Police, 2010 PESC 1

Pursuant to Rule 5.04(2), the plaintiff was allowed to substitute the City of Summerside as a party in the place of the Summerside Police Department.

MacWilliams v. Bank of Nova Scotia and Walker (1995), 130 Nfld. & P.E.I.R. 251 (PEISCTD)

Motion by the plaintiff pursuant to Rules 5 & 26 seeking leave to amend the statement of claim by adding the third party as a defendant. The Court found: (1) there would be no prejudice to the third party as he had been involved in the proceeding since being joined by the defendant; (2) there were common questions of fact and thus common issues to be dealt with in the action against the defendant and the third party thereby causing a duplication if the plaintiff was compelled to initiate a separate action against the third party.

Simmonds v. Law Society of P.E.I. (1995), 125 Nfld. & P.E.I.R. 220 (PEISCAD) appeal from *Simmonds v. Law Society of P.E.I.* (1994), 115 Nfld. & P.E.I.R. 50 (PEISCTD)

The *Judicial Review Act*, R.S.P.E.I. 1988 Cap. J-3 has not excluded the application of the Rules of Court. Therefore, Rules 5.03 and 5.04 apply to an application for judicial review and they allow the court to add a person as a party, if the court considers that person is necessary as a party for the court to adjudicate effectively and completely on the issues.

Continental Insurance Co. v. Lehman Manufacturing (Canada) Ltd. et al. (1991), 94 Nfld. & P.E.I.R. 354 (PEISCTD)

On an application to join a party as a defendant it is not the role of the court to consider the merits of the factual basis for the proposed joinder of the party. The Court adopted the principles which are applied in determining whether the joinder of defendants in one action is appropriate as the principles were set down in *Thames Steel Construction Ltd. v. Portman et al.* (1980), 111 D.L.R. (3d) 460 (Ont. H.C.).

RULE 6**CONSOLIDATION OR HEARING TOGETHER****WHERE ORDER MAY BE MADE**

- 6.01** (1) Where two or more proceedings are pending in the court and it appears to the court that,
- (a) they have a question of law or fact in common;
 - (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
 - (c) for any other reason an order ought to be made under this rule, the court may order that,
 - (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
 - (e) any of the proceedings be,
 - (i) stayed until after the determination of any other of them, or
 - (ii) asserted by way of counterclaim in any other of them.
- (2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

DISCRETION OF PRESIDING JUDGE

- 6.02** Where the court has made an order that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise.

SEPARATE HEARINGS

- 6.03** On the motion of any party or on its own initiative, the Court may order a separate hearing on one or more issues in a proceeding including separate hearings on the issues of liability and damages.

E.P. v. D.G. et al., 2025 PESC 52

After granting E.P. leave to apply for a parenting order, the court ordered that this proceeding be heard at the same time as a parallel family law proceeding pursuant to Rule 6.01(1). The court was satisfied that the two proceedings had questions of law and fact in common, seek relief from the same circumstances or occurrences, and that other reasons, such as being efficient, cost-effective, timely, avoiding multiplicity of proceedings with the potential for inconsistent results, and the result was proportionate in the circumstances.

Ghiz-Fay v. RBC et.al., 2021 PESC 37

In allowing the issues of liability to be heard and determined prior to issues of damages, the court also required that no order would be signed until damages are determined.

HZPC America v. Skye View Farms & Ano., 2019 PECA 25

The motions judge concluded that as there was an absence of direct interest in the *lis* between the main parties, a motion for leave to intervene as a party could not succeed. The judge also found there was insufficient grounds to warrant adding the proposed intervenor as a party. He concluded there was no impact beyond jurisprudential impact. The Court of Appeal confirmed the findings of the motions judge.

Rilling v. Stewart et al., 2014 PESC 29

The defendant sought an order that the trial be bifurcated such that the hearing on liability shall be held first. The Court so ordered, finding there was significant potential benefit to be gained in time and expense in bifurcating the matter and little, if any, prejudice to any party by doing so.

McCrimmon v. Hood Estate, 2012 PESC 28

The defendant estate made a motion to consolidate two actions commenced against the estate. Both actions resulted from the same motor vehicle accident. The court did not make an order for the consolidation of the actions but did make an order that the two actions be heard at the same time.

Kelly v. Prince Edward Island (Human Rights Commission), 2008 PESCAD 9

The Court of Appeal confirmed the decision of the motions judge not to bifurcate two matters within the one application for judicial review.

Kee v. MacDonald & Gov't PEI, 2006 PESCTD 35

Motion granted to have two proceedings heard at the same time and before the same judge.

Abegweit Potatoes v. J.B. Read, 2003 PESCAD 24

The best insurance against any possible prejudice from inconsistent verdicts was to have the two proceedings heard together by the same judge with the same evidence on the issues of commonality. There were residual issues not common to each proceeding, which militated against making an order for consolidation of the entire actions.

Metro v. McInnis; McInnis v. Mullin Fortier, 2002 PESCTD 79

The two causes of action were found to be inextricably intertwined and upon consideration of all the factors to be considered on a motion for consolidation, the court concluded an order should issue consolidating the two actions.

RULE 7**PERSONS UNDER DISABILITY****REPRESENTATION**

- 7.01** (1) Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of,
- (a) a minor, by a litigation guardian;
 - (b) a person declared to lack capacity under the *Adult Guardianship and Trusteeship Act*, or previous applicable legislation, by the guardian and/or trustee of that person;
 - (c) a person determined to lack capacity who has a duly appointed power of attorney, by the attorney of that person; and
 - (d) any other person who is under disability, but has not been so declared or determined, by a litigation guardian.
- (2) For the purpose of this Rule, the phrase “litigation guardian” includes a litigation guardian, trustee, guardian or attorney, as applicable.

POWERS AND DUTIES OF LITIGATION GUARDIAN

- 7.02** (1) Where a party is under disability, anything that a party in a proceeding is required or authorized to do may be done by the party’s litigation guardian.
- (2) A litigation guardian shall diligently attend to the interests of the person under disability, act solely in the best interests of the person under disability, and take all steps necessary for the advancement or protection of the interests of the person under disability, including the commencement, defence and conduct of a proceeding.
- (3) A litigation guardian, other than the Official Guardian, or the Public Guardian and Trustee, shall be represented by a lawyer and shall instruct the lawyer in the conduct of the proceeding.

LITIGATION GUARDIAN FOR PLAINTIFF, APPLICANT OR PETITIONER**Court Appointment Unnecessary**

- 7.03** (1) Subject to subrule (2), any person who is not under disability may act as litigation guardian for a plaintiff, applicant or petitioner who is under disability, without being appointed by the court.

Affidavit to be Filed

- (2) No person, except the Official Guardian, or the Public Guardian and Trustee, shall act as a litigation guardian for a plaintiff, applicant or petitioner who is under disability until the person has filed an affidavit with the Prothonotary in which the person,

- (a) consents to act as litigation guardian in the proceeding;
- (b) confirms that the person has given written authority to a named lawyer to act in the proceeding;
- (c) states whether the person and the person under disability are ordinarily resident in Prince Edward Island;
- (d) sets out their relationship, if any, to the person under disability;
- (e) states that the person has no interest in the proceedings adverse to that of the person under disability; and
- (f) acknowledges that the person has been informed of their liability to pay personally any costs awarded against the person or against the person under disability.

LITIGATION GUARDIAN FOR DEFENDANT OR RESPONDENT

Generally Must be Appointed by Court

- 7.04** (1) No person shall act as a litigation guardian for a defendant or respondent who is under disability until appointed by the court, except as provided in subrule (2) or (3).

Where Minor Interested in Estate or Trust

- (2) Where a proceeding is against a minor in respect of the minor's interest in an estate or trust, the Official Guardian shall act as the litigation guardian of the minor defendant or respondent, unless the court orders otherwise.

Defending Counterclaim or Counterpetition

- (3) A litigation guardian for a plaintiff may defend a counterclaim or counterpetition without being appointed by the court.

Motion by Person Seeking to be a Litigation Guardian

- (4) A person who seeks to be the litigation guardian of a defendant or respondent under disability shall move to be appointed by the court before acting as litigation guardian.

Application by Plaintiff or Applicant to Appoint Litigation Guardian

- (5) Where a defendant or respondent under disability has been served with an originating process and no motion has been made under subrule (4) for the appointment of a litigation guardian, a plaintiff, applicant or petitioner, before taking any further step in the proceeding, shall move for an order appointing a litigation guardian for the party under disability.
- (6) At least ten days before moving for the appointment of a litigation guardian, a plaintiff, applicant or petitioner shall serve a request for appointment of litigation guardian, Form 7 A, on the party under disability personally or by an alternative to personal service under Rule 16.03.

- (7) The request may be served on the party under disability together with the originating process.
- (8) A motion for the appointment of a litigation guardian may be made without notice to the party under disability.
- (9) A plaintiff, applicant or petitioner who moves to appoint the Official Guardian, or the Public Guardian and Trustee as the litigation guardian shall serve the notice of motion and the material required by subrule (10) on the Official Guardian, or the Public Guardian and Trustee, as applicable.

Evidence on Motion to Appoint a Litigation Guardian

- (10) A person who moves for the appointment of a litigation guardian shall provide evidence on the motion concerning,
 - (a) the nature of the proceeding;
 - (b) the date on which the cause of action arose and the date on which the proceeding was commenced;
 - (c) service on the party under disability of the originating process and the request for appointment of litigation guardian;
 - (d) the nature and extent of the disability;
 - (e) in the case of a minor, the minor's birth date;
 - (f) whether the person under disability ordinarily resides in Prince Edward Island;and except where the proposed litigation guardian is the Official Guardian, or the Public Guardian and Trustee, evidence,
 - (g) concerning the relationship, if any, between the person and the party under disability;
 - (h) whether the person ordinarily resides in Prince Edward Island;
 - (i) that the person consents to act as litigation guardian in the proceedings;
 - (j) that the person is a proper person to be appointed, and the person has no interest in the proceeding adverse to the party under disability; and
 - (k) that the person acknowledges having been informed that the person may incur costs that may not be recovered from another party.

APPOINTMENT OF OFFICIAL GUARDIAN, OR PUBLIC GUARDIAN AND TRUSTEE

- 7.05** Unless there is some other person willing and able to act as litigation guardian, the court shall appoint,
- (a) the Official Guardian, where the person under disability is a minor;

- (b) the Public Guardian and Trustee, where the person lacks capacity to manage their financial matters and/or personal matters, but has not been so declared; and
- (c) either the Official Guardian, or the Public Guardian and Trustee, where the person under disability is a minor and also lacks capacity as set out in (b), but has not been so declared.

REMOVAL OR SUBSTITUTION OF LITIGATION GUARDIAN

- 7.06** (1) Where, in the course of a proceeding,
- (a) a minor for whom a litigation guardian has been acting reaches the age of majority, the minor or the litigation guardian may, on filing an affidavit stating that the minor has reached the age of majority, obtain from the Prothonotary an order (Form 7 B) authorizing the minor to continue the proceeding without the litigation guardian;
 - (b) a party under any other disability for whom a litigation guardian has been acting ceases to be under disability, the party or the litigation guardian may move without notice for an order to continue the proceeding without the litigation guardian,
- and the order shall be served forthwith on every other party and on the litigation guardian.
- (2) Where it appears to the court that a litigation guardian is not acting in the best interests of the party under disability, the court may substitute the Official Guardian, the Public Guardian and Trustee, or any other person as litigation guardian.

DEFAULT OF PARTY UNDER DISABILITY

- 7.07** (1) A party under disability may not be noted in default under Rule 19.01 without leave of a judge.
- (2) Notice of a motion for leave under subrule (1) shall be served,
- (a) on the litigation guardian of the party under disability; and
 - (b) on the Public Guardian and Trustee, unless
 - (i) the Public Guardian and Trustee is the litigation guardian of the party under disability; or
 - (ii) a judge orders otherwise.

DISCONTINUANCE BY OR AGAINST PARTY UNDER DISABILITY

- 7.08** (1) If a party to an action is under a disability, the action may be discontinued by or against the party under Rule 23.01 only with leave of a judge.
- (2) Notice of a motion for leave under subrule (1) shall be served,
- (a) on the litigation guardian of the party under disability; and
 - (b) such other persons as a judge may otherwise order.

APPROVAL OF SETTLEMENT**Settlement Requires Judge's Approval**

- 7.09** (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.
- (2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge.

Where No Proceeding Commenced

- (3) Where an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced in respect of the claim, approval of a judge shall be obtained on an application to the court.

Notice

- (4) Notice of a motion or application for the approval of a judge under this rule shall be served,
- (a) on the Official Guardian, unless
 - (i) the Public Guardian and Trustee is the litigation guardian of the party under disability; or
 - (ii) a judge orders otherwise; and
 - (b) where the party under disability is a defendant or respondent, on the litigation guardian.

Material Required for Approval

- (5) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application,
- (a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;
 - (b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;
 - (c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and
 - (d) a copy of the proposed minutes of settlement.
- (6) On a motion or application for the approval of a judge under this rule, the judge may direct that the material referred to in subrule (5) be served on the Official Guardian or on the Public Guardian and Trustee, as the guardian and/or trustee of the person under disability, and may direct the

Official Guardian, or the Public Guardian and Trustee, as the case may be, to make an oral or written report stating any objections to the proposed the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement.

Money to be Paid into Court

- 7.10** (1) Any money payable under an order or a settlement to a person under disability shall be paid into court, unless a judge orders otherwise.
- (2) Any money paid to the Official Guardian, or the Public Guardian and Trustee, on behalf of a person under disability shall be paid into court, unless a judge orders otherwise.

MacKinnon v. Ross, 2015 PESC 38

The Court found that Rule 7 had no application to the case because the person under disability was not a party to the proceeding and therefore outside the scope of Rule 7.

Wood (Litigation Guardian of) v. Wood, 2013 PESC 11

On a motion under Rule 7, the *parens patriae* jurisdiction of the court is invoked. It is the duty of the court to protect the person under a disability and to ensure the settlement is in the best interests of the party.

An application under Rule 7.08 to approve a settlement also constitutes a judicial determination as to whether a legal account is fair and reasonable. The factors set out in Rule 57 and 58 are applicable.

Dunphy v. Registrar of Motor Vehicles, 2001 PESCTD 28

The applicant, a minor, made an application for judicial review without the assistance of a litigation guardian. The trial judge applied Rule 2.03 and dispensed with the requirement of Rule 7.01 that a proceeding by a minor shall be commenced by a litigation guardian.

RULE 8**PARTNERSHIPS AND SOLE PROPRIETORSHIPS****PARTNERSHIPS**

- 8.01** (1) A proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership.
- (2) Subrule (1) extends to a proceeding between partnerships having one or more partners in common.

Defence

- 8.02** Where a proceeding is commenced against a partnership using the firm name, the partnership's defence shall be delivered in the firm name and no person who admits having been a partner at any material time may defend the proceeding separately, except with leave of the court.

Notice to Alleged Partner Where Enforcement Sought Against Partner

- 8.03** (1) In a proceeding against a partnership using the firm name, where a plaintiff or applicant seeks an order that will be enforceable personally against a person as a partner, the plaintiff or applicant may serve the person with the originating process, together with a notice to alleged partner (Form 8 A) stating that the person was a partner at a material time specified in the notice.
- (2) A person served as provided in subrule (1) shall be deemed to have been a partner at the material time, unless the person defends the proceeding separately denying that they were a partner at the material time.

Person Defending Separately

- 8.04** A person becomes a party to the proceeding as a defendant or respondent, and the title of the proceeding shall be amended accordingly, if the person defends a proceeding separately,
- (a) denying that he was a partner at the material time; or
 - (b) with leave of the court under Rule 8.02.

Disclosure of Partners

- 8.05** (1) Where a proceeding is commenced by or against a partnership using the firm name, any other party may serve a notice requiring the partnership to disclose forthwith the names and addresses of all the partners constituting the partnership at a time specified in the notice and, where the present address of a partner is unknown, the partnership shall disclose the last known address of that partner.

- (2) Where a partnership fails to comply with a notice under subrule (1), its claim may be dismissed or the proceeding stayed or its defence may be struck out.
- (3) Where the name of a partner is disclosed pursuant to a notice under paragraph (1) and the partner has not been served as provided in Rule 8.03, the partner may be so served within fifteen days after the name is disclosed.

ENFORCEMENT OF ORDER

Against Partnership Property

- 8.06** (1) An order against a partnership using the firm name may be enforced against the property of the partnership.

Against Person Served as Alleged Partner

- (2) An order against a partnership using the firm name may also be enforced, where the order or a subsequent order so provides, against any person who was served as provided in Rule 8.03 and who,
 - (a) under that rule, is deemed to have been a partner;
 - (b) has admitted having been a partner; or
 - (c) has been adjudged to have been a partner, at the material time.

Against Person not Served as Alleged Partner

- (3) Where, after an order has been made against a partnership using the firm name, the party obtaining it claims to be entitled to enforce it against any person alleged to be a partner other than a person who was served as provided in Rule 8.03, the party may move before a judge for leave to do so, and the judge may grant leave if the liability of the person as a partner is not disputed or, if disputed, after the liability has been determined in such manner as the judge directs.

SOLE PROPRIETORSHIPS

- 8.07** (1) Where a person carries on business in a business name other than his or her own name, a proceeding may be commenced by or against the person using the business name.
- (2) Rules 8.01 to 8.06 apply, with necessary modifications, to a proceeding by or against a sole proprietor using a business name, as though the sole proprietor were a partner and the business name were the firm name of a partnership.

RULE 9**ESTATES AND TRUSTS****PROCEEDINGS BY OR AGAINST EXECUTOR, ADMINISTRATOR OR TRUSTEE****General Rule**

- 9.01** (1) A proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust and its beneficiaries without joining the beneficiaries as parties.

Exceptions

- (2) Subrule (1) does not apply to a proceeding,
- (a) to establish or contest the validity of a will;
 - (b) for the interpretation of a will;
 - (c) to remove or replace an executor, administrator or trustee;
 - (d) against an executor, administrator or trustee for fraud or misconduct; or
 - (e) for the administration of an estate or the execution of a trust by the court.

Executor, Administrator or Trustee Refusing to be Joined

- (3) Where a proceeding is commenced by executors, administrators or trustees, any executor, administrator or trustee who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent.

Beneficiaries and Others Added by Order

- (4) The court may order that any beneficiary, creditor or other interested person be made a party to a proceeding by or against an executor, administrator or trustee.

PROCEEDING AGAINST ESTATE THAT HAS NO EXECUTOR OR ADMINISTRATOR

- 9.02** (1) Where it is sought to commence or continue a proceeding against the estate of deceased person who has no executor or administrator, the court on motion may appoint a litigation administrator to represent the estate for the purposes of the proceeding.
- (2) An order in a proceeding to which a litigation administrator is a party binds or benefits the estate of the deceased person, but has no effect on the litigation administrator in a personal capacity, unless a judge orders otherwise.

REMEDIAL PROVISIONS**Proceeding Commenced before Probate or Administration**

- 9.03** (1) Where a proceeding is commenced by or against a person as executor or administrator before a grant of probate or administration has been made and the person subsequently receives a grant of probate or administration, the proceeding shall be deemed to have been properly constituted from its commencement.

Proceeding Brought by or Against Estate

- (2) A proceeding commenced by or against the estate of a deceased person,
- (a) by naming "the estate of A.B., deceased", "the personal representative of A.B., deceased" or any similar designation; or
 - (b) in which the wrong person is named as the personal representative, shall not be treated as a nullity, but the court may order that the proceeding be continued by or against the proper executor or administrator of the deceased or against a litigation administrator appointed for the purpose of the proceeding, and the title of the proceeding shall be amended accordingly.

Proceeding Commenced in the Name of or Against a Deceased Person

- (3) A proceeding commenced in the name of or against a person who has died before its commencement shall not be treated as a nullity, but the court may order that the proceeding be continued by or against the executor or administrator or a litigation administrator appointed for the purpose of the proceeding, and the title of the proceeding shall be amended accordingly.

Where There is an Executor or Administrator and a Litigation Administrator has been Appointed

- (4) Where it appears that a deceased person for whom a litigation administrator has been appointed had an executor or administrator at the time of the appointment, the proceeding shall not be treated as a nullity, but the court may order that the proceeding be continued against the executor or administrator and the title of the proceeding shall be amended accordingly.

General Power

- (5) A proceeding by or against a deceased person or an estate shall not be treated as a nullity because it was not properly constituted, but the court may order that the proceeding be reconstituted by analogy to the provisions of this rule.

Stay of Proceeding until Properly Constituted

- (6) No further step in a proceeding referred to in subrule (2), (3), (4) or (5) shall be taken until it is properly constituted and, unless it is properly

constituted within a reasonable time, the court may dismiss the proceeding or make such other order as is just.

Terms May be Imposed

- (7) On making an order under this rule, the court may impose such terms as are just, including a term that an executor or an administrator shall not be personally liable in respect of any part of the estate of a deceased person that the executor or administrator has distributed or otherwise dealt with in good faith while not aware that a proceeding had been commenced against the deceased person or the estate.

RULE 10**REPRESENTATION ORDER****REPRESENTATION OF AN INTERESTED PERSON WHO CANNOT BE ASCERTAINED****Proceedings in which Order may be Made**

- 10.01** (1) In a proceeding concerning,
- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
 - (b) the determination of a question arising in the administration of an estate or trust;
 - (c) the approval of a sale, purchase, settlement or other transaction;
 - (d) the approval of an arrangement under the *Variation of Trusts Act*;
 - (e) the administration of the estate of a deceased person; or
 - (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

Order Binds Represented Persons

- (2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to Rule 10.03.

Settlement Affecting Persons who are not Parties

- (3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,
- (a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or
 - (b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons.

- (4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to Rule 10.03.

REPRESENTATION OF A DECEASED PERSON

10.02 Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to Rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding.

RELIEF FROM BINDING EFFECT OF ORDER

10.03 Where a person or an estate is bound by reason of a representation order made under subrule 10.01(1) or Rule 10.02, an approval under subrule 10.01(3) or an order that the proceeding continue made under Rule 10.02, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,

- (a) the order or approval was obtained by fraud or non-disclosure of material facts;
- (b) the interests of the person or estate were different from those represented at the hearing; or
- (c) for some other sufficient reason the order or approval should be set aside.

RULE 11**TRANSFER OR TRANSMISSION OF INTEREST****EFFECT OF TRANSFER OR TRANSMISSION**

11.01 Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the proceeding shall be stayed until an order to continue the proceeding by or against the other person has been obtained.

ORDER TO CONTINUE

11.02 (1) Where a transfer or transmission of the interest or liability of a party takes place while a proceeding is pending, any interested person may, on filing an affidavit verifying the transfer or transmission of interest or liability and on notice to all parties in the proceeding, obtain from the Prothonotary, on requisition, an order to continue (Form 11A).

(2) An order to continue shall be served forthwith on every other party.

FAILURE TO OBTAIN ORDER TO CONTINUE ACTION

11.03 Where a transfer or transmission of the interest of a plaintiff takes place while an action is pending and no order to continue is obtained within a reasonable time, a defendant may move to have the action dismissed for delay, and Rules 24.02 to 24.05 apply with necessary modifications.

Connick v. Ramsay, 2008 PESCTD 42

On a motion by the defendant for summary judgment and a motion to have the action dismissed for delay, the court considered whether it had jurisdiction to hear the motion because, following the death of one of the defendants, an order had not been taken out continuing the action against his estate. The court held the plaintiff was responsible for taking out such an order and as this had not been done, the action had not been stayed and the court retained jurisdiction to hear the motion.

CLASS PROCEEDINGS AND OTHER REPRESENTATIVE PROCEEDINGS

12.01

RULE 12

CLASS PROCEEDINGS AND OTHER REPRESENTATIVE PROCEEDINGS

DEFINITIONS

12.01 In rules 12.02 to 12.07, “Act” means the *Class Proceedings Act*.

TITLE OF PROCEEDING

12.02 (1) In a proceeding commenced under subsection 3 (1) of the Act, the title of the proceeding shall include, after the names of the parties, “Proceeding under the *Class Proceedings Act*.”

(2) In a proceeding referred to in section 4 of the Act, the notice of motion for an order certifying the proceeding, the order certifying it and all subsequent documents shall include, after the names of the parties, “Proceeding under the *Class Proceedings Act*”.

DISCOVERY OF CLASS MEMBERS

12.03 (1) For the purpose of subrule 31.11 (1) (reading in examination of party), a class member who is examined for discovery under subsection 20 (2) of the *Act* is examined in addition to the party.

(2) Rule 31.10 (discovery of non-parties with leave) and clause 34.15(1)(b) (sanctions for default or misconduct by person to be examined) do not apply when a class member is examined for discovery under subsection 20(2) of the *Act*.

CONTENTS OF JUDGMENTS AND ORDERS

12.04 (1) A judgment in a proceeding under the *Act*, or an order approving a settlement under section 38 of the *Act* or approving a discontinuance or abandonment of a proceeding under section 39 of the *Act*, shall contain directions with respect to,

(a) the distribution of amounts awarded under section 32 or 35 of the *Act*, and the costs of distribution;

12.05 CLASS PROCEEDINGS AND OTHER REPRESENTATIVE PROCEEDINGS

- (b) the payment of amounts owing under an enforceable agreement made under section 44 of the *Act* between a lawyer and a representative party; and
 - (c) the payment of the costs of the proceeding.
- (2) An order certifying two or more proceedings as a class proceeding under section 4 of the *Act* or decertifying a class proceeding under section 13 of the *Act* shall contain directions with respect to pleadings and other procedural matters.

PROCEEDING AGAINST REPRESENTATIVE DEFENDANT

- 12.05** Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

PROCEEDING BY UNINCORPORATED ASSOCIATION OR TRADE UNION

- 12.06** Where numerous persons are members of an unincorporated association or trade union and a proceeding under the *Act* would be an unduly expensive or inconvenient means for determining their claims, one or more of them may be authorized by the court to bring a proceeding on behalf of or for the benefit of all.

CLASS ACTION DATABASE

- 12.07** Every party who commences a class proceeding under the *Act* shall within 10 days of service or filing submit to the Canadian Bar Association National Class Actions Database

- (a) a completed registration, in the form provided by the Canadian Bar Association,
- (b) a copy of their originating process,
- (c) a copy of their motion for certification (not including affidavits in support), and
- (d) a copy of any amendment to the foregoing,

and shall forthwith serve and file confirmation of fulfillment of this requirement.

[EC2022-390, published in *Royal Gazette* May 28, 2022, effective June 1, 2022]

CLASS PROCEEDINGS AND OTHER REPRESENTATIVE PROCEEDINGS
12.07

King & Dawson v. Government of P.E.I., 2020 PECA 13

The Court of Appeal confirmed that a motion for certification should issue. It found the motions judge did not make any error in defining the class, defining the common issues, and defining the preferable procedure. The only error found by the Court was the issuance of a procedural roadmap set out by the motions judge. The Court found it to be a nullity because it was made without notice and without the parties having the opportunity to be heard.

King & Dawson v. Government of PEI, 2019 PESC 27

On a motion for certification of a proposed class action, the court relied on the direction of the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dawson*, 2001 SCC 46 that class actions are available whether or not legislation in the province has been passed allowing same. The court allowed the certification and set out in Appendix A “considerations to be applied to determine the availability of class actions and the procedure to be followed by the parties to a class action proceeding in this province”.

Horne et al. v. Canada (Attorney General) (1995), 129 Nfld. & P.E.I.R. 109 (PEISCTD)

P.E.I. Supreme Court quoted a Nova Scotia Court of Appeal decision which listed seven requirements to be met before a representative action can be brought:

- (1) Class must be properly defined;
- (2) All members must have a common interest;
- (3) There must be a wrong common to all;
- (4) Damages suffered must be the same to all except in amount;
- (5) The relief sought must be beneficial to all;
- (6) None of the members of the class may have an interest antagonistic to the other members;
- (7) There must be created in the course of the action or as a result thereof a fund or a pool of assets which is isolated and subject to pro rata distribution should the need arise.

RULE 13**INTERVENTION****LEAVE TO INTERVENE AS ADDED PARTY**

- 13.01** (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
- (a) an interest in the subject matter of the proceeding;
 - (b) that the person may be adversely affected by a judgment in the proceeding; or
 - (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
- (2) On the motion the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

LEAVE TO INTERVENE AS FRIEND OF THE COURT

- 13.02** Any person may, with leave of a judge or at the invitation of the presiding judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

LEAVE TO INTERVENE IN COURT OF APPEAL

- 13.03** Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Prince Edward Island or a judge designated by Chief Justice of Prince Edward Island.

HZPC America v. Skye View Farms & Ano., 2019 PECA 25

The motions judge concluded that as there was an absence of direct interest in the *lis* between the main parties, a motion for leave to intervene as a party could not succeed. The judge also found there was insufficient grounds to warrant adding the proposed intervenor as a party. He concluded there was no impact beyond jurisprudential impact. The Court of Appeal confirmed the findings of the motions judge.

R. v. McInnis, 2018 PECA 27

The Court of Appeal granted intervenor status to the Mi'kmaq Confederacy of P.E.I. as a friend of the court rather than as an added party in a sentencing appeal. The Court determined the proposed intervenor demonstrated a sufficient interest in the subject matter of the appeal and that it would advance different and valuable insights and perspectives that could further the court's determination of the matter and promote effective adjudication by assuring all matters

are presented on appeal. The intervention would not significantly lengthen the appeal proceeding.

Robert Gallant v. Workers' Comp. Bd.(PEI), 2001 PESCAD 9

Canada Post, the appellant's former employer, made a motion to intervene as a party pursuant to Rule 13.01 of the **Rules of Court**. The motion was denied because the intervention at a late stage in the proceeding would unduly delay or prejudice the determination of the rights of the parties, particularly, the appellant.

Simmonds v. Law Society of P.E.I. (1994), 115 Nfld. & P.E.I.R. 50 (PEISCTD)

Although parties were added in this proceeding under Rules 5.03 and 5.04, the court considered the grounds for ordering addition of parties pursuant to Rule 13.01. The Court set forth the factors which apply when seeking to add in parties under this Rule. Generally, where the interests of the plaintiff or the defendant are prejudiced, an order for joinder will not be made. This prejudice cannot simply be the added costs involved when a further party is added. Affirmed on Appeal. See: *Simmonds v. Law Society of P.E.I.* (1995), 125 Nfld. & P.E.I.R. 220 (PEISCAD)

COMMENCEMENT OF PROCEEDINGS**RULE 14****ORIGINATING PROCESS****HOW PROCEEDING COMMENCED****By Issuing Originating Process**

- 14.01** (1) All civil proceedings shall be commenced by the issuing of an originating process by the registrar of the court except where a statute provides otherwise and as provided in subrule (2).

Exceptions

- (2) A counterclaim that is only against persons who are already parties to the main action, and a crossclaim, shall be commenced by the delivery of the pleading containing the counterclaim or crossclaim, and the pleading need not be issued.

Where Leave Required

- (3) Where leave to commence a proceeding is required, it shall be obtained by motion.

Relying on Subsequent Fact

- (4) A party may rely on a fact that occurs after the commencement of a proceeding, even though the fact gives rise to a new claim or defence, and, if necessary, may move to amend an originating process or pleading to allege the fact.

PROCEEDING BY ACTION AS GENERAL RULE

- 14.02** Every proceeding in the court shall be by action, except where a statute or these rules provide otherwise.

ACTIONS - BY STATEMENT OF CLAIM OR NOTICE OF ACTION**Statement of Claim**

- 14.03** (1) The originating process for the commencement of an action is a statement of claim (Form 14 A (general) or 14 B (mortgage actions)), and designation of address for service (Form 16 A.1), except as provided by,
- (a) subrule (2) (notice of action);
 - (b) Rule 14.04 (divorce petition);
 - (c) Rule 27.03 (counterclaim against person not already a party);
 - (d) subrule 29.02(1) (third party claim);
 - (e) Rule 29.11 (fourth and subsequent party claims);

- (f) Rule 76 (winding up of a company);
- (g) Rule 77 (proceeding under *Controverted Elections (Provincial Act)*);
- (h) Rule 78 (proceeding under *Controverted Election Act (Canada)*), and
- (i) a proceeding authorized by any statute of Prince Edward Island or Canada to be commenced by petition.

Notice of Action

- (2) Where there is insufficient time to prepare a statement of claim, an action other than a divorce action may be commenced by the issuing of a notice of action (Form 14 C) that contains a short statement of the nature of the claim.
- (3) Where a notice of action is used, the plaintiff shall file a statement of claim (Form 14 D) and designation of address for service (Form 16 A.1) within thirty days after the notice of action is issued, and no statement of claim shall be filed thereafter except with the written consent of the defendant or with leave of the court obtained on notice to the defendant.
- (4) The notice of action shall not be served separately from the statement of claim.

Information for Court Use

- (4.1) Form 14 F (Information for court use) shall be filed together with Form 14 A, 14 B, or 14 C, as the case may be, as well as Forms 14 E and 68 A.

Statement of Claim may Alter or Extend Claim

- (5) In an action commenced by issuing a notice of action, the statement of claim may alter or extend the claim stated in the notice of action.

DIVORCE ACTIONS - BY PETITION

- 14.04** The originating process for the commencement of a divorce action is a petition for divorce (Form 70 A) and designation of address for service (Form 16 A.1), except as provided by subrule 70.09(6) (counterpetition against person not already a party).

APPLICATIONS - BY NOTICE OF APPLICATION

Notice of Application

- 14.05** (1) The originating process for the commencement of an application is a notice of application (Form 14 E, 68 A or 74 A) and designation of address for service (Form 16 A.1).

Application under Statute to Supreme Court

- (2) Where a statute authorizes the commencement of a proceeding by an application to the Supreme Court or a judge thereof, the proceeding may be brought by application.

Application Under Rules

- (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is for,
- (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
 - (b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;
 - (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;
 - (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
 - (e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;
 - (f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;
 - (g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;
 - (h) for a remedy under the *Canadian Charter of Rights and Freedoms*; or
 - (i) in respect of any matter where it is unlikely that there will be any material facts in dispute.

TITLE OF PROCEEDING

- 14.06** (1) Every originating process shall contain a title of the proceeding setting out the names of all the parties and the capacity by which they are made parties, if other than their personal capacity.
- (2) In an action other than a divorce action, the title of the proceeding shall name the party commencing the action as the plaintiff and the opposite party as the defendant.
- (3) In an application, the title of the proceeding shall name the party commencing the application as the applicant and the opposite party, if any, as the respondent and the notice of application shall state the statutory provision or rule, if any, under which the application is made.

HOW ORIGINATING PROCESS ISSUED

- 14.07** (1) An originating process is issued by the registrar's act of dating, signing and sealing it with the seal of the Court and assigning to it a court file number.
- (2) A copy of the originating process shall be filed in the court file when it is issued.
- (3) Where the originating process is filed electronically, it is issued when it is accepted by the court computer system and a court file number is assigned to it.

TIME FOR SERVICE IN ACTIONS

- 14.08** (1) Where an action is commenced by a statement of claim, the statement of claim shall be served within six months after it is issued.
- (2) Where an action is commenced by a notice of action, the notice of action and the statement of claim shall be served together within six months after the notice of action is issued.

Simplified Procedure

- (3) Subrules (1) and (2) are subject to subrules 75.1.06(1), (2), (3), and (4), which provide that in certain circumstances the Registrar shall make an order dismissing the action as abandoned.

STRIKING OUT OR AMENDING

- 14.09** An originating process that is not a pleading may be struck out or amended in the same manner as a pleading.

DISMISSAL OF ACTION WHERE DEFENDANT PAYS CLAIM

- 14.10** (1) Where the plaintiff's claim is for money only, a defendant, on paying within the time prescribed for delivery of a defence or at any time before being noted in default, the amount of the plaintiff's claim and the amount claimed for costs, may on motion have the court dismiss the action.
- (2) A defendant who considers the amount claimed for costs to be excessive, may pay, within the time prescribed for delivery of a defence or at any time before being noted in default, the amount of the plaintiff's claim and the sum of \$400 for costs, and the court on motion may dismiss the action and may fix and order payment of the plaintiff's costs or may order payment of the plaintiff's costs as assessed under Rule 58.

Ferguson Estate (Re), 2018 PECA 19

The Executor brought the motion pursuant to Rule 14.05 which permits the court to give an opinion or direction on a question affecting the rights of a person in respect to the administration of an estate. This rule refers to motions in respect of any matter where it is unlikely that there will be any material fact in dispute. Rule 37.12(2) permits a judge hearing a motion to grant various relief, to order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by a trial judge.

National Police of Colombia v. DASH 224, LLC, 2014 PECA 16

A legal proceeding can be commenced by way of action or application. Motions are made within an action or application to seek interlocutory or interim relief. A proceeding cannot be commenced solely to obtain interlocutory or interim relief.

Ellis v. Callahan & Camp Abegweit, 2006 PESCTD 52

The court granted an order extending the time for service of the statement of claim on a defendant. If the defendant is alleging prejudice to him as the basis to oppose the extension of time, he must show it is prejudice which has been caused by the delay.

Sogelco v. Island Sea Products et al., 2006 PESCTD 3

Where there were issues of fact and credibility in dispute, the case did not qualify to be heard as an application pursuant to Rule 14.05(3)(h).

Kloosterman v. Grimme, 2005 PESCTD 46

The relevant statute provided for issues to be determined by application. Accordingly, the court directed that pursuant to Rule 14.05(2) the issue between the parties could be brought before the court by way of notice of application. The court provided directions as to how the application could proceed.

Keeler v. Prince Edward Island (1998), 162 Nfld. & P.E.I.R. 55 (PEISCTD)

A “notice of claim” served pursuant to s-s.10(2) of the *Crown Proceedings Act* does not meet the definition of “originating process” in Rule 14.03(1) and even if it could fit within the meaning of “notice of action,” it was not issued out of the court by the Registrar of the Court, as required by the Rules

MacDonald Estate v. Clow, [1997] 1 P.E.I.R. 314 (PEISCTD)

An application was brought seeking a declaration the applicant was the owner of certain lands. The court held that as the issue to be resolved involved an interpretation of the deed held by the applicant, the application was properly brought under Rule 14.05(3). Affirmed on appeal. See: [1997] P.E.I.J. No. 97 (P.E.I.S.C.-A.D.)

Tignish Credit Union Ltd. v. Murphy (1993), 109 Nfld & P.E.I.R. 287 (PEISCTD)

Declaratory relief should be sought by an originating process. Rule 14.05(3)(e) specifically contemplates it be sought by notice of application; however, if the parties agree and if the matter is in fact not dealt with in a summary fashion, the court may entertain the granting of such relief by way of notice of motion.

RULE 15**REPRESENTATION BY LAWYER****INTERPRETATION****Party Acting in Person**

- 15.01** Where a party to a proceeding is not represented by a lawyer but acts in person, anything these rules require or permit a lawyer to do shall be done by the party.

WHERE LAWYER REQUIRED

- 15.02** (a) Subject to the provisions of the *Legal Profession Act* and sub-rule 4 of Rule 74 governing proceedings in the small claims section, a party to a proceeding who is under disability or acts in a representative capacity shall be represented by a lawyer.
- (b) A party to a proceeding that is a corporation shall be represented by a lawyer, except with leave of the court.
- (c) Any other party to a proceeding may act in person or be represented by a lawyer.

NOTICE OF AUTHORITY TO COMMENCE PROCEEDING**Request for Notice by Lawyer**

- 15.03** (1) A person who is served with an originating process may deliver a request that the lawyer who is named in the originating process as the lawyer for the plaintiff or applicant deliver a notice declaring whether he or she commenced or authorized the commencement of the proceeding or whether his or her client authorized the commencement of the proceeding.

Power of Court

- (2) If the lawyer fails to deliver a notice in accordance with the request, the court may,
- (a) order the lawyer to do so;
- (b) stay the proceeding; and
- (c) order the lawyer to pay the costs of the proceeding.

Proceeding Commenced without Lawyer's Authority

- (3) If the lawyer declares that he or she did not commence or authorize the commencement of the proceeding, the court may, on motion without notice, stay or dismiss the proceeding.

Proceeding Commenced without Client's Authority

- (4) If a lawyer has commenced a proceeding without the authority of his or her client, the court may, on motion, stay or dismiss the proceeding and order the lawyer to pay the costs of the proceeding.

Effect of Stay

- (5) If a proceeding is stayed under this rule, no further step may be taken without leave of the court.

CHANGE IN REPRESENTATION BY PARTY**Notice of Change of Lawyer**

- 15.04** (1) A party who has a lawyer of record may change the lawyer of record by serving on the lawyer and every other party and filing, with proof of service, a notice of change of lawyer (Form 15 A) giving the name, address and telephone number of the new lawyer.

Notice of Appointment of Lawyer

- (2) A party acting in person or a corporation may appoint a lawyer of record by serving on every other party and filing, with proof of service, a notice of appointment of lawyer (Form 15 B) giving the name, address and telephone number of the lawyer of record.

Notice of Intention to Act in Person

- (3) Subject to subrule 15.02(a) and (b), a party who has a lawyer of record may elect to act in person by serving on the lawyer and every other party and filing, with proof of service, a notice of intention to act in person (Form 15C) and a designation of address for service (Form 16 A.1).

Claim for a Lawyer's Lien

- (4) A party may move, on notice to the party's former lawyer of record, for an order determining whether and to what extent the lawyer has a right to a lawyer's lien.
- (5) In the order, the court may impose such terms as are just in connection with the lien and its discharge.

MOTION BY LAWYER FOR REMOVAL AS LAWYER OF RECORD**Client to be Served**

- 15.05** (1) A lawyer may move, on notice to their client, for an order removing them as lawyer of record.
- (2) Service of a notice of motion for the removal of a lawyer from the record and service of the order shall be made on the client,
 - (a) personally or by an alternative to personal service under rule 16.03; or
 - (b) by mailing a copy to the client at,
 - (i) the client's last known address, and
 - (ii) another address, if any, where the lawyer believes the copy is likely to come to the client's attention.

Party under Disability

- (3) Where the party for whom the lawyer is acting is under disability, the notice of motion and the order shall also be served on the litigation guardian for the party and the Official Guardian where the party is a minor, or the Public Guardian and Trustee where the proceeding relates to financial matters and/or personal matters of the party.

Contents of Order

- (4) The order removing a lawyer from the record shall include,
- (a) the client's last known address, or the address for service if different;
 - (b) another address, if any, where the lawyer believes the copy is likely to come to the client's attention;
 - (c) the client's telephone number, email address, and fax number, if any, unless the court orders otherwise;
 - (d) if the client is a corporation, the text of subrules (5) and (6); and
 - (e) if the client is not a corporation, the text of subrules (8) and (9).
- (5) As soon as possible after the order is served,
- (a) proof of service of the order, together with a copy of the order, shall be served on every other party; and
 - (b) proof of service under subrule (2), subrule (3) (if applicable), and clause (a) shall be filed.

Corporations

- (6) A client that is a corporation shall, within 30 days after being served with the order removing the lawyer from the record,
- (a) appoint a new lawyer of record by serving a notice under subrule 15.04(2); or
 - (b) obtain and serve an order under subrule 15.02(b) granting it leave to be represented by a person other than a lawyer.
- (7) If the corporation fails to comply with subrule (5),
- (a) the Court may dismiss its proceeding or strike out its defence; and
 - (b) in an appeal
 - (i) a Judge of the Court of Appeal may, on motion, dismiss the corporation's appeal, or
 - (ii) the Court hearing the appeal may deny it the right to be heard.

Clients Other Than Corporations

- (8) A client who is not a corporation shall, within 30 days after being served with the order removing the lawyer from the record,

- (a) appoint a new lawyer of record by serving a notice under subrule 15.04(2); or
- (b) serve a notice of intention to act in person under subrule 15.04(3).
- (9) If the client fails to comply with subrule (8),
 - (a) the court may dismiss the client's proceeding or strike out his or her defence; and
 - (b) in an appeal,
 - (i) a judge of the appellate court may, on motion, dismiss the client's appeal, or
 - (ii) the court hearing the appeal may deny the client the right to be heard.

DUTY OF LAWYER OF RECORD

15.06 A lawyer of record shall act as and remain the lawyer of record for his or her client until,

- (a) the client delivers a notice under Rule 15.04; or
- (b) an order removing the lawyer from the record has been entered and the lawyer has satisfied the service and filing requirements of subrules 15.05(2), (3) if applicable), and (5).

WHERE A LAWYER OF RECORD HAS CEASED TO PRACTISE

15.07 Where the lawyer of record for a party has ceased to practise law, and the party for whom the lawyer acted has not served a notice under Rule 15.04, any other party may serve a document on the party by mailing a copy to the party at the party's last known address, or may move for directions.

The Little Poultry Company Inc. v. Kris Taylor, 2023 PESC 31

Where the plaintiff moved under Rule 15.02(b) to proceed without legal representation, the court allowed it, applying a non-exhaustive list of factors, and noting the jurisprudence in favour of granting such motions to companies which are, in essence, sole proprietorships.

Heijs v. Breuker, Dutch Trustee in Bankruptcy, 2018 PECA 12

A solicitor of record must remain the solicitor of record until either the client provides notice under Rule 15.03 or the solicitor obtains an order removing himself/herself as solicitor of record which can only be done upon serving a notice of motion on the client as provided in Rule 15.04.

Ayangma v. Charlottetown, 2017 PECA 15

Rule 15.01(c) is a *prima facie* bar to a non-lawyer representing a person in a proceeding. However, it does not oust the inherent jurisdiction of the court to allow a non-lawyer to represent a person where it is necessary in the interests of justice.

Marques v. Bambrick, 2018 PECA 4

The rule is a *prima facie* bar to representation in court by a non-lawyer. A court will exercise its jurisdiction to allow a non-lawyer to appear sparingly and with caution.

SERVICE**RULE 16****SERVICE OF DOCUMENTS****GENERAL RULES FOR MANNER OF SERVICE****Originating Process**

- 16.01** (1) An originating process shall be served personally as provided in Rule 16.02 or, except in the case of a divorce petition, by an alternative to personal service as provided in Rule 16.03.
- (2) A party who has not been served with the originating process but delivers a defence, notice of intent to defend or notice of appearance shall be deemed to have been served with the originating process as of the date of delivery.

All Other Documents

- (3) No other document need be served personally, or by an alternative to personal service, unless these rules or an order require personal service or an alternative to personal service.
- (4) Any document that is not required to be served personally or by an alternative to personal service,
- (a) shall be served on a party who has a lawyer of record by serving the lawyer, and service may be made in a manner provided in Rule 16.05;
 - (b) may be served on a party acting in person or on a person who is not a party,
 - (i) by mailing a copy of the document to the last address for service provided by the party or other person or, if no such address has been provided, to the party's or person's last known address, or
 - (ii) by personal service or by an alternative to personal service; or
 - (c) may be served on a party who has a lawyer of record, or a party acting in person, by serving a copy of the document to the party's designated address for service as set out in Rule 16.05.1.

PERSONAL SERVICE

- 16.02** (1) Where a document is to be served personally, the service shall be made,
- Individual**
- (a) on an individual, other than a person under disability, by leaving a copy of the document with the individual;

Municipality

- (b) on a municipal corporation, by leaving a copy of the document with the chair or mayor of the municipality, with the administrator or chief administrative officer of the municipality or with a lawyer for the municipality;

Corporation

- (c) on any other corporation, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business;

Board or Commission

- (d) on a board or commission, by leaving a copy of the document with a member or officer of the board or commission;

Person Outside Prince Edward Island**Carrying on Business in Prince Edward Island**

- (e) on a person outside Prince Edward Island who carries on business in Prince Edward Island, by leaving a copy of the document with anyone carrying on business in Prince Edward Island for the person;

Crown in Right of Canada

- (f) on His Majesty the King in right of Canada, in accordance with subsection 23(2) of the *Crown Liability and Proceedings Act* (Canada);

Crown in Right of Prince Edward Island

- (g) on the Government of Prince Edward Island, in accordance with section 10 of the *Crown Proceedings Act*;

Attorney General

- (h) on the Attorney General of Prince Edward Island, in the same manner as service is effected upon the Crown in right of Prince Edward Island;

Absentee

- (i) on an absentee, by leaving a copy of the document with the absentee's trustee, if one has been appointed or, if not, with the Public Guardian and Trustee;

Minor

- (j) on a minor, by leaving a copy of the document with the minor if over the age of 12 years, and, where the minor resides with a parent or other person having decision-making responsibility in respect of the minor, by leaving another copy of the document with the parent or other person, but where the proceeding is in respect of the minor's interest in an estate or trust, the minor shall be served by leaving

with the Public Guardian and Trustee a copy of the document bearing the name and current address of the minor;

Declared or Determined to Lack Capacity

- (k) on a person declared or determined to lack capacity to manage their financial matters and/or personal matters,
 - (i) by leaving a copy of the documents with the litigation guardian;
 - (ii) by leaving a copy of the document with the guardian and/or trustee, as applicable, of the person where the person lacks capacity pursuant to the *Adult Guardianship and Trusteeship Act*, or previous applicable legislation;
 - (iii) by leaving a copy of the document with the attorney of the person where the person has been determined to lack capacity to manage their financial matters and/or personal matters and has a duly appointed power of attorney; or
 - (iv) if there is no personal representative existing under clause (k)(i) to (iii), then service shall be in accordance with clause (l);

Not Declared or Determined to Lack Capacity

- (l) on a person who is under disability, but has not been so declared or determined:
 - (i) by leaving a copy of the document with the Public Guardian and Trustee, which bears the name and current address of the person, where the proceeding relates to the financial matters and/or personal matters of the person; and
 - (ii) by leaving a copy of the document with the person, except where the person is,
 - (A) a patient or out-patient of a psychiatric facility under the *Mental Health Act*, or
 - (B) a resident of a community care facility or a nursing home under the *Community Care Facilities and Nursing Homes Act*, or
 - (C) a resident of a home for special care under the regulations of the *Social Assistance Act*,

and the attending physician is of the opinion that leaving a copy with the person would be likely to cause that person serious harm;

Partnership

- (m) on a partnership, by leaving a copy of the document with any one or more of the partners or with a person at the principal place of

business of the partnership who appears to be in control or management of the place of business; and

Sole Proprietorship

- (n) on a sole proprietorship, by leaving a copy of the document with the sole proprietor or with a person at the principal place of business of the sole proprietorship who appears to be in control or management of the place of business.
- (2) A person effecting personal service of a document need not produce the original document or have it in his or her possession.

ALTERNATIVES TO PERSONAL SERVICE

Where Available

- 16.03** (1) Where these rules or an order of the court permit service by an alternative to personal service, service shall be made in accordance with this rule.

Acceptance of Service by Lawyer

- (2) Service on a party who has a lawyer may be made by leaving a copy of the document with the lawyer or an employee in the lawyer's office, but service under this subrule is effective only if the lawyer endorses on the document or a copy of it an acceptance of service and the date of the acceptance.
- (3) By accepting service the lawyer shall be deemed to represent to the court that the lawyer has the authority of his or her client to accept service.

Service by Mail to Last Known Address

- (4) Service of a document may be made by sending a copy of the document together with an acknowledgment of receipt card (Form 16 A) by mail to the last known address of the person to be served, but service by mail under this subrule is effective,
 - (a) only if the acknowledgment of receipt card or a post office receipt bearing a signature that purports to be the signature of the person to be served is received by the sender; and
 - (b) on the date on which the sender first receives either receipt, signed as provided by clause (a).

Service at Place of Residence

- (5) Where an attempt is made to effect personal service at a person's place of residence and for any reason personal service cannot be effected, the document may be served by,
 - (a) leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; and
 - (b) on the same day or the following day mailing another copy of the

document to the person at the place of residence,
and service in this manner is effective on the fifth day after the document is mailed.

- (5.1) Where an attempt is made to effect personal service at a person's place of residence and for any reason personal service cannot be effected, the document may be served by serving it on anyone who is known to the server as a person who is an adult member of the same household and such service shall be made at the server's place of business.

Service on a Corporation

- (6) Where the head office, registered office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Prince Edward Island cannot be found at the last address recorded with the Department of Justice and Public Safety, service may be made on the corporation by mailing a copy of the document to the corporation or to the attorney for service in Prince Edward Island, as the case may be, at that address.

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where Order may be Made

- 16.04** (1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Effective Date of Service

- (2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.
- (3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules.

SERVICE ON LAWYER OF RECORD

- 16.05** (1) Service of a document on the lawyer of record of a party may be made,
- (a) by mailing a copy to the lawyer's office;
 - (b) by leaving a copy with a lawyer; or employee in the lawyer's office;
 - (c) by faxing a copy of the document in accordance with rule 16.06.1;
 - (d) by sending a copy to the lawyer's office by courier; or
 - (e) by emailing a copy to the lawyer's office in accordance with rule 16.06.2.
- (2) Service of a document by sending a copy by courier under clause 1(d) is

effective on the second day following the day the courier was given the document, unless that second day is a holiday, in which case service is effective on the next day that is not a holiday.

SERVICE TO DESIGNATED ADDRESS

- 16.05.1** (1) A party who commences or responds to an originating proceeding must designate addresses for service of documents by completing, serving and filing a designation of address for service (Form 16 A.1).
- (2) A designation of address for service shall contain a mailing address and an email address, unless the Registrar directs otherwise.
- (3) Repealed.
- (4) Unless a judge determines otherwise, a party that has not served and filed a designation of address for service shall not be entitled to:
- (a) commence a proceeding;
 - (b) respond to a proceeding;
 - (c) file any documents in relation to the proceeding; or
 - (d) receive any further notice in respect of the proceeding.
- (5) Subject to subrule (9), documents may be served on a party at any one of the addresses contained in a designation of address for service unless and until a party designates different addresses for service by serving and filing a subsequent designation of address for service.
- (6) A document served by mail to a party's designated address shall be served in accordance with Rule 16.06.
- (7) A document served by fax to a party's designated address shall be served in accordance with Rule 16.06.1.
- (8) A document served by email to a party's designated addresses shall be served in accordance with Rule 16.06.2.
- (9) The court may, on motion, make an order directing the specific manner in which service shall be effected, on such terms as are just.

SERVICE BY MAIL

Manner of Service

- 16.06** (1) Where a document is to be served by mail under these rules, a copy of the document shall be sent by regular letter mail or by registered mail to the designated address contained in the receiving party's designation of address for service.

Effective Date

- (2) Service of a document by mail, except under subrule 16.03(4), is effective on the fifth day after the document is mailed but the document may be filed with proof of service before service becomes effective.

SERVICE BY FAX**Manner of Service**

- 16.06.1** (1) Where a document is to be served by fax under these rules, a copy of the document shall be transmitted to the designated address contained in the receiving party's designation of address for service.
- (2) A document that is served by fax shall include a cover page indicating,
 - (a) the sender's name, address and telephone number;
 - (b) the name of the party or lawyer to be served;
 - (c) the date and time of transmission;
 - (d) the total number of pages transmitted, including the cover page;
 - (e) the fax number of the sender; and
 - (f) the name and telephone number of a person to contact in the event of transmission problems.

Effective Date

- (3) Where service is made by fax after court office hours as defined in Rule 3.04(2) and before midnight it shall be deemed to have been made on the following day.

Deemed Receipt

- (4) A document served by fax to a party's designated address is deemed to be received by the party, unless the party serving the document receives notice that the document does not reach the recipient.

Fax of Certain Documents

- (5) A document of fifty pages or more inclusive of the cover page and the back-sheet may be served by fax only between 4 p.m. and 8 a.m. the following day, unless the party to be served gives prior consent.

SERVICE BY EMAIL**Manner of Service**

- 16.06.2** (1) Where a document is to be served by email under these rules, a copy of the document, or a link to retrieve the document, shall be sent to the designated email address contained in the receiving party's designated address for service.
- (2) A document to be served by email under these rules must be in PDF format, or another format approved by the court via practice direction.
- (3) The email message to which a document to be served is attached shall include,
- (a) the sender's name, address, telephone number, and email address;
 - (b) the date and time of transmission; and
 - (c) the name and telephone number of a person to contact in the event of transmission problems.

Document Exchange Service

- (3.1) Service by email using a document exchange service is effective provided the receiving party's electronic security system does not prohibit the exchange of documents by the document exchange service used by the sender.

Effective Date

- (4) Where service is made by email after court office hours as defined in Rule 3.04(1) and before midnight it shall be deemed to have been made on the following day.

Deemed Receipt

- (5) A document served by email to a party's designated address(es) is deemed to be received by the party, unless the party serving the document receives notice that the document does not reach the recipient.

WHERE DOCUMENT DOES NOT REACH PERSON SERVED

- 16.07** Even though a person has been served with a document in accordance with these rules, the person may show on a motion to set aside the consequences of default, for an extension of time or in support of a request for an adjournment, that the document,
- (a) did not come to the person's notice; or
 - (b) came to the person's notice only at some time later than when it was served or is deemed to have been served.

VALIDATING SERVICE

- 16.08** Where a document has been served in a manner other than one authorized by

these rules or an order, the court may make an order validating the service where the court is satisfied that,

- (a) the document came to the notice of the person to be served; or
- (b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

PROOF OF SERVICE

Affidavit of Service

- 16.09** (1) Service of a document may be proved by an affidavit of the person who served it (Form 16 B).

Sheriff's Certificate

- (2) Personal service or service under subrule 16.03(5) (service at place of residence) of a document by a sheriff or sheriff's officer may be proved by a certificate of service (Form 16 C).

Lawyer's Admission or Acceptance

- (3) A lawyer's written admission or acceptance of service is sufficient proof of service and need not be verified by affidavit.

Proof of Service on Document

- (4) The affidavit or certificate of service may be printed on the backsheet or on a stamp or sticker affixed to the backsheet of the document served.
- (5) Service of document under clause 16.05.1 (service to designated address) may be proved by a certificate of service to designated address (Form 16 D).

SERVICE PURSUANT TO CONTRACT

- 16.10** Where the court has jurisdiction in a proceeding in respect of a contract, or a contract confers jurisdiction on the court, and in the contract the parties have agreed on,

- (a) a place of service;
- (b) a mode of service;
- (c) a person upon whom service may be effected,

service of an originating process in the proceeding may be made in accordance with the contract, and when so made the notice shall be deemed to have been personally served.

Bagnall's and Tersteeg v. AWARD and Ors., 2001 PESCTD 64

The plaintiffs commenced an action against the corporate defendant and a number of other defendants in their personal capacity. Before serving the originating notice on the individuals and without serving them with the notice of motion, the plaintiffs sought a declaration from the court with respect to the liability of the corporate defendant under a contract between it and the

plaintiffs. The court dismissed the motion because the individuals had not been served as required by Rules 16 and 37.

RULE 17**SERVICE OUTSIDE PRINCE EDWARD ISLAND****DEFINITION**

17.01 In Rules 17.02 to 17.06, "originating process" includes a counterclaim against only parties to the main action, and a crossclaim.

SERVICE OUTSIDE PRINCE EDWARD ISLAND WITHOUT LEAVE

17.02 A party to a proceeding may, without a court order, be served outside Prince Edward Island with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

Property in Prince Edward Island

- (a) in respect of real or personal property in Prince Edward Island;

Administration of Estates

- (b) in respect of the administration of the estate of a deceased person,
 - (i) in respect of real property in Prince Edward Island, or
 - (ii) in respect of personal property, where the deceased person, at the time of death, was resident in Prince Edward Island;

Interpretation of an Instrument

- (c) for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of,
 - (i) real or personal property in Prince Edward Island, or
 - (ii) the personal property of a deceased person who, at the time of death, was resident in Prince Edward Island;

Trustee Where Assets Include Property in Prince Edward Island

- (d) against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Prince Edward Island;

Mortgage on Property in Prince Edward Island

- (e) for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Prince Edward Island;

Contracts

- (f) in respect of a contract where,
 - (i) the contract was made in Prince Edward Island,

- (ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Prince Edward Island,
- (iii) the parties to the contract have agreed that the courts of Prince Edward Island are to have jurisdiction over legal proceedings in respect of the contract, or
- (iv) a breach of the contract has been committed in Prince Edward Island, even though the breach was preceded or accompanied by a breach outside Prince Edward Island that rendered impossible the performance of the part of the contract that ought to have been performed in Prince Edward Island,

Tort Committed in Prince Edward Island

- (g) in respect of a tort committed in Prince Edward Island;

Damage Sustained in Prince Edward Island

- (h) in respect of damage sustained in Prince Edward Island arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed;

Injunctions

- (i) for an injunction ordering a party to do, or refrain from doing, anything in Prince Edward Island or affecting real or personal property in Prince Edward Island;

Support

- (j) for support;

Custody or Access

- (k) for a parenting order or contact order in respect of a minor;

Invalidity of Marriage

- (l) to declare the invalidity of a marriage;

Judgment of a Court Outside Prince Edward Island

- (m) on a judgment of a court outside Prince Edward Island;

Authorized by Statute

- (n) authorized by statute to be made against a person outside Prince Edward Island by a proceeding commenced in Prince Edward Island;

Necessary or Proper Party

- (o) against a person outside Prince Edward Island who is a necessary or proper party to a proceeding properly brought against another person served in Prince Edward Island;

Person Resident or Carrying on Business in Prince Edward Island

- (p) against a person ordinarily resident or carrying on business in Prince Edward Island;

Counterclaim, Crossclaim or Third Party Claim

- (q) properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or

Taxes

- (r) made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or the municipality.

SERVICE OUTSIDE PRINCE EDWARD ISLAND WITH LEAVE

- 17.03** (1) In any case to which Rule 17.02 does not apply, the court may grant leave to serve an originating process or notice of a reference outside Prince Edward Island.
- (2) A motion for leave to serve a party outside Prince Edward Island may be made without notice, and shall be supported by an affidavit or other evidence showing in which place or country the person is or probably may be found, and the grounds on which the motion is made.

ADDITIONAL REQUIREMENTS FOR SERVICE OUTSIDE PRINCE EDWARD ISLAND

- 17.04** (1) An originating process served outside Prince Edward Island without leave shall disclose the facts and specifically refer to the provision of Rule 17.02 relied on in support of such service.
- (2) Where an originating process is served outside Prince Edward Island with leave of the court, the originating process shall be served together with the order granting leave and any affidavit or other evidence used to obtain the order.

MANNER OF SERVICE OUTSIDE PRINCE EDWARD ISLAND AND PROOF

- 17.05** (1) In this rule, "contracting state" means a contracting state under this Convention; and "Convention" means the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on November 15, 1965.

General Manner of Service

- (2) An originating process or other document to be served outside Prince Edward Island in a jurisdiction that is not a contracting state may be served in the manner provided by these rules for service in Prince Edward Island, or in the manner provided by the law of the jurisdiction where service is made, if service made in that manner could reasonably be expected to come to the notice of the person to be served.

Manner of Service in Convention States

- (3) An originating process or other document to be served outside Prince Edward Island in a contracting state shall be served:
 - (a) through the central authority in the contracting state; or
 - (b) in a manner that is permitted by the Convention and that would be permitted by these rules if the document were being served in Prince Edward Island.

Proof of Service

- (4) Service may be proved,
 - (a) in the manner provided by these rules for proof of service in Prince Edward Island;
 - (b) in the manner provided by the law of the jurisdiction where service is made; or
 - (c) in accordance with the Convention, if service is made in a contracting state (Forms 17 A to 17 C).

MOTION TO SET ASIDE SERVICE OUTSIDE PRINCE EDWARD ISLAND

- 17.06** (1) A party who has been served with an originating process outside Prince Edward Island may move, before delivering a defence, a notice of intent to defend or a notice of appearance,
- (a) for an order setting aside the service and any order that authorized the service; or
 - (b) for an order staying the proceeding.
- (2) The court may make an order under subrule (1) or such other order as is just where the court is satisfied that,
- (a) service outside Prince Edward Island is not authorized by these rules;
 - (b) an order granting leave to serve outside Prince Edward Island should be set aside; or
 - (c) Prince Edward Island is not a convenient forum for the hearing of the proceeding.
- (3) Where on a motion under subrule (1) the court concludes that service outside Prince Edward Island is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Prince Edward Island under Rule 17.03, the court may make an order validating the service.
- (4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party.

Dash 224, LLC v. Vector Aerospace Engine Services, 2016 PECA 4

A party does not take a step in a proceeding and does not thereby attorn to the jurisdiction by challenging the jurisdiction of the court.

An appearance under duress is not a voluntary appearance and does not constitute attornment to the jurisdiction.

HZPC Americas v. True North et al., 2006 PESCAD 02

The court was entitled to assume jurisdiction and because the respondents were unable to prove there was another more clearly convenient or appropriate forum than Prince Edward Island to adjudicate the two causes of action, the order of the motions judge staying the actions was set aside.

3315207 Canada Inc. v. Decoexsa Global Logistics Inc., (1999) 171 Nfld. & P.E.I.R. 63 (PEISCTD)

Plaintiff, a “Canadian Corporation” with its head office in Charlottetown, P.E.I., commenced an action against the defendant, a corporation doing business in the province of Quebec. The plaintiff claimed the balance owing under the terms of a contract it had made with the defendant. The plaintiff claimed the damages were sustained in Prince Edward Island thereby entitling the plaintiff to serve the defendant *ex juris* pursuant to Rule 17.02 (f)(i) and 17.02 (h). The defendant made a motion to stay the proceedings or in the alternative, for a declaration that Quebec was the most convenient forum for the hearing of the claim.

The Court found that because of the conflicting evidence as to where the contract was made, the plaintiff could not rely on Rule 17.02(f)(i). However, it could rely on Rule 17.02(h) as the damage it sustained was within P.E.I. although such damage may have arisen out of an alleged wrong committed elsewhere. The defendant’s motion was dismissed.

RULE 18**TIME FOR DELIVERY OF STATEMENT OF DEFENCE****TIME FOR DELIVERY OF STATEMENT OF DEFENCE**

18.01 Except as provided in Rule 18.02 or subrule 19.01(5) (late delivery of defence) or 27.04(2) (counterclaim against plaintiff and non party), a statement of defence (Form 18 A) shall be delivered,

- (a) within twenty days after service of the statement of claim, where the defendant is served in Prince Edward Island;
- (b) within forty days after service of the statement of claim, where the defendant is served elsewhere in Canada or in the United States of America; or
- (c) within sixty days after service of the statement of claim, where the defendant is served anywhere else.

NOTICE OF INTENT TO DEFEND

- 18.02** (1) A defendant who is served with a statement of claim and intends to defend the action may deliver a notice of intent to defend (Form 18 B) within the time prescribed for delivery of a statement of defence.
- (2) A defendant who delivers a notice of intent to defend within the prescribed time is entitled to ten days, in addition to the time prescribed by Rule 18.01, within which to deliver a statement of defence.
- (3) Subrules (1) and (2) apply, with necessary modifications, to
- (a) a defendant to a counterclaim who is not already a party to the main action and who has been served with a statement of defence and counterclaim; and
 - (b) a third party who has been served with a third party claim.

DISPOSITION WITHOUT TRIAL**RULE 19****DEFAULT PROCEEDINGS****NOTING DEFAULT****Where no Defence Delivered**

- 19.01** (1) Where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or of deemed service under subrule 16.01(2), require the registrar to note the defendant in default. (Form 19 A)

Where Defence Struck Out

- (2) Where the statement of defence of a defendant has been struck out,
- (a) without leave to deliver another; or
 - (b) with leave to deliver another, and the defendant has failed to deliver another within the time allowed,
- the plaintiff may, on filing a copy of the order striking out the statement of defence, require the registrar to note the defendant in default.

Noting of Default by Co-defendant

- (3) Where a plaintiff has failed to require the registrar to note a defendant in default, the court on motion of any other defendant who has delivered a statement of defence, on notice to the plaintiff, may order the registrar to note the other defendant in default.

Party under Disability

- (4) A party under disability may not be noted in default without leave of a judge obtained on motion under Rule 7.07.

Late Delivery of Defence

- (5) A defendant may deliver a statement of defence at any time before being noted in default under this rule.

CONSEQUENCES OF NOTING DEFAULT

- 19.02** (1) A defendant who has been noted in default,
- (a) is deemed to admit the truth of all allegations of fact made in the statement of claim; and
 - (b) shall not deliver a statement of defence or take any other step in the action, other than a motion to set aside the noting of default or any judgment obtained by reason of the default, except with leave of the court or the consent of the plaintiff.
- (2) Despite any other rule, where a defendant has been noted in default, any step in the action that requires the consent of a defendant may be taken

without the consent of the defendant in default.

- (3) Despite any other rule, a defendant who has been noted in default is not entitled to notice of any step in the action and need not be served with any document in the action, except where the court orders otherwise or where party requires the personal attendance of the defendant, and except as provided in,
 - (a) subrule 26.04(3) (amended pleading);
 - (b) subrule 27.04(3) (counterclaim);
 - (c) subrule 28.04(2) (crossclaim);
 - (d) subrule 29.11(2) (fourth or subsequent party claim);
 - (e) subrule 54.08(1) (motion for confirmation of report on reference);
 - (f) subrule 54.09(1) (report on reference);
 - (g) subrule 54.09(3) (motion to oppose confirmation of report on reference);
 - (h) subrule 55.02(2) (notice of hearing for directions on reference);
 - (i) clause 64.03(8)(a) (notice of taking of account in foreclosure action);
 - (j) subrule 64.03(24) (notice of reference in action converted from foreclosure to sale);
 - (k) subrule 64.04(7) (notice of taking of account in sale action);
 - (l) subrule 64.06(8) (notice of reference in mortgage action);
 - (m) subrule 64.06(17) (report on reference in mortgage action);
 - (n) subrule 64.06(21) (notice of change of account);
 - (o) subrule 70.10(3) (counterpetition);
 - (p) subrule 70.16(5) (notice of Director of Child Protection's intention to investigate and report); and
 - (q) subrule 70.16(9) (Director of Child Protection's report).

SETTING ASIDE THE NOTING OF DEFAULT

- 19.03** (1) The noting of default may be set aside by the court on such terms as are just.
- (2) Where a defendant delivers a statement of defence with the consent of the plaintiff under clause 19.02(1)(b), the noting of default against the defendant shall be deemed to have been set aside.

BY SIGNING DEFAULT JUDGMENT

Where Available

- 19.04** (1) Where a defendant has been noted in default, the plaintiff may require the

Registrar to sign judgment against the defendant in respect of a claim for,

- (a) a debt or liquidated demand in money, including interest if claimed in the statement of claim (Form 19 B);
- (b) the recovery of possession of land (Form 19 C);
- (c) the recovery of personal property (Form 19 D); or
- (d) foreclosure, sale or redemption of a mortgage (Forms 64 B to 64 D, 64 G to 64 K and 64 M).

Requisition for Default Judgment

- (2) Before the signing of default judgment, the plaintiff shall file with the Registrar a requisition for default judgment (Form 19E),
 - (a) stating that the claim comes within the class of cases for which default judgment may properly be signed;
 - (b) stating whether there has been any partial payment of the claim and setting out the date and amount of any partial payment;
 - (c) where the plaintiff has claimed prejudgment interest in the statement of claim, setting out how the interest is calculated;
 - (d) where the plaintiff has claimed postjudgment interest in the statement of claim at a rate other than as provided in section 58 of the *Judicature Act*, setting out the rate; and
 - (e) stating whether the plaintiff wishes costs to be fixed by the Prothonotary or assessed.

Registrar may Decline to Sign Default Judgment

- (3) The Registrar may decline to sign default judgments if uncertain,
 - (a) whether the claim comes within the class of cases for which default judgment may properly be signed; or
 - (b) of the amount or rate that is properly recoverable for prejudgment or postjudgment interest.
- (3.1) If the Registrar declines to sign default judgment, the plaintiff may,
 - (a) move before a judge for judgment under Rule 19.05; or
 - (b) in the case of a claim referred to in subrule (1), make a motion to the court for default judgment.

Where Claim Partially Satisfied

- (4) Where the claim has been partially satisfied, the default judgment shall be confined to the remainder of the claim.

Postjudgment Interest

- (5) Revoked 1991.

Costs

- (6) On signing a default judgment, the Registrar shall fix the costs under Rule 57 Tariff to which the plaintiff is entitled against the defendant in default and shall include the costs in the judgment unless,
 - (a) the judgment directs a reference; or
 - (b) the plaintiff states in the requisition that he or she wishes to have the costs assessed,in which case the judgment shall include costs to be determined on the reference or on assessment.

BY MOTION FOR JUDGMENT

- 19.05** (1) Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed.
- (2) A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages, a divorce or a declaration of the invalidity of a marriage.
- (3) On a motion for judgment under subrule (1), the judge may grant judgment, dismiss the action or order that the action proceed to trial and that oral evidence be presented.
- (4) Where an action proceeds to trial, a motion for judgment on the statement of claim against a defendant noted in default may be made at the trial.

FACTS MUST ENTITLE PLAINTIFF TO JUDGMENT

- 19.06** A plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

EFFECT OF DEFAULT JUDGMENT

- 19.07** A judgment obtained against a defendant who has been noted in default does not prevent the plaintiff from proceeding against the same defendant for any other relief.

SETTING ASIDE DEFAULT JUDGMENT

- 19.08** (1) A judgment against a defendant who has been noted in default that is signed by the Registrar or granted by the court on motion under Rule 19.04 may be set aside or varied by the court on such terms as are just.
- (2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just.
- (3) On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under Rule 19.03.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

19.09 Rules 19.01 to 19.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims, subject to Rules 28.07 (default of defence to crossclaim) and 29.07 (default of defence to third party claim).

Vos and Meban v. Connick, 2024 PESC 49

In a motion to set aside a default judgment, the court must consider the particular circumstances of each case to decide whether or not it would be just to set it aside. Here, the court found that it would be.

Ayangma v. Amfoubalela, 2022 PECA 11

The first issue in a motion to set aside default judgment is proof of service by the plaintiff. Here, where the process server did not indicate how they were able to identify the defendant, service was defective. Where service is not defective, the defendant must also show that the motion to set aside was made as soon as possible after they became aware of the judgment, there is a plausible explanation for the default, and the defendant's case is arguable on its merits. The motions judge should lean in favour of setting aside, and the Court of Appeal will intervene only where the motions judge is "clearly wrong". A litigant who argues that a matter should not be heard on its merits because of a minor legal technicality should expect skepticism from the court.

Chauhan v. Canadian National Producers Inc., Jatana and Grewal, 2022 PESC 21

The court refused a motion to set aside a default judgment where the defendant had taken a "strategic and calculated risk" in not preventing default judgment.

Heath v. Mercantile Finance Services Ltd., 2022 PESC 27

The court granted the defendant's motion for summary judgment as the claim was barred by a limitation period.

Ayangma v. FLSB & ELSB, 2017 PECA 25

Filing a note of default without notice, with the knowledge that the opposing party disputes the action and has a live motion before the courts to strike the statement of claim constitutes sharp practice that cannot be condoned.

100578 P.E.I. Inc. v. Label, 2008 PESCTD 15

The note of default and the default judgment entered against the defendant was set aside. The motion had been brought as soon as possible after the defendant became aware of the existence of the judgment; inadvertence was accepted as a reasonable excuse for not entering a statement of defence, and the defendant had an arguable case. On a substantial indemnity basis, the plaintiff was awarded costs of the noting in default, the default judgment, and the motion.

Jorand Holdings & Ors. v. Pecoskie & Ors., 2007 PESCTD 17

The court granted a motion by one of the defendants to have the default judgment entered against him set aside. In seeking such relief, it is not necessary for the applicant to establish all three elements of the test for granting relief.

Dockendorff v. Bank of Montreal, 2003 PESCTD 19

The court allowed the defendant's motion to set aside a default judgment. The court found the motion had been made as soon as possible after the defendant became aware of the judgment; the defendant had a plausible explanation for the default; and the defendant had an arguable defence on the merits. The court held that the guiding principle in motions under this Rule is to lean in favor of an affirmative answer to the questions which comprise the test because a party should not suffer judgment without a full hearing on the merits.

Roberts v. S-G Transport Ltd. (1998), 160 Nfld. & P.E.I.R. 128 (P.E.I.S.C.-T.D.)

The defendant had been noted in default on a number of actions commenced by the plaintiff in the Small Claims Division and it applied to set the various notices aside. The court reconsidered the test applied in *Campbell v. Allen* (1992), 97 Nfld. & P.E.I.R. 191 (P.E.I.S.C.-T.D.), and concluded that to set aside a notice in default the defendant was not required to show a valid defence on the merits; however, the defendant must establish: (1) a continued intention to defend; (2) no great delay; and (3) that the failure to defend was due to inadvertence. The test for setting aside a default judgment is more onerous than the test for setting aside a notice in default.

Bank of Nova Scotia v. MacKinnon (1996), 146 Nfld. & P.E.I.R. 53 (P.E.I.S.C.-A.D.)

The test in this province for setting aside a default judgment on the ground the defendant has a defence to the claim of the plaintiff is not the same as the test for entering summary judgment against a defendant pursuant to Rule 20. The test is whether the defendant can show an arguable case on the merits.

Huynh v. Mills, [1994] 1 P.E.I.R. 334 (P.E.I.S.C.-T.D.)

Although a defendant, upon being noted in default, is deemed to have admitted the truth of the allegations made in the statement of claim, a plaintiff is not automatically entitled to a default judgment in the amount of the claim unless the facts entitle the plaintiff to judgment. Rule 19.06 contemplates that additional affidavit or oral evidence may be presented on a motion for judgment after default.

Campbell v. Allen (1992), 97 Nfld. & P.E.I.R. 191 (P.E.I.S.C.-T.D.)

The defendant had been noted in default but default judgment had not been entered. The Court applied the same test for setting aside a default judgment. The Court was satisfied as follows: (1) the defendant moved quickly to set aside the notice; (2) the defendant had an explanation for the default; and (3) the defendant had a good defence, on the merits, to the claim.

Irving Oil Ltd. v. Nichols and Jars Distributors Ltd. (1992), 101 Nfld. & P.E.I.R. 249 (P.E.I.S.C.-T.D.)

Prothonotary has jurisdiction to sign judgment against a defendant but a Registrar does not.

Huynh v. Mills (1991), 96 Nfld. & P.E.I.R. 295 (P.E.I.S.C.-T.D.)

The Court found that while the defendant did not have a satisfactory explanation for his failure to file a statement of defence and while the defendant failed to show he had a good defence on the merits, Rule 19.05(1) clearly envisaged that a motion for default judgment is to be made to a judge and not the Prothonotary as an uncontested matter under Rule 37.02(2). As the default judgment had been entered against the defendant by order of the Prothonotary, it was set aside

and it was ordered that the motion for default judgment be brought before a judge.

P.D. Construction Ltd. v. Bearsto (J.R.) Sales (1978) Ltd. (1992), 100 Nfld. & P.E.I.R. 266 (P.E.I.S.C.-T.D.)

There are three requirements that an applicant must meet before a judgment against him should be set aside; (1) the motion to set aside the judgment should be made as soon as possible after the applicant becomes aware of the existence of the judgment; (2) the applicant's affidavit should set out the circumstances under which the default arose and give a plausible explanation for the default; (3) the applicant must have at least an arguable case to present on the merits. Mere delay will not bar the application unless an irreparable injury will be done to the plaintiff or the delay has been wilful. The application should be supported by an affidavit setting out the circumstances under which the default arose and disclosing a defence on the merits.

RULE 20**SUMMARY JUDGMENT****WHERE AVAILABLE****To Plaintiff**

- 20.01** (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.
- (2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

To Defendant

- (3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

EVIDENCE ON MOTION

- 20.02** (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.
- (2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

FACTUMS AND PRE-MOTION CONFERENCE REQUIRED

- 20.03** (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.
- (2) The moving party's factum shall be filed with proof of service in the court office where the motion is to be heard at least ten days before the hearing.
- (3) The responding party's factum shall be filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.
- (4) Prior to the motion being set down for hearing by the trial co-ordinator, the parties shall have a conference call or meeting with a judge, who could be the motions judge, to determine the amount of time needed for the

motion and determine any additional steps either party needs to take before the motion is heard.

- (5) The judge may make such order as may be necessary to ensure a timely and just procedure and hearing of the motion.

DISPOSITION OF MOTION

General

- 20.04** (1) The court shall grant summary judgment if,
- (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
 - (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Only Genuine Issue is Amount

- (2) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

Only Genuine Issue is Question of Law

- (3) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly.

Only Claim is for an Accounting

- (4) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

Powers of Court

- (5) In determining under clause 20.04(1) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
- (a) weighing the evidence;
 - (b) evaluating the credibility of a deponent;
 - (c) drawing any reasonable inference from the evidence.

Oral Evidence

- (6) A judge may, for the purposes of exercising any of the powers set out in

subrule (5), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

WHERE A TRIAL IS NECESSARY

Powers of Court

- 20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

Directions and Terms

- (2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,
- (a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;
 - (b) that any motions be brought within a specified time;
 - (c) that a statement setting out what material facts are not in dispute be filed within a specified time;
 - (d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them.
 - (e) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;
 - (f) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;
 - (g) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;
 - (h) that any oral examination of a witness at trial be subject to a time limit;
 - (i) that the evidence of a witness be given in whole or in part by affidavit;
 - (j) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of

agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

- (i) there is a reasonable prospect for agreement on some or all of the issues, or
- (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;
- (k) that each of the parties deliver a concise summary of his or her opening statement;
- (l) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;
- (m) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the Chief Justice of the Supreme Court;
- (n) for payment into court of all or part of the claim; and
- (o) for security for costs.

Specified Facts

- (3) At the trial, any facts specified under subrule (1) or clause (2)(c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

Order re Affidavit Evidence

- (4) In deciding whether to make an order under clause (2)(i), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

Order re Experts' Costs

- (5) If an order is made under clause (2)(j), each party shall bear his or her own costs.

Failure to Comply with Order

- (6) Where a party fails to comply with an order under clause (2)(n) for payment into court or under clause (2)(o) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.
- (7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

Costs Sanctions for Improper Use of Rule

- 20.06** The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if
- (a) the party acted unreasonably by making or responding to the motion; or
 - (b) the party acted in bad faith for the purpose of delay.

EFFECT OF SUMMARY JUDGMENT

- 20.07** A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

STAY OF EXECUTION

- 20.08** Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

- 20.09** Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Outhouse v. Shirley's Place Take-Out & Shirley Mallard, 2025 PESC 31

In motions for summary judgment on the issue of liability, the court found that the defendants owed the plaintiff a duty of care under the *Occupier's Liability Act* and that there was no genuine issue requiring a trial in relation to the liability for the plaintiff's injuries. The plaintiff's motion for summary judgment was granted.

The Little Poultry Company and Pitre v. Intact Insurance Company, 2025 PESC 18

The moving party provided insurance coverage for a commercial building but not for the individual tenants. The respondents, who were tenants in the building, alleged various torts against the moving party. The court found that there was no duty of care owed in the circumstances, and if there was, the moving party had not breached it. The court granted summary judgment.

Clark v. 100265 P.E.I. Inc., 2023 PESC 10

The court dismissed the summary judgment motions where the Defendant failed to establish that there was no genuine issue requiring a trial in respect of the applicable standard of care under the *Occupiers Liability Act*.

Madden v. Project Gabriel Inc. and Haan, 2022 PESC 39

Where the real disputes on the motion related to the legal interpretation to be placed on events, and not the material facts, the court found in favour of the plaintiff's motion for summary judgment.

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.

Stevens v. Oyster Bed, 2022 PESC 25, affirmed *Stevens v. Oyster Bed*, 2023 PECA 7

In a defendant's motion for summary judgment, the court concluded that neither the waiver and release documents signed by the deceased, nor the *volenti* defence, barred the claim of the deceased's dependents under the *Fatal Accidents Act*.

Heath v. Mercantile Finance Services Ltd., 2022 PESC 27

The court granted the defendant's motion for summary judgment as the claim was barred by a limitation period.

Bradley v. Bradley, Holmes & MacKay, 2021 PECA 8

The Defendants' contention that the action was statute-barred as against them, was determined by the court of appeal to be a genuine issue for trial, as the applicable limitation period was dependent on questions of fact regarding a lease, to be determined by the trial judge.

Bradley v. Bradley, Holmes & MacKay, 2020 PESC 1

Two of the defendants made a motion for partial summary judgment dismissing the plaintiff's claims against them, but not as against the remaining defendants. The court granted the motion after finding that even taking the allegations in the plaintiff's claims as being true, by virtue of the applicable limitation period, the plaintiff's claim was filed out of time and there was, therefore, no genuine issue of fact or law requiring a trial.

CMT et al v. Gov't of P.E.I. et al, 2020 PECA 12

The Court of Appeal confirmed the motions judge's findings regarding the claims of misfeasance in public office and spoliation of evidence. The Court agreed there was no genuine issue requiring a trial and there was an absence of evidence to prove the requisite elements of these claims.

Regarding the breach of contract claim, the Court of Appeal allowed the appeal finding material questions of fact remain that amount to a genuine issue requiring a trial. The Court found the determination that there was no genuine issue requiring a trial is dependent on an exercise in contractual interpretation that was not performed and the exercise as performed employed an inapplicable rule of contraction. The Court stated that contractual interpretation involves consideration of the factual matrix and since that consideration did not occur, material questions of fact comprising a genuine issue requiring a trial remain.

McNally v. Health PEI, 2018 PECA 14

The order for summary judgment dismissing the plaintiff's action against the defendant physicians as barred by the applicable limitation period was set aside. The limitation period commenced when the plaintiff became aware that he had suffered damage which was caused by the physician defendants' breach.

Fraser v. Runighan, 2018 PESC 26

The court allowed a motion by the plaintiff for summary judgment on the liability issue, as it was able to make a fair and just determination without requiring a trial. Rule The defendants were found wholly liable.

Carrington v. MacLeod, 2019 PECA 24

A motion for summary judgment shall be made in Form 37 A unless the nature of the motion or the circumstances make a notice of motion unnecessary. In this case the motions judge did not make an error of law. In his view the issues needed to be decided at trial. Even though there was no formal motion, he decided the issue posed by the plaintiff.

Marques v. National Bank of Canada, 2019 PECA 8

The Court of Appeal confirmed the motion judge's finding which granted the Bank summary judgment. The Court agreed, on the evidence, there was no material fact in issue that would create a genuine issue for trial.

Mallett v. Richard, et ors, 2018 PESC 50

After a review of the law on summary judgment since *Hryniak v. Mauldin*, 2014 SCC 7, and the law regarding occupiers liability, the court found there was no genuine issue requiring a trial and dismissed the claim as against the moving parties' defendants.

Havenlee Farms Inc. v. HZPC Americas, 2017 PECA 20

The Court acknowledged that the newly added powers on summary judgment permit a motions judge to weigh the evidence, evaluate credibility of deponents and draw reasonable inferences from the evidence. However, the Court found in the course of determining that there is no genuine issue requiring a trial, a legal error occurred in the application of the principles of contractual interpretation in which material terms of the contract made between the parties were not considered, and an order for summary judgment was not made on a proper foundation and cannot stand.

McQuaid v. Govt. of PEI et al., 2017 PECA 21

The moving party bears the onus of establishing on an evidentiary basis there is no genuine issue requiring a trial.

The respondent physicians did not adduce expert evidence to show they satisfied the applicable standard of care and therefore the second part of the test requiring the responding party to establish there is evidence which offers a real chance of success to the responding party based on the pleadings did not arise.

The respondent physicians cross-appealed on the limitation period. The respondent physicians adduced evidence to show that for several of the defendant physicians the statement of claim was filed outside the limitation period. The appellant adducing no evidence to meet her evidentiary burden, the cross-appeal was allowed.

Royal Bank of Canada v. Trainor, 2017 PESC 13

The Court granted judgment in favour of the Bank finding there was no genuine issue requiring a trial.

MacInnis v. Rayner & Raylink, 2016 PESC 40

The court confirmed that the caselaw continues to support a two part test (*MacPherson v. Ellis*, 2005 PECA 10) to determine whether there is a genuine issue for trial. However, the court directed the amended rule 20.04(1)(a) requires the court to be satisfied there is no genuine issue “requiring” a trial. In determining whether there is a genuine issue requiring a trial the court must consider the evidence submitted by the parties. The evidence need not be equivalent to that which would be offered at trial but must be such that the judge is confident he or she can fairly resolve the dispute.

O’Halloran v. Watterson et.ors., 2015 PESC 3

In a personal injury claim, the defendant, Village of O’Leary, made a motion for summary judgment on the ground that there was no genuine issue for trial.

The Court refused to grant the motion finding that the statement of claim raises a genuine issue requiring a trial.

Johnston v. Stewart McKelvey Stirling Scales, 2014 PECA 8

The court confirmed the motions judge correctly interpreted and applied the principles relating to summary judgment. The judge was correct in finding the plaintiff’s statement of claim which alleged conspiracy, did not create any genuine issue requiring a trial.

Simpson v. Carewco et al., 2010 PESC 7

The motion judge granted the motions for summary judgment of the various defendants. The judge referred to the two-part test – the onus must be discharged of establishing there is no genuine issue for trial. Once discharged, the test requires the plaintiff to establish there is evidence which offers him a real chance of success.

The motions judge was of the view there were no genuine issues for trial and the plaintiff did not offer any evidence in support of his position and has no chance of success at trial.

Ayangma v. French School Board and Ano., 2006 PESCTD 37; (2006), 259 Nfld. & P.E.I.R. 354

A motion for summary judgment is not to be heard in stages but is to be considered as a whole after both parties have filed their evidence with respect to the motion. It is not proper to split a motion for summary judgment requiring the respondent to only file evidence if and when the mover meets the burden of establishing a basic case.

Metro Credit Union Ltd. v. McInnis, 2005 PESCTD 39

The court granted partial summary judgment; granted a stay on the execution of that judgment

pursuant to Rule 20.08 pending resolution of the remainder of the claims and, pursuant to Rule 20.05(2), the court made some material factual findings regarding part of the claim.

MacPherson v. Ellis, 2005 PESCAD 10

Pursuant to Rule 20.04 the onus is on the moving party to establish there is no genuine issue for trial. Once this onus has been discharged, the responding party has the evidentiary burden of showing there is a real chance of success on the pleading it has filed.

Gallant v. Piccott, 2000 PESCAD 17

A statutory onus provision - s.287 of *Highway Traffic Act*, R.S.P.E.I. 1988 Cap. H-5 - created a genuine issue for trial which, in the circumstances of this case, could only be resolved by a trial.

Canfield et al. v. P.E.I (1996), 144 Nfld. & P.E.I.R. 165 (P.E.I.S.C.-T.D.)

Applicant seeking order for summary judgment. Mechanism to resolve a proceeding when there is no genuine issue for trial. Party making motion must satisfy the court of this.

Simmonds v. Murphy (1996), 137 Nfld. & P.E.I.R. 332 (P.E.I.S.C.-T.D.)

Application for summary judgment - Purpose of Rule 20 is to remove from the trial system all matters where there is no genuine issue to go to trial. On hearing a motion, the chambers judge is to take a hard look at the evidence that is brought forth on the motion. The onus of establishing there is no triable issue is on the moving party; however, a respondent cannot sit back. If the respondent wishes to succeed it should put its best foot forward.

Read v. Read et al. (1995), 133 Nfld. & P.E.I.R. 166

Partial summary judgment can be obtained in a situation where the claims are separate and distinct. Summary judgment can also be obtained for part of a single claim where such part is severable and liability for the balance of the claim is not affected.

Westland Homes Ltd. et al. v. Schurman (M.F.) Ltd. (1993), 101 Nfld. & P.E.I.R. 122 (P.E.I.S.C.A.D.)

On hearing an application for summary judgment the chambers judge may assess the facts and the applicable law to determine if there is a genuine issue for trial.

Barclays Bank Agricultural Finance Corp. v. Miscouche Sales & Service Ltd. et al. (1992), 100 Nfld. & P.E.I.R. 129 (P.E.I.S.C.-T.D.)

The applicant must set out specific facts and cogent evidence organized to show that there is a genuine issue for trial.

RULE 21**DETERMINATION OF AN ISSUE BEFORE TRIAL****WHERE AVAILABLE****To any Party on a Question of Law**

- 21.01** (1) A party may move before a judge,
- (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
 - (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
- and the judge may make an order or grant judgment accordingly.
- (2) No evidence is admissible on a motion,
- (a) under clause (1)(a), except with leave of a judge or on consent of the parties;
 - (b) under clause (1)(b).

To Defendant

- (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

- (a) the court has no jurisdiction over the subject matter of the action;

Capacity

- (b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

- (c) another proceeding is pending in Prince Edward Island or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

- (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

MOTION TO BE MADE PROMPTLY

- 21.02** A motion under Rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs.

FACTUMS REQUIRED

- 21.03** (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.
- (2) The moving party's factum shall be served and filed with proof of service at least ten days before the hearing.
- (3) The responding party's factum shall be served and filed with proof of service at least four days before the hearing.

Hamza v. Holland College, 2026 PECA 7

On appeal of a decision to strike a claim under Rules 21.01(1)(b) for disclosing no reasonable cause of action and further under Rule 21.01(3)(d) as an abuse of process. The court of appeal struck the claim as an abuse of process.

Thomas v. Lennox Island Band Council, 2025 PESC 43

The defendant brought a motion to strike the statement of claim for not disclosing a reasonable cause of action. The statement of claim was struck in its entirety and the plaintiff was given six months to issue a new statement of claim that was compliant with the *Rules of Civil Procedure*.

Bernard v. Canada, 2024 PESC 57

The statement of claim was struck by the court pursuant to Rule 21.01(1)(b) as it did not plead sufficient facts and it was plain and obvious that it did not disclose a reasonable cause of action. The court granted the plaintiff leave to issue a new statement of claim, compliant with the *Rules of Civil Procedure*, within 30 days of the date of the decision.

Doucette v. Attorney General of Canada, 2023 PESC 51

The Court granted the defendant's motion pursuant to Rule 21.01(3)(a) to dismiss the plaintiff's action. The dispute was between an employee and employer, and the subject matter was governed by a comprehensive dispute resolution regime. The subject matter did not fall within one of the narrow exceptions where the court should become involved.

Lavern v. Norman Estate, 2019 PESC 47

The court granted the defendant's motion pursuant to Rule 21.01(3)(a) to dismiss the plaintiff's claim in its entirety due to a lack of jurisdiction. The plaintiff's residence in PEI was not enough to meet the real and substantial connection test. Forum of necessity test was also reviewed and the court declined to exercise jurisdiction on that basis.

Ayangma v. FLSB & ELSB, 2019 PECA 22

The Court of Appeal set aside the order striking out the plaintiff's statement of claim on the ground that it does not disclose a s.15(1) discrimination cause of action. The Court was of the view that an error occurred because the trial judge did not consider the plaintiff's claim that the School Board administration, by their actions, caused a Charter breach, and the law permits that

kind of claim even where breach of the law enabling their actions is not in issue. The trial judge proceeded on the narrow premise that the claim must identify a law that is breached, or link the facts pleaded to a law which denied the plaintiff equal protection or benefit. This was an error.

McMillan Point Homeowners Assn. v. Jay, 2019 PECA 18

The Court of Appeal determined that Rule 21.01(1)(a) was not available to the parties. The Court stated that the Rule is not available for determination of a fact-based question. The Rule permits a motion only on a question of law at the very preliminary stage of a proceeding and covers a very narrow scope.

The Rule asks whether (i) based entirely on the content of the pleading; (ii) there is a question of law that will dispose of the action or an issue therein. No evidence is considered on the motion, except on leave of the court or consent of the parties. Where a factual background is employed or needed to ensure that the question posed is answered correctly, Rule 21.01(1)(a) is not available and the question should not be determined.

Acadian Marine v. Highfield Construction & Parks Canada, 2019 PESC 3

The court dismissed an application by an owner to strike the claim of a subcontractor where the scope of the work required exceeded that which was described in the tender.

McKenna v. Stewart, 2018 PESC 46

The defendant sought a determination of whether the claim was statute barred by virtue of the *Highway Traffic Act*. The court considered whether an amended claim constituted a new action, and applied a functional approach and the special circumstances doctrine. The court concluded that the claim did not contain a new cause of action and was therefore not statute barred.

Ayangma v. Canada Health Infoway, 2017 PECA 13

The court found the determination of the applicable limitation period is such a question of law contained in Rule 21.01(1)(a). The limitation issue being determinative, the appeal was dismissed.

Martell v. AG of Canada & Ors., 2016 PECA 8

The Court of Appeal confirmed the finding of the motions judge that the court's jurisdiction was ousted in favour of the grievance procedure in the Collective Agreement and the dispute resolution process contained in the *Public Service Labour Relations Act*. The Court also found that those portions of the claim which were post-employment events should not have been struck as they are not matters arising in the course of employment which could have been resolved by the grievance procedure.

Donovan v. QCRS, 2016 PECA 1

In a motion to dismiss a claim pursuant to Rule 21.01(3)(a), the Court found that the Supreme Court should not have granted the defendant's motion to dismiss the claim. The Court found that the Court would have jurisdiction of a claim where it is made pursuant to the *Fatal Accidents Act*.

James Heath v. Mercantile Financial Service Ltd., 2015 PECA 11

On appeal, the Court upheld the trial judge's finding that it is plain and obvious that Heath's counterclaim discloses no reasonable cause of action and dismissed the appeal.

CMT et al. v. Gov't of PEI et al., 2016 PESC 4

The plaintiffs claimed against the defendants for \$25 million dollars for breach of contract and interference in economic relations. The Government and one defendant filed a motion to strike

numerous paragraphs of the claim and one defendant claimed to have it struck in its entirety.

The motions judge found the statement of claim should be struck in its entirety. He found the claim was a “*wholesale violation of the rules of pleadings*.” The claim could not be repaired by amendments or deletions. The claim constituted an abuse of the courts processes.

However, pursuant to Rule 25.11 the motions judge granted the plaintiffs the opportunity to start afresh and file a newly drafted statement of claim.

Shore & Johnson v. Province of PE et al, 2015 PESC 10

The Court struck the statement of claim as it failed to disclose a reasonable cause of action. The Court was of the view the claim contained assertions of irrelevant evidence and completely lacked any material facts.

The Court also stated that while the Court should not be a slave to form, the Rules have been established for good reason.

The Court also struck the claim in its entirety as it did not identify any possible claim and was incapable of being fixed by amendment. The Court considered the action to be frivolous, vexatious and an abuse of the processes of the court.

Mercantile Finance Service Ltd. v. James Heath, 2014 PESC 30

The Court granted Mercantile’s motion and struck the counterclaim of the Defendant stating it did not disclose any cause of action known to law.

Lanigan v. Eastern School District (c.o.b. Eastern School Board), 2013 PESC 12; 2014 PECA 3

The Eastern School Board made a motion to dismiss the plaintiff’s statement of claim pursuant to Rule 21.01(3)(a) on the ground the court did not have jurisdiction to adjudicate the action. While the motions judge found the jurisdiction of the Court was not ousted by the relevant statutory provisions, the motions judge ruled the Court should decline to exercise jurisdiction because of the grievance review process provided for in the applicable collective agreement.

On appeal in reasons found in *Lanigan v. Eastern School District (c.o.b. Eastern School Board)*, 2014 PECA 3, the court dismissed the appeal. The Court did find the motions judge erred in finding the court had concurrent jurisdiction in labour disputes between the courts and the grievance review board established under the collective agreement.

The Court of Appeal found the court had no jurisdiction to hear a dispute in which the essential character of the dispute arises out of the interpretation or administration of a collect agreement.

Visser Potato Ltd v. Canadian Food Inspection Agency, 2012 PESC 18

The plaintiffs commenced an action against the defendant, a federal government agency, alleging negligent misrepresentation. On a motion by the defendant, the court found the defendant did not owe the plaintiffs a duty of care and the plaintiffs’ statement of claim was struck.

Vail v. Workers Compensation Board of Prince Edward Island, 2011 PESC 6.

In considering whether a statement of claim discloses a reasonable cause of action, the court may answer a question of law and consider whether the question has been finally determined by a previous and binding decision. Also, where a claim asserts conclusions without a legal basis, it could be struck as being frivolous or vexatious. Confirmed on appeal. See: *Vail v. Prince Edward Island (Workers Compensation Board)*, 2012 PECA 18.

Kelly v. Canada (Attorney General), 2010 PECA 17

The determination of the applicable limitation period is a question of law that can be determined on a motion to strike a statement of claim as disclosing no reasonable cause of action.

McGowan v. Bank of Nova Scotia, 2010 PESC 17

On a motion for the determination of a question of law before trial, the statement of claim was struck out because it did not disclose a reasonable cause of action. The statement of claim disclosed a derivative action on behalf of shareholders, an action which, in this jurisdiction, is not founded in law. Affirmed on appeal: *McGowan v. Bank of Nova Scotia*, 2011 PECA 20; [2011] P.E.I.J. No. 35; (2011), 317 Nfld. & P.E.I.R. 62.

McQuaid v. A.G. (Canada) & Ors., 2009 PESC 40

The Court considered a motion to strike a statement of claim under Rule 21 and Rule 25. The motions judge explained the circumstances when each is applicable. The motion to strike the statement of claim pursuant to Rule 21 was denied. With respect to the motion to strike the statement of claim pursuant to Rule 25, the motions judge found deficiencies in the pleading. Instead of striking the statement of claim, he granted the plaintiff leave to amend.

Mullin v. PricewaterhouseCoopers, 2007 PESCTD 33; [2007] P.E.I.J. No. 47

The defendant made a motion for the determination of a question of law prior to trial. The court denied the motion because relevant facts were in dispute.

Kloosterman v. Grimme, 2005 PESCTD 46

The applicant applied pursuant to Rule 21.01(1)(a) to have a question of law determined by the court. The motion was denied. The court held that it was not the purpose of the rule to enable a party to obtain the opinion or a determination of the Court as to the validity of a contractual provision on submissions without evidence when there is a factual dispute.

M & M Amusement v. Govt. of P.E.I., 2005 PESCTD 50

A motion brought under Rule 21.01(1)(a) to determine a question of law should not be granted where the resolution of the issues between the parties depends on a finding of fact.

Ayangma v. Govt. of P.E.I. and Ors., 2005 PESCTD 25

A motion to strike a pleading under Rule 21.01(1)(b) as disclosing no reasonable cause of action, and a motion to strike a pleading under Rule 21.01(3)(d) or 25.11 as being vexatious, frivolous, an abuse of the process of the court or because it may prejudice or delay the fair trial of the action, requires different standards in the disposition because the consequences are different. On a motion under Rule 21.01(1)(b), some parts of the pleading may be struck while others are permitted to stand.

City of Charlottetown v. MacIssac, 2003 PESCTD 07

The court, on the motion of the defendant pursuant to Rule 74.01(4), agreed to apply Rule 21.01(b) to the proceeding commenced by the plaintiff in the Small Claims Section. The court went on to find that it was plain and obvious the statement of claim issued by the plaintiff disclosed no reasonable cause of action and accordingly, it was struck out pursuant to Rule 21.01(1)(b).

Gallant v. Workers' Comp. Bd.(PEI), 2002 PESCTD 71

The motion by the Board to dismiss the statement of claim because it disclosed no reasonable cause of action was granted. The motion by the Board to strike the statement of claim on the

ground the action was not commenced within the time prescribed by the *Statute of Limitations*, R.S.P.E.I. 1988 Cap. S-7, was denied. Where the application of the limitation period depends upon findings of fact for its resolution, a motion for its determination cannot be made under this Rule. Furthermore, the Board had the burden of establishing it was plain and obvious the plaintiff could not assert new facts, other than those disclosed in the pleading, that would preserve the action against an assertion that the limitation period had expired. The Court found the Board did not discharge this burden as there could be additional facts brought forward by the plaintiff to show the limitation period had not expired.

Polar Foods v. Jensen, 2002 PESCTD 63

The defendant's motion to stay the proceeding on the ground that the court did not have jurisdiction was dismissed. See: Annotation - Rule 46.02

Ayangma v. Wyatt, 2001 PESCTD 4

The plaintiff's statement of claim was struck out because it did not disclose a reasonable cause of action. The statements in the "fact" section of the statement of claim were not tied to the specific allegations previously made and the plaintiff had not set out the facts to support the requirements of the allegations of deceit, conspiracy, negligence, malice or the breach of s. 7 of the *Charter*.

Cameron v. Medical Society, 2002 PESCTD 31

The Court refused to answer a question of law because the full factual background necessary to address the question was not available at this stage of the proceeding. The court held that to answer a question of law posed as a stated case, it must be plain and obvious the issue of law raised by the question has been fully settled in our jurisprudence because a full factual background may be required to answer the question correctly. When the answer to a novel question of law will affect a professional association, the input of the affected profession is very important.

Rofe v. Kay Aviation b.v., 2001 PESCAD 7

The statement of claim was struck out because it did not disclose a reasonable cause of action or alternatively, because it was frivolous or vexatious or otherwise an abuse of the process of the court.

Aluma Systems v. Cherubini Metal Works, 2000 PESCAD 9

On appeal, the third party notice, which had been struck out by the motions judge, was reinstated. The third party notice was not an abuse of process as it did not raise issues which had been previously adjudicated in another action in another jurisdiction.

Ayangma v. The Government of Prince Edward Island & ors. (1998), 168 Nfld. & P.E.I.R. 1 (P.E.I.S.C.-T.D.)

The court considered the general principles applicable to an application to strike out a pleading pursuant to Rule 21.01(1)(b) as disclosing no reasonable cause of action. They are: (1) the pleading must disclose a cause of action in law; (2) the material facts as pleaded are to be taken as proved; (3) if the facts taken as proved disclose a cause of action with some chance of success, the action may proceed; and (4) the pleading in issue must be read as generously as possible.

Morgentaler v. P.E.I. (Minister of Health and Social Services) (1994), 117 Nfld. & P.E.I.R. 181 (P.E.I.S.C.-T.D.)

Motion brought to determine standing. The status of a person to maintain judicial proceedings to question legislation is a matter for the discretion of the court, and relative to the exercise of that discretion is the nature of the legislation under attack. The onus is on the applicant to establish standing. He needs to show: (1) that he is affected by the action or application directly or that he has a genuine interest in its validity; (2) that there is no other reasonable and effective manner by which the issue may be brought before the court; and (3) that there is a serious or justiciable issue.

RULE 22**SPECIAL CASE****WHERE AVAILABLE**

- 22.01** (1) Where the parties to a proceeding concur in stating a question of law in the form of a special case for the opinion of the court, any party may move before a judge to have the special case determined.
- (2) Where the judge is satisfied that the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, the judge may hear and determine the special case.

FACTA REQUIRED

- 22.02** (1) On a motion under Rule 22.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.
- (2) The moving party's factum shall be served and filed with proof of service at least ten days before the hearing.
- (3) The responding party's factum shall be served and filed with proof of service at least four days before the hearing.

REMOVAL INTO COURT OF APPEAL

- 22.03** (1) A motion under Rule 22.01 may be made to a judge of the Court of Appeal for leave to have a special case determined in the first instance by that court and the judge may grant leave where subrule 22.01(2) is satisfied and where the special case raises an issue in respect of which,
- (a) there are conflicting decisions of judges of the Supreme Court, and there is no decision of the Court of Appeal of this Province;
 - (b) there is a conflict between decisions of courts at the appellate level in Prince Edward Island and an appellate court of another province, or between decisions of appellate courts of two or more other provinces; or
 - (c) one of the parties seeks to establish that a decision at the appellate court level in Prince Edward Island should not be followed.
- (2) A judge who grants leave under subrule (1) may give directions in respect of the time and form in which the case is to be listed for hearing and the exchange and filing of factums, and subject to any such directions, Rule 61 (appeals to an appellate court) applies with necessary modifications.

FORM OF SPECIAL CASE

- 22.04** A special case (Form 22 A) shall,

- (a) set out concisely the material facts, as agreed on by the parties, that are necessary to enable the court to determine the question stated;
- (b) refer to and include a copy of any documents that are necessary to determine the question;
- (c) set out the relief sought, as agreed on by the parties, on the determination of the question of law; and
- (d) be signed by the lawyers for the parties.

HEARING OF SPECIAL CASE

- 22.05** (1) On the hearing of a special case the court may draw any reasonable inference from the facts agreed on by the parties and documents referred to in the special case.
- (2) On the determination of the question of law the court may make an order or grant judgment accordingly.

Field v. Aviva Insurance Company, 2024 PESC 8

The lawyers for both the plaintiff and the defendant agreed on the material facts. The court determined the legal issue, more particularly whether a worker who is injured in a motor vehicle accident, and starts a civil action to recover damages, is entitled to claim section B benefits under the standard automobile insurance policy. They are.

Cameron v. Economical Mutual, 2016 PESC 6

A joint motion filed pursuant to Rule 22 for a Special Case was presented to the Court. The parties submitted an Agreed Statement of Facts. The motions judge interpreted an exclusionary clause contained in a contract of insurance.

DesRoches v. Graham et al. (1995), 132 Nfld. & P.E.I.R. 142 (P.E.I.S.C.-T.D.)

The parties, in a joint submission, sought the court's opinion by way of a special case on the issue as to whether the insurer was obligated to pay the plaintiff's claim under a policy of insurance it had issued.

Redmond, Earl A. Inc. v. LaPierre (Blair) Inc. (1995), 127 Nfld. & P.E.I.R. 329 (P.E.I.S.C.-T.D.)

The plaintiff and the defendant presented a joint submission by way of a special case on the basis that its determination may dispose of all or a part of the proceeding. The question before the court was whether the defendant, a sub-contractor, was an unnamed insured in the Builders All Risk Policy taken out by the plaintiff, a general contractor, thereby preventing the insurer from bringing a subrogated action against the defendant.

MacCallum v. Charlottetown (City) (1995), 127 Nfld. & P.E.I.R. 300 (P.E.I.S.C.-A.D.)

The purpose of Rule 22 is to, where the parties agree and the judge deems appropriate, deal with certain questions of law which would either wholly or partially dispose of the action without the lengthy procedural complexities of a trial. The Court should insist upon compliance with the Rule before the special case is heard.

RULE 22.1**ADVANCE PAYMENTS IN TORT ACTIONS****ADVANCE PAYMENTS IN TORT ACTIONS**

- 22.1.01** (1) At any time before damages are assessed in an action claiming damages arising from a tort, a plaintiff may move with affidavit material or other evidence for an advance payment by the defendant to the plaintiff on all or part of the pecuniary damages suffered, incurred or to be incurred by the plaintiff as claimed in the action if,
- (a) the defendant against whom the order is sought has admitted liability for all or part of the plaintiff's damages, or
 - (b) the plaintiff has obtained summary judgment against the defendant establishing liability with the amount of damages to be assessed pursuant to Rule 20.04(2).
- (2) In response to the affidavit material or other evidence supporting an advance payment by the defendant to the plaintiff, the defendant may respond with affidavit material or other evidence disputing the pecuniary damages suffered, incurred or to be incurred by the plaintiff.

Determination of amount of advance payment

- (3) In determining the amount of an advance payment, the judge may take into account any circumstances that the judge considers relevant, including
- (a) the amount of special damages already incurred or likely to be incurred before damages are assessed;
 - (b) any counterclaim by the defendant;
 - (c) the extent, if any, to which the plaintiff may be found at trial to be contributory negligent;
 - (d) the extent, if any, to which the plaintiff may be found at trial not to have mitigated the amount of special damages; and
 - (e) the needs and resources of the plaintiff and the means of the defendant, including the availability to the defendant of insurance to indemnify the defendant in respect of the plaintiff's claim.

Payment

- (4) The judge may order that payment under Rule 22.1(1) may be made by lump sum, by installment, or in the case of ongoing expenses, as and when the expenses are incurred. The judge may order payments be made directly to third parties.

Advance payment not a full determination

- (5) An order for advance payment of pecuniary damages is not a final determination of the extent of the plaintiff's claim in respect of the type or types of pecuniary damages for which the advance payment was sought, but the receipt of the plaintiff of an advance payment shall be considered to be a release of the defendant to the extent of such payment.

Multiple applications

- (6) A plaintiff may make more than one application for an advance payment pursuant to this rule.

Rule not exhaustive

- (7) Nothing in this rule affects or precludes the right of a plaintiff to seek an advance payment of damages at common law.

Fraser v. Runighan, 2018 PESC 26

On a motion for advance payment (under the former Rules 20.10 to 20.12), the court applied a two-stage process. At step one, the plaintiff must establish it is more probable than not that the trial judge will award special damages of the type set out in the plaintiff's application. At step two, the appropriate amount of the advance payment is determined, taking into account any circumstance the motions judge considers relevant. Here, the court allowed payment for past loss of income, past costs of care and treatment, and past valuable services. The court did not allow for payment of disbursements, as these are not contemplated by the Rule.

RULE 23**DISCONTINUANCE AND WITHDRAWAL****DISCONTINUANCE BY PLAINTIFF**

- 23.01** (1) A plaintiff may discontinue all or part of an action against any defendant
- (a) before the close of pleadings, by serving on all parties who have been served with the statement of claim a notice of discontinuance (Form 23 A) and filing the notice with proof of service;
 - (b) after the close of pleadings, with leave of the court; or
 - (c) at any time, by filing the consent in writing of all parties.
- (2) If a party to an action is under disability, the action may be discontinued by or against the party only with leave of a judge obtained on motion under Rule 7.08(1).

EFFECT OF DISCONTINUANCE ON A COUNTERCLAIM

- 23.02** Where an action is discontinued against a defendant who has counterclaimed, the defendant may deliver within thirty days after the discontinuance a notice of election to proceed with the counterclaim (Form 23 B), and if the defendant fails to do so, the counterclaim shall be deemed to be discontinued without costs.

EFFECT OF DISCONTINUANCE ON CROSSCLAIM OR THIRD PARTY CLAIM

- 23.03** (1) Where an action is discontinued against a defendant who has crossclaimed or made a third party claim, the crossclaim or third party claim shall be deemed to be dismissed with costs thirty days after the discontinuance unless the court orders otherwise during the thirty-day period.
- (1.1) Where an action against a defendant whom a crossclaim has been made is discontinued, the crossclaim shall be deemed to be dismissed with costs thirty days after the discontinuance, unless the court orders otherwise during the thirty-day period.

EFFECT OF DEEMED DISMISSAL ON SUBSEQUENT ACTION

- (2) A deemed dismissal under this Rule is not a defence to a subsequent action unless the court orders otherwise during the thirty-day period.

EFFECT OF DISCONTINUANCE ON SUBSEQUENT ACTION

- 23.04** (1) The discontinuance of all or part of an action is not a defence to a subsequent action, unless the order giving leave to discontinue or a consent filed by the parties provides otherwise.
- (2) Where a plaintiff has discontinued and is liable for costs of an action, and another action involving the same subject matter is subsequently brought

between the same parties or their representatives or successors in interest before payment of the costs of the discontinued action, the court may order a stay of the subsequent action until the costs of the discontinued action have been paid.

COSTS OF DISCONTINUANCE AND DEEMED DISMISSAL

23.05 Unless the court orders otherwise, where a plaintiff discontinues an action against a defendant,

- (a) the defendant is entitled to the costs of the action; and
- (b) where the defendant has made a crossclaim or third party claim that is deemed to be dismissed under Rule 23.03, the defendant is entitled to recover from the plaintiff,
 - (i) the costs payable under Rule 23.03, and
 - (ii) the defendant's own costs of the crossclaim or third party claim.

WITHDRAWAL BY DEFENDANT

23.06 (1) A defendant may withdraw all or part of the statement of defence with respect to any plaintiff at any time by delivering to all parties a notice of withdrawal of defence (Form 23 C), but,

- (a) where the defendant has crossclaimed or made a third party claim, leave to withdraw must be obtained from the court; and
 - (b) where the defendant seeks to withdraw an admission in the statement of defence, Rule 51.05 (withdrawal of admission) applies.
- (2) Where a defendant withdraws the whole of the statement of defence, the defendant shall be deemed to be noted in default.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

23.07 Rules 23.01 to 23.06 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Clarey v. Gillis, et.al., 2022 PESC 18

The plaintiff sought leave to discontinue their action against 2 of 5 defendants; the 3 remaining defendants opposed. The court allowed the plaintiff's motion, after weighing and balancing various factors, including the progress of the action, prejudice to the plaintiff in denying leave, and to the 3 defendants in granting it.

MacCallum v. Jenkins (1992), 105 Nfld. & P.E.I.R. 35 (P.E.I.S.C.-A.D.)

The applicant commenced an action against two parties. She filed a notice of discontinuance with respect to the action against the first party, and she sought to settle the action against the other party. After the notice of discontinuance was filed, Jenkins sought costs from the applicant. She applied to set aside the notice of discontinuance on the grounds it was filed on the understanding costs would not be sought. The Court of Appeal held the Rule makes it very clear

that costs are payable on the filing of a notice of discontinuance unless otherwise ordered by the court. As the applicant had not applied for such an order, the notice remained in effect and she was responsible for the costs of the first party.

RULE 24**DISMISSAL OF ACTION FOR DELAY****WHERE AVAILABLE**

24.01 A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed,

- (a) to serve the statement of claim on all the defendants within the prescribed time;
- (b) to have noted in default any defendant who has failed to deliver a statement of defence, within thirty days after the default;
- (c) to set the action down for trial within six months after the close of pleadings;
- (d) to move for leave to restore to a trial list an action that has been struck off the trial list, within thirty days after the action was struck off.

NOTICE WHERE PLAINTIFF UNDER DISABILITY

24.02 Where the plaintiff is under disability, notice of a motion to dismiss the action for delay shall be served on,

- (a) the litigation guardian or trustee of the estate of the plaintiff; and
- (b) on the Official Guardian, unless
 - (i) the Public Guardian and Trustee is litigant guardian or trustee of the plaintiff, or
 - (ii) a judge orders otherwise.

NOTICE OF ORDER

24.02.1 If the defendant is successful on the motion to dismiss an action for delay, the defendant shall serve a copy of the order dismissing the action on every defendant to the action who has crossclaimed against them.

EFFECT OF DISMISSAL ON COUNTERCLAIM

24.03 Where an action against a defendant who has counterclaimed is dismissed for delay, the defendant may within thirty days after the dismissal deliver a notice of election to proceed with the counterclaim (Form 23 B), and if the defendant fails to do so, the counterclaim shall be deemed to be discontinued without costs.

EFFECT OF DISMISSAL ON CROSSCLAIM OR THIRD PARTY CLAIM

- 24.04** (1) Unless the court orders otherwise, where an action against a defendant who has crossclaimed or made a third party claim is dismissed for delay,
- (a) the crossclaim or third party claim shall be deemed to be dismissed with costs; and
 - (b) the defendant may recover those costs and his or her own costs of

the crossclaim or third party claim from the plaintiff.

EFFECT OF DEEMED DISMISSAL ON SUBSEQUENT ACTION

- (2) A deemed dismissal under this Rule is not a defence to a subsequent action unless the order dismissing the action provides otherwise.

EFFECT ON SUBSEQUENT ACTION

- 24.05** (1) The dismissal of an action for delay is not a defence to a subsequent action unless the order dismissing the action provides otherwise.
- (2) Where a plaintiff's action has been dismissed for delay with costs, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest before payment of the costs of the dismissed action, the court may order a stay of the subsequent action until the costs of the dismissed action have been paid.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

- 24.06** Rules 24.01 to 24.05 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Sanders v. Ratelle & Associates Ltd., 2025 PESC 5

The moving party filed a notice of motion asking for the proceeding to be dismissed under Rule 24.01(c). The motion was not held for 3.5 years. The court found the appropriate time measurement to consider, on these particular facts, was from the date of the statement of claim to the date the notice of motion was filed. The court also considered whether the remedy of dismissal had crystallized when the notice of motion was filed and what occurred in the proceeding between the filing of the notice of the motion and the hearing.

Elbaz v. Government of P.E.I., 2023 PESC 52

The defendants made a motion pursuant to Rule 24.01(c). The statement of claim was filed in 2005 and the motion for delay filed in 2022. The court dismissed the defendants' motion finding that while the delay was inordinate, it was not intentional by the plaintiffs, the plaintiffs were not wholly responsible for the delay, and the delay was not inexcusable.

Diversified Metal v. Trivett, 2014 PESC 25

The Court refused to dismiss the action for delay finding there was a plausible explanation for the delay, and there had not been prejudice to the defendant in the legal sense, such that a fair trial may not still be had.

Johnston v. Stewart McKelvey Stirling Scales, 2014 PECA 8

The Court of Appeal agreed with the trial judge's conclusion that the claim should be dismissed for delay. The Court confirmed the trial judge's finding to stay the action for abuse of the court's processes considering the length of time since the events which gave rise to the claim, the length of time since the action was commenced and the length of time since expiration of the limitation period.

Connick v. Ramsay, 2008 PESCTD 42

The defendants made a motion pursuant to Rule 24.01(c) for dismissal of the action because of delay. To establish that the action be dismissed because of delay the defendant had to show the delay was: (i) unreasonable in that it was inordinate and inexcusable; and (ii) there is a substantial risk a fair trial would not be possible, if the action is allowed to continue.

The motion was dismissed.

PLEADINGS**RULE 25****PLEADINGS IN AN ACTION****PLEADINGS REQUIRED OR PERMITTED****Action Commenced by Statement of Claim or Notice of Action**

- 25.01** (1) In an action commenced by statement of claim or notice of action, pleadings shall consist of the statement of claim (Form 14 A, 14 B or 14 D), statement of defence (Form 18 A) and reply (Form 25 A), if any.

Counterclaim

- (2) In a counterclaim pleadings shall consist of the counterclaim (Form 27 A or 27 B), defence to counterclaim (Form 27 C) and reply to defence to counterclaim (Form 27 D), if any.

Crossclaim

- (3) In a crossclaim, pleadings shall consist of the crossclaim (Form 28 A), defence to crossclaim (Form 28B) and reply to defence to crossclaim (Form 28 C), if any.

Third Party Claim

- (4) In a third party claim, pleadings shall consist of the third party claim (Form 29 A), third party defence (Form 29 B) and reply to third party defence (Form 29 C), if any.

Pleading Subsequent to Reply

- (5) No pleading subsequent to a reply shall be delivered without the consent in writing of the opposite party or leave of the court.

FORM OF PLEADINGS

- 25.02** Pleadings shall be divided into paragraphs numbered consecutively, and each allegation shall, so far as is practical, be contained in a separate paragraph.

SERVICE OF PLEADINGS**Who is to be Served**

- 25.03** (1) Every pleading shall be served,
- (a) initially on every opposite party and on every other party who has delivered a pleading or a notice of intention to defend in the main action or in a counterclaim, crossclaim or third or subsequent party claim in the main action; and
 - (b) subsequently on every other party forthwith after the party delivers a pleading or a notice of intention to defend in the

main action or in a counterclaim, crossclaim or third or subsequent party claim in the main action.

Service on Added Parties

- (2) Where a person is added as a party to an action, the party doing so shall serve on the added party all the pleadings previously delivered in the main action and in any counterclaim, crossclaim or third or subsequent party claim in the main action, unless the court orders otherwise.

Where Personal Service Not Required

- (3) Where a pleading is an originating process, personal service on parties other than an opposite party is not required.

TIME FOR DELIVERY OF PLEADINGS

Statement of Claim

- 25.04** (1) The time for service of a statement of claim is prescribed by Rule 14.08.

Statement of Defence

- (2) The time for delivery of a statement of defence is prescribed by Rule 18.01.

Reply

- (3) A reply, if any, shall be delivered within ten days after service of the statement of defence except where the defendant counterclaims, in which case a reply and defence to counterclaim, if any, shall be delivered within twenty days after service of the statement of defence and counterclaim.

In a Counterclaim

- (4) The time for delivery of pleadings in a counterclaim is prescribed by Rule 27.

In a Crossclaim

- (5) The time for delivery of pleadings in a crossclaim is prescribed by Rule 28.

In a Third Party Claim

- (6) The time for delivery of pleadings in a third party claim is prescribed by Rule 29.

CLOSE OF PLEADINGS

- 25.05** Pleadings in an action are closed when,

- (a) the plaintiff has delivered a reply to every defence in the action or the time for delivery of a reply has expired; and
- (b) every defendant who is in default in delivering a defence in the action has been noted in default.

RULES OF PLEADING - APPLICABLE TO ALL PLEADINGS**Material Facts**

- 25.06** (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

Pleading Law

- (2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

Condition Precedent

- (3) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and an opposite party who intends to contest the performance or occurrence of a condition precedent, shall specify in the opposite party's pleading the condition the condition and its non-performance or non-occurrence.

Inconsistent Pleading

- (4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.
- (5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading.

Notice

- (6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material.

Documents or Conversations

- (7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material.

Nature of Act or Condition of Mind

- (8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

Claim for Relief

- (9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

- (a) the amount claimed for each claimant in respect of each claim shall be stated; and
- (b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial.

RULES OF PLEADING - APPLICABLE TO DEFENCES

Admissions

- 25.07** (1) In a defence, a party shall admit every allegation of fact in the opposite party's pleading that the party does not dispute.

Denials

- (2) Subject to subrule (6), all allegations of fact that are not denied in a party's defence shall be deemed to be admitted unless the party pleads having no knowledge in respect of the fact.

Different Version of Facts

- (3) Where a party intends to prove a version of the facts different from that pleaded by the opposite party, a denial of the version so pleaded is not sufficient, but the party shall plead the party's own version of the facts in the defence.

Affirmative Defences

- (4) In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading.

Effect of Denial of Agreement

- (5) Where an agreement is alleged in a pleading, a denial of the agreement by the opposite party shall be construed only as a denial of the making of the agreement or of the facts from which the agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the agreement.

Damages

- (6) In an action for damages, the amount of damages shall be deemed to be in issue unless specifically admitted.

WHERE A REPLY IS NECESSARY

Different Version of Facts

- 25.08** (1) A party who intends to prove a version of the facts different from that pleaded in the opposite party's defence shall deliver a reply setting out the different version, unless it has already been pleaded in the claim.

Affirmative Reply

- (2) A party who intends to reply in response to a defence on any matter that might, if not specifically pleaded, take the opposite party by surprise or raise an issue that has not been raised by a previous pleading shall deliver a reply setting out that matter, subject to subrule 25.06(5) (inconsistent claims or new claims).

Reply Only Where Required

- (3) A party shall not deliver a reply except where required to do so by subrule (1) or (2).

Deemed Denial of Allegations Where No Reply

- (4) A party who does not deliver a reply within the prescribed time shall be deemed to deny the allegations of fact made in the defence of the opposite party.

RULES OF PLEADING - APPLICABLE TO REPLIES**Admissions**

- 25.09** (1) A party who delivers a reply shall admit every allegation of fact in the opposite party's defence that the party does not dispute.

Effect of Denial of Agreement

- (2) Where an agreement is alleged in a defence, a denial of the agreement in the opposite party's reply, or a deemed denial under subrule 25.08(4), shall be construed only as a denial of the making of the agreement or of the facts from which the agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the agreement.

PARTICULARS

- 25.10** Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may order particulars to be delivered within a specified time.

STRIKING OUT A PLEADING OR OTHER DOCUMENT

- 25.11** The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
- (a) may prejudice or delay the fair trial of the action;
 - (b) is scandalous, frivolous or vexatious; or
 - (c) is an abuse of the process of the court.

Brum Avelar v. Holland College, 2025 PESC 69

The court struck various paragraphs of the amended statement of claim for being frivolous, vexatious, or an abuse of process.

Maines & 7645686 Canada v. King, 2024 PESC 13

The purpose of pleadings is to set out the issues to be resolved and allow the other party to know the case to be met. Particulars are not a substitute for discovery. Particulars should only be ordered when they are not within the knowledge of the party requesting them, and they are necessary to enable another party to plead.

MacDonald v. Acorn, 2020 PESC 39

The plaintiff moved under Rule 21, but the court found that the motion was grounded in Rule 25. While both Rule 21 and Rule 25 provide a striking out remedy, what must be demonstrated for a party to avail themselves of either remedy varies significantly. The court found that the plaintiff failed to demonstrate inadequacies in the statement of defence, and dismissed the motion.

CMT et al. v. Gov't of PEI et al, 2016 PESC 4

The plaintiffs claimed against the defendants for \$25 million dollars for breach of contract and interference in economic relations. The Government and one defendant filed a motion to strike numerous paragraphs of the claim and one defendant claimed to have it struck in its entirety.

The motions judge found the statement of claim should be struck in its entirety. He found the claim was a “*wholesale violation of the rules of pleadings*.” The claim could not be repaired by amendments or deletions. The claim constituted an abuse of the courts processes.

However, pursuant to Rule 25.11 the motions judge granted the plaintiffs the opportunity to start afresh and file a newly drafted statement of claim.

Mercier v. Summerside Police 2010 PESC 1

The plaintiff's statement of claim did not comply with Rule 25; however, because the time for the commencement of the plaintiff's action was close to the expiration of the limitation period and because the claim was not frivolous or vexatious, the motions judge struck the statement of claim with leave to amend. The motions judge found that the limitation period should always be considered in deciding to strike a statement of claim without leave to amend.

Oliver v. Severance et al. 2005 PESCTD 7

Fact disclosure in the pleadings may be minimal; however, the allegations must be grounded in the pleading of some material facts.

Rofe v. Kay Aviation b.v. 2001 PESCAD 7

The statement of claim shall set forth relevant material facts from which it may be concluded that if such facts were proven, the claim would be successful. When the action alleges fraud, breach of trust, malice or intent on the part of the defendant, the plaintiff must provide not only the relevant material facts capable of proving these allegation but as well, full particulars of those material facts.

Stevenson v. National Bank 2001 PESCAD 14

The pleadings were closed; however, after a motion by the defendant to strike the plaintiff's statement of claim was partially successful, the court allowed the parties an opportunity to amend

their pleadings. The plaintiff then filed a jury notice. On appeal, the jury notice was struck. The court held that an order allowing the amendment of pleadings will have the effect of reopening the pleadings for all purposes unless a limitation is otherwise indicated. The limitation may be explicitly stated in the order permitting the amendment or it may be inferred from the circumstances surrounding the issuance of the order. The limitation here was inferred from the circumstances surrounding the order allowing the amendments.

Island Opry Inc. et al. v. Tweedy Ross (1996), 138 Nfld. & P.E.I.R. 36 (P.E.I.S.C.-T.D.)

Defendant filed a statement of defence which did not materially dispute the version of the facts being relied upon by the plaintiff. When, in cross-examination, defendant's counsel posed questions which clearly related to a version of the facts not pleaded in the statement of defence, plaintiff's counsel objected, relying on this Rule. The court upheld the objection and found the Rule was designed to expressly limit the effect of a general or mere denial by a defendant. The defendant then made application to amend the statement of defence. See cases noted under Rule 2 and Rule 26.

Mills v. Huynh (No.1) (1992), 104 Nfld. & P.E.I.R. 125 (P.E.I.S.C.-A.D.)

This rule makes it mandatory for a plaintiff to supply a defendant with notice of the particulars of a claim for special damages. The obligation under Rule 25.06(9) is independent of any demand from the defendant. A plaintiff is not relieved of the obligation by a defendant's failure to file a statement of defence or to make a demand for particulars in answer to a statement of claim which is void of the particulars of a special damage claimed.

RULE 26**AMENDMENT OF PLEADINGS****GENERAL POWER OF COURT**

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

WHEN AMENDMENTS MAY BE MADE

26.02 A party may amend the party's pleading,

- (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;
- (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or
- (c) with leave of the court.

HOW AMENDMENTS MADE

- 26.03** (1) An amendment to a pleading shall be made on the face of the copy filed in the court office, except that where the amendment is so extensive as to make the amended pleading difficult or inconvenient to read the party shall file a fresh copy of the original pleading as amended, bearing the date of the original pleading and the title of the pleading preceded by the word "amended".
- (2) An amendment to a pleading shall be underlined so as to distinguish the amended wording from the original.
- (3) Where a pleading has been amended more than once each subsequent amendment shall be underlined with an additional line for each occasion.

SERVICE OF AMENDED PLEADING**Service on Every Party to Action and Related Actions**

- 26.04** (1) An amended pleading shall be served forthwith on every person who is, at the time of service, a party to the main action or to a counterclaim, crossclaim or third party claim in the main action, unless the court orders otherwise.
- (2) Proof of service of an amended pleading other than an originating process shall be filed forthwith after it is served.

Amended Originating Process

- (3) Where an amended pleading is an originating process,
 - (a) it need not be served personally on a party who was served with the original pleading and responded to it; and
 - (b) it shall be served personally or by an alternative to personal service under Rule 16.03 on an opposite party who has not responded to the original pleading, whether or not the party has been noted in default.

RESPONDING TO AN AMENDED PLEADING

- 26.05** (1) A party shall respond to an amended pleading within the time remaining for responding to the original pleading, or within ten days after service of the amended pleading, whichever is the longer period, unless the court orders otherwise.
- (2) A party who has responded to a pleading that is subsequently amended and does not respond to the amended pleading within the prescribed time, shall be deemed to rely on the party's original pleading in answer to the amended pleading.

AMENDMENT AT TRIAL

- 26.06** Where a pleading is amended at the trial, and the amendment is made on the face of the record, an order need not be taken out and the pleading as amended need not be filed or served unless the court orders otherwise.

MacDonald v. Tobin, 2026 PESC 3

The defendant sought leave to amend their statement of defence. The parties disagreed as to whether Rule 26 or 51 applied. The court found that the statement was not clear enough to constitute an admission under Rule 51, so Rule 26 applied. The court granted leave for the defendant to amend their statement of defence.

Messervey v. City of Charlottetown, 2025 PESC 75

The plaintiff sought to amend his statement of claim to add a claim for wrongful dismissal after the limitation period expired. The court applied the special circumstances doctrine in allowing the plaintiff to file an amended statement of claim with a claim for wrongful dismissal.

Connick v. Vos and Meban, 2025 PESC 65

The plaintiff brought a motion for leave to amend their statement of claim. The court granted leave for the plaintiff to amend their statement of claim as the defendants would not suffer any prejudice as a result.

Zenner v. Flanagan and Macnutt & Dumont, 2024 PESC 44

26.06

AMENDMENT OF PLEADINGS

Following the release of the court's decision but prior to the order being filed, the plaintiff brought a motion to amend the statement of claim to include pre-judgment interest. The court found that Rule 26.01 makes an amendment request mandatory to grant unless the responding party can demonstrate prejudice that could not be compensated for by costs or an adjournment. The motion was granted.

TMC Avion Inc. v. Lapegna et ors., 2023 PESC 21

The court found that the amendments sought by the moving party were beyond the limitation periods, and thus prejudicial, but applied the doctrine of special circumstances to grant the amendments.

DCP v. M.M. and D.C., 2022 PESC 31

The applicant sought to amend their notice of application to add additional grounds one day before the hearing. Guided by the child's best interests, the court allowed the amendment, while inviting the possibility of a motion for an adjournment by the parents, or additional relief such as extended recesses or supplementary affidavits.

National Police of Colombia v. DASH 224, LLC, 2014 PECA 16

Rule 26 creates an obligation to grant leave to amend a pleading on such terms as are just unless prejudice would result that could not be compensated by costs or an adjournment.

100251 P.E.I. Inc. (c.o.b. Central Roadways) v. Summerside (City), 2010 PESC 27

The defendant's motion to amend its statement of defence to plead the breach of a limitation period was granted. Unless the prejudice to the party opposite cannot be remedied by costs or an adjournment, Rule 26.01 is mandatory.

Lank v. Government of P.E.I., 2010 PESC 9

A motion to amend a pleading filed 11 years previous was denied because the prejudice to the party opposite could not be remedied by either costs or an adjournment.

Peardon v. Long and WTH Funding, 2008 PESCAD 13

The motions judge allowed the defendant's motion to amend the statement of defence and declined the request of the plaintiff to impose as a condition of allowing the amendment, an opportunity for the plaintiff to re-examine the defendant in oral discovery. On appeal the decision of the motions judge was affirmed.

Durrell v. Lloyd Underwriters, 2005 PESCAD 17

Rule 75.1.02(7) as it read prior to an amendment effective September 1, 2004, did not foreclose the operation of Rule 26 when a plaintiff wished to amend a statement of claim to bring the action within Rule 75.1 – Simplified Procedure.

Island Opry Inc. et al. v. Tweedy Ross (1996), 138 Nfld. & P.E.I.R. 36 (P.E.I.S.C.-T.D.)

Rule 26.01 is not concerned with the nature or magnitude of the amendment as such, but rather with whether prejudice would result that could not be compensated for by costs or an adjournment; however, the nature and magnitude of the amendment are factors to be considered in determining that question. The rule is mandatory and the only discretion left to the court is to decide whether prejudice will result that could not be compensated for by costs or an adjournment. The purpose of Rule 2.01(1)(a) is to secure the just determination of the issues in dispute.

MacWilliams v. Bank of Nova Scotia and Walker (1995), 130 Nfld. & P.E.I.R. 251 (P.E.I.S.C.-T.D.)

The motion was brought by the plaintiff pursuant to Rules 5 and 26 seeking leave to amend the statement of claim by adding the third party as a defendant. The Court found: (1) there would be no prejudice to the third party as he had been involved in the proceeding since being joined by the defendant; (2) there were common questions of fact and thus common issues to be dealt with in the action against the defendant and any action against the third party. There would be a multiplicity of proceedings if the plaintiff was compelled to initiate a separate action against the third party.

RULE 27**COUNTERCLAIM****WHERE AVAILABLE****Against the Plaintiff**

- 27.01** (1) A defendant may assert, by way of counterclaim in the main action, any right or claim against the plaintiff including a claim for contribution and indemnity under the *Contributory Negligence Act* in respect of another party's claim against the defendant.

Against the Plaintiff and Another Person

- (2) A defendant who counterclaims against a plaintiff may join as a defendant to the counterclaim any other person, whether a party to the main action or not, who is a necessary or proper party to the counterclaim.

STATEMENT OF DEFENCE AND COUNTERCLAIM

- 27.02** A counterclaim (Form 27 A or 27 B) shall be included in the same document as the statement of defence and the document shall be entitled a statement of defence and counterclaim.

COUNTERCLAIM TO BE ISSUED WHERE DEFENDANT TO COUNTERCLAIM NOT ALREADY PARTY TO MAIN ACTION

- 27.03** Where a person who is not already a party to the main action is made a defendant to the counterclaim, the statement of defence and counterclaim,
- (a) shall be issued,
 - (i) within the time prescribed by Rule 18.01 for delivery of the statement of defence in the main action or at any time before the defendant is noted in default, or
 - (ii) subsequently with leave of the court; and
 - (b) shall contain a second title of proceeding showing who is the plaintiff by counterclaim and who are defendants to the counterclaim.

TIME FOR DELIVERY OR SERVICE OF DEFENCE AND COUNTERCLAIM**Where all Parties are Parties to Main Action**

- 27.04** (1) Where a counterclaim is only against the plaintiff, or only against the plaintiff and another person who is already a party to the main action, the statement of defence and counterclaim shall be delivered within the time prescribed by Rule 18.01 for the delivery of the statement of defence in the main action, or at any time before the defendant is noted in default.

Where New Party is Brought in

- (2) Where a counterclaim is against the plaintiff and a defendant to the counterclaim who is not already a party to the main action, the statement of defence and counterclaim shall be served, after it has been issued, on the parties to the main action and, together with all the pleadings previously delivered in the main action, on a defendant to the counterclaim who is not already a party to the main action, and shall be filed with proof of service,
 - (a) within thirty days after the statement of defence and counterclaim is issued or at any time before the defendant is noted in default, or
 - (b) subsequently with leave of the court.
- (3) A statement of defence and counterclaim need not be served personally on any person who is a party to the main action, except where a defendant to the counterclaim is also a defendant in the main action and has failed to deliver a notice of intent to defend or a statement of defence in the main action, in which case the defendant shall be served personally or by an alternative to personal service under Rule 16.03 whether or not the defendant has been noted in default in the main action.

TIME FOR DELIVERY OF DEFENCE TO COUNTERCLAIM

- 27.05** (1) The plaintiff and any other defendant to a counterclaim who is already a party to the main action shall deliver a defence to counterclaim (Form 27 C) within twenty days after service of the statement of defence and counterclaim.
- (2) Where the plaintiff delivers a reply in the main action, the defence to counterclaim shall be included in the same document as the reply and the document shall be entitled a reply and defence to counterclaim.
 - (3) Except as provided in subrule 18.02(3) (notice of intent to defend) or 19.01(5) (late delivery of defence), a defendant to a counterclaim who is not already a party to the main action shall deliver a defence to counterclaim,
 - (a) within twenty days after service of the statement of defence and counterclaim, where the defendant to the counterclaim is served in Prince Edward Island;
 - (b) within forty days after service of the statement of defence and counterclaim, where the defendant to the counterclaim is served elsewhere in Canada or in the United States of America; or
 - (c) within sixty days after service of the statement of defence and counterclaim, where the defendant to the counterclaim is served anywhere else.

TIME FOR DELIVERY OF REPLY TO DEFENCE TO COUNTERCLAIM

27.06 A reply to defence to counterclaim (Form 27 D), if any, shall be delivered within ten days after service of the defence to counterclaim.

AMENDING DEFENCE TO ADD COUNTERCLAIM

- 27.07** (1) A defendant who has delivered a statement of defence that does not contain a counterclaim and who wishes to counterclaim only against the plaintiff or only against the plaintiff and another person who is already a party to the main action may amend the statement of defence in accordance with Rules 26.02 and 26.03 in order to add the counterclaim, and Rule 26.05 (responding to amended pleading) applies to the amended statement of defence and counterclaim.
- (2) A defendant who has delivered a statement of defence that does not contain a counterclaim and who wishes to counterclaim against the plaintiff and another person who is not already a party to the main action may, with leave of the court, have the Registrar issue an amended statement of defence and counterclaim, and Rule 26.05 (responding to amended pleading) applies to the amended statement of defence and counterclaim.

TRIAL OF COUNTERCLAIM

- 27.08** (1) A counterclaim shall be tried at the trial of the main action, unless the court orders otherwise.
- (2) Where it appears that a counterclaim may unduly complicate or delay the trial of the main action, or cause undue prejudice to a party, the court may order separate trials or order that the counterclaim proceed as a separate action.

DISPOSITION OF COUNTERCLAIM**Where Claim in Main Action not Disputed**

- 27.09** (1) Where a defendant does not dispute the claim of the plaintiff in the main action, but asserts a counterclaim, the court may stay the main action or grant judgment, with or without a stay of execution, until the counterclaim is disposed of.

Where Counterclaim not Disputed

- (2) Where the plaintiff does not dispute the counterclaim of a defendant, the court may stay the counterclaim or grant judgment, with or without a stay of execution, until the main action is disposed of.

Where Both Claim and Counterclaim Succeed

- (3) Where both the plaintiff in the main action and the plaintiff by counterclaim succeed, either in whole or in part, and there is a resulting balance in favour of one of them, the court may in a proper case give judgment for the balance and dismiss the smaller claim and may make

such order for costs of the claim and counterclaim as is just.

**APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD
PARTY CLAIMS**

27.10 Rules 27.01 to 27.09 apply, with necessary modifications, to the assertion of a counterclaim by a defendant to a counterclaim, by a defendant to a crossclaim and by a third party.

RULE 28**CROSSCLAIM****WHERE AVAILABLE**

- 28.01** (1) A defendant may crossclaim against a co-defendant who,
- (a) is or may be liable to the defendant for all or part of the plaintiff's claim;
 - (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,
 - (i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or
 - (ii) a related transaction or occurrence or series of transactions or occurrences; or
 - (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.
- (2) A defendant who claims contribution from a co-defendant under the *Contributory Negligence Act* shall do so by way of crossclaim.

STATEMENT OF DEFENCE AND CROSSCLAIM

- 28.02** A crossclaim (Form 28 A) shall be included in the same document as the statement of defence and the document shall be entitled a statement of defence and crossclaim.

AMENDING DEFENCE TO ADD CROSSCLAIM

- 28.03** A defendant who has delivered a statement of defence that does not contain a crossclaim and who wishes to crossclaim may amend the statement of defence in accordance with Rules 26.02 and 26.03 in order to add the crossclaim, and Rule 26.05 (responding to amended pleading) applies to the amended statement of defence and crossclaim.

TIME FOR DELIVERY OF STATEMENT OF DEFENCE AND CROSSCLAIM

- 28.04** (1) A statement of defence and crossclaim shall be delivered,
- (a) within the time prescribed by Rule 18.01 for delivery of the statement of defence in the main action or at any time before the defendant is noted in default; or
 - (b) subsequently with leave, which the court shall grant unless the plaintiff would be prejudiced thereby.
- (2) A statement of defence and crossclaim need not be served personally on a defendant against whom a crossclaim is made, unless the defendant has failed to deliver a notice of intent to defend or a statement of defence in

the main action, in which case the defendant shall be served personally or by an alternative to personal service under Rule 16.03, whether or not the defendant has been noted in default in the main action.

TIME FOR DELIVERY OF DEFENCE TO CROSSCLAIM

Defence to Crossclaim

- 28.05** (1) Subject to subrule (2), a defence to crossclaim (Form 28 B) shall be delivered within twenty days after service of the statement of defence and crossclaim.

Where Defence to Crossclaim not Required

- (2) Where,
- (a) a crossclaim contains no claim other than a claim for contribution or indemnity under the *Contributory Negligence Act*,
 - (b) the defendant to the crossclaim has delivered a statement of defence in the main action; and
 - (c) the defendant to the crossclaim in response to the crossclaim relies on the facts pleaded in the defendant's statement of defence in the main action and not on a different version of the facts or on any matter that might, if not specifically pleaded, take the crossclaiming defendant by surprise, the defendant to the crossclaim need not deliver a defence to the crossclaim and shall be deemed to deny the allegations of fact made in the crossclaim and to rely on the facts pleaded in the statement of defence in the main action.

CONTENTS OF DEFENCE TO CROSSCLAIM

May Defend Against Crossclaim and Against Plaintiff's Claim Against Co-defendant

- 28.06** (1) In a defence to crossclaim, the defendant may,
- (a) defend against the crossclaim; and
 - (b) where appropriate, defend against the plaintiff's claim against the crossclaiming defendant, in which case the defendant may raise any defence open to the crossclaiming defendant.

Separate Part for Defence Against Plaintiff

- (2) Where the defendant defends against the plaintiff's claim against the crossclaiming defendant, the defence to crossclaim shall contain a separate part entitled a defence to plaintiff's claim against crossclaiming defendant.

Consequence of Defending Against Plaintiff

- (3) A defendant who defends against the plaintiff's claim against the crossclaiming defendant,
- (a) has the same rights and obligations in the action, including those in

28.07

CROSSCLAIM

respect of discovery, trial and appeal, as a defendant to that claim;
and

- (b) is bound by any order or determination made in the main action between the plaintiff and the crossclaiming defendant.

Time for Reply by Plaintiff

- (4) The plaintiff's reply, if any, to the defence to plaintiff's claim against cross claiming defendant shall be delivered within ten days after service of that defence.

Consequence of Not Defending Against Plaintiff

- (5) A defendant who does not defend against the plaintiff's claim against the crossclaiming defendant is bound by any order or determination made in the main action between the plaintiff and the crossclaiming defendant.

EFFECT OF DEFAULT OF DEFENCE TO CROSSCLAIM

28.07 Where a defendant against whom a crossclaim is made is noted in default in respect of the crossclaim, the crossclaiming defendant may obtain judgment against the other defendant only at the trial of the main action or on motion to a judge.

TIME FOR DELIVERY OF REPLY TO DEFENCE TO CROSSCLAIM

28.08 A reply to defence to crossclaim (Form 28 C), if any, shall be delivered within ten days after service of the defence to crossclaim.

TRIAL OF CROSSCLAIM

28.09 A crossclaim shall be tried at or immediately after the trial of the main action, unless the court orders otherwise.

PREJUDICE OR DELAY TO PLAINTIFF

28.10 A plaintiff is not to be prejudiced or unnecessarily delayed by reason of a crossclaim, and on motion by the plaintiff the court may make such order or impose such terms, including an order that the crossclaim proceed as a separate action, as are necessary to prevent prejudice or delay where that may be done without injustice to the parties to the crossclaim.

APPLICATION TO COUNTERCLAIMS AND THIRD PARTY CLAIMS

28.11 Rules 28.01 to 28.10 apply, with necessary modifications, to the assertion of a crossclaim between co-defendants to a counterclaim or between third parties to a third party claim.

RULE 29**THIRD PARTY CLAIM****WHERE AVAILABLE**

29.01 A defendant may commence a third party claim against any person who is not a party to the action and who,

- (a) is or may be liable to the defendant for all or part of the plaintiff's claim;
- (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,
 - (i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or
 - (ii) a related transaction or occurrence or series of transactions or occurrences; or
- (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

TIME FOR THIRD PARTY CLAIM**Issuing**

- 29.02** (1) A third party claim (Form 29 A) shall be issued within ten days after the defendant delivers a statement of defence, or at any time before the defendant is noted in default.

Exception, Reply

- (1.1) A third party claim may be issued within ten days after the plaintiff delivers a reply in the main action to the defendant's statement of defence.

Exceptions, Consent and Leave

- (1.2) A third party claim may be issued at any time with the plaintiff's consent or with leave, which the court shall grant unless the plaintiff would be prejudiced thereby.

Service

- (2) A third party claim shall be served on the third party personally or by an alternative to personal service under Rule 16.03, together with all the pleadings previously delivered in the main action or in any counterclaim, crossclaim or third or subsequent party claim in the main action, within thirty days after the third party claim is issued.
- (3) A third party claim shall also be served on every other party to the main action within the time for service on the third party, but personal service is not required.

THIRD PARTY DEFENCE

29.03 Except as provided in subrule 18.02(3) (notice of intent to defend) or 19.01(5) (late filing of defence), a third party may defend against the third party claim by delivering a third party defence (Form 29 B),

- (a) within twenty days after service of the third party claim, where the third party is served in Prince Edward Island;
- (b) within forty days after service of the third party claim, where the defendant is served elsewhere in Canada or in the United States of America; or
- (c) within sixty days after service of the third party claim, where the third party is served anywhere else.

REPLY TO THIRD PARTY DEFENCE

29.04 A reply to third party defence (Form 29 C), if any, shall be delivered within ten days after service of the third party defence.

DEFENCE OF MAIN ACTION BY THIRD PARTY**Third Party May Defend Main Action**

29.05 (1) Where appropriate, the third party may defend against the plaintiff's claim against the defendant by delivering a statement of defence in the main action, in which the third party may raise any defence open to the defendant.

Consequence of Defending Main Action

- (2) A third party who delivers a statement of defence in the main action,
 - (a) has the same rights and obligations in the main action, including those in respect of discovery, trial and appeal, as a defendant in the main action; and
 - (b) is bound by any order or determination made in the main action between the plaintiff and the defendant who made the third party claim.

Time for Statement of Defence

- (3) The statement of defence of the third party shall be delivered within the time prescribed by Rule 29.03 for the delivery of the third party defence.

Time for Reply

- (4) The plaintiff's reply, if any, to the statement of defence of the third party shall be delivered within ten days after service of that statement of defence.

Consequence of Not Defending Main Action

- (5) A third party who does not deliver a statement of defence in the main action is bound by any order or determination made in the main action between the plaintiff and the defendant who made the third party claim.

EFFECT OF THIRD PARTY DEFENCE

29.06 Where a third party has delivered a third party defence,

- (a) the third party shall be served with all subsequent documents in the main action;
- (b) judgment in the main action on consent or after the noting of the defendant in default may be obtained only on notice to the third party; and
- (c) where the defendant making the third party claim has also made a crossclaim against a co-defendant, the co-defendant and the third party have the same rights to discovery from each other as if they were parties to the same action.

EFFECT OF DEFAULT OF THIRD PARTY

29.07 Where a third party has been noted in default, the defendant may obtain judgment against the third party only at the trial of the main action or on motion to a judge.

TRIAL OF THIRD PARTY CLAIM

- 29.08** (1) After the close of pleadings in the third party claim it shall be listed for trial as an action as provided in Rule 48 without undue delay and placed on the trial list immediately after the main action.
- (2) The third party claim shall be tried at or immediately after the trial of the main action, unless the court orders otherwise.

PREJUDICE OR DELAY TO PLAINTIFF

29.09 A plaintiff is not to be prejudiced or unnecessarily delayed by reason of a third party claim, and on motion by the plaintiff the court may make such order or impose such terms, including an order that the third party claim proceed as a separate action, as are necessary to prevent prejudice or delay where that may be done without injustice to the defendant or the third party.

THIRD PARTY DIRECTIONS

29.10 Any party affected by a third party claim may move for directions in respect of any matter of procedure not otherwise provided for in these rules.

FOURTH AND SUBSEQUENT PARTY CLAIMS

- 29.11** (1) A third party may, by commencing a fourth party claim, assert against any person not already a party to the third party claim any claim that is properly the subject matter of a third party claim, and Rules 29.01 to 29.10 apply, with necessary modifications, to the fourth party claim.
- (2) A fourth party claim need not be served personally on a fourth party who is a party to the main action, unless the fourth party is a defendant in that action and has failed to deliver a notice of intent to defend or a statement of defence in the main action, in which case the fourth party shall be served personally or by an alternative to personal service under Rule 16.03,

whether or not the fourth party has been noted in default in the main action.

- (2.1) Despite subrule 29.02(2), when a fourth party claim is served on a person who is already a party to the main action or to any counterclaim, crossclaim or third party claim in the main action, the pleadings previously delivered in the main action or in any counterclaim, crossclaim or third party claim in the main action need not be served.
- (3) A fourth or subsequent party may assert any claim that is properly the subject matter of a third party claim in like manner as a third party claim.

APPLICATION TO FOURTH AND SUBSEQUENT PARTY CLAIMS

29.12 The provisions of these rules that apply to third party claims apply, with necessary modifications, to fourth and subsequent party claims.

APPLICATION TO COUNTERCLAIMS AND CROSSCLAIMS

29.13 Rules 29.01 to 29.12 apply, with necessary modifications, to the assertion of a third party claim by a defendant to a counterclaim or by a defendant to a crossclaim.

MacLean v. The Little Poultry Company Inc., et al., 2024 PESC 5

The court ordered that the third party claim be severed and proceed as a separate action. Under Rule 29.09, the plaintiff must prove they will suffer prejudice or delay in the future. Once proven, the court considers whether severing the third-party claim from the main action will cause injustice for either the defendant(s) or the third party(ies).

Eco Forest Group v. Scott & ors. 2001 PESCTD 84

The plaintiff made a motion seeking an order that would require the defendant's third party claim to proceed as a separate action. The primary consideration in the application of Rule 29.01 is to permit the parties involved in a dispute arising from the same fact situation to have their rights determined without a multiplicity of proceedings. The plaintiff's motion was denied. The plaintiff would not be prejudiced by having the third party claim proceed at the same time as the main action, nor would the proceedings be unnecessarily delayed by the inclusion of the third party claim.

RULE 29.2**PROPORTIONALITY IN DISCOVERY****DEFINITION**

29.2.01 In this Rule, “document” has the same meaning as in clause 30.01(1)(a).

APPLICATION

29.2.02 This Rule applies to any determination by the court under any of the following Rules as to whether a party or other person must answer a question or produce a document:

1. Rule 30 (Discovery of Documents);
2. Rule 31 (Examination for Discovery);
3. Rule 34 (Procedure on Oral Examinations); and
4. Rule 35 (Procedure on Examination for Discovery by Written Questions).

CONSIDERATIONS**General**

29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether:

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
- (b) the expense associated with answering the question or producing the document would be unjustified;
- (c) requiring the party or other person to answer the question or produce the document would cause undue prejudice to the party or other person;
- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- (e) the information or the document is readily available to the party requesting it from another source.

Overall Volume of Documents

- (2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

DISCOVERY**RULE 30****DISCOVERY OF DOCUMENTS****INTERPRETATION**

- 30.01** (1) In Rules 30.02 to 30.11,
- (a) "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and data and information in electronic form; and
 - (b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.
- (2) In subrule 30.02(4),
- (a) a corporation is a subsidiary of another corporation where it is controlled directly or indirectly by the other corporation; and
 - (b) a corporation is affiliated with another corporation where,
 - (i) one corporation is the subsidiary of the other,
 - (ii) both corporations are subsidiaries of the same corporation, or
 - (iii) both corporations are controlled directly or indirectly by the same person or persons.

SCOPE OF DOCUMENTARY DISCOVERY**Disclosure**

- 30.02** (1) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in Rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

Production for Inspection

- (2) Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in Rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

Insurance Policy

- (3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,
- (a) to satisfy all or part of a judgment in the action; or

- (b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,

but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

Subsidiary and Affiliated Corporations and Corporations Controlled by Party

- (4) The court may order a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party and to produce for inspection all such documents that are not privileged.

AFFIDAVIT OF DOCUMENTS

Party to Serve Affidavit

- 30.03** (1) A party to an action shall, within ten days after the close of pleadings, serve on every other party an affidavit of documents (Form 30 A or 30 B) disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.

Contents

- (2) The affidavit shall list and describe, in separate schedules, all documents relating to any matter in issue in the action,
 - (a) that are in the party's possession, control or power and that the party does not object to producing;
 - (b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and
 - (c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control of or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.
- (3) The affidavit shall also contain a statement that the party has never had in his or her possession, control or power any document relating to any matter in issue in the action other than those listed in the affidavit.

Copies of Documents

- (4) True copies of all documents which are not privileged and are listed in a party's affidavit of documents shall be annexed to the affidavit of documents, unless another party has previously produced or agreed to produce a true copy of the document in the party's affidavit of documents.

Lawyer's Certificate

- (5) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,
- (a) the necessity of making full disclosure of all documents relating to any matter in issue in the action; and
 - (b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

Affidavit not to be Filed

- (6) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial.

INSPECTION OF DOCUMENTS**Request to Inspect**

- 30.04** (1) A party who serves on another party a request to inspect documents (Form 30 C) is entitled to inspect any original document that is not privileged and that is referred to in the other party's affidavit of documents as being in his or her possession, control or power.
- (2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party.
- (3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection.

Documents to be Taken to Examination and Trial

- (4) All documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at,
- (a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and
 - (b) the trial of the action,
- unless the parties agree otherwise.

Court may Order Production

- (5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

Court may Inspect to Determine Claim of Privilege

- (6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim.

Copying of Documents

- (7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at his or her own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy.

Divided Disclosure or Production

- (8) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined.

DISCLOSURE OR PRODUCTION NOT ADMISSION OF RELEVANCE

- 30.05** The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility.

WHERE AFFIDAVIT INCOMPLETE OR PRIVILEGE IMPROPERLY CLAIMED

- 30.06** Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,
- (a) order cross-examination on the affidavit of documents;
 - (b) order service of a further and better affidavit of documents;
 - (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and
 - (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

DOCUMENTS OR ERRORS SUBSEQUENTLY DISCOVERED

- 30.07** Where a party, after serving an affidavit of documents,
- (a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or
 - (b) discovers that the affidavit is inaccurate or incomplete,
- the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.

EFFECT OF FAILURE TO DISCLOSE OR PRODUCE FOR INSPECTION**Failure to Disclose or Produce Document**

- 30.08** (1) Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules, an order of the court or an undertaking,
- (a) if the document is favourable to his or her case, the party may not use the document at the trial, except with leave of the trial judge; or
 - (b) if the document is not favourable to his or her case, the court may make such order as is just.

Failure to Serve Affidavit or Produce Document

- (2) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under Rules 30.02 to 30.11, the court may,
- (a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;
 - (b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and
 - (c) make such other order as is just.

PRIVILEGED DOCUMENT NOT TO BE USED WITHOUT LEAVE

- 30.09** Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection within 30 days after the issuance of a notice of trial pursuant to Rule 48.05(2), the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

PRODUCTION FROM NON-PARTIES WITH LEAVE**Order for Inspection**

- 30.10** (1) The Prothonotary or the court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,
- (a) the document is relevant to a material issue in the action; and
 - (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

Notice of Motion

- (2) A motion for an order under subrule (1) shall be made on notice,
- (a) to every other party; and
 - (b) to the person not a party, served personally or by an alternative to personal service under Rule 16.03.

Court may Inspect Document

- (3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue.

Preparation of Certified Copy

- (4) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (1) and the certified copy may be used for all purposes in place of the original.

Cost of Producing Document

- (5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise.

DOCUMENT DEPOSITED FOR SAFE KEEPING

- 30.11** The court may order that a relevant document be deposited for safe keeping with the Prothonotary and thereafter the document shall not be inspected by any person except with leave of the court.

W.D. Potato v. Visser Produce et al., 2025 PESC 56

The plaintiff brought a motion for additional disclosure from the defendants, as well as disclosure from non-parties pursuant to Rule 30.10. Various third party documents were ordered to be disclosed as they were relevant to a material issue in the action.

Ayangma v. FLSB and ELSB, 2025 PECA 7

Remedies available under Rules 30.08(1) and 30.08(2) are available where a party:

- a) Fails to disclose a document in an affidavit of documents;
- b) Fails to produce a document when required by the Rules;
- c) Fails to serve an affidavit of documents in accordance with the Rules; or
- d) Fails to comply with a court order relating to disclosure.

The Court of Appeal agreed with the motions judge that the respondent's affidavit of documents complied with the requirements of Rule 30.

Williams v. Rashed, 2022 PESC 8

The non-party employer objected to producing the plaintiff's complete employee file. The court concluded that Rule 30.10 requires only a general description of the type of document sought, as here. Further, as damages for loss of employment income is a material issue, the documents are relevant. The court ordered production with costs against the non-party.

Doyle v. Murray, 2020 PESC 10

On a motion by the defendant pursuant to Rule 30.10 for production of documents from a third party (the plaintiff's psychologist), the court determined the reasonable costs of producing the document pursuant to Rule 30.10(5). The court reviewed the applicability of the *Health Information Act* in regards to requests for production of documents.

Creighan v. MacPhee, 2018 PECA 1

A decision of a court to order production of documents for inspection that are in the possession, control or power of a person who is not a party involves the exercise of discretion.

The Court found the motions judge properly exercised his discretion in ordering a non-party to produce documents.

MacDonald v. E. Robinson Inc. & S. Dawson, 2018 PESC 4

Where the plaintiff claimed for lost earnings, but provided evidence of a joint venture with his son, the plaintiff's son was ordered to provide his financial records for inspection by the defendant's counsel.

McCabe v. Wawanesa Mutual Insurance Company, 2017 PECA 12

The court may order production for inspection of a document that is in the possession, control, or power of a person who is not a party provided that the document is not privileged and the court is satisfied that (a) the document is relevant to a material issue; and (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

What is material is determined by the governing substantive and procedural law and the pleadings. Evidence is material if what it is offered to prove is in issue according to the governing substantive and procedural law and the pleadings in the proceeding.

Lauer v. Attorney General of Canada, 2015 PESC 15

The Court declined to make an order for further production based on the Defendant's motion to strike. If that motion succeeded, there would be no further production of documents.

Havenlee Farms v. HZPC Americas, 2013 PESC 14

A party must disclose all documents which have a semblance of relevance and which are in the possession of the party or which the party has the ability to obtain. A party must also identify and disclose all the documents over which privilege is claimed and all documents over which the party no longer has control (Schedules "B" & "C" to the affidavit of documents).

Jay v. DHL Express (Canada) Ltd., 2009 PECA 2

The Court of Appeal allowed an appeal from the decision of the motions judge striking out a statement of defence for the failure of the defendant to produce documents. The court considered the principles that are applicable when a motion is brought pursuant to Rule 30.08(2) to strike pleadings because of the failure of one of the parties to produce documents.

Llewellyn v. Carter, 2008 PESCAD 12

The court addressed the issue as to what is required for an affidavit of documents to comply with the rule.

Johnston v. CADC, 2004 PESCTD 73

The right to have the production of relevant documents does not take priority over an established solicitor-client privilege.

Imperial Oil v. Noonan Fuels, 2004 PESCTD 75

Business documents were found to be relevant for purposes of discovery. Disclosure was ordered subject to exceptions. A counter-motion for divided discovery/disclosure was denied as there were no exceptional or unusual circumstances to warrant such relief. Confirmed on appeal except for the disclosure of some business documents. See: *Noonan Fuels et al v. Imperial Oil* 2006 PESCAD 15.

Campbell v. Gardiner & Ors., 2001 PESCTD 62

The plaintiffs sought the pre-trial production of an “External Review” of the medical practice of one of the defendants. Based on the wide scope of the relevancy test with respect to the production of documents at the discovery stage of the proceeding, the court found the report must be produced.

Mullin v. PriceWaterhouseCoopers, 2004 PESCTD 23

The court ordered the production of documents relating to facts arising prior to those that gave rise to the cause of action. There was a possibility the documents could be relevant to issues arising in the action.

MacDougall v. Mutual Life & Lambe, 2004 PESCTD 61; (2004) 241 Nfld. & P.E.I.R. 92

The plaintiff failed to produce documents for discovery as required by Rule 30.02. Her action was dismissed pursuant to Rule 30.08.

Johnston v. CADC, 2004 PESCTD 24

To obtain production of a document from a non party to the action, notice of such an application must be given to the person from whom the production is sought.

Aluma Systems v. Strait Crossing 2002 PESCTD 19

The plaintiff sought the production of minutes of the meetings of the executive committee of the Confederation Bridge Building Project as well as all documents relating to the claim of the defendants against the Government of Canada. The court ordered production because the documents were necessary to the defence of the counterclaim and on the basis that the documents met the broad relevancy test applicable to the disclosure of documents at the discovery stage of the proceedings.

MacLeod v. MacLeod (1999), 173 Nfld. & P.E.I. R. 229 (P.E.I.S.C.-T.D.)

The respondent failed to disclose, pursuant to Rule 30.02, a document which related to the establishment of the value of his pre-marital assets. Applying Rule 30.08, the court refused to consider or give any weight to the document in deciding whether the respondent had discharged the onus of proving the asset should be deducted from the value of net family property.

Canadian Imperial Bank of Commerce v. Bonnell et al., [1998] P.E.I.J. No. 18 (Q.L.) (P.E.I.S.C.-T.D.)

A liberal interpretation is to be given to the discoverability rules. Relevance is broader at discovery of documents’ stage than it is at trial. The threshold at the discovery stage for the

production of a document is that the Chambers' judge must be satisfied upon a hard look there is an arguable case that the document will be relevant to an issue arising in the proceeding.

Breau v. Naddy (1995), 133 Nfld. & P.E.I.R. 196 (P.E.I.S.C.-T.D.)

Surveillance videotapes obtained on instructions from counsel attract litigation privilege while a statement given by a party to his or her insurance adjuster only days after an accident is not privileged.

The court also held that the party making the disclosure is required to provide a description of each document sufficient to identify it and to enable an order for production to be enforced.

Gallinger v. Kurylyk (1995), 129 Nfld. & P.E.I.R. 306 (P.E.I.S.C.-A.D.)

To meet the objectives of securing a just, most expeditious, and least expensive determination of every civil proceeding on the merits, the discovery rules are entitled to a liberal interpretation.

A party asserting a claim of litigation privilege must establish the document is protected from disclosure by that privilege.

Cormier et al. v. Compton (1995), 129 Nfld. & P.E.I.R. 224 (P.E.I.S.C.-T.D.)

Rule 30.02 requires the disclosure of every document relating to a matter in issue in the action. If a party wishes to claim privilege over a document, the basis of the privilege shall be cited in the appropriate schedule to the affidavit.

RULE 30.1**DEEMED UNDERTAKING****APPLICATION**

- 30.1.01(1)** This rule applies to,
- (a) evidence obtained under,
 - (i) Rule 30 (documentary discovery)
 - (ii) Rule 31 (examination for discovery)
 - (iii) Rule 32 (inspection of property)
 - (iv) Rule 33 (medical examination)
 - (v) Rule 35 (examination for discovery by written questions) and
 - (b) information obtained from evidence referred to in clause (a).
- (2) This rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

Deemed Undertaking

- (3) All parties and their lawyer are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Exceptions

- (4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.
- (5) Subrule (3) does not prohibit the use, for any purpose, of
- (a) evidence that is filed with the court;
 - (b) evidence that is given or referred to during a hearing;
 - (c) information obtained from evidence referred to in clause (a) or (b).
- (6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.
- (7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11(8) (subsequent action).

Order That Undertaking Does Not Apply

- (8) If satisfied that the interests of justice outweigh any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

RULE 31**EXAMINATION FOR DISCOVERY****DEFINITION**

31.01 In Rules 31.02 to 31.11, "document" has the same meaning as in clause 30.01(l)(a).

FORM OF EXAMINATION

- 31.02** (1) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the court.
- (2) Where more than one party is entitled to examine a person, the examination for discovery shall take the form of an oral examination, unless all the parties entitled to examine the person agree otherwise.

WHO MAY EXAMINE AND BE EXAMINED**Generally**

- 31.03** (1) A party to an action may examine for discovery any other party adverse in interest once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (3) to (8).

On Behalf of Corporation

- (2) Where a corporation may be examined for discovery,
- (a) the examining party may examine any officer, director or employee on behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee; and
 - (b) the examining party may examine more than one officer, director or employee only with the consent of the parties or the leave of the court.

On Behalf of Partnership or Sole Proprietorship

- (3) Where an action is brought by or against a partnership or a sole proprietor using the firm name,
- (a) each person who was, or is alleged to have been, a partner or the sole proprietor, as the case may be, at a material time, may be examined on behalf of the partnership or sole proprietorship; and
 - (b) the examining party may examine one or more employees of the partnership or sole proprietorship only with the consent of the parties or the leave of the court.

Requirements for Leave

- (4) Before making an order under clause (2)(b) or (3)(b), the court shall satisfy itself that,
 - (a) satisfactory answers respecting all of the issues raised cannot be obtained from only one person without undue expense and inconvenience; and
 - (b) examination of more than one person would likely expedite the conduct of the action.

In Place of Person under Disability

- (5) Where an action is brought by or against a party under disability,
 - (a) the litigation guardian, guardian or trustee may be examined in place of the person under disability; or
 - (b) at the option of the examining party, the person under disability may be examined if the person is competent to give evidence but, where the litigation guardian is the Public Guardian and Trustee or the Official Guardian, the litigation guardian may be examined only with leave of the court.

Assignee

- (6) Where an action is brought by or against an assignee, the assignor may be examined in addition to the assignee.

Trustee in Bankruptcy

- (7) Where an action is brought by or against a trustee of the estate of a bankrupt, the bankrupt may be examined in addition to the trustee.

Nominal Party

- (8) Where an action is brought or defended for the immediate benefit of a person who is not a party, the person may be examined in addition to the party bringing or defending the action.

Limiting Multiple Examinations

- (9) Where a party is entitled to examine for discovery,
 - (a) more than one person under this rule; or
 - (b) multiple parties who are in the same interest,but the court is satisfied that multiple examinations would be oppressive, vexatious or unnecessary, the court may impose such limits on the right of discovery as are just.

WHEN EXAMINATION MAY BE INITIATED**Examination of Plaintiff**

- 31.04** (1) A party who seeks to examine a plaintiff for discovery may serve a notice

of examination under Rule 34.04 or written questions under Rule 35.01 only after delivering a statement of defence and, unless the parties agree otherwise, serving an affidavit of documents.

Examination of Defendant

- (2) A party who seeks to examine a defendant for discovery may serve a notice of examination under Rule 34.04 or written questions under Rule 35.01 only after,
- (a) the defendant has delivered a statement of defence and, unless the parties agree otherwise, the examining party has served an affidavit of documents; or
 - (b) the defendant has been noted in default.

Completion of Examination

- (3) The party who first serves on another party a notice of examination under Rule 34.04 or written questions under Rule 35.01 may examine first and may complete the examination before being examined by another party, unless the court orders otherwise.

ORAL EXAMINATION BY MORE THAN ONE PARTY

- 31.05** Unless the court orders or the parties agree otherwise, where more than one party is entitled to examine a party or other person for discovery without leave, there shall be only one oral examination, which may be initiated by any party adverse to the party,
- (a) who is to be examined; or
 - (b) on behalf or in place of whom, or in addition to whom, a person is to be examined.

SCOPE OF EXAMINATION

General

- 31.06** (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relating to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,
- (a) the information sought is evidence;
 - (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or
 - (c) the question constitutes cross-examination on the affidavit of documents of the party being examined.

Identity of Persons Having Knowledge

- (2) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the

court orders otherwise.

Expert Opinions

- (3) Subject to Rule 31.01, a party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,
 - (a) the findings, opinions and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
 - (b) the party being examined undertakes not to call the expert as a witness at the trial.

Insurance Policies

- (4) A party may on an examination for discovery obtain disclosure of,
 - (a) the existence and contents of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment; and
 - (b) the amount of money available under the policy and any conditions affecting its availability.
- (5) No information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

Divided Discovery

- (6) Where information may become relevant only after the determination of an issue in the action and the disclosure of the information before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold the information until after the issue has been determined.

FAILURE TO ANSWER ON DISCOVERY

Failure to Answer Questions

- 31.07** (1) A party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question if,
- (a) the party or other person refuses to answer the question, whether on the grounds of privilege or otherwise;
 - (b) the party or other person indicates that the question will be considered or taken under advisement, but no answer is provided within 60 days after the response; or
 - (c) the party or other person undertakes to answer the question, but no answer is provided within 60 days after the response.

Effect of Failure to Answer

- (2) If a party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question as described in subrule (1), the party may not introduce at the trial the information that was not provided, except with leave of the trial judge.

Additional Sanction

- (3) The sanction provided by subrule (2) is in addition to the sanctions provided by rule 34.15 (sanctions for default in examination).

Obligatory Status of Undertakings

- (4) For greater certainty, nothing in these rules relieves a party or other person who undertakes to answer a question from the obligation to honour the undertaking.

EFFECT OF LAWYER ANSWERING

31.08 Questions on an oral examination for discovery shall be answered by the person being examined but, where there is no objection, the question may be answered by the person's lawyer and the answer shall be deemed to be the answer of the person being examined unless, before the conclusion of the examination, the person repudiates, contradicts or qualifies the answer.

INFORMATION SUBSEQUENTLY OBTAINED**Duty to Correct Answers**

- 31.09** (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,
- (a) was incorrect or incomplete when made; or
 - (b) is no longer correct and complete,
- the party shall forthwith provide the information in writing to every other party.

Consequences of Correcting Answers

- (2) Where a party provides information in writing under subrule (1),
- (a) the writing may be treated at a hearing as if it formed part of the original examination of the person examined; and
 - (b) any adverse party may require that the information be verified by affidavit of the party or be the subject of further examination for discovery.

Sanction for Failing to Correct Answers

- (3) Where a party has failed to comply with subrule (1) or a requirement under clause (2)(b), and the information subsequently discovered is,
- (a) favourable to the party's case, the party may not introduce the information at the trial, except with leave of the trial judge; or

- (b) not favourable to the party's case, the court may make such order as is just.

DISCOVERY OF NON-PARTIES WITH LEAVE

General

- 31.10** (1) The Prothonotary or the court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, including an expert retained by a party in preparation for contemplated or pending litigation, unless that party undertakes to not call the expert as a witness at trial.

Test for Granting Leave

- (2) An order under subrule (1) shall not be made unless the court is satisfied that,
 - (a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;
 - (b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and
 - (c) the examination will not
 - (i) unduly delay the commencement of the trial of the action;
 - (ii) entail unreasonable expense for other parties, or
 - (iii) result in unfairness to the person the moving party seeks to examine.

Service

- (3) Where an order is granted under subrule (1) the moving party shall serve upon the person to be examined and any party to the action a copy of the order for examination in Form 31 A.

Cost Consequences for Examining Party

- (4) A party who examines a person orally under this rule shall serve every party who attended or was represented on the examination with the transcript free of charge, unless the court orders otherwise.
- (5) The examining party is not entitled to recover the costs of the examination from another party unless the court expressly orders otherwise.
- (6) Any person to be examined or examined by any party to a proceeding pursuant to this rule may apply to the court for an order for his costs for

the examination and such order for costs may be granted by the court on such terms as it deems just and reasonable in the circumstances.

Excusing from Examination

- (7) Any person served with a notice of examination pursuant to this rule (Form 31 B) may, within 10 days of service of the notice of examination, apply to the court for an order that they be excused from the examination of discovery on one or more of the grounds that:
- (a) such examination will unduly delay the commencement of the trial of the action;
 - (b) such examination will entail unreasonable expense for the party being examined;
 - (c) such examination will result in unfairness to the person being sought to be examined;
 - (d) such examination is not made in good faith but is made in bad faith and is calculated to annoy, embarrass or repress the person sought to be examined; or
 - (e) on such other grounds as may be just and reasonable in the circumstances.
- (8) Upon an application for an order under subrule (7) the court may:
- (a) order that the examination for discovery proceed as scheduled;
 - (b) order that the examination for discovery be adjourned to a fixed date;
 - (c) award the person to be examined on discovery their costs of the discovery to be paid by the party conducting the discovery;
 - (d) relieve the person to be discovered from their obligation to attend the discovery and vacate the notice of examination for discovery; or
 - (e) grant such order as is just and reasonable in the circumstances.

Limitation on Use at Trial

- (9) The evidence of a person examined under this rule may not be read into evidence at a trial under subrule 31.11(1).

USE OF EXAMINATION FOR DISCOVERY AT TRIAL

Reading in Examination of Party

- 31.11** (1) At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of,
- (a) the adverse party; or
 - (b) a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise,

if the evidence is otherwise admissible, whether the party or other person has already given evidence or not.

Impeachment

- (2) The evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

Qualifying Answers

- (3) Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party the trial judge may direct the introduction of any other part of the evidence that qualifies or explains the part first introduced.

Rebuttal

- (4) A party who reads into evidence as part of the party's own case evidence given on an examination for discovery of an adverse party, or a person examined for discovery on behalf or in place of or in addition to an adverse party, may rebut that evidence by introducing any other admissible evidence.

Party under Disability

- (5) The evidence given on the examination for discovery of a party under disability may be read into or used in evidence at the trial only with leave of the trial judge.

Unavailability of Deponent

- (6) Where a person examined for discovery,
 - (a) has died;
 - (b) is unable to testify because of infirmity or illness;
 - (c) for any other sufficient reason cannot be compelled to attend at the trial; or
 - (d) refuses to take an oath or make an affirmation or to answer any proper question,

any party may, with leave of the trial judge, read into evidence all or part of the evidence given on the examination for discovery as the evidence of the person examined, to the extent that it would be admissible if the person were testifying in court.

- (7) In deciding whether to grant leave under subrule (6), the trial judge shall consider,
 - (a) the extent to which the person was cross-examined on the examination for discovery;
 - (b) the importance of the evidence in the proceeding;
 - (c) the general principle that evidence should be presented orally in

court; and

- (d) any other relevant factor.

Subsequent Action

- (8) Where an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, the evidence given on an examination for discovery taken in the former action may be read into or used in evidence at the trial of the subsequent action as if it had been taken in the subsequent action.

Est. of Faye Carter v. Flemming et al., 2015 PECA 9

The Court found that a Report which was produced regarding a review of care to a patient was not protected by litigation privilege because it was made for a purpose other than contemplated or pending litigation.

Reeves v. Aylward, 2013 PESC 21

The plaintiff sought to set aside an order of the Prothonotary which granted leave for the defendant to conduct an examination for discovery of a non-party. The non-party was an expert witness who resided in Toronto and was engaged by the plaintiff. The plaintiff would not consent to the examination for discovery unless the defendant agreed to pay all the costs associated with the expert's attendance.

The Court found the defendant was entitled to conduct an examination for discovery of the expert without being subject to what, in effect, would be a pre-trial order of costs against the defendant.

The Court also found that the local practice regarding use of the solicitor's own affidavit required by Rule 31.10(2) is an acceptable practice at that stage of the motion.

Llewellyn v. Carter, 2008 PESCAD 12

The court allowed the appeal and addressed the scope of informational disclosure as well as the procedure relating to the order of oral discovery examination.

Gallinger v. Kurylyk (1995), 129 Nfld. & P.E.I.R. 306 (P.E.I.S.C.-A.D.)

Rule 31.03 clearly establishes, as a general rule, that a party to an action has the right to discover an adverse party only once. Any further examinations may be conducted with leave of the court unless the request for a further examination comes within Rule 31.09(2)(b).

Rule 31.09(1) obligates parties to correct or complete answers given on discovery forthwith after discovering they are incorrect or incomplete.

Rule 31.09(2)(b) provides for a second examination as of right without requiring leave of the court under Rule 31.03, but limited to circumstances of verifying the corrected and/or more complete information provided since the first examination.

Oliver v. Severance et al., 2003 PESCTD 50

Any proper question relating to any matter in issue shall be answered by the person to be

examined. Evidence on discovery may be broader than at trial, the wider latitude being permitted on satisfying a “semblance of relevancy” test.

RULE 32**INSPECTION OF PROPERTY****ORDER FOR INSPECTION**

- 32.01** (1) 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.
- (2) For the purpose of the inspection, the court may,
- (a) authorize entry on or into and the taking of temporary possession of any property in the possession of a party or of a person not a party;
 - (b) permit the measuring, surveying or photographing of the property in question, or of any particular object or operation on the property; and
 - (c) permit the taking of samples, the making of observations or the conducting of tests or experiments.
- (3) The order shall specify the time, place and manner of the inspection and may impose such other terms, including the payment of compensation, as are just.
- (4) No order for inspection shall be made without notice to the person in possession of the property unless,
- (a) service of notice, or the delay necessary to serve notice, might entail serious consequences to the moving party; or
 - (b) the court dispenses with service of notice for any other sufficient reason.

RULE 33**MEDICAL EXAMINATION OF PARTIES****MOTION FOR MEDICAL EXAMINATION**

33.01 A motion by an adverse party for an order under section 48 of the *Judicature Act* for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party.

ORDER FOR EXAMINATION**Contents of Order**

33.02 (1) An order under section 48 of the *Judicature Act* may specify the time, place and purpose of the examination and shall name the health practitioner or practitioners by whom it is to be conducted.

Further Examinations

(2) The court may order a second examination or further examinations on such terms respecting costs and other matters as are just.

DISPUTE AS TO SCOPE OF EXAMINATION

33.03 The court may on motion determine any dispute relating to the scope of an examination.

PROVISION OF INFORMATION TO PARTY OBTAINING ORDER**Interpretation**

33.04 (1) Subrule 30.01(1) (meaning of "document", "power") applies to subrule (2).

Party to be Examined Must Provide Information

- (2) The party to be examined shall, unless the court orders otherwise, provide to the party obtaining the order, at least seven days before the examination, a copy of,
- (a) any report made by a health practitioner who has treated or examined the party to be examined in respect of the mental or physical condition in question, other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom the party to be examined undertakes not to call as a witness at the hearing; and
 - (b) any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the party other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in

respect of which the party to be examined undertakes not to call evidence at the hearing.

WHO MAY ATTEND ON EXAMINATION

33.05 No person other than the person being examined, the examining health practitioner and such assistants as the practitioner requires for the purpose of the examination shall be present at the examination, unless the court orders otherwise.

MEDICAL REPORTS

Preparation of Report

33.06 (1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.

Service of Report

(2) The party who obtained the order shall forthwith serve the report on every other party.

PENALTY FOR FAILURE TO COMPLY

33.07 A party who fails to comply with section 48 of the *Judicature Act* or an order made under that section or with Rule 33.04 is liable, if a plaintiff or applicant, to have the proceeding dismissed or, if a defendant or respondent, to have the statement of defence or affidavit in response to the application struck out.

EXAMINATION BY CONSENT

33.08 Rules 33.01 to 33.07 apply to a physical or mental examination conducted on the consent in writing of the parties, except to the extent that they are waived by the consent.

Robbins v. Kenny, 2022 PESC 28

The court allowed a motion by the defendant that the plaintiff undergo a second medical examination, on the basis of fairness, necessity, and prejudice to the defendant if the motion not allowed.

Preece v. Nicholson, et al., 2019 PESC 34

The defendants applied pursuant to Rule 33 for an order for the minor plaintiff to complete the IME initiated by one physician, by providing blood and urine samples to be tested, the results of which would be determined by another physician. After concluding the matter was properly before the court in the form of a Rule 37 motion, the court reviewed the three part test of fairness, necessity and prejudice and granted the defendants' motion.

EXAMINATION OUT OF COURT**RULE 34****PROCEDURE ON ORAL EXAMINATIONS****APPLICATION OF THE RULE**

34.01 Rules 34.02 to 34.19 apply to,

- (a) an oral examination for discovery under Rule 31;
- (b) the taking of evidence before trial under Rule 36.01, subject to Rule 36.02;
- (c) a cross-examination on an affidavit for use on a motion or application under Rule 39.02;
- (d) the examination out of court of a witness before the hearing of a pending motion or application under Rule 39.03; and
- (e) an examination in aid of execution under Rule 60.19.

BEFORE WHOM TO BE HELD

- 34.02** (1) An oral examination to be held in Prince Edward Island shall be held at a time and place set out in the notice of examination or summons to a witness, before,
- (a) the Prothonotary;
 - (b) a court transcriber; or
 - (c) any other person agreed on by the parties.
- (2) A person who objects to being examined at the time or place set out in the notice of examination or before a person assigned under subrule (1) may make a motion to show that the time, place or person is unsuitable for the proper conduct of the examination.
- (3) If a motion under subrule (2) is dismissed, the court shall fix the responding party's costs on a substantial indemnity basis and order the moving party to pay them forthwith, unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable.

PLACE OF EXAMINATION

34.03 Where the person to be examined resides in Prince Edward Island, the examination shall take place in the county in which the person resides, unless the court orders or the person to be examined and all the parties agree otherwise.

HOW ATTENDANCE REQUIRED**Party**

- 34.04** (1) Where the person to be examined is a party to the proceeding, a notice of examination (Form 34 A) shall be served,
- (a) on the party's lawyer of record; or
 - (b) where the party acts in person, on the party personally or by an alternative to personal service.

Person Examined on Behalf or in Place of Party

- (2) Where a person is to be examined for discovery or in aid of execution on behalf or in place of a party, a notice of examination shall be served,
- (a) on the party's lawyer of record; or
 - (b) on the person to be examined, personally and not by an alternative to personal service.

Deponent of Affidavit

- (3) Where a person is to be cross-examined on an affidavit, a notice of examination shall be served,
- (a) on the lawyer for the party who filed the affidavit; or
 - (b) where the party who filed the affidavit acts in person, on the person to be cross-examined, personally and not by an alternative to personal service.

Others

- (4) Where the person to be examined,
- (a) is neither a party nor a person referred to in subrule (2) or (3); and
 - (b) resides in Prince Edward Island,
- the person shall be served with a summons to witness (Form 34 B), personally and not by an alternative to personal service.

Attendance Money

- (5) When a summons to witness is served on a witness, attendance money calculated in accordance with Tariff A shall be paid or tendered to the witness at the same time.

Summons May be Issued in Blank

- (6) On the request of a party or a lawyer and on payment of the prescribed fee, the Prothonotary shall sign, seal and issue a blank summons to witness and the party or lawyer may complete the summons and insert the names of any number of witnesses.

Person Outside Prince Edward Island

- (7) Rule 53.05 (summons to a witness outside Prince Edward Island) applies to the securing of the attendance for examination of a person outside Prince Edward Island and the attendance money paid or tendered to the

person shall be calculated in accordance with the *Interprovincial Subpoena Act*.

Person in Custody

- (8) Rule 53.06 (compelling attendance of witness in custody) applies to the securing of the attendance for examination of a person in custody.

NOTICE OF TIME AND PLACE

Person to be Examined

- 34.05** (1) Where the person to be examined resides in Prince Edward Island, the person shall be given not less than twenty days' notice of the time and place of the examination, unless the court orders otherwise.

Every Other Party

- (2) Every party to the proceeding other than the examining party shall be given not less than twenty days' notice of the time and place of the examination.

EXAMINATION ON CONSENT

- 34.06** A person to be examined and all the parties may consent to the time and place of the examination and,

- (a) to the minimum notice period and the form of notice; or
- (b) to dispense with notice.

WHERE PERSON TO BE EXAMINED RESIDES OUTSIDE PRINCE EDWARD ISLAND

Contents of Order for Examination

- 34.07** (1) Where the person to be examined resides outside Prince Edward Island, the court may determine,
- (a) whether the examination is to take place in or outside Prince Edward Island;
 - (b) the time and place of the examination;
 - (c) the minimum notice period;
 - (d) the person before whom the examination is to be conducted;
 - (e) the amount of attendance money to be paid to the person to be examined; and
 - (f) any other matter respecting the holding of the examination.

Commission and Letter of Request

- (2) Where the person is to be examined outside Prince Edward Island, the order under subrule (1) shall be in Form 34 E and shall, if the moving party requests it, provide for the issuing of,

- (a) a commission (Form 34 C) authorizing the taking of evidence before a named commissioner; and
 - (b) a letter of request (Form 34 D) directed to the judicial authorities of the jurisdiction in which the person is to be found, requesting the issuing of such process as is necessary to compel the person to attend and be examined before the commissioner.
- (3) The commission and letter of request shall be prepared and issued by the Prothonotary.

Attendance Money

- (4) Where the person to be examined resides outside Prince Edward Island and is not a party or a person to be examined on behalf or in place of a party, the examining party shall pay or tender to the person to be examined the amount of attendance money fixed by the order under subrule (1).

Duties of Commissioner

- (5) A commissioner shall, to the extent that it is possible to do so, conduct the examination in the form of oral questions and answers in accordance with these rules, the law of evidence of Prince Edward Island and the terms of the commission, unless some other form of examination is required by the order or the law of the place where the examination is conducted.
- (6) As soon as the transcript of the examination is prepared the commissioner shall,
- (a) return the commission, together with the original transcript and exhibits, to the Prothonotary who issued it;
 - (b) keep a copy of the transcript and, where practicable, the exhibits; and
 - (c) notify the parties who appeared at the examination that the transcript is complete and has been returned to the Prothonotary who issued the commission.

Examining Party to Serve Transcript

- (7) The Prothonotary shall send the transcript to the lawyer for the examining party and the lawyer shall forthwith serve every other party with the transcript free of charge.

PERSON EXAMINED TO BE SWORN

- 34.08** (1) Before being examined, the person to be examined shall take an oath or make an affirmation and, where the examination is conducted in Prince Edward Island, the oath or affirmation shall be administered by the Prothonotary or by a person authorized to administer oaths in Prince Edward Island.
- (2) Where the examination is conducted outside Prince Edward Island, the oath or affirmation may be administered by the person before whom the

examination is conducted, a person authorized to administer oaths in Prince Edward Island or a person authorized to take affidavits or administer oaths or affirmations in the jurisdiction where the examination is conducted.

INTERPRETER

- 34.09** (1) Where the person to be examined does not understand the language or languages in which the examination is to be conducted or is deaf or mute, a competent and independent interpreter shall, before the person is examined, take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation and the questions to and answers of the person being examined.
- (2) Where an interpreter is required by subrule (1) for the examination of,
- (a) a party or a person on behalf or in place of a party, the party shall provide the interpreter;
 - (b) any other person, the examining party shall provide the interpreter, unless the interpretation is from English to French or from French to English and an interpreter is provided by the Ministry of the Attorney General.

PRODUCTION OF DOCUMENTS ON EXAMINATION

Interpretation

- 34.10** (1) Subrule 30.01(1) (meaning of "document", "power") applies to subrules (2), (3) and (4).

Person to be Examined Must Bring Required Documents and Things

- (2) The person to be examined shall bring to the examination and produce for inspection,
- (a) on an examination for discovery, all documents in his or her possession, control or power that are not privileged and that subrule 30.04(4) requires the person to bring; and
 - (b) on any examination, including an examination for discovery, all documents and things in his or her possession, control or power that are not privileged and that the notice of examination or summons to witness requires the person to bring.

Notice or Summons May Require Documents and Things

- (3) Unless the court orders otherwise, the notice of examination or summons to witness may require the person to be examined to bring to the examination and produce for inspection,
- (a) all documents and things relevant to any matter in issue in the proceeding that are in his or her possession, control or power and are not privileged; or

- (b) such documents or things described in clause (a) as are specified in the notice or summons.

Duty to Produce Other Documents

- (4) Where a person admits, on an examination, that the person has possession or control of or power over any other document that relates to a matter in issue in the proceeding and is not privileged, the person shall produce it for inspection by the examining party forthwith, if the person has the document at the examination, and if not, within two days thereafter, unless the court orders otherwise.

RE-EXAMINATION

On Examination for Discovery

- 34.11** (1) A person being examined for discovery may be re-examined by his or her own lawyer and by any party adverse in interest to the examining party.

On Cross-Examination of Affidavit or Examination in Aid of Execution

- (2) A person being cross-examined on an affidavit or examined in aid of execution may be re-examined by his or her own lawyer.

Timing and Form

- (3) The re-examination shall take place immediately after the examination or cross-examination and shall not take the form of a cross-examination.

On Examination for Motion or Application

- (4) Re-examination of a witness examined,
 - (a) before the hearing of a motion or application, is governed by subrule 39.03(2); and
 - (b) at the hearing of a motion or application, is governed by subrule 39.03(3).

On Examination Before Trial

- (5) Re-examination of a witness examined before trial under Rule 36 is governed by subrule 36.02(2).

OBJECTIONS AND RULINGS

- 34.12** (1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.
- (2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing.
 - (3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the court.

RULINGS BY OFFICIAL EXAMINER

- 34.13** The Prothonotary may make rulings in respect of the conduct of an examination, other than a ruling on the propriety of a question, but the Prothonotary's ruling is subject to review on a motion to set aside or vary the ruling.

IMPROPER CONDUCT OF EXAMINATION**Adjournment to Seek Directions**

- 34.14** (1) An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where,
- (a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections;
 - (b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined;
 - (c) many of the answers to the questions are evasive, unresponsive or unduly lengthy; or
 - (d) there has been a neglect or improper refusal to produce a relevant document on the examination.

Sanctions for Improper Conduct or Adjournment

- (2) Where the court finds that,
- (a) a person's improper conduct necessitated a motion under subrule (1); or
 - (b) a person improperly adjourned an examination under subrule (1),
- the court may order the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination and the court may fix the costs and make such other order as is just.

SANCTIONS FOR DEFAULT OR MISCONDUCT BY PERSON TO BE EXAMINED

- 34.15** (1) Where a person fails to attend at the time and place fixed for an examination in the notice of examination or summons to witness or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that he or she is required to produce or to comply with an order under Rule 34.14, the court may,
- (a) where an objection to a question is held to be improper, order or permit the person being examined to reattend at his or her own

expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;

- (b) where the person is a party or, on an examination for discovery, a person examined on behalf or in place of a party, dismiss the party's proceeding or strike out the party's defence;
 - (c) strike out all or part of the person's evidence, including any affidavit made by the person; and
 - (d) make such other order as is just.
- (2) Where a person does not comply with an order under Rule 34.14 or subrule (1), a judge may make a contempt order against the person.

EXAMINATION TO BE RECORDED

34.16 Every examination shall be recorded in its entirety in question and answer form in a manner that permits the preparation of a typewritten transcript of the examination, unless the court orders or the parties agree otherwise.

TYPEWRITTEN TRANSCRIPT

- 34.17** (1) Where a party so requests, the Prothonotary or person who recorded an examination shall have a typewritten transcript of the examination prepared and completed within four weeks after receipt of the request.
- (2) The transcript shall be certified as correct by the person who recorded the examination, but need not be read to or signed by the person examined.
- (3) As soon as the transcript is prepared the official examiner or person who recorded the examination shall send one copy to each party who has ordered and paid for a transcript and, if a party so requests and pays for it, shall provide an additional copy for the use of the court.

FILING OF TRANSCRIPT

Party to Have Transcript Available

- 34.18** (1) It is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the court.

Filing for Use on Motion or Application

- (2) Where a party intends to refer to a transcript on the hearing of a motion or application, a copy of the transcript for the use of the court shall be filed in the court office where the motion or application is to be heard, at least four days before the hearing.
- (2a) The party may file a copy of a portion of the transcript if the other party consents.

Filing for Use at Trial

- (3) A copy of a transcript for the use of the court at trial shall not be filed until a party refers to it at trial, and the trial judge may read only the portions to which a party refers.

VIDEOTAPING OR OTHER RECORDING OF EXAMINATION

- 34.19** (1) On consent of the parties or by order of the court, an examination may be recorded by videotape or other similar means and the tape or other recording may be filed for the use of the court along with the transcript.
- (2) Rule 34.18 applies, with necessary modifications, to a tape or other recording made under subrule (1).

Muir v. MacRae, Gaudet & Johnston, [1996] 2 P.E.I.R. 399 (P.E.I.S.C.T.D.)

The plaintiff was granted an order pursuant to Rule 34.19 permitting her to videotape the examination for discovery. Only if she used a videotaping service approved by the court would she be permitted to file the videotape of the examination with the court or make use of the evidence in court.

The examination was ordered to take place in Summerside where most of the witnesses resided and the examination was to be conducted by an examiner appointed by the court, unless the parties could agree upon a duly qualified examiner.

RULE 35

PROCEDURE ON EXAMINATION FOR DISCOVERY BY WRITTEN QUESTIONS

QUESTIONS

35.01 An examination for discovery by written questions and answers shall be conducted by serving a list of the questions to be answered (Form 35 A) on the person to be examined and every other party.

ANSWERS

- 35.02** (1) Written questions shall be answered by the affidavit (Form 35 B) of the person being examined, and served on the examining party within fifteen days after service of the list of questions.
- (2) The examining party shall serve the answers on every other party forthwith.

OBJECTIONS

35.03 An objection to answering a written question shall be made in the affidavit of the person being examined, with a brief statement of the reason for the objection.

FAILURE TO ANSWER

Further List of Questions

- 35.04** (1) Where the examining party is not satisfied with an answer or where an answer suggests a new line of questioning, the examining party may, within ten days after receiving the answer, serve a further list of written questions which shall be answered within fifteen days after service.

Court Order for Further Answers

- (2) Where the person being examined refuses or fails to answer a proper question or where the answer to a question is insufficient, the court may order the person to answer or give a further answer to the question or to answer any other question either by affidavit or on oral examination.

Court Order for Oral Examination

- (3) Where the court is satisfied, on reading all the answers to the written questions, that some or all of them are evasive, unresponsive or otherwise unsatisfactory, the court may order the person examined to submit to oral examination on such terms respecting costs and other matters as are just.

Additional Sanctions

- (4) Where a person refuses or fails to answer a proper question on a written examination or to produce a document that the person is required to produce, the court may, in addition to imposing the sanctions provided in subrules (2) and (3),

- (a) if the person is a party or a person examined on behalf or in place of a party, dismiss the party's action or strike out the party's defence;
- (b) strike out all or part of the person's evidence; and
- (c) make such other order as is just.

IMPROPER CONDUCT OF EXAMINATION

35.05 On motion by the person being examined, or by any party, the court may terminate the written examination or limit its scope where,

- (a) the right to examine is being abused by an excess of improper questions; or
- (b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined.

FILING QUESTIONS AND ANSWERS

35.06 Rule 34.18 applies, with necessary modifications, to the filing of written questions and answers for the use of the court.

Century 21, Colonial Realty Inc. v. Dickson - Thompson, [1995] 1 P.E.I.R. 335 (P.E.I.S.C.T.D.)

The defendant did not respond to written questions and the plaintiff applied to dismiss the statement of defence. The Court refused to dismiss the statement of defence and gave the defendant time to respond to the questions.

RULE 36**TAKING EVIDENCE BEFORE TRIAL****WHERE AVAILABLE****By Consent or by Order**

- 36.01** (1) In this rule, “party” includes a party to a pending or intended proceeding.
- (2) A party who intends to introduce the evidence of a person at trial may, with leave of the court or the consent of the parties, examine the person on oath or affirmation before trial for the purpose of having the person's testimony available to be tendered as evidence at the trial.

Discretion of Court

- (3) In exercising its discretion to order an examination under subrule (1), the court shall take into account,
- (a) the convenience of the person whom the party seeks to examine;
 - (b) the possibility that the person will be unavailable to testify at the trial by reason of death, infirmity or sickness;
 - (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial;
 - (d) the expense of bringing the person to the trial;
 - (e) whether the witness ought to give evidence in person at the trial; and
 - (f) any other relevant consideration.

Expert Witness

- (4) Before moving for leave to examine an expert witness under subrule (1), the moving party shall serve on every other party the report of the expert witness referred to in subrule 53.03(1) (calling expert witness at trial) unless the court orders otherwise.

Interim Costs, Pending or Intended Proceeding

- (5) Where an order is made under subrule (2) for the examination of a witness in respect of a matter that is or will be the subject of a pending or intended proceeding, the court may, if it considers it appropriate to do so, order the moving party to pay to any other party, in advance of the examination, any or all of the costs reasonably expected to arise for the other party from the examination and any related cross-examination or re-examination.

PROCEDURE

- 36.02** (1) Subject to subrule (2), Rule 34 applies to the examination of a witness under Rule 36.01, unless the court orders otherwise, and, for the purpose,

a reference in Rule 34 to a party includes a reference to a party to a pending or intended proceeding.

- (2) A witness examined under Rule 36.01 may be examined, cross-examined and re-examined in the same manner as a witness at trial.

EXAMINATIONS OUTSIDE PRINCE EDWARD ISLAND

36.03 Where an order is made under Rule 36.01 for the examination of a witness outside Prince Edward Island, the order shall, if the moving party requests it, provide for the issuing of a commission and letter of request under subrules 34.07(2) and (3) for the taking of the evidence of the witness and, on consent of the parties, any other witness in the same jurisdiction, and the order shall be in Form 34 E.

USE AT TRIAL

- 36.04** (1) In subrules (2) to (7), where an action,
- (a) is brought by or against a corporation, "party" includes an officer, director or employee of the corporation;
 - (b) is brought by or against a partnership or a sole proprietorship using the firm name, "party" includes each person who was, or is alleged to have been, a partner or the sole proprietor, as the case may be;
 - (c) is brought by or against a party under disability, "party" includes the litigation guardian, guardian or trustee;
 - (d) is brought by or against an assignee, "party" includes the assignor;
 - (e) is brought by or against a trustee of the estate of a bankrupt, "party" includes the bankrupt;
 - (f) is brought or defended for the immediate benefit of a person who is not a party, "party" includes the person for whose immediate benefit the action is brought or defended.
- (2) At trial any party may use the transcript and videotape or other recording of an examination under rule 36.01 or 36.03 of a witness who is not a party as the evidence of the witness, unless the court orders otherwise on the ground that the witness ought to give evidence at trial or for any other sufficient reason.
- (3) A witness who is not a party and whose evidence has been taken under rule 36.01 or 36.03 shall not be called to give evidence at the trial, except with leave of the trial judge.
- (4) With leave of the trial judge or the consent of the parties, a party may use at trial the transcript and a videotape or other recording of an examination under rule 36.01 of a witness who is a party as the evidence of the witness.
- (5) In exercising its discretion under subrule (4), the court shall take into account,

- (a) whether the party is unavailable to testify by reason of death, infirmity or sickness;
 - (b) whether the party ought to give evidence in person at the trial; and
 - (c) any other relevant consideration.
- (6) Use of evidence taken under rule 36.01 or 36.03 is subject to any ruling by the trial judge respecting its admissibility.
- (7) The transcript and a videotape or other recording may be filed with the court at trial and need not be read or played at trial unless a party or the trial judge requires it.

RULE 37**MOTIONS - JURISDICTION AND PROCEDURE****NOTICE OF MOTION**

[See Supreme Court Practice Directions, Part VI, A. Pre-Motion Conferences, where applicable.]

37.01 A motion shall be made by a notice of motion (Form 37 A) unless the nature of the motion or the circumstances make a notice of motion unnecessary.

JURISDICTION TO HEAR A MOTION**Jurisdiction of a Judge**

37.02 (1) A judge has jurisdiction to hear any motion in a proceeding.

Jurisdiction of Prothonotary

- (2) In addition to the duties set forth in the *Judicature Act*, the Prothonotary has jurisdiction to hear any uncontested motion in a proceeding in the Supreme Court or Court of Appeal, and has all the jurisdiction of a judge in respect of such a motion, except a motion,
- (a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;
 - (b) to set aside, vary or amend an order of a judge;
 - (c) to abridge or extend a time prescribed by an order that the Prothonotary could not have made;
 - (d) for judgment on consent in favour of or against a party under disability;
 - (e) relating to the liberty of the subject; or
 - (f) in an appeal.
- (3) The Prothonotary shall make an order granting the relief sought on a motion for an order on consent, if,
- (a) the consent of all parties (including the consent of any party to be added, deleted or substituted) is filed;
 - (b) the consent states that no party affected by the order is under disability; and
 - (c) the order sought is for,
 - (i) amendment of a pleading, notice of application or notice of motion,
 - (ii) addition, deletion or substitution of a party,
 - (iii) removal of a lawyer as lawyer of record,

- (iv) setting aside the noting of a party in default,
- (v) setting aside a default judgment,
- (vi) discharge of a certificate of pending litigation,
- (vii) security for costs in a specified amount,
- (viii) re-attendance of a witness to answer questions on an examination,
- (ix) fulfilment of undertakings given on an examination, or
- (x) dismissal of a proceeding, with or without costs.

PLACE OF HEARING

37.03 (1) Unless the court otherwise orders, the place of hearing a motion shall be at the place named in the notice of motion.

Leave to Hear Motion on Notice at Another Place

- (2) On the ground of urgency or hardship or for another sufficient reason, the court may grant leave for the hearing of a motion on notice at a place elsewhere than provided in subrule (1).
- (3) Where leave is refused on a motion under subrule (2), the court shall fix the costs of any responding party who appeared at the hearing of the motion on a lawyer and client basis, together with travelling expenses, and order the moving party or his or her lawyer to pay those costs and expenses forthwith, unless the court is satisfied that the making of the motion for leave, although unsuccessful, was nevertheless reasonable.

Motions - Whom to be Made

37.04 A motion in a proceeding shall be made to,

- (a) the Prothonotary, if the motion is within the Prothonotary's jurisdiction, or
- (b) a judge, in any other case.

HEARING DATE FOR MOTIONS

- 37.05** (1) Where a motion is to be heard by a judge, a hearing date shall be obtained from the registrar before the notice of motion is served.
- (2) Subrule (1) does not apply if the motion is urgent and a satisfactory date cannot be obtained from the registrar.
 - (3) Subrule (1) does not apply to motions made in the Family Section for which a pre-motion conference will be held.
 - (4) **Revoked.**

CONTENT OF NOTICE

37.06 Every notice of motion (Form 37 A) shall,

- (a) state the precise relief sought;
- (b) state the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and
- (c) list the documentary evidence to be used at the hearing of the motion.

SERVICE OF NOTICE

Required as General Rule

- 37.07** (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise.

Where Not Required

- (2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.
- (3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.
- (4) Unless the court orders or these rules provide otherwise, an order made without notice to a person or other party affected by the order shall be served on the person or party together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion.

Where Notice Ought to Have Been Served

- (5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,
 - (a) dismiss the motion or dismiss it only against the person who was not served;
 - (b) adjourn the motion and direct that the notice of motion be served on the person; or
 - (c) direct that any order made on the motion be served on the person.

Minimum Notice Period

- (6) Where a motion is made on notice, the party making the motion shall, unless the court otherwise orders, file, with proof of service, a motion record containing a copy of the notice of motion and of all other material to be used on the motion, at least ten days before the hearing, unless another Rule specifically provides for a different filing time or notice period.

Contents of Motion Record

- (7) The motion record shall contain in consecutively numbered pages arranged in the following order,
 - (a) a table of contents describing each document, including each exhibit, by its nature and date;

- (b) a copy of the notice of motion;
- (c) a copy of all affidavits to be used by the maker of the motion;
- (d) a list of all relevant extracts from any transcripts of evidence;
- (e) a copy of any material in the court file that is necessary for the hearing of the motion;
- (f) a factum, if needed, consisting of a concise statement, with argument, of the facts and law relied on by the party;
- (g) a memorandum of authorities, if needed, listing any relevant case law, statute, regulation or rule that the moving party intends to rely on or refer to; and
- (h) a draft of any proposed order.

Responding Party's Motion Record

- (8) Where a motion record is served, the responding party shall file with proof of service at least four days before the hearing date, a responding party's motion record containing in consecutively numbered pages arranged in the following order,
 - (a) a table of contents describing each document, including each exhibit, by its nature and date;
 - (b) a copy of any material to be used by the responding party on the motion and not included in the motion record of the party making the motion;
 - (c) a factum, if needed, consisting of a concise statement, with argument, of the facts and law relied on by the responding party;
 - (d) a memorandum of authorities, if needed, listing any relevant case law, statute, regulation or rule that the responding party intends to rely on or refer to.

Transcript of Evidence

- (9) A party who intends to refer to a transcript of evidence at the hearing of a motion shall file a copy of the transcript as provided by Rule 34.18.

Material may be Filed as Part of Record

- (10) A notice of motion and any other material served by a party for use on a motion may be filed together with proof of service, as part of the party's motion record and need not be filed separately.

ABANDONED MOTIONS

- 37.08 (1) A party who makes a motion may abandon it by delivering a notice of abandonment.
- (2) A party who serves a motion record and does not file it or appear at the

hearing shall be deemed to have abandoned the motion unless the court orders otherwise.

- (3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the motion record was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

REFUSALS AND UNDERTAKINGS CHART

- 37.09** (1) On motion to compel answers or to have undertakings given on an examination or cross-examination satisfied,
- (a) the moving party shall serve on every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least ten days before the hearing, a refusals and undertakings chart that sets out
 - (i) the issue that is the subject of the refusal or undertaking and its connection to the pleadings or affidavit,
 - (ii) a reference to the page and line numbers of the transcript where the question appears, and
 - (iii) the exact words of the question; and
 - (b) the responding party shall serve on the moving party and every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a copy of the undertakings and refusals chart that was served by the moving party completed so as to show
 - (i) the answer provided; or
 - (ii) the basis for the refusal to answer the question or satisfy the undertaking.

HEARING IN ABSENCE OF PUBLIC

- 37.10** (1) A motion may be heard in the absence of the public where,
- (a) the motion is to be heard and determined without oral argument.
 - (b) because of urgency, it is impractical to have the motion heard in public;
 - (c) the motion is to be heard by telephone conference or video conference;
 - (d) the motion is made in the course of a pre-trial conference or case conference; or
 - (e) the motion is before a single judge of the Court of Appeal.
- (2) The hearing of all other motions shall be open to the public, except as provided in section 61 of the *Judicature Act* in which case the presiding

judge or officer shall endorse on the notice of motion leave for a hearing in the absence of the public.

HEARING WITHOUT ORAL ARGUMENT

Consent Motions, Unopposed Motions and Motions Without Notice

- 37.11** (1) Where a motion is on consent, unopposed or without notice under subrule 37.07(2), the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise.
- (2) Where the motion is on consent, the consent and a draft order shall be filed with the notice of motion.
- (3) Where the motion is unopposed, a notice from the responding party stating that the party does not oppose the motion and a draft order shall be filed with the notice of motion.

Opposed Motions in Writing

- (4) Where the issues of fact and law are not complex, the moving party may propose in the notice of motion that the motion be heard in writing without the attendance of the parties, in which case,
- (a) the motion shall be made on at least fourteen days notice;
 - (b) the moving party shall serve with the notice of motion and immediately file, with proof of service in the court office where the motion is to be heard, a motion record, a draft order and a factum entitled factum for a motion in writing, setting out the moving party's argument;
 - (c) the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise.
- (5) Within ten days after being served with the moving party's material, the responding party shall serve and file, with proof of service, in the court office where the motion is to be heard,
- (a) a consent to the motion;
 - (b) a notice that the responding party does not oppose the motion;
 - (c) a motion record, a notice that the responding party agrees to have the motion heard and determined in writing under this rule and a factum entitled factum for a motion in writing setting out the party's argument; or
 - (d) a notice that the responding party intends to make oral argument along with any material intended to be relied upon by the party.
- (6) Where the responding party delivers a notice under subrule (5) that the party intends to make oral argument, the moving party may either attend the hearing and make oral argument or not attend and rely on the party's motion record and factum.

DISPOSITION OF MOTION

- 37.12** (1) On the hearing of a motion, the presiding judge or Prothonotary may grant the relief sought or dismiss or adjourn the motion, in whole or in part and with or without terms, and may,
- (a) where the proceeding is an action, order that it be placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or
 - (b) where the proceeding is an application, order that it be heard at such time and place as are just.
- (2) A judge who hears a motion may,
- (a) in a proper case, order that the motion be converted into a motion for judgment; or
 - (b) order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge.
- (3) Where on a motion a judge directs the trial of an issue, subrules 38.11(2) and (3) (issue treated as action) apply with necessary modifications.

SETTING ASIDE, VARYING OR AMENDING ORDERS**Motion to Set Aside or Vary**

- 37.13** (1) A party or other person who,
- (a) is affected by an order obtained on motion without notice; or
 - (b) fails to appear on a motion through accident, mistake or insufficient notice; or
 - (c) is affected by an order of the registrar
- may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least four days after service of the notice of motion.
- (2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

Order made by Registrar

- (3) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a registrar in a proceeding may be made to a judge or Prothonotary at a place in accordance with Rule 37.03 (place of hearing motions).

Order made by Judge or Prothonotary

- (4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge or Prothonotary may be made to the judge or Prothonotary who made it at a place in accordance with Rule 37.03 (place

of hearing motions).

Order Made in Court of Appeal

- (5) A motion under subrule (1) or any other rule to set aside, vary or amend an order made by a judge or panel of the Court of Appeal may be made,
 - (a) where the order was made by a judge of the Court of Appeal, to the judge who made it or any other judge of the court; or
 - (b) where the order was made by a panel of the court, to the panel that made it or any other panel of the court.

MOTIONS IN A COMPLICATED PROCEEDING OR SERIES OF PROCEEDINGS

- 37.14 (1)** Where a proceeding involves complicated issues or where there are two or more proceedings in a court that involve similar issues, the Chief Justice of the Supreme Court, or a judge designated by them, may direct that all motions in the proceeding or proceedings be heard by a particular judge.
- (1.2) A judge who is directed to hear all motions under subrule (1) may give such directions and make such procedural orders as are necessary to promote the most expeditious and least expensive determination of the proceeding.
- (2) A judge who hears motions pursuant to a direction under subrule (1) shall not preside at the trial of the actions or the hearing of the applications except with the written consent of all parties.

PROHIBITING MOTIONS WITHOUT LEAVE

- 37.15** On motion by any party, a judge or Prothonotary may by order prohibit another party from making further motions in the proceeding without leave, where the judge or Prothonotary on the hearing of the motion is satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions.

MOTION BEFORE COMMENCEMENT OF PROCEEDING

- 37.16** In an urgent case, a motion may be made before the commencement of a proceeding on the moving party's undertaking to commence the proceeding forthwith.

J.P.M. v. M.A.M., 2025 PESC 20

On a motion for child and spousal support, the court had concerns that there was insufficient evidence filed and that multiple credibility assessments would be required on a significant number of conflicting facts. The issues of child and spousal support were set for a trial pursuant to Rule 37.12(2)(b).

Ayangma v. FLSB et al, 2022 PESC 30

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.

Preece v. Nicholson, et al., 2019 PESC 34

The defendants applied pursuant to Rule 33 for an order for the minor plaintiff to complete the IME initiated by one physician, by providing blood and urine samples to be tested, the results of which would be determined by another physician. After concluding the matter was properly before the court in the form of a Rule 37 motion, the court reviewed the three part test of fairness, necessity and prejudice and granted the defendants' motion.

C.G v. P.P., 2020 PESC 22

Following a number of motions in the action, including an abandoned motion for contempt, the issue left to be determined was that of costs. The plaintiff requested costs for her abandoned motion for contempt and a certificate of pending litigation. The defendant requested costs of the abandoned motion pursuant to Rule 37.08(3). The court reviewed the history of the action and the guidance provided by Rule 57. It held that the defendant was primarily responsible for the outstanding issues between certain relevant dates pre-dating the abandonment of the motion and, therefore, awarded partial indemnity costs to the plaintiff for a specific period of time, but not for all of the time frames requested by the plaintiff.

Carrington v. MacLeod, 2019 PECA 24

A motion for summary judgment shall be made in Form 37 A unless the nature of the motion or the circumstances make a notice of motion unnecessary. In this case the motions judge did not make an error of law. In his view the issues needed to be decided at trial. Even though there was no formal motion, he decided the issue posed by the plaintiff.

Ferguson Estate (Re), 2018 PECA 19

The Executor brought a motion pursuant to Rule 14.05 which permits the court to give an opinion or direction on a question affecting the rights of a person in respect to the administration of an

estate. This rule refers to motions in respect of any matter where it is unlikely that there will be any material fact in dispute. Rule 37.12(2) permits a judge hearing a motion to grant various relief, to order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by a trial judge.

Dash 224, LLC v. Vector Aerospace Engine Services, 2016 PECA 4

Forum non conveniens is an issue that may be raised under s.19 of the *Judicature Act* after a party has attained to jurisdiction provided it is raised in a timely fashion.

J.W.K. v. V.A.K., 2009 PESC 37

The court held there is no procedure pursuant to Rule 37 for a counter-motion.

Vail v. Prince Edward Island (Workers Compensation Board), 2009 PECA 17

A motion for the funding of public interest litigation was presented before the commencement of a proceeding. Only in urgent situations does Rule 37.17 allow for the presentation of a motion before the commencement of a proceeding. This rule applies to the situation where a public interest litigant makes a motion to request the government, or a government agency, to fund the litigation.

CGI & Ors. v. Garrett, 2006 PESCTD 53

The defendant moved to set aside an order pursuant to Rule 37.14(1) and on the grounds that he was mistaken in failing to note the time and place of the hearing as indicated on the motion record that had been served upon him. The motion was dismissed. The court concluded the defendant did not make a mistake.

Bagnall's and Tersteeg v. AWARD and Ors., 2001 PESCTD 64

The plaintiffs commenced an action against the corporate defendant and a number of other defendants in their personal capacity. Before serving the originating notice on the individuals and without serving them with the notice of motion, the plaintiffs sought a declaration from the court with respect to the liability of the corporate defendant under a contract between it and the plaintiffs. The court dismissed the motion because the individuals had not been served as required by Rules 16 and 37.

Clark v. Simmonds (1999), 171 Nfld. & P.E.I.R. 70 (P.E.I.S.C.-T.D.)

On the facts of this case the party affected by the *ex parte* order of the Prothonotary could either file an appeal from the order pursuant to Rule 62 or make a motion to set aside or vary, pursuant to Rule 37.14(1).

Judson Catering Ltd. v. Marine Atlantic Inc. (1994), 123 Nfld. & P.E.I.R. 68 (P.E.I.S.C.-T.D.)

Plaintiff made a motion before the commencement of a proceeding pursuant to Rule 37.17 (erroneously referred to in the decision as Rule 31.17) seeking an injunction and a declaration for wrongful conduct. The Court stated the motion must fail for the principal reason that it seeks a resolution of the ultimate question in the anticipated proceeding by means of an interim declaration. It is not within the court's authority to make declaratory orders determining the rights of the parties prior to the commencement of the proceeding.

Huynh v. Mills (1991), 96 Nfld. & P.E.I.R. 295 (P.E.I.S.C.-T.D.)

Pursuant to Rule 37.02(2)(a) the Prothonotary has no jurisdiction to grant default judgment

because pursuant to Rule 19 the power to grant default judgment is conferred expressly on a judge.

RULE 38**APPLICATIONS - JURISDICTION AND PROCEDURE****APPLICATION OF THE RULE**

- 38.01** (1) Rules 38.02 to 38.12 apply to all proceedings commenced by a notice of application under Rule 14.05.
- (2) Rules 38.02 to 38.13 apply to an application made under subsection 65(1) of the *Judicature Act* unless otherwise provided in Rule 38.14 and subject to any modifications set out in that rule.

JURISDICTION

- 38.02** A judge of the court in which a proceeding is pending has jurisdiction to hear any application.

APPLICATIONS – TO WHOM TO BE MADE**Judge**

- 38.03** An application in the court may be made to a judge or to the Prothonotary where the Prothonotary has been assigned jurisdiction by a statute or by the Rules of Court.

PLACE AND DATE OF HEARING**Place**

- 38.04** (1) Unless the court orders otherwise, the place of hearing an application shall be at the place named in the application.
- (2) A hearing date should be obtained from the registrar before the notice of application is issued.

Counter-Application

- (3) Where a notice of application has been served, and the respondent wishes to make an application against the applicant, or against the applicant and another person, the respondent may make the application at the same place and time to the same judge, unless the court orders otherwise.

CONTENT OF NOTICE

- 38.05** Every notice of application (Form 14 E) shall state,
- (a) the precise relief sought;
 - (b) the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and
 - (c) the documentary evidence to be used at the hearing of the application.

ISSUING OF NOTICE

38.06 A notice of application shall be issued as provided by Rule 14.07 before it is served.

SERVICE OF NOTICE**Generally**

38.07 (1) The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions.

Where Notice Ought to Have Been Served

- (2) Where it appears to the judge hearing the application that the notice of application ought to have been served on a person who has not been served, the judge may,
- (a) dismiss the application or dismiss it only against the person who was not served;
 - (b) adjourn the application and direct that the notice of application be served on the person; or
 - € direct that any judgment made on the application be served on the person.

Minimum Notice Period

- (3) The notice of application shall be served at least ten days before the date of the hearing of the application, except where the notice is served outside Prince Edward Island, in which case it shall be served at least twenty days before the hearing date.

Filing Proof of Service

- (4) Where service of the notice of application is effected outside Prince Edward Island, the notice of application shall be filed with proof of service at least ten days before the hearing.

NOTICE OF APPEARANCE

- 38.08** (1) A respondent who has been served with a notice of application shall forthwith deliver a notice of appearance (Form 38 A).
- (2) A respondent who has not delivered a notice of appearance is not entitled to,
- (a) receive notice of any step in the application;
 - (b) receive any further document in the application, unless,
 - (i) the court orders otherwise, or
 - (ii) the document is an amended notice of application that changes the relief sought;

- (c) file material, examine a witness or cross-examine on an affidavit on the application; or
 - (d) be heard at the hearing of the application, except with leave of the presiding judge.
- (3) Despite subrule (2), a party who is served with a notice of application outside Prince Edward Island may make a motion under subrule 17.06(1) before delivering a notice of appearance and is entitled to be served with material responding to the motion.
- (4) The notice of appearance and any affidavit to be used shall be filed with proof of service at least four days before the hearing.

ABANDONED APPLICATIONS

- 38.09** (1) The applicant may abandon an application by delivering a notice of abandonment.
- (2) An applicant who fails to appear at the hearing shall be deemed to have abandoned the application unless the court orders otherwise.
- (3) Where an application is abandoned or is deemed to have been abandoned, a respondent on whom the notice of application was served is entitled to the costs of the application, unless the court orders otherwise.

MATERIAL FOR USE ON APPLICATIONS

Application Record and Factum

- 38.10** (1) The applicant shall,
- (a) serve an application record, together with a factum consisting of a concise argument stating the facts and law relied on by the applicant, at least ten days before the hearing, on every respondent who has served a notice of appearance; and
 - (b) file the application record and factum, with proof of service, at least ten days before the hearing, in the court office where the application is to be heard.
- (2) The applicant's application record shall contain, in consecutively numbered pages arranged in the following order,
- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
 - (b) a copy of the notice of application;
 - (c) a copy of all affidavits and other material served by any party for use on the application;
 - (d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves;

- (e) a copy of any other material in the court file that is necessary for the hearing of the application; and
- (f) a draft of any proposed order.

Respondent's Application Record and Factum

- (3) The respondent shall serve on every other party, at least four days before the hearing, a factum consisting of a concise argument stating the facts and law relied on by the respondent.
- (3.1) If of the opinion that the application record is incomplete, the respondent may serve on every other party, at least four days before the hearing, a respondent's application record containing, in consecutively numbered pages arranged in the following order,
 - (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and
 - (b) a copy of any material to be used by the respondent on the application and not included in the applicant's application record.
- (3.2) The respondent's factum, and the respondent's application record, if any, shall be filed with proof of service in the court office where the application is to be heard, at least four days before the hearing.

Dispensing with Record and Factum

- (3.3) A judge, before or at the hearing of the application, may dispense with compliance with this rule in whole or in part.

Material May be Filed as Part of Record

- (4) Any material served by a party for use on an application may be filed, together with proof of service, as part of the party's application record and need not be filed separately if the record is filed within the time prescribed for filing the notice or other material.

Transcript of Evidence

- (5) A party who intends to refer to a transcript of evidence at the hearing of an application shall file a copy of the transcript as provided by Rule 34.18.

DISPOSITION OF APPLICATION

- 38.11** (1) On the hearing of an application the presiding judge may,
- (a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or
 - (b) order that the whole application or any issue proceed to trial and give such directions as are just.

- (2) Where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action, subject to the directions in the order directing the trial.
- (3) Where a trial of an issue in the application is directed, the order directing the trial may provide that the proceeding be treated as an action in respect of the issue to be tried, subject to any directions in the order, and shall provide that the application be adjourned to be disposed of by the trial judge.

SETTING ASIDE JUDGMENT ON APPLICATION MADE WITHOUT NOTICE

- 38.12** (1) A party or other person who is affected by a judgment on an application made without notice or who fails to appear at the hearing of an application through accident, mistake or insufficient notice may move to set aside or vary the judgment, by a notice of motion that is served forthwith after the judgment comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.
- (2) A motion under subrule (1) may be made,
 - (a) to the judge who granted the judgment, or
 - (b) to any other judge.
 - (3) On a motion under subrule (2), the judgment may be set aside or varied on such terms as are just.

HEARING BY CONFERENCE TELEPHONE

- 38.13** By appointment obtained from the judge or officer before whom the application is to be heard, the application may be heard in whole or in part by means of a conference telephone call.

APPLICATIONS UNDER S.65(1) OF THE JUDICATURE ACT

- 38.14** (1) This Rule applies to applications made under subsection 65(1) of the *Judicature Act*.

Written Hearing

- (2) An application made under subsection 65(1) of the *Judicature Act* shall be heard in writing without the attendance of the parties, unless the court orders otherwise.

Commencement

- (3) The application shall be commenced by filing both a notice of application and the application record described in subrule 38.10(2).

Factum not Required

- (4) A factum described in clause 38.10(1)(a) is not required to be filed, but any factum that is filed shall be filed together with the notice of application and the application record.

Interpretation of Service of Notice Rule

- (5) Subrules 38.07(1) and (2) shall be read as if the reference to the notice of application includes reference to the application record and, if applicable, the applicant's factum.

Service on Attorney General

- (6) In addition to serving the notice of application, application record and, if applicable, factum, on all parties under subrule 38.07(1), the applicant shall serve the documents on the Attorney General of Prince Edward Island in the manner described in clause 16.02(1)(h).

Timing of Service

- (7) The notice of application, application record and, if applicable, factum shall be served within 15 days after the documents were filed or, if the service is on a person outside Prince Edward Island, within 25 days after the documents were filed.

Proof of Service

- (8) Proof of service of the notice of application, application record and, if applicable, factum shall be filed immediately after they are served.
- (9) Subrules 38.07(3) and (4), Rule 38.08, and subrules 38.10(1) and (2) do not apply to applications made under subsection 65(1) of the *Judicature Act*, unless the court orders otherwise.

Opportunity to Respond Before Making Order

- (10) Despite subrule (9), the court shall not make an order under 65(3) of the *Judicature Act* granting leave to institute or continue a proceeding, or rescinding an order made under 65(1) of the *Judicature Act*, without giving the other parties and the Attorney General of Prince Edward Island an opportunity to serve and file a respondent's application record and factum.

Lewis & Lewis v. Adams, 2025 PECA 5

The proceeding was improperly started as an application rather than action. Where a proceeding was commenced improperly as an application rather than a proceeding, the court is required to convert the application to an action on such terms as are just, provided the respondent suffers no prejudice. The court allowed the appellant (applicant) to convert their application into an action.

Intact Insurance Company v. Morris Holdings Ltd., 2025 PESC 11

In an application to appoint an umpire, after the parties submitted their documents, but prior to the hearing, the applicant advised the court that they agreed to the umpire proposed by the respondent and were withdrawing their application. Pursuant to Rule 38.09(3), the respondent

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APPLICATIONS - JURISDICTION AND PROCEDURE

was entitled to their costs unless the court ordered otherwise. The court ordered costs against the applicant.

Estate of Lewis v. Lewis and Credit Union, 2018 PESC 30

The motions judge held she had the jurisdiction to hear a motion requesting the application be converted to an action. The court denied the Credit Union's motion to convert the application to an action in its entirety, but rather bifurcated the issues and ordered that some issues be heard by way of application, while other issues would, if necessary, proceed to an applications judge who could further determine whether those issues would be converted to a trial.

Urquhart v. Loane, 2016 PECA 15

The court stated the general practice is that counter applications will be heard at the same time and have the same court file number. Relying upon R. 38.04(3) and Practice Note 7 the court found the issues raised in the respondent's application were properly before the court.

Guptill v. Noble, 2006 PESCTD 29

Rule 38.04(3) is to be interpreted as meaning that counter-applications may be filed.

Ward v. University of Prince Edward Island (1997), 157 Nfld. & P.E.I.R. 129 (P.E.I.S.C.-T.D.)

Rule 38 applies to applications for judicial review. The Rule addresses affidavit evidence within applications and as some affidavit evidence may be admissible for a particular purpose in an application, leave is not required before the affidavit is filed. Any disagreement with respect to the admissibility of affidavit evidence filed in an application for judicial review can be addressed as a preliminary matter before factums are filed.

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 date.
- (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.

PRESERVATION OF RIGHTS IN PENDING LITIGATION**RULE 40****INJUNCTIONS AND MANDATORY ORDERS****HOW OBTAINED**

40.01 An interlocutory injunction or mandatory order under sections 44 and 45 of the *Judicature Act* may be obtained on motion to a judge by a party to a pending or intended proceeding.

WHERE MOTION MADE WITHOUT NOTICE**Maximum Duration**

40.02 (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days.

Extension

- (2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party.
- (3) An extension may be granted on a motion without notice for a further period not exceeding ten days.

Labour Injunctions Excepted

- (4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 45 of the *Judicature Act*.

UNDERTAKING

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

Early Dissolution of Injunction

40.04 On two days' notice or on such shorter notice as the court may prescribe an opposing party may apply for the dissolution or modification of an injunction obtained without notice.

FACTA REQUIRED

40.05 (1) On a motion under rule 40.01, each party shall serve on every other party

to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

- (2) The moving party's factum shall be served and filed, with proof of service, at least seven days before the hearing.
- (3) The responding party's factum shall be served and filed, with proof of service, at least four days before the hearing.

Hawker v. BNS, 2021 PESC 21

The court dismissed a motion to extend an interlocutory injunction, as there were serious questions to be tried, no irreparable harm was demonstrated, and the balance of convenience did not favour the injunction.

Diversified Metal v. Trivett, 2014 PESC 25

The defendant sought an order compelling the plaintiff to comply with an undertaking to pay any damages arising from the granting of an interlocutory injunction.

The Court denied the motion stating it is only after a full airing of the issues at trial and a determination of the plaintiff's ultimate success or failure that it would be appropriate for the Court to turn its attention as to whether the plaintiff ought to be held to the undertaking given and to determine what damages actually flow from the undertaking.

RULE 41**APPOINTMENT OF RECEIVER****DEFINITION**

41.01 In Rules 41.02 to 41.06, "receiver" means a receiver or receiver and manager.

HOW OBTAINED

41.02 The appointment of a receiver under section 44 of the *Judicature Act* may be obtained on motion to a judge in a pending or intended proceeding.

FORM OF ORDER

41.03 An order appointing a receiver shall,

- (a) name the person appointed or refer that issue in accordance with Rule 54;
- (b) specify the amount and terms of the security, if any, to be furnished by the receiver for the proper performance of the receiver's duties, or refer that issue in accordance with Rule 54;
- (c) state whether the receiver is also appointed as manager and, if necessary, define the scope of the receiver's managerial powers; and
- (d) contain such directions and impose such terms as are just.

REFERENCE OF CONDUCT OF RECEIVERSHIP

41.04 An order appointing a receiver may refer the conduct of all or part of the receivership in accordance with Rule 54.

DIRECTIONS

41.05 A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the referee.

DISCHARGE

41.06 A receiver may be discharged only by the order of a judge.

RULE 42**CERTIFICATE OF PENDING LITIGATION****ISSUING OF CERTIFICATE****Court Order Required**

- 42.01** (1) A certificate of pending litigation (Form 42 A) under section 46 of the *Judicature Act* may be issued by the registrar only under an order of the court.

Claim for Certificate to be in Originating Process

- (2) A party who seeks a certificate of pending litigation shall include a claim for it in the originating process or pleading that commences the proceeding, together with a description of the land in question sufficient for registration.

Motion Without Notice

- (3) A motion for an order under subrule (1) may be made without notice.

Order to be Served Forthwith

- (4) A party who obtains an order under subrule (1) shall forthwith serve it, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, on all parties against whom an interest in land is claimed in the proceeding.

DISCHARGE OF CERTIFICATE

- 42.02** (1) An order discharging a certificate of pending litigation under subsection 46(6) of the *Judicature Act* may be obtained on motion to the court.

Factum

- (2) The moving party's factum shall be served and filed, with proof of service, at least seven days before the hearing.
- (3) The responding party's factum shall be served and filed, with proof of service, at least four days before the hearing.

Deelstra and Xstra Farms Ltd. v. Seegers, et al. 2025 PESC 68

A motion to discharge a certificate of pending litigation was granted as the court found that the plaintiffs' claim did not raise a triable issue in respect of a reasonable claim to an interest in land.

Hawker v. BNS, 2021 PESC 21

A motion to set aside a certificate of pending litigation was denied, as the requirement of a triable issue was met.

Chen and Li v. Dong et al., 2019 PESC 10

The court held that the failure of the party seeking a certificate of pending litigation to prosecute the proceeding with reasonable diligence was grounds to discharge the certificate. The court also stated that failure of the party seeking a certificate of pending litigation to serve it forthwith on the defendant is sufficient grounds to allow a discharge of the certificate. Further, the party seeking the certificate must comply with Rule 39.01(6), by disclosing all material facts to the Prothonotary.

Re Estate of Harry Lewis, 2019 PECA 1

On a motion for an order discharging a certificate of pending litigation, the motions judge correctly identified the underlying claim as one for debt in a specified amount and granted the motion. The court found an IOU is an acknowledgment of a debt that has arisen. The demonstrated obligation to repay indebtedness evidences a contract which is a juristic reason for the enrichment pleaded in the proceeding.

Tweel v. Tweel, 2019 PECA 12

The Court of Appeal upheld discharging a certificate of pending litigation finding the plaintiff's claim did not create a triable issue as to whether the plaintiff has a reasonable claim to an interest in the properties owned by the defendant property development company.

Tweel v. Tweel, et ors, 2018 PESC 27

In discharging the Certificate of Pending Litigation, the court held that shareholders of a company do not have an interest in property so as to allow them to obtain a Certificate of Pending Litigation in a shareholders oppression case. The decision was confirmed on appeal.

Rule 42.02 (Also Note: s.46(6) of the Judicature Act, S.P.E.I. 2008, Cap. 20)

Ellis et al. v. Island Beach Properties Inc. Et al. (1991), 85 Nfld. & P.E.I.R. 35 (P.E.I.S.C.-T.D.)

Land charged by the certificate was desirable for cottage or resort development. The Court ordered the Certificate be vacated on the condition that the net proceeds from the sale of any part of the land be paid to the Prothonotary pending the resolution of the litigation.

Rational Development Co. Ltd. v. McQuaid (1991), 94 Nfld. & P.E.I.R. 289 (P.E.I.S.C.-T.D.)

Considering a number of factors, including the fact damages were claimed as an alternate remedy by the plaintiff and the harm to the defendant if the certificate were left in place, the court ordered the certificate which charged that part of the land upon which the defendant had constructed buildings, be discharged.

RULE 43**INTERPLEADER****GENERAL****Definition**

- 43.01** (1) In Rules 43.02 to 43.04, “property” means personal property and includes a debt.

Claimants

- (2) For the purposes of rules 43.02 to 43.04, the following persons are claimants:
- (a) in the case of an application or motion for an interpleader order under subrule 43.02(1), each person who makes a claim in respect of the property.
 - (b) in the case of an application or motion for an interpleader order under subrule 43.02(2),
 - (iii) the judgment debtor against whom the enforcement process has been filed;
 - (ii) every creditor who has filed with the sheriff an enforcement process against the judgment debtor; and
 - (iii) each person who makes a claim in respect of the property.

WHERE AVAILABLE**Person Claiming No Beneficial Interest**

- 43.02** (1) A person may seek an interpleader order (Form 43 A) in respect of property if,
- (a) two or more other persons have made adverse claims in respect of the property; and
 - (b) the first-named person,
 - (i) claims no beneficial interest in the property, other than a lien for costs, fees or expenses, and
 - (ii) is willing to deposit the property with the court or dispose of it as the court directs.

Claims Under Rule 60.14

- (2) A claimant who is entitled to do so under subrule 60.14(4) or (5) may seek an interpleader order (Form 43 A).

HOW OBTAINED**Application or Motion under Subrule 43.02(1)**

- 43.03** (1) The following requirements apply when a person seeks an interpleader order under subrule 43.02(1):
- (a) if no proceeding has been commenced in respect of the property, the person shall make an application naming the claimants as respondents;
 - (b) if a proceeding has been commenced in respect of the property, the person shall make a motion in the proceeding on notice to the claimants;
 - (c) the notice of application or notice of motion shall require the claimants to attend the hearing to substantiate their claims;
 - (d) the application or motion shall be supported by an affidavit identifying the property, containing the names and addresses of every claimant of whom the deponent has knowledge, and stating that the applicant or moving party,
 - (i) claims no beneficial interest in the property, other than a lien for costs, fees or expenses;
 - (ii) does not collude with any of the claimants; and
 - (iii) is willing to deposit the property with the court or dispose of it as the court directs.

Motion under Subrule 43.02(2)

- (2) The following requirements apply when a claimant seeks an interpleader order under subrule 43.02(2):
- (a) the claimant shall make a motion, on notice to the other claimants, in the proceeding in which the writ of execution was issued against the debtor;
 - (b) the notice of motion shall require the other claimants to attend the hearing to substantiate their claims.

DISPOSITION**Powers of Court**

- 43.04** (1) On the hearing of an application or motion for an interpleader order, the court may,
- (a) order that the applicant or moving party deposit the property with an officer of the court, sell it as the court directs or, in the case of money, pay it into court to await the outcome of a specified proceeding;
 - (b) declare that, on compliance with an order under clause (a), the

liability of the applicant or moving party in respect of the property or its proceeds is extinguished; and

- (c) order that the costs of the applicant or moving party be paid out of the property or its proceeds.
- (2) In an order under subrule (1) the court may,
- (a) order a claimant to be made a party to a proceeding already commenced in substitution for or in addition to the moving party;
 - (b) order the trial of an issue between the claimants, define the issue to be tried and direct which claimant is to be plaintiff and which defendant;
 - (c) where the question is one of law and the facts are not in dispute, decide the question without directing the trial of an issue;
 - (d) on the request of a claimant, determine the rights of the claimants in a summary manner, if, having regard to the value of the property and the nature of the issues in dispute, it seems desirable to do so;
 - (e) where a claimant fails to attend the hearing, or attends and fails to comply with an order made in the course of the proceeding, make an order declaring that the claimant and all persons claiming under the claimant are forever barred from making a claim against the applicant or moving party, and all persons claiming under the applicant or moving party, without affecting the rights of the claimants as between themselves;
 - (f) stay any further step in a proceeding in respect of the property; and
 - (g) make such other order as is just.
- (3) Where a motion for an interpleader order is made to the Prothonotary and raises a genuine issue of fact or of law, the motion shall be adjourned to be heard by a judge.

Peace Property v. TTK and KMAC, 2024 PESC 32

An interpleader paid money into court pursuant to Rule 43. The applicant sought to have the money paid to them while the respondents asked for the money to remain paid into court pending the resolution of the main action. The court found that keeping the money paid into court pending the resolution of the main action would be akin to the applicant providing pre-judgment security, which had not been ordered or applied for. The court ordered the money paid to the applicant pursuant to Rule 43.04(d).

RULE 44**INTERIM RECOVERY OF PERSONAL PROPERTY****MOTION FOR INTERIM ORDER**

- 44.01** (1) An interim order under section 47 of the *Judicature Act* for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,
- (a) a description of the property sufficient to make it readily identifiable;
 - (b) the value of the property;
 - (c) that the plaintiff is the owner or lawfully entitled to possession of the property;
 - (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and
 - (e) the facts and circumstances giving rise to the unlawful taking or detention.
- (2) The notice of motion shall be served on the defendant unless the court is satisfied that there is reason to believe that the defendant may improperly attempt to prevent recovery of possession of the property or that, for any other sufficient reason, the order should be made without notice.

ORDER TO CONTAIN DESCRIPTION AND VALUE OF PROPERTY

- 44.02** An interim order for recovery of possession of personal property shall contain a description of the property sufficient to make it readily identifiable and shall state the value of the property.

DISPOSITION OF MOTION**Where Made on Notice**

- 44.03** (1) On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may,
- (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant to give it to the plaintiff;
 - (b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or

- (c) make such other order as is just.

Where Made Without Notice

- (2) On a motion for an interim order for the recovery of possession of personal property made without notice to the defendant, the court may,
 - (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take and detain the property for a period of ten days after service of the interim order on the defendant before giving it to the plaintiff; or
 - (b) make such other order as is just.

CONDITION AND FORM OF SECURITY

- 44.04** (1) Where an interim order for the recovery of possession of personal property requires either party to give security, the condition of the security shall be that the party providing the security will return the property to the opposite party without delay when ordered to do so, and pay any damages and costs the opposite party has sustained by reason of the interim order.
- (2) Where the security is by bond, the bond shall be in Form 44 A and shall remain in force until the security is released under Rule 44.06.
- (3) Where the bond is to be given, the person giving the bond shall first be approved by the court.

SETTING ASIDE ORDER

- 44.05** The court on motion may set aside or vary an interim order for the recovery of possession of personal property or stay enforcement of the order.

RELEASE OF SECURITY

- 44.06** Any security furnished pursuant to an order made under Rule 44.03 may be released on the filing of the written consent of the parties or by order of the court.

DUTY OF SHERIFF

- 44.07** (1) Before proceeding to enforce an interim order for the recovery of possession of personal property, the sheriff shall ascertain that any security required by the order has been given.
- (2) The sheriff shall serve the order on the defendant when the property or any part of it is recovered or as soon thereafter as is possible.
- (3) Where the sheriff is unable to comply with the order, or it is dangerous to do so, the sheriff may move for directions from the court.
- (4) The sheriff shall, without delay, after attempting to enforce the order and in any event within ten days after service of the order, report to the plaintiff on what property has been recovered and, where the sheriff has failed to recover possession of all or part of the property, on what property has not

been recovered and the reason for his or her failure to recover it.

WHERE DEFENDANT PREVENTS RECOVERY

44.08 Where the sheriff reports that the defendant has prevented the recovery of all or part of the property, the court may make an order,

- (a) directing the sheriff to take any other personal property of the defendant, to the value of the property that the sheriff was prevented from recovering, and give it to the plaintiff; and
- (b) directing the plaintiff to hold the substituted property until the defendant surrenders to the plaintiff the property that the sheriff was prevented from recovering.

RULE 45**INTERIM PRESERVATION OF PROPERTY****INTERIM ORDER FOR PRESERVATION OR SALE**

- 45.01** (1) The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party.
- (2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just.

SPECIFIC FUND

- 45.02** Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

RECOVERY OF PERSONAL PROPERTY HELD AS SECURITY

- 45.03** (1) Where in a proceeding a party from whom the recovery of personal property is claimed does not dispute the title of the party making the claim, but claims the right to retain the property as security for a debt, the court may order the party claiming recovery of the property to pay into court or otherwise give security for the debt and such further sum, if any, for interest and costs as the court directs.
- (2) The affidavit in support of a motion under subrule (1) shall disclose the name of every person asserting a claim to possession of the property of whom the party claiming recovery has knowledge and every such person shall be served with notice of the motion.
- (3) On compliance with an order under subrule (1), the property shall be given to the party claiming recovery and the money in court or the security shall await the outcome of the proceeding.

Burns v. MacPherson, 2021 PESC 5

The court granted the defendant's motion for summary judgment as there was no genuine issue for trial, and the plaintiff failed to show a real chance of success.

National Police of Colombia v. Dash, 2014 PECA 16

The appellant argued that an interim preservation order should not have been granted as there was no underlying proceeding. The Court of Appeal found that this procedural error could be remedied by a costs order, and allowed an amendment which corrected the procedural error.

PRE-TRIAL PROCEDURES**RULE 46****PLACE OF TRIAL****PLACE OF TRIAL****To be Named in Statement of Claim**

- 46.01** (1) The plaintiff shall name in the statement of claim the place where he proposes the action is to be tried.
- (2) Where no place has been named for the trial of the action the place shall be where the statement of claim was issued.
- (3) In a divorce action the place of trial shall be named in accordance with Rule 70.17, and in a family law proceeding it shall be named in accordance with Rule 71.05.

Changing Place of Trial

- 46.02** The court on motion of any party may order that the trial be held at a place other than determined by Rule 46.01 where the court is satisfied that,
- (a) the balance of convenience substantially favours the holding of the trial at another place; or
- (b) it is likely that a fair trial cannot be had at the place named in the statement of claim.

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

The court stated that the issue of *forum non conveniens* should be analyzed only once jurisdiction is established.

Polar Foods v. Jensen, 2002 PESCTD 63

The defendant's motion to stay the proceeding on the grounds of *forum non conveniens* was dismissed because the defendant did not establish there was a more convenient or appropriate forum than P.E.I.

DesRoches v. Di-Carra Inc., [1999] P.E.I.J. No. 107 (Q.L.) (P.E.I.S.C.T.D.)

The defendant brought a motion to change the place of trial from the place named in the statement of claim. The motion was granted. The defendant had established, on the balance of convenience, that the trial should be held at a place other than the place named by the plaintiff in the statement of claim.

RULE 47**JURY NOTICE****ACTIONS TO BE TRIED WITH A JURY**

47.01 A party to an action may require that the issues of fact be tried or the damages be assessed, or both, by a jury, by delivering a jury notice (Form 47 A) no later than the date of the trial readiness pre-trial conference, unless the *Judicature Act* or another statute requires that the action be tried without a jury.

STRIKING OUT JURY NOTICE**Where Jury Notice not in Accordance with Statute or Rules**

- 47.02** (1) A motion may be made to the court to strike out a jury notice on the ground that,
- (a) a statute requires a trial without a jury; or
 - (b) the jury notice was not delivered in accordance with Rule 47.01.

Where Jury Trial Inappropriate

- (2) A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge.

Discretion of Trial Judge

- (3) Where a motion striking out a jury notice is refused, the refusal does not affect the discretion of the trial judge, in a proper case, to try the action without a jury.

Fraser v. Runighan, 2020 PESC 20

In a motion for leave for an extension of time to file a jury notice under Rule 47.01, the court considered the application of Rule 48.06 and determined that, given the matter was not currently set down for trial, the motion could proceed without the requirement for leave. The court then determined that the defendants could not rely on the jury notice filed by the plaintiffs and later withdrawn. As unconscionable delay and prejudice existed in this case, the court dismissed the defendants' request to deliver a jury notice.

Metro Credit Union Limited v. McInnis, 2011 PECA 7

The Court of Appeal may only set aside the order of a motions judge striking a jury notice if the motions judge exercised his or her discretion arbitrarily or capriciously, or based the exercise of discretion on an incorrect or inapplicable principle of law.

Irving Oil v. Blanchard, 2002 PESCTD 52

There is a substantive right to a trial by jury and the time for filing a jury notice should be extended unless there has been unconscionable delay or the party opposite is likely to be prejudiced. If the defendant's counterclaim continues to include a claim for equitable relief, the

jury notice should be struck in accordance with s-s. 3(2)(k) of the *Jury Act* R.S.P.E.I. 1988 Cap. J-5.1. The complexity of the issues in this case did not warrant the striking of the jury notice.

Stevenson v. National Bank, 2001 PESCAD 14

The pleadings were closed; however, after a motion by the defendant to strike the plaintiff's statement of claim was partially successful, the court granted a motion permitting an amendment to the pleadings. The plaintiff then filed a jury notice. On appeal, the jury notice was struck. An order allowing the amendment of the pleadings will have the effect of reopening the pleadings for all purposes unless a limitation is otherwise indicated. The limitation may be explicitly stated in the order permitting the amendment or it may be inferred from the circumstances surrounding the issuance of the order. The court inferred a limitation on the reopening of the pleadings from the circumstances surrounding the order allowing the amendments.

DesRoches v. Di-Carra Inc. & Carragher, [1999] P.E.I.J. No. 33 (Q.L.) (P.E.I.S.C.-T.D.)

On a motion by the defendants, the motions judge dismissed an application to strike a jury notice in an action grounded in constructive dismissal where aggravated damages and damages for mental distress were being sought.

Burns v. Thompson Newspapers Co. (1997), 150 Nfld. & P.E.I.R. 358 (P.E.I.S.C.-T.D.)

Plaintiff's claim against the defendant sought injunctive relief. The defendant moved to set aside the jury notice issued by the plaintiff. The defendant moved to set aside the jury notice issued by the plaintiff. Subsection 3(2) of the *Jury Act*, R.S.P.E.I. 1988 Cap. S-10, provides that actions in which there is a claim for an injunction or a mandatory order must be heard without a jury. Therefore, the court ordered that unless the plaintiff withdrew its claim for injunctive relief, the motion to strike the jury notice would be granted. The court also ordered if the statement of claim was amended to remove the claim for injunctive relief, the motion to strike the jury notice would be denied as the defendant had not otherwise convinced the court the action was one which ought to be tried without a jury.

RULE 48**SETTING DOWN FOR TRIAL****WHEN AND BY WHOM ACTION MAY BE SET DOWN FOR TRIAL**

48.01 After the close of pleadings and after the pre-trial conference judge authorizes trial dates, the matter will be set down for trial, together with any counterclaim or crossclaim, by the court.

HOW ACTION IS SET DOWN FOR TRIAL**Defended Action**

48.02 (1) Where an action is defended, and a pre-trial conference judge authorizes trial dates, the plaintiff shall serve a trial record prepared in accordance with Rule 48.03 on every party to the action or to a counterclaim or crossclaim in the action and on any third or subsequent party who has delivered a statement of defence in the main action, and forthwith file the trial record with proof of service no later than sixty days prior to the trial date.

Undefended Action

- (2) Subject to Rule 70, where the court orders the trial of an undefended action, the plaintiff shall contact the trial coordinator in writing to request the court to set a trial date and then file a trial record prepared in accordance with Rule 48.03, no later than sixty days prior to the trial date.
- (3) A judge may, on their own initiative or at a party's request, abridge the time for filing the trial record when the judge considers it necessary or advisable to do so.

TRIAL RECORD

- 48.03** (1) The trial record shall contain, in the following order,
- (a) a table of contents, describing each document by its nature and date;
 - (b) a copy of any jury notice;
 - (c) a copy of the pleadings, including those relating to any counterclaim or crossclaim;
 - (d) a copy of any financial statement delivered under Rule 70.14 or 71.04 or waiver of financial statements filed under subrule 70.14(3);
 - (e) a copy of any demand or order for particulars of a pleading or financial statement and the particulars delivered in response;
 - (f) a copy of any notice of amounts and particulars of special damages delivered under subrule 25.06(9)(b);
 - (g) a copy of any order respecting the trial;
 - (h) a memorandum setting forth the number of witnesses proposed to

be called, the number of expert witnesses proposed to be called, the number of documents proposed to be presented and an estimate of the number of hours or days required to present the case; and

- (i) a certificate (Form 48 B) signed by the lawyer for the plaintiff stating,
 - (i) that the record contains the documents required by clauses (a) to (g);
 - (ii) that the time for delivery of pleadings has expired; and
 - (iii) where applicable, that judgment has been obtained or that the action has been discontinued or dismissed against a defendant.
- (2) It is the responsibility of the party who filed the trial record to place with the record, before the trial, a copy of
 - (a) any notice of amounts and particulars of special damages delivered after the filing of the trial record;
 - (b) any order respecting the trial made after the filing of the trial record;
 - (c) any memorandum signed by a lawyer or any order made by the court, following a pre-trial conference;
 - (d) in an undefended action, any affidavit to be used in evidence; and
 - (e) any report of the Public Guardian and Trustee or Official Guardian (as the case may be) and supporting affidavit and any dispute of, or waiver of the right to dispute, the report or affidavit.

SETTING UNDEFENDED ACTION DOWN FOR TRIAL

- 48.04** (1) In an undefended action, where a trial has been ordered, the court shall set a date, time, and place for the trial.
- (2) When the court sets down a matter for trial, the trial coordinator shall mail a notice (Form 48 BB) of the date, time and place of trial to all parties.
- (3) Where an action is an undefended third party claim, a party who has obtained a trial date shall serve a trial record on the plaintiff in the main action within five days after the third party claim is set down for trial and shall forthwith file the notice with proof of service.

SETTING DOWN FOR TRIAL

- 48.05** (1) In a defended action and after a pre-trial conference has been held, after a pre-trial judge authorizes trial dates, the court shall set a date, time, and place for the trial.
- (2) The trial coordinator shall mail a notice (Form 48 BB) to every party to the action of the date, time and place set for the trial.
- (3) Where a defended action is a third party claim, a party who has obtained a trial date shall in addition serve the trial record on the plaintiff in the main action within the time for service on the parties to the third party

48.06 (1)

SETTING DOWN FOR TRIAL

claim, and shall forthwith file the notice with proof of service.

CONSEQUENCES OF ACTION BEING SET DOWN FOR TRIAL

48.06 (1) Where an action is set down for trial,

- (a) all parties shall be deemed to be ready for trial;
- (b) no party to the action shall initiate or continue any motion or form of discovery without leave of the court, but this does not relieve a party from complying with their undertaking on an examination for discovery or relieve a party from any obligation imposed by,
 - (i) Rule 30.07 (disclosure of documents or errors subsequently discovered),
 - (ii) Rule 30.09 (abandonment of claim of privilege),
 - (iii) Rule 31.07 (disclosure of information refused on discovery),
 - (iv) Rule 31.09 (disclosure of information subsequently obtained),
 - (v) Rule 51.03 (duty to respond to request to admit),
 - (vi) Rule 53.03 (service of report of expert witness) or
 - (vii) Rule 70.14 (delivery of financial statement);
- (c) all parties shall be precluded from resorting to the provisions of Rule 51.02 (request to admit facts or documents);
- (d) the trial shall proceed on the date set for trial unless a judge orders otherwise.

(2) Leave of the court is not required for a motion to compel compliance with any obligation imposed by a rule listed in subrule 48.06(1)(b).

ACTIONS ADJOURNED

48.07 Where an action is set for trial and is adjourned at the request of a lawyer, it shall not thereafter be given a new trial date except with leave of a pre-trial judge.

DUTY TO INFORM TRIAL COORDINATOR OF SETTLEMENT

48.08 Every party to an action, whether it is set for trial or not, shall promptly inform the trial coordinator of any settlement of the action and shall confirm in writing that the action has been settled.

APPLICATION OF THE RULE

48.09 Rules 48.01 to 48.08 apply to any proceeding in which the court has directed the trial of an issue, unless the court orders otherwise.

PRE-TRIAL BRIEF

48.10 (1) Unless ordered otherwise, each party to an action shall, at least seven days prior to the date for trial, deliver to the trial judge and to each opposite party a brief containing,

- (a) a succinct outline of the facts the party intends to establish,

- (b) a concise statement of the principle of law on which the party relies, and
 - (c) citation of relevant statutory provisions and leading authorities.
- (2) Documentary evidence shall not be included with the pre-trial brief unless all parties have consented to its admission as evidence.

DISMISSAL OF ACTION FOR DELAY

Status Notice

- 48.11** (1) Where an action in which a statement of defence has been filed has not been set for trial or terminated within two years after filing of a statement of defence, the case management coordinator shall serve on the parties a status notice (Form 48 C) that the action will be dismissed for delay unless it is set down for trial or terminated within ninety days after service of the notice.

Dismissal by Registrar

- (2) The registrar shall dismiss the action for delay, with costs, ninety days after service of the status notice, unless
- (a) the action has been set down for trial;
 - (b) the action has been terminated by any means; or
 - (c) a judge presiding at a status hearing has ordered otherwise.
- (3) Where an action is not set down for trial or terminated by any means within the time specified in an order made at a status hearing, the registrar shall dismiss the action for delay, with costs and shall serve on the parties a copy of the order (Form 48 D).

Status Hearing

- (4) Where a status notice has been served, any party may request the case management coordinator to arrange a status hearing, in which case the case management coordinator shall mail to the parties a notice of the hearing, and the hearing shall be held in person or by telephone or video conference, at the judge's discretion.

Attendance at Status Hearing

- (5) The lawyers of record shall attend, and the parties may attend, the status hearing.

Disposition at Status Hearing

- (6) At the status hearing, the plaintiff shall show cause why the action should not be dismissed for delay, and,
- (a) if the presiding judge is satisfied that the action should proceed, the judge may set time periods for the completion of the remaining steps necessary to have the action set down for trial and may order that it be set down for trial within a specified time, or may adjourn the

status hearing to a specified date, on such terms as are just; or

- (b) if the presiding judge is not satisfied that the action should proceed, the judge may dismiss the action for delay.

Plaintiff Under Disability

- (7) Where the plaintiff is under disability, the action may be dismissed for delay only if,
 - (a) the defendant gives notice to the Official Guardian or, if the Public Guardian and Trustee is litigation guardian, guardian or trustee of the plaintiff, to the Public Guardian and Trustee; or
 - (b) the presiding judge or a judge on motion orders otherwise.

Effect of Dismissal

- (8) Rules 24.03 to 24.05 (effect of dismissal for delay) apply to an action dismissed for delay under subrule (3), (4) or (8).
- (9) An order under this rule dismissing an action may be set aside under Rule 37.13.

Zenner & Zerd v. Flanagan et ors., 2022 PESC 29

Rule 48.06(b) prohibits a motion unless leave is granted. Relying on *McInnis*, the trial judge noted that where a substantive right which is considered to be fundamental to the proceeding is in issue, the test is less vigorous. Here, the motion involved the right to a jury trial, a substantive right. In granting leave, the court found that prejudice to the moving party if leave were to be denied would greatly outweigh that experienced by the responding party in being required to address the motion on its merits. However, the court also questioned whether Rule 48 leave is required in a motion to the trial judge to strike a jury notice.

Fraser v. Runighan, 2019 PECA 3

An order for production of documents was set aside because there was no request pursuant to Rule 48.06(b) for leave of the court, and leave was not judicially granted. A process error occurred because the leave requirement was not evaluated and determined upon consideration of applicable criteria for leave where an action is set down for trial.

Kennedy v. MacDonald, 2016 PESC 13

The motions judge granted leave pursuant to Rule 48.06(b) for the plaintiff to present a motion for bifurcation, notwithstanding the matter had been set down for trial.

Metro Credit Union Limited v. McInnis, 2011 PECA 7

Pursuant to Rule 48.06(b), leave of the court is required to bring a motion to strike a jury notice after the proceeding has been placed on the trial list (Rule 48.05). Except where substantive rights are affected, only a substantial or unexpected change in circumstances will justify granting leave to resume interlocutory proceedings after a proceeding has been placed on the trial list.

RULE 49**OFFER TO SETTLE****DEFINITIONS**

49.01 In Rules 49.02 to 49.14,

- (a) "defendant" includes a respondent;
- (b) "plaintiff" includes an applicant.

WHERE AVAILABLE

- 49.02** (1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle (Form 49 A).
- (2) Subrule (1) and Rules 49.03 to 49.14 also apply to motions, with necessary modifications.

TIME FOR MAKING OFFER

49.03 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the hearing commences, the costs consequences referred to in Rule 49.10 do not apply.

WITHDRAWAL OR EXPIRY OF OFFER**Withdrawal**

- 49.04** (1) An offer to settle may be withdrawn at any time before it is accepted by serving written notice of withdrawal of the offer on the party to whom the offer was made.
- (2) The notice of withdrawal of the offer may be in Form 49 B.

Offer Expiring after Limited Time

- (3) Where an offer to settle specifies a time within which it may be accepted and it is not accepted or withdrawn within that time, it shall be deemed to have been withdrawn when the time expires.

Offer Expires when Court Disposes of Claim

- (4) An offer may not be accepted after the court disposes of the claim in respect of which the offer is made.

EFFECT OF OFFER

49.05 An offer to settle shall be deemed to be an offer of compromise made without prejudice.

DISCLOSURE OF OFFER TO COURT

- 49.06** (1) No statement of the fact that an offer to settle has been made shall be contained in any pleading.
- (2) Where an offer to settle is not accepted, no communication respecting the offer shall be made to the court at the hearing of the proceeding until all questions of liability and the relief to be granted, other than costs, have been determined.
- (3) An offer to settle shall not be filed until all questions of liability and the relief to be granted in the proceeding, other than costs, have been determined.

ACCEPTANCE OF OFFER**Generally**

- 49.07** (1) An offer to settle may be accepted by serving an acceptance of offer (Form 49 C) on the party who made the offer, at any time before it is withdrawn or the court disposes of the claim in respect of which it is made.
- (2) Where a party to whom an offer to settle is made rejects the offer or responds with a counter offer that is not accepted, the party may thereafter accept the original offer to settle, unless it has been withdrawn or the court has disposed of the claim in respect of which it was made.

Payment into Court or to Trustee as Term of Offer

- (3) An offer by a plaintiff to settle a claim in return for the payment of money by a defendant may include a term that the defendant pay the money into court or to a trustee and the defendant may accept the offer only by paying the money in accordance with the offer and notifying the plaintiff of the payment.

Payment into Court or to Trustee as a Condition of Acceptance

- (4) Where a defendant offers to pay money to the plaintiff in settlement of a claim, the plaintiff may accept the offer with the condition that the defendant pay the money into court or to a trustee and, where the offer is so accepted and the defendant fails to pay the money in accordance with the acceptance, the plaintiff may proceed as provided in Rule 49.09 for failure to comply with the terms of an accepted offer.

Costs

- (5) Where an accepted offer to settle does not provide for the disposition of costs, the plaintiff is entitled,
- (a) where the offer was made by the defendant, to the plaintiff's costs assessed to the date the plaintiff was served with the offer; or
- (b) where the offer was made by the plaintiff, to the plaintiff's costs assessed to the date that the notice of acceptance was served.

Incorporation into Judgment

- (6) Where an offer is accepted, the court may incorporate any of its terms into a judgment.

Payment out of Court

- (7) Where money is paid into court under subrule (3) or (4), it may be paid out on consent or by order.

PARTIES UNDER DISABILITY

49.08 A party under disability may make, withdraw and accept an offer to settle, but no acceptance of an offer made by the party and no acceptance by the party of an offer made by another party is binding on the party under disability until the settlement has been approved as provided in Rule 7.08.

FAILURE TO COMPLY WITH ACCEPTED OFFER

49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,

- (a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or
- (b) continue the proceeding as if there had been no accepted offer to settle.

COSTS CONSEQUENCES OF FAILURE TO ACCEPT**Plaintiff 's Offer**

49.10 (1) Where an offer to settle,

- (a) is made by a plaintiff at least seven days before the commencement of the hearing;
- (b) is not withdrawn and does not expire before the commencement of the hearing; and
- (c) is not accepted by the defendant,

and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

Defendant's Offer

- (2) Where an offer to settle,
- (a) is made by a defendant at least seven days before the commencement of the hearing;
 - (b) is not withdrawn and does not expire before the commencement of the hearing; and
 - (c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

Burden of Proof

- (3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2).

MULTIPLE DEFENDANTS

49.11 Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, the costs consequences prescribed by Rule 49.10 do not apply to an offer to settle unless,

- (a) in the case of an offer made by the plaintiff, the offer is made to all the defendants, and is an offer to settle the claim against all the defendants; or
- (b) in the case of an offer made to the plaintiff,
 - (i) the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer; or
 - (ii) the offer is made by all the defendants and is an offer to settle the claim against all the defendants, and, by the terms of the offer, they are made jointly and severally liable to the plaintiff for the whole amount of the offer.

OFFER TO CONTRIBUTE

- 49.12** (1) Where two or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim, any defendant may serve on any other defendant an offer to contribute (Form 49 D) toward a settlement of the claim.
- (2) The court may take an offer to contribute into account in determining whether another defendant should be ordered,
- (a) to pay the costs of the defendant who made the offer; or
 - (b) to indemnify the defendant who made the offer for any costs that defendant is liable to pay to the plaintiff,
- or to do both.
- (3) Rules 49.04, 49.05, 49.06 and 49.13 apply to an offer to contribute as if it were an offer to settle.

DISCRETION OF COURT

49.13 Despite Rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

49.14 Rules 49.01 to 49.13 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

M.A.M. v. J.P.M., 2024 PECA 13

The motions judge issued a costs decision without providing the father an opportunity to attempt to meet the burden of proof in Rule 49.10(3). The court of appeal found that the father should have had an opportunity. The matter of costs and consideration of the father's offer to settle were sent back to the motions judge for determination.

J.P.M. v. M.A.M., 2025 PESC 19

Following an interim motion, the court was unable to find that there was an offer to settle the motion as none of the offers or correspondence referred to whether the offers exchanged were to resolve the motion or the main proceeding.

Field v. Aviva Insurance Company, 2024 PESC 19

An offer falling short of the conditions for a Rule 49 offer to settle may still be relevant to costs. The decision on the motion was not as favorable as the offer made to settle but the fact that an offer was made was considered by the court.

The Little Poultry Company Inc. v. Kris Taylor, 2023 PESC 37 (CanLII)

The respondent offered to allow the moving party to abandon its motion on a without-costs basis prior to the moving party filing the supporting materials for the motion. The moving party was unsuccessful on its motion and the court considered this offer to settle under Rule 49.13 when it ordered costs.

Collins and Poirier v. Woodburn, 2023 PESC 29, affirmed *Collins and Poirier v. Woodburn*, 2024 PECA 9

Where an offer to settle was withdrawn prior to trial, the court, in deciding costs, gave some credit to the offeror for putting forward a reasonable offer which, if accepted, would have eliminated many of the hours reflected in the offeror's bill of costs.

F.(L.C.) v. B.(W.P.), 2023 PESC 30, reversed on other grounds, 2023 PECA 9

Where a reasonable offer to settle was neither withdrawn nor accepted and the matter proceeded to trial, the successful party (offeror) was entitled to substantial indemnity costs from the date of the offer to the end of the trial.

Fraser v. Runighan, 2020 PECA 5

Communications made with the intent to settle a matter are privileged and inadmissible unless the party making the communication states their intent that the admission is not to be held in

confidence.

Fraser v. Runighan, 2019 PESC 21

The plaintiffs were found to have obtained a judgment as favourable, as or more favourable than, the plaintiffs' offers to settle. Rule 49.10 was triggered, with the *prima facie* effect to award the plaintiffs' substantial indemnity costs. However, the court considered numerous other factors in determining costs and awarded an amount greater than partial indemnity but less than substantial indemnity costs.

Koughan v. Dow, 2014 PESC 15

The Court awarded substantial indemnity costs because, had the Offer to Settle been accepted when made, it would have exceeded the amount of the award.

The Court confirmed there is no costs reward for making an offer which is "nearly as good" or "almost as good" for the opposing party as to what the opposing party receives.

Shepard v. Sanderson, 2012 PESC 20

The trial judge held that the plaintiff's offer to the defendant to settle the liability part of the claim by admitting 100% liability is not a Rule 49 offer. The plaintiff's offer was one to settle a "component of the claim" but not an offer to settle a "claim" as contemplated by Rule 49.02. An element of compromise is not an essential element of an offer to settle but the absence of an element of compromise may be taken into account in assessing whether it is an offer within the meaning of Rule 49.02.

Mutch v. Huestis & Century 21, 2011 PESC 13.

The plaintiff made two offers to settle. While the second offer qualified for consideration under the provisions of Rule 49, the trial judge found that the plaintiff did not meet the burden of establishing that the offer was more favourable than the judgment (Rule 49.10(3)). The claim for costs was excessive. The trial judge denied the plaintiff substantial indemnity costs within the applicable time period.

D. A. Browning & Associates Inc. v. Tweedy, 2010 PESC 8

Offers made by the successful plaintiff did not qualify as offers under Rule 49.10; however, when the offers were made they were for less than the amount of damages awarded to the plaintiff. Considering the offers and other relevant factors in Rule 57.01, the plaintiff was awarded 65% of its legal fees throughout and 100% of its disbursements, with one exception.

Guptill v. Noble, 2006 PESCTD 29

A second offer, by implication, had the effect of withdrawing the first offer and thus was an offer for purposes of Rule 49.10.

Paynter v. Paynter, 2005 PESCTD 65

A motion under Rule 49.09 to enforce the terms of a settlement agreement entered into between the petitioner and the respondent was denied.

Roberts v. Clough, 2002 PESCTD 55

The defendant's offer did not fall within the Rule because of the combined operation of Rules 49.03 and 3.02(1)(a). The offer was not made within 7 days before the commencement of the hearing.

Tannereye v. Hansen, 2002 PESCTD 37

The plaintiff's offer to settle did not meet the requirements of this Rule because it was not fixed or certain. Furthermore, on a proper consideration of the award at trial against one of the defendants, it did not exceed the offer.

Bus. Dev. Bank v. ABN Amro, 2002 PESCTD 32

The applicant and the respondent had contested priority under the provisions of the ***Personal Property Security Act*** S.P.E.I. 1997 1997, c.33. The respondent was successful and obtained an order that it had priority. The trial judge awarded the respondent costs on a party and party basis. The respondent had made an offer to the applicant to settle the dispute over priority on payment of a certain sum of money in exchange for the applicant's withdrawal of the application for priority. Accordingly, the respondent argued because it was totally successful on the application, the offer it made attracted the costs consequences of Rule 49.10 and the applicant should be ordered to pay the respondent costs on a solicitor-client basis. The trial judge held that Rule 49.10(2) did not apply because the respondent did not "obtain a judgment" as contemplated by the rule.

Davis and Loignon v. Kelly and Fortin-Kelly, 2002 PESCTD 9

The plaintiffs and the defendants exchanged offers prior to the commencement of trial. The plaintiffs' claim was dismissed. The defendant asserted that it should be entitled to costs in accordance with Rule 49.10(2) as the plaintiff failed to recover at least the amount of the defendants' offer. The court found that Rule 49.10(2) did not apply as the plaintiffs did not 'obtain a judgment' as the Rule requires.

Wawanesa v. Mann & Ors., 2001 PESCTD 59

The provisions of this Rule are not available unless, at the time the purported settlement is concluded, a proceeding has been commenced.

Kenny v. The City of Summerside, 2000 PESCTD 31

The plaintiff was awarded damages which were substantially lower than the amount offered by the defendant in an offer which did not comply with Rule 49.10 because it was not made within seven days of the commencement of the trial. Nevertheless, the court decided that in exercising its discretion to award costs pursuant to Rule 57, it may consider any offers of settlement even if they were not made in compliance with Rule 49.10.

Martin v. East Coast Limber and Maibec Industries Inc. (1998), 166 Nfld. & P.E.I.R. 295 (P.E.I.S.C.-T.D.)

See cases noted under Rule 74 where Rule 49.10 was considered in a small claims proceeding.

Reeves v. Arsenault; Reeves v. Gauthier (1998), 155 Nfld. & P.E.I.R. 328 (P.E.I.S.C.-T.D.)

For purposes related to the application of Rule 49, a civil non-jury trial commences when the action is called for trial by the trial judge. It is not necessary that evidence be called before the hearing or trial actually commences.

An offer which expires one minute after the time set for the commencement of the hearing is treated as an offer which is fixed and certain. If not withdrawn prior to that time, the offer is an offer as contemplated by Rule 49.10(2)(b).

Noye Enterprises Inc. v. Grady et al., [1998] P.E.I.J. No. 9 (Q.L.) (P.E.I.S.C.-T.D.)

The consequences of the strict application of Rule 49.10(1) can be significant for a litigant and for that reason, the Rule should not be imposed lightly. A written offer expiring two weeks after

service did not come within the Rule. A verbal repetition of that offer on the eve of the trial did not bring it within the narrow confines of Rule 49.10(1).

Island Opry Inc. et al. v. Tweedy Ross (1996), 138 Nfld. & P.E.I.R. 36. (P.E.I.S.C.-T.D.)

Granting leave to amend the statement of defence did not, in the circumstances, result in any prejudice to the plaintiffs in relation to Rule 49. See: paras. 17-19.

Terris v. Crossman, [1995] 2 P.E.I.R. 227 (P.E.I.S.C.T.D.)

Rule 49 was held to apply because the defendants made an offer to settle at least 7 days before the commencement of the trial which was not withdrawn and the plaintiff obtained a judgment less favourable than the amount offered. The plaintiff was awarded her party and party costs to the date of the offer and the defendants were awarded their party and party costs from the date of the offer. The amount of the party and party costs to which the plaintiff was entitled was reduced by the trial judge in accordance with the discretion exercised pursuant to Rule 57. See cases annotated under that Rule. Confirmed on appeal. See: [1996] 1 P.E.I.R. 106 (P.E.I.S.C.A.D.)

Lewis v. P.E.I. (1994), 123 Nfld. & P.E.I.R. 36 (P.E.I.S.C.-A.D.)

Rule 49 does not apply to offers at the appeal stage.

RULE 50**PRE-TRIAL CONFERENCE****PURPOSE**

50.01 The purpose of this Rule is to provide an opportunity for the issues in a proceeding to be settled without a hearing and, with respect to any issues that are not settled, to obtain from the court directions to assist in the just, most expeditious and least expensive disposition of the proceeding, including directions to ensure that any trial or hearing proceeds in an orderly and efficient manner.

PRE-TRIAL CONFERENCES FOR ACTIONS

- 50.02** (1) A pre-trial conference before a judge is mandatory for actions unless otherwise directed by a judge.
- (2) Any party to an action may deliver a request to the case management coordinator for a pre-trial conference and shall confirm to the case management coordinator whether the purpose of the pre-trial conference is settlement or trial readiness and, where the parties are unable to agree, the pre-trial conference shall be deemed to be for the purpose of trial readiness.
- (3) After reviewing the request from the parties, the court may set down a date, time, and place for a pre-trial conference or give such other directions as it considers necessary or advisable with respect to the conduct of the action.
- (4) The case management coordinator shall deliver notice to every party of the date, time, and place of the pre-trial conference.
- (5) Parties to an action in the Small Claims Section may be directed by the Registrar to appear before a judge for a pre-trial conference and, upon review of that direction, the court may set down a date, time, and place for a pre-trial conference or give such other directions as it considers necessary or advisable with respect to the conduct of the action.

PRE-TRIAL CONFERENCES FOR APPLICATIONS

50.03 In an application, a judge may at any time, on their own initiative or at a party's request, direct that a pre-trial conference be held before a judge.

MEMORANDUM TO BE SERVED AND FILED

50.04 At least seven days before a pre-trial conference, each party shall file with proof of service a pre-trial conference memorandum (Form 50A).

PARTICIPATION**Attendance**

- 50.05** (1) The lawyers for the parties shall appear at the pre-trial conference and, unless the presiding judge directs otherwise, the parties shall also appear at the pre-trial conference.

Authority to Settle

- (2) A party who requires another person's approval before agreeing to a settlement shall, before the pre-trial conference, arrange to have immediate access to the other person throughout the pre-trial conference.

Duty of Lawyers

- (3) Every lawyer attending the pre-trial conference shall ensure that they have the authority to deal with the matters referred to in Rule 50.06 and they are fully acquainted with the facts and legal issues in the proceeding.

MATTERS TO BE CONSIDERED

50.06 The following matters may be considered at a pre-trial conference:

1. The possibility of settlement of any or all of the issues in the proceeding.
2. Simplification of the issues.
3. The possibility of obtaining admissions that may facilitate the hearing.
4. The question of liability.
5. The amount of damages, if damages are claimed.
6. The estimated duration of the trial or hearing.
7. The advisability of having the court appoint an expert.
8. The number of expert witnesses and other witnesses that may be called by each party, and dates for the service of any outstanding or supplementary experts' reports.
9. The advisability of directing a reference.
10. Any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.

DOCUMENTS TO BE MADE AVAILABLE

50.07 All documents intended to be used at the trial or hearing that may be of assistance in achieving the purposes of a pre-trial conference, such as any medical reports and reports of experts, shall be provided to the presiding judge at the pre-trial conference.

POWERS

Conduct of the Proceeding

- 50.08** (1) If the proceeding is not settled at the pre-trial conference, the presiding judge may
- (a) establish a timetable for the parties;

- (b) direct the parties to a case management conference;
- (c) continue the pre-trial conference on another date if the judge considers it necessary or advisable to do so;
- (d) direct the parties to participate in an additional pre-trial conference for the purpose of readiness for the trial or hearing;
- (e) authorize dates for the trial or hearing of the proceeding; and
- (f) give such other directions as the judge considers necessary or advisable with respect to the conduct of the proceeding.

Memorandum or Order

- (2) If the proceeding is settled at the pre-trial conference, the parties or their lawyers may sign a memorandum setting out the results of the pre-trial conference and the presiding judge may make such order as is considered necessary or advisable with respect to the conduct of the proceeding.

Memorandum or Order Binds Parties

- (3) A memorandum or order made under this Rule binds the parties unless the judge presiding at the trial or hearing of the proceeding orders otherwise to prevent injustice.

Copy of Memorandum or Order

- (4) A copy of any memorandum or order made under this Rule shall be placed with the trial or application record.

NO DISCLOSURE

- 50.09** No communication shall be made to the judge presiding at the hearing of the proceeding or a motion or reference in the proceeding with respect to any statement made at a pre-trial conference, except as disclosed in a memorandum or order under Rule 50.08.

PRE-TRIAL JUDGE NOT TO PRESIDE AT TRIAL OR HEARING

- 50.10** A judge who conducts a pre-trial conference shall not preside at the trial of the action or the hearing of the application, except with the written consent of all parties.

CONFERENCE BEFORE TRIAL OR HEARING JUDGE

- 50.11** Rule 50.10 does not prevent a judge before whom a proceeding has been called for hearing from holding a conference either before or during the hearing to consider any matter that may assist in the just, most expeditious and least expensive disposition of the proceeding without disqualifying the judge from presiding at the hearing.

COSTS OF PRE-TRIAL CONFERENCE

- 50.12** At the pre-trial conference, the presiding judge may make an order for costs of the conference but, in the absence of such an order, the costs shall be assessed

as part of the costs of the proceeding.

CASE MANAGEMENT CONFERENCES

50.13 A judge presiding at a pre-trial conference may at any time, on their own initiative or at a party's request, direct that a case management conference be held before a judge or the case management coordinator.

PRE-TRIAL CONFERENCE BY TELEPHONE OR VIDEO CONFERENCE

50.14 Where all lawyers and parties participating in a pre-trial conference consent, and the presiding judge considers it necessary or advisable to do so, the presiding judge may authorize the pre-trial conference to be conducted by telephone or video conference.

Zenner & Zerd v. Flanagan et ors., 2022 PESC 29

Where a previous court order arose from a pre-trial conference, the trial judge found that it related to “the conduct of the proceeding” under Rule 50.02, but set the order aside in its entirety, with two specified exceptions.

Ayangma v. P.S.A.C. and P.E.I.H.R.C., 2014 PECA 15

Rule 50.07 does not prevent a judge before whom a proceeding has been called for a hearing from holding a conference either before or during the hearing to consider any matter that may assist in the just, most expeditious and least expensive disposition of the proceeding without disqualifying the judge from presiding at the hearing. This rule differentiates and excepts that kind of conference from a pre-trial conference.

Ayangma v. P.E.I. Teachers' Federation, 2014 PECA 9

Rule 50 does not apply in the case of a Memorandum of Settlement and Release where a party to the proceeding was not a party which resulted in the Agreement. Where a party to the Memorandum of Settlement and Release provides the documentation voluntarily, it is not protected by any pre-trial confidentiality contemplated by Rule 50.

MacDonald v. Underhay, 2003 PESCAD 14

Documents and communications disclosed during a pre-trial conference may not be subsequently disclosed for any purpose unless they were part of or contained in a memorandum signed by all the parties or, alternatively, the disclosure has been ordered by the court.

RULE 50.1**SETTLEMENT CONFERENCES**

- 50.1** (1) At the request of the parties, the court may set a date, time, and place for a settlement conference.
- (1.1) The case management coordinator shall deliver notice to every party of the date, time, and place of the settlement conference.
 - (1.2) A settlement conference before a judge is available in any proceeding unless otherwise directed by a judge.
 - (1.3) The purposes of a settlement conference are to resolve or narrow the issues in the proceeding, to expedite the determination of the proceeding, and to facilitate settlement of the proceeding.
 - (1.4) A judge who conducts a settlement conference shall not preside at the trial or hearing of the proceeding, except with the written consent of all parties.

Steps to be Completed Before Settlement Conference

- (2) All examinations, production of documents and motions arising out of examinations and production of documents shall be completed before the settlement conference unless otherwise authorized by a judge.

Attendance at Settlement Conference

- (3) The lawyers for the parties shall appear at the settlement conference and, unless the presiding judge directs otherwise, the parties shall also appear at the settlement conference.
- (3.1) A party who requires another person's approval before agreeing to a settlement shall, before the settlement conference, arrange to have immediate access to the other person throughout the settlement conference.
- (3.2) Every lawyer attending the settlement conference shall ensure that they have the authority to settle the proceeding and they are fully acquainted with the facts and legal issues in the proceeding.

Settlement Conference Briefs

- (4) At least seven days before the settlement conference, each party shall file with proof of service a settlement conference brief containing all material each party considers necessary for the settlement conference.

Contents of Brief

- (5) A settlement conference brief shall contain,
 - (a) a concise summary of the facts, including the agreed upon facts and admissions;

- (b) a concise summary of the issues followed by concise argument with reference to the law, authorities, and facts relating to each issue;
 - (c) a list of witnesses and a concise summary of the relevant evidence of each witness;
 - (d) the relevant portions only of transcripts, experts' reports and other evidence that may be adduced at trial;
 - (e) the party's pleadings, including any demand or order for particulars of a pleading and the particulars delivered in response; and
 - (f) any offer or counteroffers made to date.
- (6) A judge may waive any of the requirements set out above in subrule 50.1(5).

Memorandum or Order

- (7) If the proceeding is settled at the settlement conference, the parties or their lawyers may sign a memorandum setting out the results of the settlement conference and the presiding judge may make such order as is considered necessary or advisable with respect to the conduct of the proceeding.
- (7.1) A memorandum or order made under this Rule binds the parties unless the judge presiding at the trial or hearing of the proceeding orders otherwise to prevent injustice.

No Disclosure

- (8) No communication shall be made to the judge presiding at the hearing of the proceeding or a motion or reference in the proceeding with respect to any statement made at the settlement conference, except as disclosed in a memorandum or order under subrule 50.1(7).

Powers

- (9) If the proceeding is not settled at the settlement conference, the presiding judge may
- (a) establish a timetable for the parties;
 - (b) direct the parties to a case management conference;
 - (c) continue the settlement conference on another date if the judge considers it necessary or advisable to do so;
 - (d) direct the parties to participate in a pre-trial conference for the purpose of readiness for the trial or hearing;
 - (e) authorize dates for the trial or hearing of the proceeding; and
 - (f) give such other directions as the judge considers necessary or advisable with respect to the conduct of the proceeding.

Telephone or Video Conference

- (10) Where all lawyers and parties participating in a settlement conference consent, and the presiding judge considers it necessary or advisable to do so, the presiding judge may authorize the settlement conference to be conducted by telephone or video conference.

RULE 51**ADMISSIONS****INTERPRETATION**

51.01 In Rules 51.02 to 51.06, "authenticity" includes the fact that,

- (a) a document that is said to be an original was printed, written, signed or executed as it purports to have been;
- (b) a document that is said to be a copy is a true copy of the original; and
- (c) where the document is a copy of a letter, telegram or telecommunication, the original was sent as it purports to have been sent and received by the person to whom it is addressed.

REQUEST TO ADMIT FACT OR DOCUMENT

- 51.02** (1) A party may at any time, by serving a request to admit (Form 51 A), request any other party to admit, for the purposes of the proceeding only, the truth of a fact or the authenticity of a document.
- (2) A copy of any document mentioned in the request to admit shall, where practicable, be served with the request, unless a copy is already in the possession of the other party.

EFFECT OF REQUEST TO ADMIT**Response Required Within Twenty Days**

- 51.03** (1) A party on whom a request to admit is served shall respond to it within twenty days after it is served by serving on the requesting party a response to request to admit (Form 51 B).

Deemed Admission Where No Response

- (2) Where the party on whom the request is served fails to serve a response as required by subrule (1), the party shall be deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request to admit.

Deemed Admission Unless Response Contains Denial or Reason for Refusal to Admit

- (3) A party shall also be deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request, unless the party's response,
- (a) specifically denies the truth of a fact or the authenticity of a document mentioned in the request; or

- (b) refuses to admit the truth of a fact or the authenticity of a document and sets out the reason for the refusal.

COSTS ON REFUSAL TO ADMIT

51.04 Where a party denies or refuses to admit the truth of a fact or the authenticity of a document after receiving a request to admit, and the fact or document is subsequently proved at the hearing, the court may take the denial or refusal into account in exercising its discretion respecting costs.

WITHDRAWAL OF ADMISSION

51.05 An admission made in response to a request to admit, a deemed admission under Rule 51.03 or an admission in a pleading may be withdrawn on consent or with leave of the court.

ORDER BASED ON ADMISSION OF FACT OR DOCUMENT

Motion

- 51.06** (1) Where an admission of the truth of a fact or the authenticity of a document is made,
- (a) in an affidavit filed by a party,
 - (b) in the examination for discovery of a party or a person examined for discovery on behalf of a party; or
 - (c) by a party on any other examination under oath or affirmation in or out of court,
- any party may make a motion to a judge in the same or another proceeding for such order as the party may be entitled to on the admission without waiting for the determination of any other question between the parties, and the judge may make such order as is just.
- (2) Where an admission of the truth of a fact or the authenticity of a document is made by a party in a pleading or is made or deemed to be made by a party in response to a request to admit, any party may make a motion in the same proceeding to a judge for such order as the party may be entitled to on the admission without waiting for the determination of any question between the parties, and the judge may make such order as is just.

Exception: Deemed Undertaking

- (3) If Rule 30.1 applies to the admission, its use in another proceeding is subject to Rule 30.1 (deemed undertaking).

MacDonald v. Tobin, 2026 PESC 3

The defendant sought leave to amend their statement of defence. The parties disagreed as to whether Rule 26 or 51 applied. The court found that the statement was not clear enough to constitute an admission under Rule 51, so Rule 26 applied. The court granted leave for the defendant to amend their statement of defence.

M.C. v. K.C., 2023 PESC 40 (CanLII)

The wife made a motion to change the date of separation in the petition for divorce. The motion was brought under Rule 26 initially and subsequently counsel argued Rule 51 was the governing Rule. The court determined Rule 51 governed but concluded the Rule 26 jurisprudence provided significant guidance to the court. The court stated that the test for a withdrawal of an admission is three-part: 1) whether the proposed amendment raises a triable issue; 2) whether there is a reasonable explanation for the requested change, such as inadvertence or wrong instructions; and 3) whether the withdrawal will result in any prejudice that cannot be compensated for in costs. The court determined the wife met the test and leave was granted to amend the date of separation in the petition.

C.J.D. v. C.E.D., 2020 PESC 21

In a divorce action, the Petitioner issued a Request to Admit. The Respondent did not respond as provided for in Rule 51.03. The court held that, for the purposes of the proceeding only, the assertions set out in the Request to Admit were deemed admitted.

Ayangma v. Eastern School Board, 2009 PESC 20

The plaintiff commenced an action seeking relief under s. 24 of the *Charter*. The plaintiff brought a motion for summary judgment because the defendant was previously ordered to write an apology letter to the plaintiff. The motion was dismissed. The motions judge did not consider the apology letter to be an admission of liability by the defendant as proof that it infringed the plaintiff's rights under s.15(1) of the *Charter*.

Bassett v. City of Summerside (1999), 171 Nfld. & P.E.I.R. 33 (P.E.I.S.C.-T.D.)

On a motion by the defendant to withdraw a deemed admission, the court found the test applicable in deciding such a motion is as follows: (1) that the proposed amendment or what is proposed to replace the admitted fact or facts gives rise to a triable issue; (2) that the admission was due to inadvertence of the solicitor or the solicitor was wrongly instructed; and (3) that the withdrawal of the admission will not result in any prejudice which cannot be compensated in costs.

TRIALS**RULE 52****TRIAL PROCEDURE****FAILURE TO ATTEND AT TRIAL**

- 52.01** (1) Where an action is called for trial and all parties fail to attend, the trial judge may strike the action off the trial list.
- (2) Where an action is called for trial and a party fails to attend, the trial judge may,
- (a) proceed with the trial in the absence of the party;
 - (b) where the plaintiff attends and the defendant fails to attend, dismiss the counterclaim, if any, and allow the plaintiff to prove the claim;
 - (c) where the defendant attends and the plaintiff fails to attend, dismiss the action and allow the defendant to prove the counterclaim, if any; or
 - (d) make such other order as is just.
- (3) A judge may set aside or vary, on such terms as are just, a judgment obtained against a party who failed to attend at the trial.

ADJOURNMENT OF TRIAL

- 52.02** A judge may postpone or adjourn a trial to such time and place, and on such terms, as are just.

COURT APPOINTED EXPERTS**Appointment by Judge**

- 52.03** (1) On motion by a party, or on their own initiative, a judge may, at any time, appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the action.
- (2) The expert shall be named by the judge and, where possible, shall be an expert agreed on by the parties.

Contents of Order Appointing Expert

- (3) The order shall contain the instructions to be given to the expert and the judge may make such further orders as the judge considers necessary to enable the expert to carry out the instructions, including, on motion by a party, an order for,
- (a) inspection of property under Rule 32; or
 - (b) the physical or mental examination of a party.

Remuneration of Expert

- (4) The remuneration of an expert shall be fixed by the judge who appoints the expert, and shall include a fee for the expert's report and an appropriate sum for each day that attendance at the trial is required.
- (5) The responsibility of the parties for payment of the remuneration of an expert shall be determined in the first instance by the judge.
- (6) Where a motion by a party for the appointment of an expert is opposed, the judge may, as a condition of making the appointment, require the party seeking the appointment to give such security for the remuneration of the expert as is just.

Report

- (7) The expert shall prepare a report and send it to the Registrar and the Registrar shall send a copy of the report to every party.
- (8) The report shall be filed as evidence at the trial of the action unless the trial judge orders otherwise.
- (9) The judge may direct the expert to make a further or supplementary report, and subrules (7) and (8) apply to that report.

Cross-examination of Expert

- (10) Any party may cross-examine the expert at the trial.

Liability of Parties for Remuneration of Expert

- (11) The liability of the parties for payment of the remuneration of the expert shall be determined by the trial judge at the end of the trial, and a party who has paid the expert in accordance with a determination under subrule (5) if not the party determined to be liable for payment under this subrule, shall be indemnified by the party determined to be liable.

EXHIBITS**Marking and Numbering**

- 52.04** (1) Exhibits shall be marked and numbered consecutively, and the registrar attending the trial shall make a list of the exhibits, giving a description of each exhibit, and stating by whom it was put in evidence and, where the person who produced it is not a party or a party's lawyer, the name of that person.

Return of Exhibits

- (2) At any time following the trial judgment, on requisition by the lawyer or party who put an exhibit in evidence or the person who produced it and on the filing of the consent of all parties represented at the trial, the registrar may return the exhibit to the person making the requisition.
- (3) Subject to subrule (2), the exhibits shall remain in the possession of the registrar,

- (a) until the time for an appeal has expired; or
 - (b) where an appeal has been taken, until it has been disposed of.
- (4) On the expiration of the time for appeal or on the disposition of the appeal, the registrar on his or her own initiative, shall return the exhibits to the respective lawyers or parties who put the exhibits in evidence at the trial.

VIEW BY JUDGE OR JURY

52.05 The judge or judge and jury by whom an action is being tried or the court before whom an appeal is being heard may, in the presence of the parties or their lawyers, inspect any property concerning which any question arises in the action, or the place where the cause of action arose.

EXCLUSION OF WITNESSES

Order for Exclusion

52.06 (1) The trial judge may, at the request of any party, order that a witness be excluded from the courtroom until called to give evidence, subject to subrule (2).

Order not to Apply to Party or Witness Instructing Lawyer

- (2) An order under subrule (1) may not be made in respect, of a party to the action or a witness whose presence is essential to instruct the lawyer for the party calling the witness, but the trial judge may require any such party or witness to give evidence before any other witnesses are called to give evidence on behalf of that party.

No Communication with Excluded Witnesses

- (3) Where an order is made excluding a witness from the courtroom, there shall be no communication to the witness of any evidence given during his or her absence from the courtroom, except with leave of the trial judge, until after the witness has been called and has given evidence.

Exclusion of Persons Interfering with Trial

- (4) Nothing in this rule prevents the trial judge from excluding from the courtroom any person who is interfering with the proper conduct of the trial.

ORDER OF PRESENTATION IN JURY TRIALS

- 52.07** (1) On the trial of an action with a jury, the order of presentation shall be regulated as follows, unless the trial judge directs otherwise:
- (a) The plaintiff may make an opening address and, subject to paragraph 2, shall then adduce evidence;
 - (b) A defendant may, with leave of the trial judge, make an opening address immediately after the opening address of the plaintiff, and before the plaintiff adduces any evidence;

- (c) When the plaintiff's evidence is concluded, the defendant may make an opening address, unless he or she has already done so and shall then adduce evidence;
 - (d) When the defendant's evidence is concluded, the plaintiff may adduce any proper reply evidence and the defendant shall then make a closing address, followed by the closing address of the plaintiff;
 - (e) Where a defendant adduces no evidence after the conclusion of the plaintiff's evidence, the plaintiff shall make a closing address, followed by the closing address of the defendant.
- (2) Where the burden of proof in respect of all matters in issue in the action lies on the defendant, the trial judge may reverse the order of presentation.
 - (3) Where there are two or more defendants separately represented, the order of presentation shall be as directed by the trial judge.
 - (4) Where a party is represented by a lawyer, the right to address the jury shall be exercised by the lawyer.

DISAGREEMENT OF THE JURY

- 52.08** (1) Where the jury,
- (a) subject to the provisions of s. 24 of the *Jury Act* disagrees;
 - (b) makes no finding on which judgment can be granted; or
 - (c) answers some but not all of the questions directed to it or gives conflicting answers, so that judgment cannot be granted on its findings,
- the trial judge may direct that the action be retried with another jury, but where there is no evidence on which a judgment for the plaintiff could be based or where for any other reason the plaintiff is not entitled to judgment, the judge shall dismiss the action.
- (2) Where the answers given by a jury are sufficient to entitle a party to judgment on some but not all of the claims in the action, the judge may grant judgment on the claims in respect of which the answers are sufficient, and subrule (1) applies to the remaining claims.

RECORDING JURY VERDICT

52.09 The verdict of a jury shall be endorsed on the trial record.

FAILURE TO PROVE A FACT OR DOCUMENT

- 52.10** Where, through accident, mistake or other cause, a party fails to prove some fact or document material to the party's case,
- (a) the judge may proceed with the trial subject to proof of the fact or document afterwards at such time and on such terms as the judge directs; or

- (b) where the case is being tried by a jury, the judge may direct the jury to find a verdict as if the fact or document had been proved, and the verdict shall take effect on proof of the fact or document afterwards as directed, and, if it is not so proved, judgment shall be granted to the opposite party, unless the judge directs otherwise; or
- (c) adjourn the trial and require the attendance of the jury upon a date to be fixed by them.

RIGHT OF DEFENDANT TO MOVE FOR DISMISSAL

52.11 At the close of the plaintiff's case, the defendant may, without being called upon to elect whether he will call evidence, move for dismissal of the proceeding on the ground that upon the facts and the law no case has been made out.

Clow and Clow v. Pine Acres Ltd., 2026 PESC 1

The defendant requested an adjournment of a trial. The decision on whether to grant an adjournment is discretionary and the court must balance the interests of the plaintiff, defendant and the administration of justice. The court considered a number of factors, including the late filing of the trial record and the plaintiffs' decision on the eve of trial to no longer call an expert witness. The court adjourned the trial.

Doyle v. Roberts & P.E.I. Mutual, 2015 PESC 2

This was a motion for non-suit. The Defendant tendered discovery evidence before cross-examination of the plaintiff. The Court found that the defendant essentially opened his case, and therefore was precluded from bringing a motion for non-suit.

P.P. v. D.C.W. (P.E.I.), 2006 PESCAD 12

The rule does not contemplate the order in which multiple defendants present their cases. The court provided an interpretation as to the application of Rule 52.06(1) and (2).

Bryant v. Fenton (1997), 152 Nfld. & P.E.I.R. 306 (P.E.I.S.C.-T.D.), affirmed on appeal, (1998) 166 Nfld. & P.E.I.R. 109

On a motion for non-suit the court must determine whether facts have been established from which liability might be inferred and whether there is any evidence, if left un-contradicted, which would permit a reasonable trier of fact to find in plaintiff's favour.

MacDougall v. St. Peters Bay (Community) (1992), 100 Nfld. & P.E.I.R. 45 (P.E.I.S.C.-T.D.)

The motion for non-suit will be granted if there is no evidence upon which a jury properly instructed could find for the plaintiff. The judge must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence adduced by the plaintiff.

McKenna's Express Ltd. v. Air Canada, [1992] 1 P.E.I.R. 24 (P.E.I.S.C.-T.D.).

On a motion for non-suit it is the function of the trial judge to determine whether any facts have been established by the plaintiff from which liability may be inferred.

RULE 53**EVIDENCE AT TRIAL****EVIDENCE BY WITNESSES****Oral Evidence as General Rule**

- 53.01** (1) Unless these rules provide otherwise, witnesses at the trial of an action shall be examined orally in court and the examination may consist of direct examination, cross-examination and re-examination.

Trial Judge to Exercise Control

- (2) The trial judge shall exercise reasonable control over the mode of interrogation of a witness so as to protect the witness from undue harassment or embarrassment and may disallow a question put to a witness that is vexatious or irrelevant to any matter that may properly be inquired into at the trial.
- (3) The trial judge may at any time direct that a witness be recalled for further examination.

Leading Questions on Direct Examination

- (4) Where a witness appears unwilling or unable to give responsive answers, the trial judge may permit the party calling the witness to examine them by means of leading questions.

Interpreter

- (5) Where a witness does not understand the language or languages in which the examination is to be conducted or is deaf or mute, a competent and independent interpreter shall, before the witness is called, take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation to the witness, the questions put to the witness and his or her answers.
- (6) Where an interpreter is required under subrule (5), the party calling the witness shall provide the interpreter.

EVIDENCE BY AFFIDAVIT**With Leave of Court**

- 53.02** (1) Before or at the trial of an action, the court may make an order allowing the evidence of a witness or proof of a particular fact or document to be given by affidavit, unless an adverse party reasonably requires the attendance of the deponent at trial for cross-examination.
- (2) Where an order is made under subrule (1) before the trial, it may be set aside or varied by the trial judge where it appears necessary to do so in the interest of justice.

Undefended Actions

- (3) At the trial of an undefended action, the plaintiff's case may be proved by affidavit unless the trial judge orders otherwise.

EXPERT WITNESSES

- 53.03** (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been
- (a) served on each opposite party within thirty days of the filing of the notice of trial and
 - (b) filed with the court within thirty days of the filing of the notice of trial,
- the evidence of the expert shall not be admissible on the trial without leave of the trial judge.
- (2) Where a copy of the report has been served and filed as provided in subrule 53.03(1), the expert shall be required to attend at the trial unless the person receiving the report gives notice that the person does not require the attendance of the expert at the trial.
- (3) A report provided for the purposes of subrule (1) and (2) shall contain the following information:
- (a) The expert's name, address and area of expertise.
 - (b) The expert's qualifications and employment and educational experiences in his or her area of expertise.
 - (c) The instructions provided to the expert in relation to the proceeding.
 - (d) The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
 - (e) The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
 - (f) The expert's reasons for his or her opinion, including,
 - (i) a description of the factual assumptions on which the opinion is based;
 - (ii) a description of any research conducted by the expert that led them to form the opinion, and
 - (iii) a list of every document, if any relied on by the expert in forming the opinion.
 - (g) An acknowledgment of the expert's duty (Form 53 E) signed by the expert.

COMPELLING ATTENDANCE AT TRIAL**By Summons to Witness**

- 53.04** (1) A party who requires the attendance of a person in Prince Edward Island as a witness at a trial may serve the person with a summons to witness (Form 53 A) requiring them to attend the trial at the time and place stated in the summons, and the summons may also require the person to produce at the trial the documents or other things in their possession, control or power relating to the matters in question in the action that are specified in the summons.

Summons may be Issued in Blank

- (2) On the request of a party or a lawyer and on payment of the prescribed fee, the Registrar shall sign, seal and issue a blank summons to witness and the party or lawyer may complete the summons and insert the names of any number of witnesses.

Where Document may be Proved by Certified Copy

- (3) No summons to witness for the production of an original record or document that may be proved by a certified copy shall be served without leave of the court.

Summons to be Served Personally

- (4) A summons to witness shall be served on the witness personally and not by an alternative to personal service and, at the same time, attendance money calculated in accordance with Rule 57 Tariff shall be paid or tendered to the witness.
- (5) Service of a summons to witness and the payment or tender of attendance money may be proved by affidavit.

Summons in Effect until Attendance No Longer Required

- (6) A summons to witness continues to have effect until the attendance of the witness is no longer required.

Sanctions for Failure to Obey Summons

- (7) Where a witness whose evidence is material to an action is served with a summons to witness and the proper attendance money is paid or tendered to them, and the witness fails to attend at the trial or to remain in attendance in accordance with the requirements of the summons, the presiding judge may by a warrant for arrest (Form 53 B) cause the witness to be apprehended anywhere within Prince Edward Island and forthwith brought before the court.
- (8) On being apprehended, the witness may be detained in custody until his or her presence is no longer required, or released on such terms as are just, and the witness may be ordered to pay the costs arising out of the failure

to attend or remain in attendance.

INTERPROVINCIAL SUBPOENA

53.05 A summons to a witness outside Prince Edward Island to compel his or her attendance under the *Interprovincial Subpoena Act* shall be in Form 53 C.

COMPELLING ATTENDANCE OF WITNESS IN CUSTODY

53.06 The court may make an order (Form 53 D) for attendance of a witness in custody whose evidence is material to an action, directing the officer having custody of a prisoner to produce them, for an examination authorized by these rules or as a witness at a hearing.

CALLING ADVERSE PARTY AS WITNESS

Persons to Whom Rule Applies

- 53.07** (1) Subrules (2) to (7) apply in respect of the following persons:
1. An adverse party;
 2. An officer, director, employee or sole proprietor of an adverse party;
 3. A partner or a partnership that is an adverse party.

Securing Attendance

- (2) A party may secure the attendance of a person referred to in subrule (1) as a witness at a trial,
- (a) by securing the person with a summons to witness, or by serving on the adverse party or the lawyer for the adverse party, at least 10 days before the commencement of the trial, a notice of intention to call the person as a witness; and;
 - (b) by paying or tendering attendance money calculated in accordance with Rule 57 Tariff at the same time.
- (3) If a person referred to in subrule (1) is in attendance at the trial, it is unnecessary to serve the person with a summons or to pay attendance money to call the person as a witness.

When Adverse Party may be Called

- (4) A party may call a person referred to in subrule (1) as a witness unless
- (a) the person has already testified; or
 - (b) the adverse party or the adverse party's lawyer undertakes to call the person as a witness.

Cross-examination

- (5) A person referred to in subrule (1) may be cross-examined by the party who called them as a witness and by any other party who is adverse in interest to that person.

Re-examination

- (6) After a cross-examination under subrule (5), the person may be re-examined by any party who is not entitled to cross-examine under that subrule.

Failure to Testify

- (7) The Court may grant judgment in favour of the party calling the witness, adjourn the trial or make such other order as is just where a person required to testify under this rule,
- (a) refuses or neglects to attend at the trial or to remain in attendance at the trial;
 - (b) refuses to be sworn; or
 - (c) refuses to answer any proper question put to them or to produce any document or other thing that they are required to produce.

EVIDENCE ADMISSIBLE ONLY WITH LEAVE

- 53.08** (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.
- (2) Subrule (1) applies with respect to the following provisions:
- (1) Subrule 30.08(1) (failure to disclose document).
 - (2) Rule 30.09 (failure to abandon claim of privilege).
 - (3) Rule 31.07 (refusal to disclose information on discovery).
 - (4) Subrule 31.09(3) (failure to correct answers on discovery).
 - (5) Subrule 53.03(3) (failure to serve expert's report).
 - (6) Subrule 75.1.04(2) (failure to disclose witness).

CALCULATION OF AWARDS FOR FUTURE PECUNIARY DAMAGES**Discount Rate**

- 53.09** (1) The discount rate to be used in determining the amount of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is 2.5 per cent per year.

Gross Up

- (2) In calculating the amount to be included in the award to offset any liability for income tax on income from investment of the award, the court shall,
- (a) assume that the entire award will be invested in fixed income securities; and

- (b) determine the rate to be assumed for future inflation in accordance with the following formula:

$$g = \frac{(1+i)}{(1+d)} - 1$$

where "g" is the rate to be assumed for future inflation;

"i" is the average yield on Government of Canada marketable bonds for durations of over ten years, as published in the edition of the Bank of Canada Weekly Financial Statistics appearing on or not more than six days before the date that the trial commenced, rounded to the nearest half of one per cent; and

"d" is the discount rate specified in subrule (1).

Murphy et al. v. Stanhope Cape Estates Inc., 2024 PESC 36

Whereas the defendant did not participate in the hearing, the trial judge allowed the plaintiffs to prove their claim by affidavit and partly by *viva voce* evidence, pursuant to Rule 53.02(3).

Waite v. Waite, 2021 PESC 12

The author of an assessment ordered under the *Children's Law Act* is not an expert witness unless such a determination is made pursuant to Rule 53.

DCP v. C.P. & T.P., 2014 PECA 18

The court confirmed the trial judge's finding that the expert's evidence was relevant and had probative value. The court also confirmed that hearsay in an expert report is admissible to show the information upon which the expert bases his opinion but not for the proof of the contents.

MacWilliams v. Connors, 2014 PESC 12

The court stated it would be fundamentally wrong to allow an expert witness on one side of the case to decide or have a role in deciding, whether another expert witness would be allowed to testify on the other side of the case.

MacWilliams v. Connors, 2017 PESC 2

The court stated that experts may be disqualified or their evidence may be given less weight if they are found to be biased but it was not shown in the case.

Lewis v. Lewis, 2017 PECA 11

The Court found the hearing process was unfair as the motions judge denied one party the opportunity to present her financial case. Relying on *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, the court stated for an expert opinion to be inadmissible, more than a simple appearance of bias is necessary and that the mother was entitled to have her accountant appear under oath and speak to his accounting report.

REFERENCES**RULE 54****DIRECTING A REFERENCE****APPLICATION OF RULES 54 AND 55**

54.01 Rules 54 and 55 apply to references directed,

- (a) under Rule 54.02 or any other rule; and
- (b) under a statute, subject to the provisions of the statute.

WHERE REFERENCE MAY BE DIRECTED**Reference of Whole Proceeding or Issue**

54.02 (1) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference of the whole proceeding or a reference to determine an issue where,

- (a) all affected parties consent;
- (b) a prolonged examination of documents or an investigation is required that, in the opinion of the judge, cannot conveniently be made at trial; or
- (c) a substantial issue in dispute requires the taking of accounts.

Reference of Issue

(2) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference to determine an issue relating to,

- (a) the taking of accounts;
- (b) the conduct of a sale;
- (c) the appointment of a guardian, receiver or trustee;
- (d) the conduct of a guardianship, receivership or trusteeship; or
- (e) the enforcement of an order.

TO WHOM REFERENCE MAY BE DIRECTED**Supreme Court**

54.03 (1) A reference may be directed to,

- (a) the referring judge;
- (b) another judge with that judge's consent;
- (c) the Prothonotary;
- (d) a person agreed on by the parties; or
- (e) a family mediator or clinician, where the reference is directed under

Rule 70.21 or 71.07.

Person Agreed on by Parties

- (2) Where a reference is directed to a person agreed on by the parties, the person is, for the purposes of the reference, an officer of the court directing the reference.
- (3) The judge directing a reference to a person agreed on by the parties may,
 - (a) determine his or her remuneration and the liability of the parties for its payment;
 - (b) refer that issue to the person to whom the reference is directed; or
 - (c) reserve that issue until the report on the reference is confirmed.

ORDER DIRECTING A REFERENCE

- 54.04** (1) An order directing a reference shall specify the nature and subject matter of the reference and who is to conduct it and may,
- (a) direct in general terms that all necessary inquiries be made, accounts taken and costs assessed;
 - (b) contain directions for the conduct of the reference; and
 - (c) designate which party is to have carriage of the reference.
- (2) An order of the Prothonotary directing a reference shall not require a report back, and the report or an interim report on the reference shall be confirmed under Rule 54.09 (confirmation by passage of time).
- (3) A referee has, subject to the order directing the reference, all the powers these rules give to a referee.

MOTIONS ON A REFERENCE

- 54.05** (1) A referee shall hear and dispose of any motion made in connection with the reference, but in the absence of or with the consent of the referee a motion may be heard and disposed of by a judge or, if the referee is not the Prothonotary, by the Prothonotary.
- (2) Rule 37.03 (place of hearing of motions) does not apply to a motion made in connection with a reference and heard by the referee.
- (3) Where a referee has made an order on a motion in the reference, a person who is affected by the order may make a motion to a judge to set aside or vary the order by a notice of motion served within seven days after the order is made and naming the first available hearing date that is at least three days after service of the notice of motion.

REPORT ON REFERENCE

- 54.06** A referee shall make a report that contains his or her findings and conclusions.

REPORT MUST BE CONFIRMED

- 54.07** (1) A report has no effect until it has been confirmed.
- (2) A report shall be entered immediately after it has been confirmed and Rule 59.04 (entry of order) applies, with necessary modifications.

CONFIRMATION ON MOTION WHERE REPORT BACK REQUIRED

- 54.08** (1) Where the order directing a reference requires the referee to report back, the report or an interim report on the reference may be confirmed only on a motion to the judge who directed the reference, subject to subrule 70.21(3) (reference to family mediator or clinician), on notice to every party who appeared on the reference, and the judge may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just.
- (2) Where the judge who directed the reference is unable for any reason to hear a motion for confirmation, the motion may be made to another judge.

CONFIRMATION BY PASSAGE OF TIME WHERE REPORT BACK NOT REQUIRED**Fifteen Day Period to Oppose Confirmation**

- 54.09** (1) Where the order directing a reference does not require the referee to report back, the report or an interim report on the reference is confirmed,
- (a) immediately on the filing of the consent of every party who appeared on the reference; or
- (b) on the expiration of fifteen days after a copy, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced, unless a notice of motion to oppose confirmation of a report is served within that time.

To Whom Motion to Oppose Confirmation Made

- (2) A motion to oppose confirmation of a report shall be made,
- (a) in a proceeding in which the reference was directed by a judge, to a judge;
- (b) in a proceeding in which the reference was directed by the Prothonotary, to a judge.

Notice of Motion to Oppose Confirmation

- (3) A notice of motion to oppose confirmation of a report shall,
- (a) set out the grounds for opposing confirmation;
- (b) be served within fifteen days after a copy of the report, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced; and
- (c) name the first available hearing date that is at least three days after

service of the notice of motion.

Motion for Immediate Confirmation

- (4) A party who seeks confirmation before the expiration of the fifteen day period prescribed in subrule (1) may make a motion to a judge for confirmation.

Disposition of Motion

- (5) A judge hearing a motion under subrule (2) or (4) may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just.

REFEREE UNABLE TO CONTINUE OR COMPLETE REFERENCE

54.10 Where a referee is unable for any reason to continue or complete a reference,

- (a) the parties to the reference may by consent appoint a new referee; or
- (b) any party to the reference may make a motion to a judge for directions for continuation or completion of the reference.

RULE 55**PROCEDURE ON A REFERENCE****GENERAL PROVISIONS FOR CONDUCT OF REFERENCE****Simple Procedure to be Adopted**

- 55.01** (1) A referee shall, subject to any directions contained in the order directing the reference, devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may,
- (a) give such directions as are necessary; and
 - (b) dispense with any procedure ordinarily taken that the referee considers to be unnecessary, or adopt a procedure different from that ordinarily taken.

Special Circumstances to be Reported

- (2) A referee shall report on any special circumstances relating to the reference and shall generally inquire into, decide and report on all matters relating to the reference as fully as if they had been specifically referred.

General Procedure

- (3) Subject to subrule (1), a reference shall be conducted as far as possible in accordance with Rules 55.01 to 55.07.

PROCEDURE ON A REFERENCE GENERALLY**Hearing for Directions**

- 55.02** (1) The party having carriage of the reference shall forthwith have the order directing the reference signed and entered and, within ten days after entry, request an appointment with the referee for a hearing to consider directions for the reference and, in default, any other party having an interest in the reference may assume carriage of it.
- (2) A notice of hearing for directions (Form 55 A) and a copy of the order directing the reference shall be served on every other party to the proceeding, and filed with the court, at least five days before the hearing unless the referee directs or these rules provide otherwise.

Directions

- (3) At the hearing for directions, the referee shall give such directions for the conduct of the reference as are just, including,
 - (a) the time and place at which the reference is to proceed;
 - (b) any special directions concerning the parties who are to attend; and
 - (c) any special directions concerning what evidence is to be received and how documents are to be proved.

- (4) The directions may be varied or supplemented during the course of the reference.

Adding Parties

- (5) Where it appears to the referee that any person ought to be added as a party to the proceeding, the referee may make an order adding the person as a defendant or respondent and direct that the order, together with the order directing the reference and a notice to party added on reference (Form 55 B), be served on the person, and on being served the person becomes a party to the proceeding.
- (6) A person served with a notice under subrule (5) may make a motion to a judge to set aside or vary the order directing the reference or the order adding the person as a party, by a notice of motion served within ten days after service of the notice under subrule (5), or where the person is served outside Prince Edward Island, within such further time as the referee directs, and naming the first available hearing date that is at least three days after service of the notice of motion.

Failure to Appear on Reference

- (7) A party who is served with notice of reference under subrule (2) or (5) and does not appear in response to the notice is not entitled to notice of any step in the reference and need not be served with any document in the reference, unless the referee orders otherwise.

Representation of Parties with Similar Interests

- (8) Where it appears to the referee that two or more parties have substantially similar interests and can be adequately represented as a class, the referee may require them to be represented by the same lawyer and, where they cannot agree on a lawyer to represent them, the referee may designate a lawyer on such terms as are just.
- (9) Where one of the parties referred to in subrule (8) insists on being represented by a different lawyer, he or she shall not recover the costs of his or her separate representation and, unless the referee orders otherwise, shall pay all costs incurred by the other parties as a result of his or her separate representation.

Amendment of Pleadings

- (10) The referee may grant leave to make any necessary amendments to the pleadings that are not inconsistent with the order of reference.

Procedure Book

- (11) The referee shall keep a procedure book in which the referee shall note all steps taken and all directions given in respect of the reference, and the directions need not be embodied in a formal order or report to bind the parties.

Transferring Carriage of Reference

- (12) Where the party having carriage of the reference does not proceed with reasonable diligence, the referee may, on the motion of any other interested party, transfer the carriage of the reference to another party.

Evidence of Witnesses

- (13) Witnesses on a reference shall be examined orally unless the referee directs otherwise, and evidence taken orally shall be recorded.
- (14) The attendance of a person to be examined on a reference may be compelled in the same manner as provided in Rule 53 for a witness at a trial.

Expert Witness

- (14.1) Rule 53.03 (expert witness) and Rule 53.08 (evidence admissible only with leave) apply, with necessary modifications, to the calling of an expert witness on a reference.

Expert Appointed by Reference

- (14.2) A referee may appoint an independent expert and Rule 52.03 (court appointed experts) applies, with necessary modifications.

Examination of Party and Production of Documents

- (15) The referee may require any party to be examined and to produce such documents as the referee thinks fit and may give directions for their inspection by any other party.

Filing of Documents

- (16) While a reference is pending, all documents relating to it shall be filed with the referee and, on completion of the reference, the documents shall be returned to the office in which the proceeding was commenced.

Execution or Delivery of Instrument

- (17) Where a person refuses or neglects to execute or deliver an instrument that becomes necessary under an order directing the reference, the referee may give directions for its execution or delivery.

Rulings

- (18) Where the referee has made a ruling on the admissibility of evidence or any other matter relating to the conduct of the reference the referee shall, on the request of any party, set out the ruling and the reasons for it in the report or, in the discretion of the referee, in an interim report on the reference.

Preparation of Report

- (19) When the hearing of the reference is completed, the referee shall fix a date to settle the report and the party having carriage of the reference shall serve

notice of the date on all parties who appeared on the reference unless the referee dispenses with notice.

- (20) The party having carriage of the reference shall prepare a draft report and present it to the referee on the day fixed for settling the report.
- (21) When the referee has settled and signed the report, the party having carriage of the reference shall forthwith serve it on all parties who appeared on the reference and file a copy with proof of service.
- (22) In a proceeding for the administration of the estate of a deceased person, the report shall, as far as possible, be in Form 55 C.

PROCEDURE TO ASCERTAIN INTERESTED PERSONS AND VERIFY CLAIMS

Publication of Advertisements

- 55.03** (1) The referee may direct the publication of advertisements for creditors or beneficiaries of an estate or trust, other unascertained persons, or their successors.

Filing of Claims

- (2) The advertisement shall specify a date by which and a place where interested persons may file their claims and shall notify them that, unless their claims are so filed, they may be excluded from the benefit of the order, but the referee may nevertheless accept a claim at a later time.

Examination of Claims

- (3) Before the day specified by the referee for the consideration of claims filed in response to the advertisement, the executor, administrator or trustee, or such other person as the referee directs, shall examine the claims and prepare an affidavit verifying a list of the claims filed in response to the advertisement and stating which claims he or she believes should be disallowed and the reasons for that belief.

Adjudication of Contested Claims

- (4) If a claim is contested, the referee shall order that a notice of contested claim (Form 55 D), fixing a date for adjudication of claim, be served on the claimant.

PROCEDURE ON TAKING OF ACCOUNTS

Powers of Referee

- 55.04** (1) On the taking of accounts, the referee may,
- (a) take the accounts with rests or otherwise;
 - (b) take account of money received or that might have been received but for wilful neglect or default;
 - (c) make allowance for occupation rent and determine the amount;

- (d) take into account necessary repairs, lasting improvements, costs and other expenses properly incurred; and
- (e) make all just allowances.

Preparation of Accounts

- (2) Where an account is to be taken, the party required to account, unless the referee directs otherwise, shall prepare the account in debit and credit form, verified by affidavit.
- (3) The items on each side of the account shall be numbered consecutively, and the account shall be referred to in the affidavit as an exhibit and shall not be attached to the affidavit.

Books of Account as Proof

- (4) The referee may direct that the books in which the accounts have been kept be taken as prima facie proof of the matters contained in them.

Production of Vouchers

- (5) Before hearing a reference, the referee may fix a date for the purpose of taking the accounts and may direct the production and inspection of vouchers and, where appropriate, cross-examination of the party required to account on his or her affidavit, with a view to ascertaining what is admitted and what is contested between the parties.

Questioning Accounts

- (6) A party who questions an account shall give particulars of the objection, with specific reference by number to the item in question, to the party required to account, and the referee may require the party to give further particulars of the objection.

DIRECTION FOR PAYMENT OF MONEY**Payment into Financial Institution**

- 55.05** (1) Where under an order directing a reference the referee directs money to be paid at a specified time and place, the referee shall direct it to be paid into a financial institution to the credit of the party entitled and the Registrar.

Payment Out

- (2) Where money is directed to be paid out of court to the credit of the party entitled, the party may name the financial institution into which he or she wishes it to be paid.
- (3) Where money has been paid into the joint credit of the party and the Registrar, the Registrar shall sign the cheque or direction for payment out on the production of the consent of the party paying in, verified by affidavit, or of the party's lawyer, or, in the absence of the consent, on the order of the referee.

Money Belonging to Minor

- (4) Where it appears that money in court belongs to a minor, the referee shall require evidence of the age of the minor and shall, in the report, state the minor's birth date and full address.

Money to be Paid to Creditors

- (5) Where an order of reference or a report directs the payment of money out of court to creditors, the person having carriage of the reference shall deposit with the Registrar a copy of the order or report and shall serve a notice to creditor (Form 55 E) on each creditor stating that payment of the creditor's claim, as allowed, may be obtained from the Registrar.

REFERENCE FOR CONDUCT OF SALE**Method of Sale**

- 55.06** (1) Where a sale is ordered, the referee may cause the property to be sold by public auction, private contract or tender, or partly by one method and partly by another.

Advertisement

- (2) Where property is directed to be sold by auction or tender, the party having carriage of the sale shall prepare a draft advertisement according to the instructions of the referee showing,
- (a) the short title of the proceeding;
 - (b) that the sale is by order of the court;
 - (c) the time and place of the sale;
 - (d) a short description of the property to be sold;
 - (e) whether the property is to be sold in one lot or several and, if in several, in how many, and in what lots;
 - (f) the terms of payment;
 - (g) that the sale is subject to a reserve bid, if that is the case; and
 - (h) any conditions of sale different from those set out in Form 55 F.

Conditions of Sale

- (3) The conditions of sale by auction or tender shall be those set out in Form 55 F, subject to such modifications as the referee directs.

Hearing for Directions

- (4) At a hearing for directions under subrule 55.02(3), the referee shall,
- (a) settle the form of the advertisement;
 - (b) fix the time and place of sale;
 - (c) name an auctioneer, where one is to be employed;

- (d) give directions for publication of the advertisement;
- (e) give directions for obtaining appraisals;
- (f) fix a reserve bid, if any; and
- (g) make all other arrangements necessary for the sale.

Who May Bid

- (5) All parties may bid except the party having carriage of the sale and any trustee or agent for the party or other person in a fiduciary relationship to the party.
- (6) Where the party having carriage of the sale wishes to bid, the referee may transfer carriage of the sale to another party or to any other person.

Who Conducts Sale

- (7) Where no auctioneer is employed, the referee or a person designated by the referee shall conduct the sale.

Purchaser to Sign Agreement

- (8) The purchaser shall enter into an agreement of purchase and sale at the time of sale.

Deposit

- (9) The deposit required by the conditions of sale shall be paid to the party having carriage of the sale or his or her lawyer at the time of sale and the party or lawyer shall forthwith pay the money into court in the name of the purchaser.

Interim Report

- (10) Where a sale is made through an auctioneer, the auctioneer shall make an affidavit concerning the result of the sale, and where no auctioneer is employed, the referee shall enter the result in the procedure book and, in either case, the referee may make an interim report on the sale. (Form 55 G)

Objection to Sale

- (11) A party may object to a sale by making a motion to the referee to set it aside, and notice of the motion shall be served on all parties to the reference and on the purchaser, who shall be deemed to be a party for the purpose of the motion.

Completion of Sale

- (12) The purchaser may pay the purchase money or the balance of it into court without order and, after the confirmation of the report on the sale, on notice to the party having carriage of the sale, the purchaser may obtain a vesting order.

- (13) Where possession is wrongfully withheld from the purchaser, either the purchaser or the party having carriage of the sale may move for a writ of possession.
- (14) The purchase money may be paid out of court in accordance with the report,
 - (a) on consent of the purchaser or their lawyer; or
 - (b) on proof to the Registrar that the purchaser has received a transfer or vesting order of the property for which the money in question was paid into court.
- (15) No transfer shall be approved until the referee is satisfied that the purchase money has been paid into court and, where a mortgage is taken for part of the purchase money, that the mortgage has been registered and deposited with the Registrar.

REFERENCE TO APPOINT LITIGATION GUARDIAN OR RECEIVER

- 55.07** (1) Where, by an order directing a reference, a referee is directed to appoint a litigation guardian or receiver, the referee shall not report on the appointment until the referee has settled and approved any security required by the order and until the security has been filed with the registrar.
- (2) Where by an order directing a reference or a report, the person so appointed is required to pass accounts or to pay money into court and has not done so, the referee may, on the passing of accounts, disallow any compensation and may charge the person with interest.

Campbell, Harris and Kays v. Ford and Harris, 2022 PESC 13

As part of the court's order for partition and sale of real property owned by seven family members, the prothonotary was appointed to facilitate the sale, based on the goals of maximizing selling price, and a fair, transparent and timely sale.

COSTS**RULE 56****SECURITY FOR COSTS****WHERE AVAILABLE**

56.01 In any proceeding where, on motion by the defendant or respondent, it appears that,

- (a) the plaintiff or applicant is ordinarily resident outside Prince Edward Island;
 - (b) the plaintiff or applicant has another proceeding for the same relief pending in Prince Edward Island or elsewhere;
 - (c) the plaintiff, or any person through or under whom they claim, has a judgment or order against them for costs that have not been paid;
 - (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Prince Edward Island to pay the costs of the defendant or respondent;
 - (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Prince Edward Island to pay the costs of the defendant or respondent; or
 - (f) a statute entitles the defendant or respondent to security for costs,
- the court may make such order for security for costs as is just.

DECLARATION OF PLAINTIFF'S OR APPLICANT'S PLACE OF RESIDENCE

56.02 The lawyer for the plaintiff or applicant shall, forthwith on receipt of a demand in writing from any person who has been served with the originating process, declare in writing whether the plaintiff or applicant is ordinarily resident in Prince Edward Island, and where the lawyer fails to respond to the demand, the court may order that the action or application be stayed or dismissed.

MOTION FOR SECURITY

- 56.03** (1) In an action, a motion for security for costs may be made only after the defendant has delivered a defence and shall be made on notice to the plaintiff and every other defendant who has delivered a defence or notice of intent to defend.
- (2) In an application, a motion for security for costs may be made only after the respondent has delivered a notice of appearance and shall be made on notice to the applicant and every other respondent who has delivered a notice of appearance.

AMOUNT AND FORM OF SECURITY AND TIME FOR FURNISHING

56.04 The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court.

FORM AND EFFECT OF ORDER

56.05 A plaintiff or applicant against whom an order for security for costs (Form 56 A) has been made may not, until the security has been given, take any step in the proceeding except an appeal from the order, unless the court orders otherwise.

DEFAULT OF PLAINTIFF OR APPLICANT

56.06 Where a plaintiff or applicant defaults in giving the security required by an order, the court on motion may dismiss the proceeding against the defendant or respondent who obtained the order and the stay imposed by Rule 56.05 no longer applies unless another defendant or respondent has obtained an order for security for costs.

AMOUNT MAY BE VARIED

56.07 The amount of security required by an order for security for costs may be increased or decreased at any time.

NOTICE OF COMPLIANCE

56.08 On giving the security required by an order, the plaintiff or applicant shall forthwith give notice of compliance to the defendant or respondent who obtained the order and to every other party.

SECURITY FOR COSTS AS TERM OF RELIEF

56.09 Despite Rules 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under Rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief, and where such an order is made, Rules 56.04 to 56.08 apply, with necessary modifications.

Ayangma v. FLSB and ELSB, 2026 PESC 5

The Defendants' separate motions for security for costs were each dismissed. The litigation had been ongoing for over 10 years and the motions were brought only a few months before trial. Even though the plaintiff had multiple unpaid judgments and cost orders, the court found that it would not be just in the circumstances to order for security for costs.

Lisbon Seafood v. Kildare Princess Seafood Products, 2024 PESC 26

The defendant sought an order for the plaintiff to post security for costs. The plaintiff corporation conceded that they were not ordinarily resident in Prince Edward Island and would have insufficient assets in Prince Edward Island to pay the potential costs of the defendant. In trying to strike a balance to provide the defendant with protection from costs and not prevent the plaintiff from pursuing its claim, the court ordered the sum of \$27,500 be posted as security for costs.

Freid v. Air Canada, 2024 PESC 39

The defendant sought an order for the plaintiff to post security for costs. The plaintiff resided outside Prince Edward Island. The court found that the plaintiff was of limited financial means and that their case, on a *prima facie* basis, had merit. The court declined to make an order for security for costs.

Ayangma v. The Saltwire Network Inc., 2019 PECA 17

The Court of Appeal ordered the appellant to post security for costs in the amount of \$5,000. The appellant has a history of not paying costs orders.

O’Leary Potato Packers Ltd. v. Lewis, 2018 PESC 36

Defendant to the counterclaim sought an order for security for costs in relation to the counterclaim. The court noted that the plaintiff-by-counterclaim had an unsatisfied judgment for costs filed against him by the defendant, did not establish he was impecunious and, alternatively, that if he was impecunious, justice did not require he be permitted to continue pursuit of his counterclaim without posting security for costs. He was ordered to post security in the amount of \$7,000.

CMT et al. v. Government of P.E.I. et al., 2018 PECA 28

The motions judge granted a motion to allow defendants to be joined to a proceeding on the condition that the plaintiffs provide security for costs the new defendants.

The Court of Appeal confirmed the motion judge’s quantum of security for costs stating it is justified and reasonable.

Zenner & Zerd v. Flanagan, 2018 PECA 7

Where there are multiple plaintiffs and their claims are joint, an order for security for costs will not be issued if at least one of the plaintiffs is ordinarily resident in the province or is a corporation that has assets in the province available to respond to an order for security for costs.

Zenner & Zerd v. Flanagan, 2015 PESC 5

The Court stated that the Rule gives discretion to the Court to give such order “*as is just*” and one of the considerations for the Court is whether the plaintiffs’ claims appear sound.

The Court ordered the plaintiffs to post security for costs against one of the defendants as the plaintiffs’ claim appeared “*tenuous and the defence looked strong.*”

Marques v. Bambrick, 2018 PECA 4

The test to be applied for security for costs is “*there is good reason to believe that the action or application is frivolous and vexatious, and the plaintiff or applicant has insufficient assets*

in Prince Edward Island...”. Frivolous and vexatious means that the action is devoid of merit and has little or no chance of success.

Action is defined in Rule 1.03 to include “*counterclaim*.” It is the basis of the claim which must be assessed, not the damages or relief requested. If the underlying action is valid, it cannot be frivolous and vexatious notwithstanding the damages or relief claimed is excessive.

Ayangma v. French Language School Board, 2017 PECA 4

The court refused to require the appellant to post security and dismissed the motion even though judgment and cost orders are outstanding because of delay in bringing the motion.

CMT et al. v. Gov’t of PEI et al, 2016 PESC 4

The plaintiffs failed to show they were impecunious but they do not have sufficient assets in the jurisdiction to respond to any potential costs order following a trial of this magnitude. Security was ordered to be posted in the amount of \$1,032,250.

Elbaz v. Government of PEI, 2007 PESCTD 38

The court found that one of the plaintiffs had sufficient assets in the province to respond to a reasonable order for costs against the plaintiffs. However, one of the other plaintiffs held security on those assets. The court ordered the plaintiff holding the security to postpone its interest in the security to the interest of a final order for costs. Alternatively, the plaintiffs were given the option of providing security by way of a letter of credit or other suitable instrument for costs in the amount of \$20,000.

Ayangma v. CBC et al., 2005 PESCTD 11

A motion was brought by the defendant for security for costs on the basis there were outstanding judgments registered against the plaintiff for costs. The plaintiff in response to the motion alleged he was impecunious and unable to post security. The court allowed the motion because the plaintiff did not produce sufficient evidence to establish he was impecunious. Confirmed on appeal. See: *Ayangma v. CBC* 2005 PESCAD 26.

Aluma v. SCJV, 2004 PESCTD 12

SCJV made an application for security for costs on the ground that Aluma is not ordinarily resident in the province and that it has insufficient assets in the province to satisfy a judgment for costs. Aluma was ordered to post security for costs because its assets outside the jurisdiction were not of a kind which could be conveniently realized upon.

National Bank v. Stevenson, 2000 PESCAD 3, (2000) 184 Nfld. & P.E.I.R. 95

The defendant moved for security for costs. The Appeal Division found that the plaintiff’s claim was not frivolous and vexatious. As the judgment for costs which the defendant relied upon as being a previously outstanding unpaid judgment for costs arose from another action commenced by the defendant against the plaintiff and as the latter action arose out of the same series of transactions which gave rise to the plaintiff’s claim against the defendant, it would serve an injustice to order security for costs.

Barnard v. Testori Americas Corporation, [1998] P.E.I.J. No. 72 (Q.L.) (P.E.I.S.C.-T.D.).

Reciprocal enforcement of judgment legislation may make an order for security for costs unnecessary; however, the assets which the non-resident plaintiff claims to have in the reciprocating jurisdiction must be of a kind which can be conveniently realized. Only then will

the legislation have the effect of equating a non-resident plaintiff to the position of a resident with realizable assets in this jurisdiction. In setting the amount of the security, the court took into consideration the actions of the defendant may have caused the plaintiff's present financial position.

Meadowbank Fine Foods Ltd. v. Elbaz (1997), 150 Nfld. & P.E.I.R. 83 (P.E.I.S.C.-T.D.)

Application for security on the grounds that the plaintiff did not have sufficient assets to pay the costs of the defendant and that the action was frivolous, vexatious and without merit. Based on a reading of the pleadings the court found the action was not frivolous or vexatious and was not clearly without merit. While the corporate plaintiff and its principal were without assets and thus unlikely to be able to pay an order for costs in favour of the defendant, the court declined to make an order for security for costs because the plaintiff appeared to have a meritorious claim which would be destroyed if the order were made. Of significance was the assertion by the plaintiff that the defendant's alleged negligence caused its impoverishment. The words "as is just" in Rule 56.01(d) permits the court to consider the merits of a case in determining whether to order security for costs.

Atlantic Golf Construction Ltd. v. Lakeside Development Corp. et al. (1993), 116 Nfld. & P.E.I.R. 254 (P.E.I.S.C.-T.D.)

The Court held that for purposes of Rule 56.01(a) there is little difference between a resident and non-resident plaintiff provided there is reciprocal enforcement of judgment legislation between the two jurisdictions and provided further the non-resident has assets in the jurisdiction of its residence.

In seeking an order for security for costs under Rule 56.01(d), the following steps are involved:

1) The onus is on the defendant to first show there is good reason to believe the plaintiff company does not have sufficient assets in Prince Edward Island or in a jurisdiction with reciprocal enforcement of judgment legislation, to pay the costs of the defendant. Within this step there are two points which the defendant must cover: (i) the amount of costs; and (ii) that the plaintiff has insufficient assets in Prince Edward Island to pay them.

2) The onus then shifts to the plaintiff to prove either that it has sufficient assets or to prove impecuniosity.

Johnston et al. v. Montreal Trust Co. of Canada (1993), 110 Nfld. & P.E.I.R. 276 (P.E.I.S.C.-T.D.)

Where one of two plaintiffs had assets which appeared capable of being realized to satisfy an order for costs, it is unnecessary to make an order for security for costs against the other plaintiff as there would be one bill of costs payable by the plaintiffs jointly and severally.

RULE 57**FIXING OF COSTS****GENERAL PRINCIPLES****Factors in Discretion**

- 57.01** (1) In exercising its discretion under section 60 of the *Judicature Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
 - (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
 - (a) the amount claimed and the amount recovered in the proceeding;
 - (b) the apportionment of liability;
 - (c) the complexity of the proceeding;
 - (d) the importance of the issues;
 - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
 - (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
 - (g) a party's denial of or refusal to admit anything that should have been admitted;
 - (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
 - (i) any other matter relevant to the question of costs.

Costs Against Successful Party

- (2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

FIXING OF COSTS

Fixing Costs: Tariff

- (3) When the court awards costs, it shall fix them in accordance with Rule 57.01 and the Rule 57 Tariff.

Authority of Court

- (4) Nothing in this rule or Rules 57.02 to 57.06 affects the authority of the court under section 60 of the *Judicature Act*,
- (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
 - (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
 - (c) to award all or part of the costs on a substantial indemnity basis;
 - (d) to award costs in an amount that represents full indemnity; or
 - (e) to award costs to a party acting in person.

Submission on Costs of a Proceeding

- (5) A party shall serve a Submission on Costs (Form 57 A), or such other submission as the court may require, on the other parties and shall file it with proof of service,
- (a) after a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, if the party has been awarded costs; or
 - (b) before, or at the conclusion of, a hearing, in the court's discretion, if required by the hearing judge.

Costs on a Motion

- (6) (a) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,
- i. fix the costs of the motion and order them to be paid within 30 days; or
 - ii. in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment.
- (b) Where a party fails to pay the costs of a motion as required under subrule (6)(a), the court may dismiss or stay the party's proceeding, strike out the party's defence or make such other order as is just.

No Costs on Motion Without Notice

- (c) On a motion made without notice, there shall be no costs to any party, unless the court orders otherwise.

Process for Fixing Costs

- (7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of

the foregoing, costs may be fixed after receiving oral submissions only, or after receiving written submissions, without the attendance of the parties.

DIRECTIONS TO PROTHONOTARY

- 57.02** (1) Despite subrule 57.01(3), in an exceptional case the court may refer costs for assessment by the Prothonotary under Rule 58.
- (2) Where costs are to be assessed under Rule 58, the court may give directions to the Prothonotary in respect of any matter referred to in Rule 57.01.
- (3) The court shall record,
- (a) any direction to the Prothonotary;
 - (b) any direction that is requested by a party and refused; and
 - (c) any direction that is requested by a party and that the court declines to make but leaves to the discretion of the Prothonotary.

COSTS OF LITIGATION GUARDIAN

- 57.03** (1) The court may order a successful party to pay the costs of the litigation guardian of a party under disability who is a defendant or respondent, but may further order that the successful party pay those costs only to the extent that the successful party is able to recover them from the party liable for the successful party's costs.
- (2) A litigation guardian who has been ordered to pay costs is entitled to recover them from the person under disability for whom they have acted, unless the court orders otherwise.

LIABILITY OF LAWYER FOR COSTS

- 57.04** (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
- (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
 - (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
 - (c) requiring the lawyer personally to pay the costs of any party.
- (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court.
- (3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order.

FIXING OF COSTS

LAWYER AND CLIENT COSTS: GENERAL

Costs of a Lawyer Acting as a Trustee, Etc.

- 57.05** Unless an enactment otherwise provides, a lawyer who is a guardian, mortgagee, trustee or personal representative is entitled as against the estate, fund, or mortgaged property, to make the same charges for services performed by them as a lawyer for or in connection with the estate, fund or mortgaged property as might have been payable out of the estate or fund, or be chargeable against the mortgaged property, as if the lawyer had been employed by some other person acting in that capacity.

Costs Payable Out of Trust Funds

- 57.06** Costs payable out of or chargeable against any trust estate, trust fund or mortgaged property, shall not be so paid as against any person interested therein, unless
- (a) the costs have been assessed;
 - (b) any interested person is *sui juris* and has consented to the payment; or
 - (c) the court has fixed the amount of, and directed the payment or charge.

Payment in Advance or Security Taken

- 57.07** A lawyer may obtain payment in advance or take security for his future fees, charges or disbursements, subject to the right of assessment.

Charging Property for Fees

- 57.08** (1) The court may, on the application of a lawyer, declare that the lawyer is entitled to a charge for their proper fees and disbursements in a proceeding upon the property recovered or preserved through their instrumentality in the proceeding, and may make such order as is just for the payment of the fees and disbursements out of the property.
- (2) Nothing shall defeat any such charge referred to in subrule (1) unless the property has been disposed of to a bona fide purchaser for value without notice.
- (3) An order shall not be made under subrule (1) where the right of a lawyer to recover payment of their fees and disbursements is barred by any statute of limitations.

Proceeding for Costs

- 57.09** A lawyer may bring a proceeding for any costs due to them.

COSTS OF A PROCEEDING REMOVED TO THE SUPREME COURT

- 57.10** The court may deal with the costs of a proceeding transferred or removed to the court from any other tribunal, including the costs arising both before and after the transfer or removal, as it deems just.

Rule 57 TARIFF**PART I - FEES**

1. The fee for any step in a proceeding authorized by the Rules of Civil Procedure and the counsel fee for motions, applications, trials, references and appeals shall be determined in accordance with section 60(1) of the *Judicature Act*, R.S.P.E.I. Cap. J-2.1, and the factors set out in subrule 57.01(1).
2. Where students-at-law or law clerks have provided services of a nature that the Law Society of Prince Edward Island authorizes them to provide, fees for those services may be allowed.

PART II - DISBURSEMENTS

- | Item | Amount |
|---|---------------|
| 3. Attendance money actually paid to a witness who is entitled to attendance money, to be calculated as follows: | |
| 1. Attendance allowance for each day of necessary attendance..... | \$ 50 |
| 2. Travel allowance, where the hearing or examination is held, | |
| (a) in a city or town in which the witness resides, P.E.I. civil service mileage rates for each day of necessary attendance; | |
| (b) where the witness resides outside the town or city where the hearing or examination is held, P.E.I. civil service mileage rates each way between his or her residence and the place of hearing or examination; | |
| (c) where the witness resides outside the Province of Prince Edward Island and is required to attend a hearing or examination in Prince Edward Island, the minimum return airfare plus P.E.I. civil service mileage rates each way from their residence to the airport and from the airport to the place of hearing or examination. | |
| 3. A reasonable amount for overnight accommodation and meals, where the witness resides elsewhere than the place of hearing or examination and is required to remain overnight. | |
| 4. Reasonable fees or expenses actually paid to a court, or a court transcriber, for transcription services. | |
| 5. For service or attempted service of a document, | |
| (a) the amount actually paid, subject to reasonableness; | |
| (b) that was ordered to be served by publication, a reasonable amount. | |
| 6. For an examination and transcript of evidence taken on the examination, the amount actually paid, providing it was a reasonable sum. | |
| 7. For the preparation of a plan, model, videotape, film or photograph reasonably necessary for the conduct of the proceeding, a reasonable amount. | |

FIXING OF COSTS

8. For experts' reports that were supplied to the other parties as required by the *Evidence Act* or these rules and that were reasonably necessary for the conduct of the proceeding, a reasonable amount.
9. The cost of the investigation and report of the Official Guardian.
10. For an expert who gives opinion evidence at the hearing or whose attendance was reasonably necessary at the hearing, a reasonable amount.
- 10.1 For a professional who gives evidence at the hearing, a reasonable amount.
11. For an interpreter for services at the hearing or on an examination, a reasonable amount.
- 11.1. Where ordered by the presiding judge, for translation into English or French of a document that has been filed, a reasonable amount.
12. Where ordered by the presiding judge or officer, for travelling and accommodation expenses incurred by a party, a reasonable amount.
13. For copies of any documents or authorities prepared for or by a party for the use of the court and supplied to the opposite party, a reasonable amount.
14. For copies of records, appeal books and factums, a reasonable amount.
15. The cost of certified copies of documents such as orders, birth, marriage and death certificates, abstracts of title, deeds, mortgages and other registered documents where reasonably necessary for the conduct of the proceeding.
16. The cost of transcripts of proceedings of courts or tribunals,
 - (a) where required by the court or the rules; or
 - (b) where reasonably necessary for the conduct of the proceeding.
17. Where ordered by the presiding judge, for any other disbursement reasonably necessary for the conduct of the proceeding, a reasonable amount.
18. Any applicable taxes actually paid or payable on the lawyer's fees and disbursements allowable under Rule 58.05.

PART III - JURY FEE IN CIVIL CASES

19. As per the *Court Fees Act* Regulations.

PART IV - FILING FEES PAYABLE TO THE COURT

20. As per the *Court Fees Act* Regulations.

H.P. Consultants Inc. v. IIDI, 2025 PESC 73

In an application for judicial review, the respondent was successful on both a motion to settle the record and on the substantive judicial review application. The court considered the totality of the circumstances, including the hearing results, the applicable Rule 57.01(1) factors, the timing of the filing of certain certificates and that consideration of section 3(6) of the *Island Investment Development Act* was relatively novel. The court order \$30,000 in costs.

Townsend v Townsend, 2025 PESC 71

Following a trial, the court considered the defendant's conduct in determining costs. This included the defendant not attending the trial without advising either the court or the plaintiff, and not providing financial disclosure. The defendant was ordered to pay the plaintiff \$25,000 in costs.

Field v. Aviva Insurance Company, 2024 PESC 19

On a motion pursuant to Rule 22, the court has a duty to fix an amount of costs that is relevant to the particular step in the proceeding only, and not the entire proceeding.

MacLean v. The Little Poultry Company Inc. & Pitre, 2023 PESC 54

The court ordered costs to impress upon the defendant that there are consequences to their litigation strategy. In this matter, for a second time the defendant noted a third party in default and refused to set aside the note of default, resulting in another hearing.

M.B. v. D.B., 2024 PESC 7 (CanLII)

The wife was largely successful on her motion for a preservation order, child support, and spousal support. The court considered that the relief sought was somewhat novel, there was no specific precedential caselaw dealing with either section of the *Family Law Act*, and the court declined to grant the wife control of the husband's business. The court exercised its discretion to reduce the partial indemnity costs sought by the wife.

Grafton Management Inc. v. Charlottetown (City), 2021 PECA 11

The court set out a framework for costs of a self-represented litigant. Self-represented litigants are not entitled to costs on the same basis as a litigant who retains counsel. A self-represented litigant should not be compensated in relation to time and effort expended on a case which flow from the simple fact of being a litigant. A self-represented litigant must show that the time spent is time for functions ordinarily performed by a lawyer.

M.J. v. T.J., 2022 PESC 6

In fixing costs on a contempt motion, the court considered several factors, including that the contemptuous conduct called out for a costs award.

Estate of Mullen, 2022 PESC 5

On a motion for directions in an estate matter, the court fixed costs against a beneficiary, discounting for tasks which could have been done by junior lawyers.

Beer v. Anschutz, 2020 PESC 37

Under Rule 57.03(1)(a), the court ordered that costs be paid by the plaintiff to the defendant

FIXING OF COSTS

within 30 days of a determination on the issue of liability. The court stated that arriving at an appropriate amount for costs involves much more than a mere formulaic exercise, and the ultimate goal is that of reasonableness.

C.G. v. P.P., 2020 PESC 32

In fixing costs in a family law proceeding, the court considered all relevant factors, and in particular that the defendant bore responsibility for the matter not resolving, and the defendant had been unsuccessful in their argument. However, the plaintiff had not fully complied with timelines, issues arose from a certificate of pending litigation obtained by the plaintiff, and the plaintiff delayed in abandoning the motion. Accordingly, the court reduced the plaintiff's fees by \$2,000.

Fraser v. Runighan, 2020 PECA 5

Throw away costs are meant to compensate a party for costs that have been wasted. They are generally awarded on a full or substantial recovery basis.

CMT et al v. Gov't of P.E.I. et al, 2020 PECA 12

The Court awarded substantial indemnity costs finding there were reprehensible, scandalous and outrageous conduct by one of the parties. The court stated that unfounded serious allegations of fraud and dishonesty merit substantial indemnity costs. The Court stated that it is reprehensible to make irrelevant and scandalous allegations on the public record against the defendants, lawyers and the judiciary without a solid evidentiary foundation.

King & Dawson v. Government of P.E.I., 2020 PECA 13

The general rule is that the parties are responsible for putting their counsel at the place of trial at their own expense. An unsuccessful party should be called upon to reimburse the successful party for proper travelling and living expenses of counsel who does not practice in this province only where, in the opinion of the Court, based on evidence or other explanation either a) the expertise required to perform the particular case was not available from solicitors practicing in this province, or b) conflicts of interest prevent the solicitors practising here from acting in the matter.

C.G v. P.P., 2020 PESC 22

Following a number of motions in the action, including an abandoned motion for contempt, the issue left to be determined was that of costs. The plaintiff requested costs for her abandoned motion for contempt and a certificate of pending litigation. The defendant requested costs of the abandoned motion pursuant to Rule 37.08(3). The court reviewed the history of the action and the guidance provided by Rule 57. It held that the defendant was primarily responsible for the outstanding issues between certain relevant dates pre-dating the abandonment of the motion and, therefore, awarded partial indemnity costs to the plaintiff for a specific period of time, but not for all of the time frames requested by the plaintiff.

Hughes v. PEITF, 2019 PESC 45

The defendant, which was the successful party on the motion, filed a bill of costs which included fees for both senior and junior counsel, plus disbursements. The unsuccessful plaintiff filed no submissions on costs. The court allowed fees for both counsel, but disallowed the portion of the disbursements related to tabs and binding of documents.

Fraser v. Runighan, 2019 PESC 21

In awarding costs under Rule 49.10, the court considered several Rule 57.01 factors, including

the result, offers to settle, the amount of advance sought and the amount ordered, liability, complexity and importance, conduct which tended to shorten or lengthen the motions, whether any step was improper, refusal to admit, the principal of indemnity, and the amount of costs the unsuccessful party could reasonably expect to pay.

Ellerdale Investments Ltd. v. UPEI and Maxim 2000 Inc., 2019 PECA 27

The Court allowed solicitor fees and disbursements with the exception of travel, food and accommodation expenses which were disallowed. Travel time and expenses are recoverable on an assessment of costs but only when it is reasonably necessary to retain out-of-province counsel.

Ayangma v. FLSB & ELSB, 2017 PECA 25

Baseless allegations and actions in surreptitiously attempting to gain a monetary judgment without notice and without any basis are sufficiently outrageous to warrant substantial indemnity costs. Costs were awarded in the amount of \$3,500. being the substantial indemnity costs sought.

Cairns v. PEIHRC and Eastern School District, 2017 PECA 24

Considering the complexity of the case, the duration of the hearing, the lengthy record, and importance of the appeal, the Eastern School District was awarded costs in the amount of \$5,000. plus tax. The amount of time was considered reasonable even though three lawyers had worked on the file.

Ayangma v. FLSB & ELSB, 2017 PECA 18

A lay litigant was awarded costs in accordance with *Ayangma v. Eastern School Board*, 2008 PESCAD 16. Reimbursement was allowed for CD, transcript, filing fees, photocopies and binding. A claim for loss of earnings was also allowed upon receipt of written verification from the employer that the litigant lost pay in the amount claimed.

Lanigan v. PEITF, 2017 PECA 14

The Court awarded costs of \$85,500. plus tax and disbursements at trial, and \$30,000. plus tax and disbursements on appeal. The Court disallowed disbursements on appeal for courier and service of documents on lawyers as they were disbursements which would not have been incurred had both counsel been local counsel.

Lanigan v. PEITF, 2017 PECA 3

When costs follow the result after trial the general rule is that they will be fixed on a partial indemnity basis. The higher level of substantial indemnity costs is reserved to situations where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. The potential bankruptcy of a plaintiff is not a factor to be taken into account in elevating costs from the presumptive level to substantial indemnity.

James Heath v. Mercantile Financial Service Ltd., 2015 PECA 11

The respondent did not bring a motion under Rule 21 promptly; the respondent waited over two and a half years to bring the motion. For this reason, the usual rule of costs in the cause was not applied. Each party was ordered to bear their own costs.

Morrissey v. Morrissey, 2015 PECA 10

The appellant was awarded costs of the motion for a stay pending appeal in the amount of \$3,900. However, due to the precarious financial position of the respondent, and the possibility of adjustments and tradeoffs made in the divorce proceeding, the obligation to pay costs was deferred.

CASP et al. v. AG of Canada, 2015 PESC 15

FIXING OF COSTS

The Court awarded costs of the trial in the amount of \$1 million to the defendant on a partial indemnity basis up to the date of the defendant's offer to settle, then on a substantial indemnity basis.

In respect of the recusal motion, the motions judge awarded the sum of \$48,270.40 finding that, notwithstanding the amount may appear to be a large amount of costs for a single motion, the judge found it to be fair and reasonable. He also said the amount does not exceed what an unsuccessful party, in these circumstances, could reasonably expect to pay in relation to that step in the proceedings.

Vail & McIver v. WCB (P.E.I.), 2011 PESC 16

The motions judge assessed costs against the plaintiffs after the defendant successfully made a motion to strike the statement of claim. Despite the fact the plaintiffs were impecunious, costs were assessed against them. The motions judge stated ... "*a litigant's impecuniosity should never be allowed to become a sword which can be wielded in support of baseless litigation.*"

Gunn Estate (Re), 2010 PECA 13

Where there is a dispute between executors and one or more beneficiaries, costs are awarded pursuant to s.10 of the *Probate Act*, R.S.P.E.I. 1988, Cap. P-21. By the operation of Rule 65.49, the factors in Rule 57 are applicable to the assessment of those costs.

Mutch v. Huestis & Century 21, 2011 PESC 13.

On the basis that they constituted a duplication of effort, the trial judge denied the claim for costs incurred by the plaintiff in retaining counsel who were discharged prior to trial.

Ayangma v. Eastern School Board, 2010 PECA 34

Disbursements for "Delivery and Postage" were considered part of office overhead and disallowed as a claim in a bill of costs. Claims in a bill of costs for "electronic research" need to be supported with information upon which the reasonableness of the claim can be assessed.

Griffin v. Summerside (City), 2010 PECA 15

The court made a Bullock Order which required the City to reimburse the plaintiff the costs which the plaintiff was ordered to pay two defendants who were successful in defending against the claim made by the plaintiff.

If the cost of counsel's travel and accommodations are deemed necessary, the plaintiff is entitled to be indemnified against those costs. Claims for document production and research which are included in office overhead are not recoverable as costs. Griffin was awarded his costs on the appeal of \$25,000. plus tax and disbursements.

Griffin v. Summerside (City), 2010 PECA 19

In his reasons for judgment finding the City liable to the plaintiff, the trial judge deferred the issue of costs until appeals had been exhausted. The Court of Appeal was subsequently asked by all parties to assess the trial costs. In determining when interest on the trial costs accrued due, the Court applied s.59 of the *Judicature Act*, R.S.P.E.I. 1988, Cap. J-2.1 and found that interest was payable from the date of the trial judge's reasons for judgment and not from the date the Court of Appeal made the order as to the quantum of the trial costs.

J.W.K. v. V.A.K., 2009 PESC 37

Pursuant to Rule 57.01, the court considered the applicable factors in assessing costs. Certain time claimed for the work of a paralegal was deemed administrative work and not allowed as paralegal time for purposes of costs recovery.

D. A. Browning & Associates Inc. v. Tweedy, 2010 PESC 8

Offers made by the successful plaintiff did not qualify as offers under Rule 49.10; however, when the offers were made they were for less than the amount of damages awarded to the plaintiff. Considering the offers and other relevant factors in Rule 57.01, the plaintiff was awarded 65% of its legal fees throughout and 100% of its disbursements, with one exception.

Ellen Creek v. CADC & Ano., 2009 PESC 17

Following a nine-day trial which resulted in complete success for the defendant and where an offer to settle had been made by the defendant pursuant to Rule 49, the trial judge assessed the costs payable to the defendant on a partial and substantial indemnity basis.

Jay v. DHL Express Canada Ltd., 2009 PECA 11; [2009] P.E.I.J. No. 20

The Court of Appeal assessed the costs of the successful party. The overriding objective in the assessment of costs is to achieve reasonableness. In deciding what is fair and reasonable, regard is to be given to the reasonable expectations of the parties in commencing and defending the motion.

Whiteway v. O'Halloran, 2007 PESCAD 22

On an appeal from a decision in a small claims matter, costs are to be fixed in accordance with the provisions of Rule 57 because Rule 74, pursuant to sub-rule 1.01 thereof, is applicable only to proceedings in the small claims section of the trial division.

Oliver v. Severance, 2007 PESCAD 21

Considering the applicable factors and what an unsuccessful party might reasonably expect to pay, the Court of Appeal assessed the costs of the successful party who brought a motion to strike a statement or claim on grounds the court was without jurisdiction.

Ross v. The City of Charlottetown, 2008 PESCAD 6; [2008] P.E.I.J. No. 23 (QL)

Pursuant to Rule 57.03, the court has discretion to dismiss an action for the failure to pay costs. The motions judge, in exercising his discretion, considered the plaintiff's financial situation and provided the plaintiff with time to pay an outstanding order for costs. When payment was not made, the motions judge issued an order dismissing the plaintiff's action. The Appeal Division held the motions judge properly exercised his discretion. The Court of Appeal also held this rule did not violate s.15 or s.7 of the *Charter*.

Prince Edward Island Regional Administrative Unit No. 3 School Board v. Morin, 2008 PESCTD 2

An appeal from the Prothonotary's assessment of costs was allowed, in part. The costs awarded to a self-represented party were substantially reduced.

MacPherson v. Ellis, 2005 PESCAD 19

Costs ordered on a substantial indemnity basis. In assessing costs, the principles of indemnification apply. The amount should reflect what the parties would expect as a reasonable and fair amount to be contributed by the unsuccessful party to the costs of the successful party.

FIXING OF COSTS

Corps. of Commissionaires v. Labour Rel. Bd. (P.E.I.), 2005 PESCAD 11

The function of the court in assessing costs is to consider what is reasonable in the circumstances. The assessment involves more than the arithmetical exercise of multiplying an hourly rate by the number of hours expended on the task.

Tannereye v. Hansen, 2002 PESCTD 37

In deciding to award the plaintiffs 50% of their costs on a party-party basis the trial judge indicated that four factors were significant: (1) none of the offers attracted cost consequences under Rule 49.10 or 49.11; (2) the plaintiff's claim was disproportionately high in relation to the final award; (3) the major portion of trial time related to claims that were disallowed; and (4) the plaintiffs were partially successful on the issue of general damages. *Terris v. Crossman* [1995] P.E.I.J. No. 16 (Q.L.) (PEISCTD) was applied.

Action Press v. PEITF, 2002 PESCTD 02

The trial judge considered the criteria for awarding solicitor-client costs and awarded costs on a party-party basis.

Polar Foods v. Labour Relations Board et al., 2002 PESCTD 78

The power of the court to award costs of a "proceeding" relates to a proceeding in the Supreme Court and does not extend to a hearing before the Board. The Rules Committee established pursuant to the provisions of the *Supreme Court Act*, R.S.P.E.I. 1988 Cap. S-10, does not have power to make rules with respect to proceedings before an inferior tribunal like the Board. Alternatively, this Rule is rendered meaningless by virtue of the application of *Judicial Review Act* and the procedure it contemplates.

Callaghan v. Montague (Town), 2000 PESCTD 69

Where the applicant sought to recover a variety of costs incurred in preventing the respondent from demolishing her property, the Court found that only those expenses which were directly related to or were incidental to her application for the injunction restraining the respondent from carrying out such demolition, came within the meaning of "costs."

Griffin v. Town of Summerside et al., [1998] P.E.I.J. No. 30 (Q.L.) (P.E.I.S.C.-T.D.)

The fact a party is successful in a proceeding does not prevent the court from awarding costs against that party in a proper case. Where the parties "achieved divided success" on an application for judicial review, the court awarded the applicant his entire party and party costs because the conduct of the respondent and its agents contributed to the applicant having to resort to making the application.

Morrissey v. MacNeill et al. (1997), 151 Nfld. & P.E.I.R. 287 (P.E.I.S.C.T.D.).

After a jury trial, the plaintiff's claim against the defendants for defamation based on the publication of a newspaper story was dismissed. The Court ordered the plaintiff to pay only one-half of the defendant's party and party costs because the defendant displayed a lack of care and vigilance in the publication of the story.

Terris v. Crossman, [1995] 2 P.E.I.R. 227 (P.E.I.S.C.T.D.)

The court reduced the amount of the party and party costs to which the plaintiff was entitled by 25% because of certain actions of the plaintiff throughout the course of the proceedings. The court also awarded the defendants their costs in obtaining and consulting independent counsel by reason of the fact the plaintiffs claim was originally in excess of the policy limits of the defendants insurance. The court was of the view the claim was initially unrealistic and as it was

reduced to the limits of the defendants' insurance policy one week before the trial, the defendants should have their costs associated with having to defend the larger claim. The court also noted that where a party calls expert witnesses to give *viva voce* evidence, even when the other party is prepared to accept the expert's report in accordance with Rule 53, there may be cost consequences. There were none here because of the application of Rule 49.

Huynh v. Mills (1994), 129 Nfld. & P.E.I.R. 9 (P.E.I.S.C.-T.D.)

While an offer may not trigger the application of Rule 49.10, it remains a factor which the court may consider in the exercise of its discretion to award costs.

Clark v. Biggar (1993), 112 Nfld. & P.E.I.R. 330 (P.E.I.S.C.-T.D.)

The general rule in legal proceedings is that costs follow the result. A successful party has no legal right to costs, but only a reasonable expectation of receiving them, subject to the court's discretion in that regard - this general rule should govern the award of costs in the family proceedings. The rule was developed to foster realistic assessments and realistic settlements. That objective has application in family law matters. Unless a case is an exception to the ordinary rule, the successful party should be entitled to party and party costs.

Rayner v. Knickle and Kingston (1992), 99 Nfld. & P.E.I.R. 35 (P.E.I.S.C.-A.D.)

Costs are in the absolute and unfettered discretion of the court, subject only to the requirement that the discretion must be exercised judicially, and the judge ought not to exercise it against a successful party, except for some reason connected with the case. Action brought against two physicians, only one of whom was found liable. Because the plaintiff had reasonable cause to sue both physicians, the plaintiff was allowed to recover from the negligent physician the costs he had to pay the other physician. This is known as a "Bullock Order."

ASSESSMENT OF COSTS

RULE 58

ASSESSMENT OF COSTS

GENERAL

- 58.01** (1) Where a rule or order provides that a party is entitled to the costs of all or part of a proceeding and the costs have not been fixed by the court, they shall be assessed in accordance with Rules 58.02 to 58.10.
- (2) Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not included in or determined by the settlement, the costs may be assessed in accordance with Rules 58.02 to 58.10 on the filing of a copy of the minutes of settlement with the court.

WHO MAY ASSESS COSTS

General Rule

58.02 Costs shall be assessed by the Prothonotary.

ASSESSMENT AT INSTANCE OF PARTY ENTITLED

By Filing Submission on Costs and Obtaining Appointment

- 58.03** (1) A party entitled to costs may obtain a notice of appointment for assessment of costs (Form 58 A) from the Prothonotary on filing a Submission on Costs (Form 57 A) and a copy of the order or other document giving rise to the party's entitlement to costs with the Prothonotary.
- (2) The notice and the Submission on Costs shall be served on every party interested in the assessment at least seven days before the date fixed for the assessment.

ASSESSMENT AT INSTANCE OF PARTY LIABLE

By Obtaining Appointment and Serving Notice

- 58.04** (1) Where a party entitled to costs fails or refuses to file or serve a Submission on Costs for assessment within a reasonable time, any party liable to pay the costs may obtain a notice to deliver a Submission on Costs for assessment (Form 58 B) from the Prothonotary.
- (2) The notice shall be served on every party interested in the assessment at least twenty-one days before the date fixed for the assessment.

Delivery of Submission on Costs

- (3) On being served with the notice, the person required to deliver a Submission on Costs shall file and serve a copy of the bill on every party interested in the assessment at least seven days before the date fixed for the assessment.

Failure to Deliver Submission on Costs

- (4) Where a party required to deliver a Submission on Costs for assessment fails to do so at the time set out in the notice and thereby prejudices another party, the Prothonotary may fix the costs of the defaulting party at an appropriate sum in order to prevent further prejudice to the other party.

ASSESSMENT

Generally

- 58.05** (1) If costs are to be assessed, the Prothonotary shall consider Rule 57.01 and the Rule 57 Tariff.

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- (2) No other fees, disbursements or charges shall be assessed or allowed unless the court orders otherwise.

Disbursements

- (3) No disbursements other than fees paid to the court shall be assessed or allowed unless it is established by affidavit or by the lawyer appearing on the assessment that the disbursement was made or that the party is liable for it.

Directions

- (4) The Prothonotary may direct production of books and documents and give directions for the conduct of an assessment.

Set Off of Costs

- (5) Where parties are liable to pay costs to each other, the Prothonotary may adjust the costs by way of set off.

Costs of Assessment

- (6) The Prothonotary may, in their discretion, award or refuse the costs of an assessment to either party, and fix those costs.
- (7) In assessing costs, the Prothonotary is bound by the court's direction or refusal to make a direction under Rule 57.02, but is not bound where the court declines to make a direction and leaves the matter to the Prothonotary's discretion.

58.06 Revoked.

COSTS OF ABANDONED PROCEEDING

- 58.07** The costs of a motion, application, action or appeal that is abandoned or deemed to be abandoned may be assessed on filing in the office of the Prothonotary,
- (a) the notice of motion or application served, together with an affidavit that the notice was not filed within the prescribed time or that the moving party or applicant did not appear at the hearing; or
 - (b) the notice of abandonment served; or
 - (c) a copy of the order dismissing the action or appeal as abandoned.

ASSESSMENT OF COSTS

COSTS OF PARTICULAR PROCEEDINGS

Passing of Accounts

- 58.08** (1) The costs of passing the accounts of a trustee, guardian, attorney under a power of attorney or other representative having similar duties shall be fixed in accordance with the Rules subject to any specific considerations under the *Adult Guardianship and Trusteeship Act*, *Powers of Attorney and Personal Directives Act*, and/or *Probate Act*, as applicable, and any applicable regulations made thereto.

Costs out of Fund or Estate

- (2) Where costs are to be paid out of a fund or estate, the Prothonotary may direct what parties are to attend on the assessment and may disallow the costs of the assessment of any party whose attendance is unnecessary because the interest of the party in the fund or estate is small, remote or sufficiently protected by other interested parties.

CERTIFICATE OF ASSESSMENT

- 58.09** On the assessment of costs, the Prothonotary shall set out in a certificate of assessment of costs (Form 58 D) the amount of costs assessed and allowed.

OBJECTIONS TO ASSESSMENT

- 58.10** (1) On request, the Prothonotary shall withhold the certificate for seven days or such other time as they direct, in order to allow a party who is dissatisfied with the decision of the Prothonotary to serve objections on every other interested party and file them with the court, specifying concisely the grounds for the objections.
- (2) A party on whom objections have been served may, within seven days after service or such other time as the Prothonotary directs, serve a reply to the objections on every other interested party and file it with the court.
- (3) The Prothonotary shall then reconsider and review the assessment in view of the objections and reply and may receive further evidence in respect of the objections, and the Prothonotary shall decide on the objections and complete the certificate accordingly.
- (4) The Prothonotary may, and if requested shall, state in writing the reasons for their decision on the objections.

APPLICATION TO HAVE A LAWYER'S ACCOUNT ASSESSED

- 58.11** (1) An application for assessment of a lawyer's account to their client shall be commenced by notice of application in Form 14 E.
- (2) No notice of application under this subrule shall be issued unless brought within 12 months from the date of the rendering of the account.
- (3) The application may be made by either the client or the lawyer.
- (4) The Prothonotary has jurisdiction to hear the application under this Rule.

- (5) An application shall be accompanied by either Form 58 C or a completed affidavit which should include relevant facts, including:
- (i) a copy of the lawyer's account(s);
 - (ii) certification that disbursements were made;
 - (iii) a copy of any Retainer Agreement and/or Engagement Letter;
 - (iv) a copy of any document routinely used to outline fees payable by a client;
 - (v) any estimate of fees and disbursements;
 - (vi) any discussion about what, if anything, was required or expected to be done or provided by the client and the lawyer and by other persons not associated with the lawyer;
 - (vii) any discussion of a timetable of the conduct of the matter with appropriate milestones identified, if appropriate;
 - (viii) any discussion of the method and frequency of communications between the parties;
 - (ix) any discussion of ownership of the work product and the client's right of access;
 - (x) any discussion of the basis on which fees will be set in regard to the payment of costs outside services and disbursements;
 - (xi) any discussion of the frequency of billing of fees and disbursements and time of payment;
 - (xii) any discussion of the charging of interest on accounts more than 30 days overdue.
- (6) A hearing date must be obtained from the Registrar before the notice of application is issued.
- (7) The notice of application shall be served at least ten clear days before the date of the hearing, except where the notice is served outside Prince Edward Island, in which case it shall be served at least 20 clear days before the date of the hearing.
- (8) Proof of service of the notice of application and affidavit or Form 58 C must be filed at least three clear days before the hearing date.
- (9) A respondent who has been served with a notice of application shall serve the applicant, a notice of appearance in Form 38 A and a completed Form 58 C, or an affidavit described in subrule (5), at least three clear days before the date of the hearing.

ASSESSMENT OF COSTS

- (10) Proof of service of the respondent's notice of appearance and the affidavit or Form 58 C must be filed at least one clear day before the date of the hearing.
- (11) In assessing costs, the Prothonotary may consider Rule 57.01(1) and the Rule 57 Tariff.
- (12) On the hearing of the application, the Prothonotary may:
 - (a) decide any issue of fact or law;
 - (b) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms;
 - (c) impose sanctions for the failure of a party, to attend, including
 - (i) the award of costs;
 - (ii) dismissal of part or all of the application; and
 - (iii) noting the respondent in default.
- (13) The Prothonotary shall provide brief written reasons for their decision.

APPEAL FROM ASSESSMENT

58.12 The time for and the procedure on an appeal under section 10 of the *Judicature Act* from a certificate of the Prothonotary on an issue in respect of which an objection was served is governed by Rule 62.

CONTINGENT FEE AGREEMENT

58.13 A lawyer may, with respect to an intended or existing proceeding, make an agreement with a client for the amount and manner of payment of the whole or any part of past or future services, fees, charges or disbursements rendered and incurred, or to be rendered and incurred, by them with respect to the proceeding, and the form of payment may consist of a gross sum, commission, percentage or otherwise in an amount which may be the same, greater or less than that which the lawyer normally receives as remuneration, subject however to assessment under Rule 58.

Agreement Must Be in Writing

- 58.14** (1) Where under an agreement referred to in Rule 58.13, a lawyer's compensation is dependent or contingent, in whole or in part upon the successful disposition of the subject matter, then the agreement shall be in writing and signed by the client or their authorized agent.
- (2) The agreement shall contain,
 - (a) the name and address of each client;
 - (b) the name and address of the lawyer;
 - (c) a statement of the nature of the claim;

- (d) a statement of the contingency upon which the compensation is to be paid, and, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected by the lawyer;
- (e) a statement that reasonable contingent compensation is to be paid for the services, and the maximum amount or rate which the compensation is not to exceed, after deduction of all reasonable and proper disbursements; and
- (f) a statement to the following effect:

"This agreement may be reviewed by the Prothonotary at the client's request, and may either at the instance of the Prothonotary or the client be further reviewed by the court, and either the Prothonotary or the court may vary, modify or disallow the agreement."

Agreement Must Be Filed

- 58.15** (1) Within ten days after it is signed, a copy of an agreement referred to in Rule 58.13 shall be filed with the Prothonotary, and the Prothonotary shall file the agreement separately from any proceeding and, unless the court otherwise orders, the agreement is not available for inspection by, or its contents shall not be communicated to, any person, other than the client, lawyer, or Prothonotary engaged in the assessment.
- (2) Where an agreement as mentioned in Rule 58.13 does not comply with Rule 58.14, or is not properly filed as provided in subrule (1), the lawyer is, upon the successful disposition of the subject matter, entitled only to the compensation as would have been payable in the absence of any contingency arrangement and without regard to the contingency.

Review of Agreement by Prothonotary or Court

- 58.16** (1) Any agreement as mentioned in Rule 58.13 may, at any time after its making until the expiry of six months from the last date on which a lawyer has received, on his own account, the fee or any part of it, be reviewed by the Prothonotary at the instance of the client.
- (2) At any time after giving a decision on review, the Prothonotary may, and on the request of the client shall, refer the agreement to the court. The Prothonotary shall obtain an appointment for the review by the court and shall notify the lawyer and the client of the appointed time.
- (3) The court and Prothonotary have power on review to,
- (a) approve the agreement,
 - (b) vary, modify or disallow all or any of the provisions of the agreement, and if the agreement is so disallowed, any amount payable to the lawyer shall be determined in accordance with Rule 57.01, and
 - (c) exercise the powers which the Prothonotary has on the assessment of costs in a proceeding.

ASSESSMENT OF COSTS

Void Provisions in Agreement

- 58.17** (1) A provision in an agreement respecting lawyer and client fees which purports to,
- (a) relieve a lawyer from liability for negligence or other liability to which they might be subject as a lawyer; or
 - (b) provide that a proceeding cannot be abandoned, discontinued or settled without consent of the lawyer;
- is void.
- (2) Notwithstanding anything in an agreement to the contrary, a client may change their lawyer before the conclusion of the retainer.

Death of a Lawyer

- 58.18** (1) Where a lawyer dies or becomes incapable of acting before their retainer has been completely performed by them, an application may be made by or on behalf of either party to the Prothonotary to determine the amount, if any, due in respect of the services rendered under the retainer and, subject to subrule (2), the Prothonotary, in determining the amount, shall have regard to terms of any agreement between the parties.
- (2) Where an agreement provides that payment is to be contingent, in whole or in part, upon the successful disposition of the subject matter, the Prothonotary has the powers provided by Rule 58.16 or may refuse any compensation, and no monies in respect of the agreement are payable until the disposition has been made.
- (3) Where a client changes or discharges their lawyer before the conclusion of the retainer, the lawyer shall be deemed to have become incapable of acting within the meaning of subrule (1).
- (4) Where a client personally settles any matter which is the subject of an agreement as described in subrule (2), without changing or discharging their lawyer, the lawyer shall be deemed to have discharged them within the meaning of subrule (3).
- (5) Where a client discontinues or abandons any matter which is the subject of an agreement as described in subrule (2) without changing or discharging their lawyer, then the lawyer may apply to assess their costs against their client, and the Prothonotary may, if they find the discontinuance or abandonment to be wholly unreasonable, allow to the lawyer reasonable compensation therefor, and has the powers provided by Rule 58.16.
- (6) Payment of any amount found to be due under subrule (1) may be enforced in the same manner as if the lawyer had completely performed their retainer, except that in any case falling within subrule (2), payment may not be enforced prior to the successful disposition, and then only with the leave of the court.

Lewis v. Prince Edward Island (1993), 112 Nfld. & P.E.I.R. 111 (P.E.I.S.C.T.D.)

The Court will not enter into a new hearing and will not interfere with the Prothonotary's assessment unless it is so unreasonable as to suggest an error in principle. The Prothonotary properly considered and applied all the factors to be considered on an assessment. The Prothonotary has the jurisdiction to include GST in a taxation award unless the judge who ordered costs gave some other direction.

ORDERS

ORDERS

RULE 59

ORDERS

EFFECTIVE DATE

59.01 An order is effective from the date on which it is made, unless it provides otherwise.

PREPARATION AND FORM OF ORDER

Preparation of Draft Formal Order

- 59.02** (1) Any party affected by an order may prepare a draft of the formal order and send it to all other parties represented at the hearing for approval of its form.
- (2) Repealed.

General Form of Order

- (3) An order shall be in Form 59 A (order) or 59 B (judgment) and shall contain,
- (a) the name of the judge or Prothonotary who made it;
 - (b) the date on which it was made; and
 - (c) a recital of the particulars necessary to understand the order, including the date of the hearing, the parties who were present or represented by a lawyer and those who were not, and any undertaking made by a party as a condition of the order.
- (4) The operative parts of an order shall be divided into paragraphs, numbered consecutively.

Order Directing Payment for Minor

- (5) An order directing payment into court or to a trustee on behalf of a minor shall show the minor's birth date and full address and shall direct that a copy of the order be served on the Official Guardian.

Order for Costs

- (6) An order for the payment of costs shall direct payment to the party entitled to receive the costs and not to the party's lawyer.

Order on which Interest Payable

- (7) An order for the payment of money on which postjudgment interest is payable shall set out the rate of interest and the date from which interest is payable.

SIGNING ORDERS**General**

- 59.03** (1) Every order shall be submitted in accordance with subrules (4) to (8) for the signature of the Judge or Prothonotary, as the case may be, unless the court or judge who made the order has signed it.
- (2) Where an order states that it may be signed only on the filing of an affidavit or the production of a document, the Judge or Prothonotary shall examine the affidavit or document and ascertain that it is regular and sufficient before signing the order.
- (3) Where a Judge ceases to hold office or becomes incapacitated after making an order but before the order is signed, the order may be settled and signed by another judge of the court.
- (3.1) Where the Prothonotary ceases to hold office or becomes incapacitated after making an order but before the order is signed, the order may be settled and signed by a judge of the court.

Signing Where Form of Draft Order Approved

- (4) Where all the parties represented at the hearing have approved the form of the order, the party who prepared the draft order shall,
- (a) file the approval of all the parties represented at the hearing, together with a copy of the order; and
 - (b) leave the order with the Judge or Prothonotary for signing.

~~Signing Where Approval of Form Not Required~~

- (5) Repealed.

Where Judge or Prothonotary Satisfied

- (6) Where the Judge or Prothonotary is satisfied that the order is in proper form, the Judge or Prothonotary shall sign the order and return it to the party who left it to be signed.

Where Judge or Prothonotary not Satisfied

- (7) Where the Judge or Prothonotary is not satisfied that the order is in proper form, the Judge or Prothonotary shall return the order unsigned to the party who left it to be signed and the party may,
- (a) submit the order in proper form and, if required by the Judge or Prothonotary, file the approval of the parties to the order in that form, together with a copy of the order; or
 - (b) obtain an appointment to have the order settled by the court or judge that made it and serve notice of the appointment (Form 59 C) on all

other parties who were represented at the hearing and file it, with proof of service, before the appointment date.

Appointment to Settle Where Form of Draft Order not Approved

- (8) Where approval is not received within a reasonable time, a party may obtain an appointment to have the order settled by the Prothonotary or, where the Prothonotary considers it necessary, by the court, judge or Prothonotary that made it, and notice of the appointment (Form 59 C) shall be served on all other parties who were represented at the hearing and filed, with proof of service, before the appointment date.

Urgent Cases

- (9) In a case of urgency, the order may be settled and signed by the court, judge or Prothonotary that made it without the approval of any of the parties who were represented at the hearing.

Appointment to Settle Disputed Order before Judge or Prothonotary

- (10) Where an objection is taken to the proposed form of the order in the course of its settlement before the Prothonotary, the Prothonotary shall settle the order in the form that the Prothonotary considers proper and the objecting party may obtain an appointment with the court or judge that made the order to settle the part of the order to which objection has been taken and serve notice of the appointment (Form 59 C) on all other parties who were represented at the hearing and file it, with proof of service, before the appointment date.
- (11) Where the order was made by a court that consisted of more than one judge, the appointment shall be with the judge who presided at the hearing or, where the judge is unavailable, any other judge who was present at the hearing.
- (12) The judge with whom an appointment is obtained under subrule (11) may refer the settling of the order to the full court that made the order.
- (13) Where an appointment is not obtained under subrule (10) or (11) within seven days after the Prothonotary settles the order a party may require the Prothonotary to sign the order as settled by them.
- (14) After an order has been settled under subrule (10) by the judge or Prothonotary who made it, or under subrule (11) or (12), the Prothonotary shall sign it unless it was signed by a judge or Prothonotary at the time it was settled.

ENTRY OF ORDER

Every Order to be Entered and Filed

- 59.04** (1) Every order shall be entered in accordance with subrules (2) to (4) immediately after it is signed and the party having the order signed shall give to the Registrar the original to file.

- (2) Every order shall be entered in the office of the Registrar.
- (3) Where an order in a subsequent action or application affirms, reverses, sets aside, varies or amends an earlier order, it shall be entered not only in the office described in subrule (2) but also in the office in which the earlier order was entered.
- (4) The certificate of the Registrar of the Supreme Court of Canada in respect of an order made on an appeal to that court shall be entered in the office of the Deputy Registrar of the Court of Appeal and in the office where the action or application was commenced and all subsequent steps may be taken as if the order had been made in the court from which the appeal was taken.

AMENDING, SETTING ASIDE OR VARYING ORDER

Amending

- 59.05** (1) An order that,
- (a) contains an error arising from an accidental slip or omission; or
 - (b) requires amendment in any particular on which the court did not adjudicate,
- may be amended on a motion in the proceeding.

Setting Aside or Varying

- (2) A party who seeks to,
- (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
 - (b) suspend the operation of an order;
 - (c) carry an order into operation; or
 - (d) obtain other relief than that originally awarded,
- may make a motion in the proceeding for the relief claimed.

SATISFACTION OF ORDER

- 59.06** A party may acknowledge satisfaction of an order in a document signed by the party before a witness, and the document may be filed and entered in the court office where the order was entered.

Lanigan v. PEITF, 2017 PECA 9

The general rule is that a final decision of the court cannot be re-opened. Reconsideration is a power that a court should be most reluctant to exercise. A court should only reconsider in exceptional and special circumstances, otherwise the principle of finality would be jeopardized. Until the court has issued a formal order of judgment it has the authority to reconsider and vary its judgment. This particular motion was dismissed. The court did

observe that a court may exercise its power of reconsideration to prevent a miscarriage of justice.

Ayangma v. PEI H.Rts. Comm. & La Commission Scolaire, 2015 PESC 4

The appellant made a motion to vacate the original order to post security for costs on the grounds that a change of circumstances had occurred which showed the rationale for the order no longer existed. The Court dismissed the motion indicating that recent actions of the appellant constituted additional support for the original order for security for costs.

L.G.K. v. L.A.D., 2013 PESC 15

The trial judge made post-decision corrections and additional findings. The Court found that Rule 59.05(1)(b) gives the court the power to amend on any particulars on which the Court did not adjudicate, whether or not it was asked to do so at trial.

Griffin v. Summerside (City), 2010 PECA 19

After the Court of Appeal issued its reasons for judgment and before the Court issued the formal order, the Court ruled that it retained the jurisdiction to resolve the question as to when interest accrued due on costs ordered by the trial judge. The Court found that pursuant to Rule 59.05(1)(b) its decision required an amendment to address a particular the Court had not been asked to adjudicate upon during the hearing of the appeal.

Ayangma v. French School Board, 2011 PECA 3

After the formal order is issued the court does not have jurisdiction pursuant to Rule 59.05 to reopen the appeal to entertain legal arguments which were not pursued or considered at the trial or the appeal.

Beck v. Harris, 2001 PESCAD 11

The defendant obtained summary judgment dismissing the plaintiff's claim. The plaintiff subsequently applied to set aside the summary judgment on the ground that he had obtained an expert's report which would establish there was a genuine issue for trial. The motion judge set aside the order for summary judgment. The defendant appealed and the decision of the motion judge was upheld. In accordance with Rule 1.04(1), this Rule is to be construed liberally. In considering whether to set aside or vary a summary judgment because of new evidence, the court should consider the following:

- a. that the new evidence would have had an important influence on the decision whether or not there was a triable issue;
- b. that the evidence is apparently credible; and
- c. and that it could not have been obtained by reasonable diligence before summary judgment.

Edison v. Edison, 2000 PESCTD 45

When costs have not been addressed in the order but were sought by the parties, the court has failed to adjudicate on the matter, and the order requires amendment pursuant to Rule 59.05(1). The respondent's motion to amend the divorce judgment to include an award of costs was granted.

Lewis v. Prince Edward Island (1999), 172 Nfld. & P.E.I. R. 93 (P.E.I.S.C.-A.D.)

Following the delivery of written reasons in two cases, orders were never issued. The applicant made an application to set aside or vary the two decisions. The application was dismissed as the court found the nature of the relief being sought did not bring the application within Rule 59.05(1) or (2).

Canadian Imperial Bank of Commerce v. Bonnell, [1999] P.E.I.J. No. 39 (Q.L.) (P.E.I.S.C.-T.D.)

The court had power to amend pursuant to Rule 59.05(1) as no formal judgment had been issued. Prior to formal judgment being issued, the court retains the jurisdiction to clarify the terms of its judgment, to reconsider the judgment or ruling given, and to change the disposition of a motion.

Cairns v. Harris (1995), 129 Nfld. & P.E.I.R. 250 (P.E.I.S.C.T.D.)

The trial judge gave written reasons wherein he ordered the defendant to pay damages under various heads. On only one head of damages did he award interest. There was no formal order taken out subsequent to the delivery of the trial judge's reasons; however, the decision was appealed and a decision was given by the Appeal Division with no mention of the issue of interest. The trial judge retired and the plaintiff made a motion to another judge of the Trial Division pursuant to Rule 59.03(3) and 59.05 asserting there was an error in the trial judge's decision which arose from an accidental slip or omission, which error required an amendment. The motion was dismissed. The Court was not convinced the decision of the trial judge to award interest on only one head of damages was an accidental slip or omission.

RULE 60**ENFORCEMENT OF ORDERS****DEFINITIONS**

60.01 In Rules 60.02 to 60.19,

- (a) "creditor" means a person who is entitled to enforce an order for the payment or recovery of money;
- (b) "debtor" means a person against whom an order for the payment or recovery of money may be enforced.

ENFORCEMENT OF ORDER FOR PAYMENT OR RECOVERY OF MONEY**General**

- 60.02** (1) In addition to any other method of enforcement provided by law, an order for the payment or recovery of money may be enforced by,
- (a) a writ of execution (Form 60 A) under Rule 60.07;
 - (b) garnishment under Rule 60.09;
 - (c) a writ of sequestration (Form 60 B) under Rule 60.10; and
 - (d) the appointment of a receiver.

Recovery of Costs without Order Awarding Costs

- (2) Where under these rules a party is entitled to costs on the basis of a certificate of assessment of costs without an order awarding costs, and the costs are not paid within seven days after the certificate of assessment of costs is signed, the party may enforce payment of the costs by the means set out in subrule (1) on filing with the Registrar an affidavit setting out the basis of entitlement to costs and attaching a copy of the certificate of assessment.

ENFORCEMENT OF ORDER FOR POSSESSION OF LAND

60.03 An order for the recovery or delivery of the possession of land may be enforced by a writ of possession (Form 60 C) under Rule 60.11.

ENFORCEMENT OF ORDER FOR RECOVERY OF PERSONAL PROPERTY

- 60.04** (1) An order for the recovery of possession of personal property other than money may be enforced by a writ of delivery (Form 60 D), which may be obtained on filing with the Registrar a requisition together with a copy of the order as entered.

- (2) Where the property is not delivered up under a writ of delivery, the order may be enforced by a writ of sequestration (Form 60 B) under Rule 60.10.

ENFORCEMENT OF ORDER TO DO OR ABSTAIN FROM DOING ANY ACT

60.05 An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under Rule 60.12.

ENFORCEMENT BY OR AGAINST A PERSON NOT A PARTY

- 60.06** (1) An order that is made for the benefit of a person who is not a party may be enforced by that person in the same manner as if the person were a party.
- (2) An order that may be enforced against a person who is not a party may be enforced against that person in the same manner as if the person were a party.

WRIT OF EXECUTION

Where Available Without Leave

- 60.07** (1) Where an order may be enforced by a writ of execution, the creditor is entitled to the issue of one or more writs of execution (Form 60 A), on filing with the Registrar a requisition setting out,
- (a) the date and amount of any payment received since the order was made; and
- (b) the amount owing and the rate of post-judgment interest,
- together with a copy of the order as entered and any other evidence necessary to establish the amount awarded and the creditor's entitlement.

Where Leave is Required

- (2) If ten years or more have elapsed since the date of the order, or if its enforcement is subject to a condition, a writ of execution shall not be issued unless leave of the court is first obtained.
- (3) An order granting leave to issue a writ of execution and sale ceases to have effect if the writ is not issued within one year after the date of the order granting leave, but the court may grant leave on a subsequent motion.

Order for Payment into Court

- (4) Where an order is for the payment of money into court, the writ of execution shall contain a notice that all money realized by the sheriff under the writ is to be paid in to court.

Order for Payment at Future Time

- (5) Where an order is for payment at or after a specified future time, the writ of execution shall not be issued until after the expiration of that time.

Delivery to Sheriff

- (6) When a writ of execution is delivered to a sheriff, the sheriff shall endorse thereon the date and time of delivery.

Duration and Renewal

- (7) A writ of execution issued against a party against whom judgment has been recovered remains in force so long as the judgment remains in force.
- (8) Where a writ of execution is filed with a sheriff, the sheriff shall, not less than thirty days nor more than sixty day before expiration of the writ, mail a notice of its expiration to the creditor, at the address shown on the writ or the most recent request to renew it.

Change of Debtor's Name

- (9) Where the name of a debtor named in a writ of execution is changed after the writ is issued, the creditor may file an affidavit with the sheriff setting out the change, and the sheriff shall,
 - (a) amend the writ by adding the new name of the debtor following the words " now known as"; and
 - (b) amend the index of writs to show the new name.

Writ to Bear Creditor's Address

- (10) Every writ of execution shall bear the name and address of the creditor and the creditor's lawyer, if any.
- (10.1) If the address of the creditor's lawyer changes after the writ is issued, the creditor may have the new address noted on the writ by filing a requisition to that effect with the Sheriff.

Property in Hands of Receiver

- (11) A writ of execution shall not be enforced against property in the hands of a receiver appointed by a court.

Seizure of Personal Property

- (12) Where personal property is seized under a writ of execution, the sheriff shall, on request, deliver an inventory of the property seized to the debtor or the debtor's agent or employee before or, where this is not practicable, within a reasonable time after the property is removed from the premises on which it was seized.

Sale of Personal Property

- (13) Personal property seized under a writ of execution shall not be sold by the sheriff unless notice of the time and place of the sale has been,

- (a) mailed to the creditor at the address shown on the writ or the creditor's lawyer and to the debtor at the debtor's last known address, at least ten days before the sale; and
- (b) published in a newspaper of general circulation in the place where the property was seized.

Abortive Sale

- (14) Where personal property seized under a writ of execution remains unsold for want of buyers, the sheriff shall notify the creditor of the date and place of the attempted sale and of any other relevant circumstances.
- (15) On receipt of a notice under subrule (14), the creditor may instruct the sheriff in writing to sell the personal property in such a manner as the sheriff considers will realize the best price that can be obtained.

STATUTORY EXECUTION AGAINST LAND**Sale of Land**

- 60.08** (1) A creditor may not take any step to sell land under a writ of execution until four months after the writ was filed with the sheriff or, where the writ has been withdrawn, four months after the writ was re-filed.
- (2) No sale of land under a writ of execution may be held until six months after the writ was filed with the sheriff or, where the writ has been withdrawn, six months after the writ was re-filed.
- (3) A sale of land shall not be held under a writ of execution unless notice of the time and place of sale has been,
- (a) mailed to the creditor at the address shown on the writ or to the creditor's lawyer and to the debtor at the debtor's last known address, at least thirty days before the sale;
 - (b) published in the Royal Gazette once at least thirty days before the sale and in a newspaper of general circulation in the place where the land is situate, once each week for two consecutive weeks, the last notice to be published not less than one week nor more than three weeks before the date of sale; and
 - (c) posted in a conspicuous place in the local courthouse for at least thirty days before the sale.
- (4) The notice shall set out,
- (a) a short description of the property to be sold, including the property number;
 - (b) the short title of the proceeding;
 - (c) the time and place of the intended sale; and

- (d) the name of the debtor whose interest is to be sold.
- (5) The Sheriff may adjourn a sale to a later date where the Sheriff considers it necessary in order to realize the best price that can be obtained in all the circumstances, and where the sale is adjourned, it may be conducted on the later date with such further notice, if any, as the Sheriff considers advisable.
- (6) Where a notice of sale of land under a writ of execution is published in The Royal Gazette before the writ expires, the sale may be completed by a sale and transfer of the land after the writ expires.

Abortive Sale

- (7) Where land seized under a writ of execution remains unsold for want of buyers, the Sheriff shall notify the creditor of the date and place of the attempted sale and of any other relevant circumstances.
- (8) On receipt of a notice under subrule (7), the creditor may instruct the Sheriff in writing to sell the land in such manner as the Sheriff considers will realize the best price that can be obtained.

GARNISHMENT

Where Available

- 60.09** (1) A creditor under an order for the payment or recovery of money may enforce it by garnishment of debts payable to the debtor by other persons.

Joint Debts Garnishable

- (1.1) Where a debt is payable to the debtor and to one or more co- owners, one-half of the indebtedness or a greater or lesser amount specified in an order made under subrule (16) may be garnished.

Where Leave Required

- (2) If ten years or more have elapsed since the date of the order, or if its enforcement is subject to a condition, a notice of garnishment shall not be issued unless leave of the court is first obtained.
- (3) An order granting leave to issue a notice of garnishment ceases to have effect if the notice is not issued within one year after the date of the order granting leave, but the court may grant leave again on a subsequent motion.

Obtaining Notice of Garnishment

- (4) A creditor under an order for the payment or recovery of money who seeks to enforce it by garnishment shall file with the registrar where the proceeding was commenced a requisition for garnishment (Form 60 F) together with a copy of the order as entered, any other evidence necessary to establish the amount awarded and the creditor's entitlement, and an affidavit stating,

- (a) the date and amount of any payment received since the order was made;
 - (b) the amount owing, including postjudgment interest;
 - (c) details of how the amount owing and the postjudgment interest are calculated;
 - (c.1) the address of the debtor.
 - (d) the name and address of each person to whom a notice of garnishment is to be directed;
 - (e) that the creditor believes that those persons are or will become indebted to the debtor and the grounds for the belief;
 - (f) such particulars of the debts as are known to the creditor;
 - (g) where a person to whom a notice of garnishment is to be directed is not in Prince Edward Island, that the debtor is entitled to sue that person in Prince Edward Island to recover the debt, and the basis of entitlement to sue in Prince Edward Island; and
 - (h) where a person to whom a notice of garnishment is to be directed is not then indebted but will become indebted to the debtor, such particulars of the date on and the circumstances under which the debt will arise as are known to the creditor.
- (5) The affidavit required by subrule (4) 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.
 - (6) On the filing of the requisition and affidavit required by subrule (4), the registrar shall issue notices of garnishment (Form 60 G) naming as garnishees the persons named in the affidavit and the creditor shall send a copy of each notice of garnishment to the sheriff of the county in which the debtor resides or, if the debtor resides outside Prince Edward Island, to the sheriff of the county in which the proceeding was commenced.

Service of Notice of Garnishment

- (7) The creditor shall serve the notice of garnishment,
 - (a) on the debtor, together with a copy of the affidavit required by subrule (4); and
 - (b) on the garnishee, with a blank garnishee's statement (Form 60 H) attached.
- (8) The notice of garnishment shall be served by ordinary mail, or by personal service or an alternative to personal service under Rule 16.03.

- (9) A notice of garnishment may be served outside Prince Edward Island if the debtor would be entitled to sue the garnishee in Prince Edward Island to recover the debt.
- (10) Where the garnishee is a financial institution, the garnishee shall be served at the branch at which the debt is payable.

Garnishee Liable from Time of Service.

- (11) The garnishee is liable to pay to the sheriff any debt of the garnishee to the debtor, up to the amount shown in the notice of garnishment or supplementary notice of garnishment, less \$10 for the cost of making each payment, within ten days after service on the garnishee or ten days after the debt becomes payable, whichever is later.
- (12) For the purposes of subrule (11), a debt of the garnishee to the debtor includes a debt payable at the time the notice of garnishment is served and a debt,
 - (a) payable within ten years after the notice is served; or
 - (b) payable on the fulfilment of a condition within ten years after the notice is served.
- (13) For the purposes of subrule (11), a debt of the garnishee to the debtor does not include,
 - (a) if the garnishee is a financial institution, money in an account opened after the notice of garnishment is served;
 - (b) if the garnishee is an employer, a debt arising out of employment that commences after the notice is served; or
 - (c) if the garnishee is an insurer, a debt payable under an insurance policy that is entered into after the notice is served.

Payment by Garnishee to Sheriff

- (14) A garnishee who admits owing a debt to the debtor shall pay it to the sheriff in the manner prescribed by the notice of garnishment, subject to section 17 of the *Garnishee Act*.

When Garnishee Must Serve Statement

- (15) A garnishee who wishes for any reason to dispute the garnishment or who pays to the sheriff less than the amount set out in the notice of garnishment because the debt is owed to the debtor and to one or more co-owners or for any other reason shall, within 10 days after service of the notice of garnishment, serve on the creditor and the debtor and file with the court a garnishee's statement (Form 60 H) setting out the particulars.

Notice to Co-owner of the Debt

- (15.1) When a creditor is served with a garnishee's statement that indicates that the debt is owed to the debtor and to one or more co-owners, the creditor

shall forthwith serve the co-owners with a notice to co-owner of the debt (Form 60 H.1) and a copy of the garnishee's statement.

- (15.2) The notice to co-owner of the debt and the copy of the garnishee's statement shall be served by personal service or an alternative to personal service under Rule 16.03.

Garnishment Hearing

- (16) On motion by a creditor, debtor, garnishee, co-owner of the debt or any other interested person, the court may,
- (a) where it is alleged that the debt of the garnishee to the debtor has been assigned or encumbered, order the assignee or encumbrancer to appear and state the nature and particulars of his or her claim;
 - (b) determine the rights and liabilities of the garnishee, the debtor, any co-owner of the debt and any assignee or encumbrancer;
 - (c) vary or suspend periodic payments under a notice of garnishment; or
 - (d) determine any other matter in relation to a notice of garnishment,
- and the court may proceed in a summary manner, but where the motion is made to the Prothonotary and raises a genuine issue of fact or of law, it shall be adjourned to be heard by a judge.

Enforcement against Garnishee

- (17) Where the garnishee does not pay to the sheriff the amount set out in the notice of garnishment as owing by the garnishee to the debtor and does not serve and file a garnishee's statement, the creditor is entitled on motion to the court, on notice to the garnishee, to an order against the garnishee for payment of the amount that the court finds is payable to the debtor by the garnishee, or the amount set out in the notice, whichever is less.

Payment by Garnishee to Person other than Sheriff

- (18) Where, after service of a notice of garnishment, the garnishee pays a debt attached by the notice to a person other than the sheriff, the garnishee remains liable to pay the debt in accordance with the notice.

Effect of Payment to Sheriff

- (19) Payment of a debt by a garnishee in accordance with a notice of garnishment is a valid discharge of the debt, as between the garnishee and the debtor, and any co-owner of the debt, to the extent of the payment, including the amount deducted for the cost of making payment under subrule (11).

Creditor to give Notice when Order Satisfied

- (20) When the amount owing under an order that is enforced by garnishment has been paid, the creditor shall forthwith serve a notice of termination of garnishment (Form 60 I) on the garnishee and on the sheriff.

Payment When Debt Jointly Owned

- (21) Where a payment of a debt owed to the debtor and one or more co-owners has been made to the sheriff, no notice of motion for a garnishment hearing is delivered and the time for doing so has expired, the creditor may file with the sheriff, within 30 days thereafter,
- (a) proof of service of the notice to co-owner; and
 - (b) an affidavit stating that the creditor believes that no co-owner of the debt is a person under disability and the grounds for the belief.
- (22) The affidavit required by subrule (21) 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.
- (23) Where the creditor does not file the material referred to in subrule (21), the sheriff shall return the money to the garnishee.

Garnishment Before Judgment

- (24) A person who has not obtained an order for the payment or recovery of money, but who has commenced an action for the payment or recovery of money, may file a motion for garnishment and subrules 60.09(1) to (23) apply with the necessary modifications, except that:
- (a) the affidavit filed with the motion shall state the nature of the cause of action, the amount of debt, claim or demand and that it is due and owing by the person against whom the action has been commenced, after making all just discounts;
 - (b) the sheriff shall not pay out any funds garnisheed that are in his possession until the person who commenced the action obtains an order for the payment or recovery of money against whom the action has been commenced;
 - (c) the sheriff may pay any such funds to the Registrar pending the outcome of the action;
 - (d) an order under this section shall only be made by the Prothonotary or a judge.

WRIT OF SEQUESTRATION

Leave Required

- 60.10** (1) A writ of sequestration (Form 60 B), directing a sheriff to take possession of and hold the property of a person against whom an order has been made and to collect and hold any income from the property until the person complies with the order, may be issued only with leave of the court, obtained on motion.

- (2) The court may grant leave to issue a writ of sequestration only where it is satisfied that other enforcement measures are or are likely to be ineffective.
- (3) In granting leave to issue a writ of sequestration, the court may order that the writ be enforced against all or part of the person's real and personal property.

Variation or Discharge

- (4) The court on motion may discharge or vary a writ of sequestration on such terms as are just.

WRIT OF POSSESSION**Leave Required**

- 60.11** (1) A writ of possession (Form 60 C) may be issued only with leave of the court, obtained on motion without notice or at the time an order entitling a party to possession is made.
- (2) The court may grant leave to issue a writ of possession only where it is satisfied that all persons in actual possession of any part of the land have received sufficient notice of the proceeding in which the order was obtained to have enabled them to apply to the court for relief.

Duration

- (3) A writ of possession remains in force for one year from the date of the order authorizing its issue, and may, before its expiry, be renewed by order for a period of one year from each renewal.

CONTEMPT ORDER**Motion for Contempt Order**

- 60.12** (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.
- (2) The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise.
 - (3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit.

Warrant for Arrest

- (4) A judge may issue a warrant (Form 60 J) for the arrest of the person against whom a contempt order is sought where the judge is of the opinion that the person's attendance at the hearing is necessary in the interest of justice and it appears that the person is not likely to attend voluntarily.

Content of Order

- (5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,
 - (a) be imprisoned for such period and on such terms as are just;
 - (b) be imprisoned if the person fails to comply with a term of the order;
 - (c) pay a fine;
 - (d) do or refrain from doing an act;
 - (e) pay such costs as are just; and
 - (f) comply with any other order that the judge considers necessary,and may grant leave to issue a writ of sequestration under Rule 60.10 against the person's property.

Where Corporation is in Contempt

- (6) Where a corporation is in contempt, the judge may also make an order under subrule (5) against any officer or director of the corporation and may grant leave to issue a writ of sequestration under Rule 60.10 against his or her property.

Warrant of Committal

- (7) An order under subrule (5) for imprisonment may be enforced by the issue of a warrant of committal (Form 60 K).

Discharging or Setting Aside Contempt Order

- (8) On motion, a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5) or (6) and may grant such other relief and make such other order as is just.

Order that Act be done by Another Person

- (9) Where a person fails to comply with an order requiring the doing of an act, other than the payment of money, a judge on motion may, instead of or in addition to making a contempt order, order the act to be done, at the expense of the disobedient person, by the party enforcing the order or any other person appointed by the judge.
- (10) The party enforcing the order and any person appointed by the judge are entitled to the costs of the motion under subrule (9) and the expenses incurred in doing the act ordered to be done, fixed by the judge or assessed by an assessment officer in accordance with Rule 58.

FAILURE TO COMPLY WITH INTERLOCUTORY ORDER

- 60.13** Where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules,
- (a) stay the party's proceeding;
 - (b) dismiss the party's proceeding or strike out the party's defence; or
 - (c) make such other order as is just.

DISPUTE OF OWNERSHIP OF PROPERTY SEIZED BY SHERIFF

- 60.14** (1) A person who makes a claim in respect of property or the proceeds of property taken or intended to be taken by a sheriff in the execution of any enforcement process against another person shall give notice to the sheriff of the claim and the address for service of the person making the claim.
- (2) On receiving a claim, the sheriff shall forthwith give notice of claim (Form 60 L) to every creditor of the debtor who has filed an enforcement process with the sheriff, by mail addressed to the creditor at the address shown on the enforcement process, and the creditor shall within seven days after receiving the notice give the sheriff notice in writing stating whether the creditor admits or disputes the claim.
- (3) Where the sheriff,
- (a) receives a notice admitting the claim from every creditor; or
 - (b) receives a notice admitting the claim from the creditor at whose direction the sheriff took or intended to take the property and does not receive a notice disputing the claim from any other creditor,
- he or she shall release the property in respect of which the claim is admitted.

Interpleader Proceedings

- (4) Where the sheriff,
- (a) does not receive a notice disputing the claim; or
 - (b) does not receive a notice disputing the claim from the creditor at whose direction the Sheriff took or intended to take the property and receives a notice admitting the claim from every other creditor,
- the Sheriff shall give notice to every creditor who has filed an enforcement process with the Sheriff, by mail addressed to the creditor at the address shown on the enforcement process that, unless the creditor seeks an interpleader order under Rule 43 within 60 days of the date of the notice, the Sheriff will release the property.
- (5) Where the Sheriff receives a notice disputing the claim, the Sheriff shall give notice to the person making the claim by mail addressed to the person's designated address(es) for service that, unless the person seeks

an interpleader order under Rule 43 within 60 days of the date of the notice, the Sheriff shall proceed as if the claim had been abandoned.

SHERIFF'S REPORT ON EXECUTION OF WRIT

- 60.15** (1) A party or lawyer who has filed a writ of execution with a sheriff may in writing require the sheriff to report the manner in which he or she has executed the writ of execution and the sheriff shall do so forthwith by mailing to the party or lawyer a sheriff's report (Form 60M).
- (2) Where the sheriff fails to comply with a request made under subrule (1) within a reasonable time, the party serving the request may move before a judge for an order directing the sheriff to comply with the request.

REMOVAL OR WITHDRAWAL OF WRIT OF EXECUTION FROM SHERIFF'S FILE

Executed and Expired Writs of Execution

- 60.16** (1) When a writ of execution has been fully executed or has expired, the sheriff shall so indicate in the file, endorse a memorandum to that effect on the writ of execution, remove it from the file and retain it in a separate file of executed and expired writs.

Withdrawal of Writ of Execution

- (2) A party or lawyer who has filed a writ of execution with a sheriff may withdraw it as against one or more of the debtors named in it by giving the sheriff written instructions to that effect.

Withdrawal of Writ on Debtor's Request

- (3) When a judgment debt has been released by an order of discharge or by a certificate of full performance under the *Bankruptcy and Insolvency Act (Canada)*, the debtor may request that the writ be withdrawn by giving the sheriff,
- a. a written request to withdraw the writ (Form 60 N); and
 - b. a certified copy of the order of discharge or a copy of the certificate of full performance.
- (4) On receiving the documents described in subrule (3), the sheriff shall forthwith send the creditor, by mail addressed to the creditor at the address shown on the writ, a copy of the documents and a notice that the writ will be withdrawn unless the creditor,
- a. makes a motion for an order under the *Bankruptcy and Insolvency Act (Canada)* that the judgment debt is not released by the order of discharge or certificate of full performance; and
 - b. within 30 days after the date of the sheriff's notice, serves the sheriff with a copy of the notice of motion and a copy of all affidavits and other material served for use on the motion.

- (5) The sheriff shall withdraw the writ after the day that is 30 days after the date of the notice to the creditor, unless the creditor has taken the steps described in clause (4)(b).
- (6) If the creditor takes the steps described in clause (4)(b), the sheriff shall not withdraw the writ at the debtor's request unless the court orders otherwise.
- (7) When a writ of execution is withdrawn, the sheriff shall record the date and time of the withdrawal in a memorandum on the writ of execution, and where it is withdrawn as against all debtors named in it, shall remove the writ or statutory execution from his or her file and return it to the person who withdrew it.

DUTY OF PERSON FILING WRIT WITH SHERIFF

- 60.17** (1) Where a writ of execution has been filed with a sheriff and any payment has been received by or on behalf of the creditor, the creditor shall forthwith give the sheriff notice of the payment.
- (2) Where an order has been satisfied in full, the creditor shall withdraw all writs of execution relating to the order from the office of any sheriff with whom they have been filed.
 - (3) Where the creditor fails to withdraw a writ of execution as required by subrule (2), the court on motion by the debtor may order that the writ of execution be withdrawn.

MOTION FOR DIRECTIONS

- 60.18** Where a question arises in relation to the measures to be taken by a sheriff in carrying out an order, writ of execution, or notice of garnishment, the sheriff or any interested person may make a motion for directions,
- (a) to the judge or Prothonotary who made the original order;
 - (b) to a judge who had jurisdiction to make the original order; or
 - (c) where an appeal has been taken from the original order, to a judge of the Court of Appeal.

EXAMINATION IN AID OF EXECUTION

Definitions

- 60.19** (1) In subrules (2) to (6),
- (a) "creditor" includes the sheriff and a person entitled to obtain or enforce a writ of execution, writ of possession, delivery or sequestration;
 - (b) "debtor" includes a person against whom a writ of possession, delivery or sequestration may be or has been issued.

Examination of Debtor

- (2) A creditor may examine the debtor in relation to,
 - (a) the reason for non-payment or non-performance of the order;
 - (b) the debtor's income and property;
 - (c) the debts owed to and by the debtor;
 - (d) the disposal the debtor has made of any property either before or after the making of the order;
 - (e) the debtor's present, past and future means to satisfy the order;
 - (f) whether the debtor intends to obey the order or has any reason for not doing so; and
 - (g) any other matter pertinent to the enforcement of the order.
- (3) An officer or director of a corporate debtor, or, in the case of a debtor that is a partnership or sole proprietorship, a partner or sole proprietor against whom the order may be enforced, may be examined on behalf of the debtor in relation to the matters set out in subrule (2).
- (4) Only one examination under subrule (2) or (3) may be held in a twelve month period in respect of a debtor in the same proceeding, unless the court orders otherwise.
- (5) Where it appears from an examination under subrules (2) to (4) that a debtor has concealed or made away with property to defeat or defraud creditors, a judge may make a contempt order against the debtor.

Examination of Person other than Debtor

- (6) Where any difficulty arises concerning the enforcement of an order, the court may,
 - (a) make an order for the examination of any person who the court is satisfied may have knowledge of the matters set out in subrule (2); and
 - (b) make such order for the examination of any other person as is just.

Service on Debtor

- (7) Despite clause 34.04(1)(a) (service on lawyer), a party who is to be examined in aid of execution shall be served with a notice of examination personally or by an alternative to personal service.

COSTS OF ENFORCEMENT

- 60.20** (1) A party who is entitled to enforce an order is entitled to the costs of the following steps on a partial indemnity scale, unless the court on motion orders otherwise:
- 1. An examination in aid of execution.
 - 2. The issuing, service, filing, enforcement and renewal of a writ of execution and notice of garnishment.

3. Any other procedure authorized by these rules for enforcing the order.
- (2) A party entitled to costs under subrule (1) may include in or collect under a writ of execution or notice of garnishment,
 - (a) \$50. for the preparation of documents in connection with issuing, renewing and filing with the sheriff the writ of execution or notice of garnishment;
 - (b) Disbursements paid to a sheriff, registrar, Prothonotary, court reporter or other public officer and to which the party is entitled under subrule (1), on filing with the Prothonotary a copy of a receipt for each disbursement;
 - (c) An amount determined in accordance with Tariff A for conducting an examination in aid of execution, on filing with the Prothonotary an affidavit stating that the examination was conducted; and
 - (d) Any other costs to which the party is entitled under subrule (1), on filing with the Prothonotary a certificate of assessment of the costs.
- (3) The Prothonotary may fix costs under clause (2)(c),
 - a. if all parties consent; or
 - b. if the lawyer's fee does not exceed \$2,000, exclusive of harmonized sales tax (HST).
- (4) Under clause (3)(b), the Prothonotary shall fix costs of \$750 plus disbursements.
- (5) When costs are to be fixed by the Prothonotary under subrule (3), the party who is entitled to costs shall file a bill of costs with the Prothonotary.

A.D. v. J.S., 2025 PESC 64

A mother was found in contempt of multiple clauses of a court order. The court declined to order the mother to pay a fine, as it would not be in the children's best interests. The court ordered the mother to pay \$1,500 in costs to the father.

A.J.D. v. N.S.D., 2025 PESC 29

In a high conflict parenting dispute, the court dismissed the contempt motion by the mother, finding the allegations were not proven beyond a reasonable doubt. The court was also of the view that it was not in the children's best interests for the mother to bring the motion.

M.B. v. D.B., 2024 PESC 6

Under Rule 60.12, a spouse was found in contempt of multiple clauses of a family court order. A fine for civil contempt is not paid to a party in an action, but rather is paid to the province. The court exercised restraint and imposed a smaller fine than requested, as any fine would take away from child and spousal support obligations. The court fined the spouse \$2,500.

J.M. v. L.C., 2022 PESC 35

The court denied a mother's motion for contempt against a father, relating to a child moving their residence from the mother to the father, as the 17-year-old had made an autonomous decision.

M.J. v. T.J., 2021 PESC 26

Where one spouse has not complied with a court order, and where a warrant for their arrest was required to compel their attendance at the motion for contempt, a finding of contempt was made by the court to denounce the spouse's conduct in the strongest terms.

DCP v. A.D.D., J.D. & B.T., 2019 PESC 53

Motion by B.T. for an order finding the Director in contempt of the order granting temporary care and control of the child to the Director. In denying the motion, the court reviewed the quasi-criminal nature of a contempt citation and the resulting burden of proof. The court also reviewed the three-pronged test in assessing a motion for contempt and determined that although the Director breached the *Child Protection Act*, there was no evidence of contempt beyond a reasonable doubt.

Heijs v. Breuker, Dutch Trustee in Bankruptcy, 2018 PECA 12

A motion for civil contempt must be served personally unless otherwise ordered by the court.

United Brotherhood of Carpenters and Joiners of America v. United Brotherhood of Carpenters and Joiners, Local 1338 (1997), 148 Nfld. & P.E.I.R. 152 (P.E.I.S.C.A.D.)

The judge granting an interlocutory injunction, remains vested with the jurisdiction to vacate or vary the interlocutory injunction upon proper application of any of the parties.

Horne et al. v. Canada (Attorney General) (1997), 149 Nfld. & P.E.I.R. 46 (P.E.I.S.C.-T.D.)

An application was made to set aside a post-judgment garnishment proceeding on the grounds of non-compliance with Rule 60.09(4). What is necessary and contemplated by the Rule regarding post-judgment garnishment proceedings contemplates the provision of sufficient information and notice to fully inform other interested creditors of their claim for priority.

Safe Haven Guest Home v. McKeil et al. (1996), 147 Nfld. & P.E.I.R. 153 (P.E.I.S.C.-T.D.)

Defendant debtors moved to set aside and quash a pre-judgment garnishee issued by the plaintiff creditor against the corporate defendant.

Pre-judgment garnishment proceedings must be set aside if the procedure set out in the Rules of Court are not meticulously followed. The affidavit must contain all the information required by Rule 60.09(21) and must be adapted to contain the information required by Rule 60.09(4) or be set aside as a nullity.

Read v. Read et al.(No.1) (1995), 131 Nfld. & P.E.I.R. 91 (P.E.I.S.C.-T.D.)

Action to set aside pre-judgment garnishment proceedings on basis that the form of documentation, the notice of garnishment and the affidavit filed in support of the requisition do not comply with the Rules of Court.

The affidavit to be filed with the requisition must not only contain the information required by Rule 60.09(21)(a) but as well, must be adapted to contain the information required by Rule 60.09(4).

The court also interpreted Rule 60.09(24) as permitting a pre-judgment garnishee only in a case where the plaintiff's claim against the defendant is for a liquidated amount.

Tignish Credit Union Ltd. v. Murphy (1993), 109 Nfld. & P.E.I.R. 287 (P.E.I.S.C.-T.D.)

A writ of possession is the instrument utilized to enforce an order for the recovery or delivery of possession. Before the court can grant leave to issue a writ of possession, the party claiming its right to possession must first have obtained an order for the recovery or delivery of possession.

APPEALS**RULE 61****APPEALS TO THE COURT OF APPEAL****APPLICATION OF THE RULE**

61.01 Rules 61.01.1 to 61.15 apply to all appeals to the Court of Appeal and, with necessary modifications, to proceedings in the Court of Appeal by way of,

- (a) special case under Rule 22.03, subject to any directions given under subrule 22.03(2); and
- (b) references under section 7 and sub-section 11(2) of the *Judicature Act*.

ELECTRONIC EXCHANGE AND SUBMISSION OF DOCUMENTS

- 61.01.1** (1) Service of facta and transcripts of evidence may be made electronically.
- (2) Electronic service of facta and transcripts of evidence, with proof of service, is complete service.
 - (3) Electronic submission to the Court clerk of facta and transcripts of evidence is required. Electronic submission may be effected by email, memory stick (USB port), or other approved means.
 - (4) Electronic submission of application records and appeal books is permitted. This is in addition to the requirements for service and filing of bound paper appeal books stated in Rule 61.07(3)(a) and (b).
 - (5) The pages of each document filed with the Registrar and submitted to the Court clerk by a party shall be consecutively numbered.
 - (6) Each party shall file with the Registrar a bound paper copy of each document that is submitted electronically.

APPLICATION FOR LEAVE TO APPEAL**Application for Leave**

- 61.02** (1) Where an appeal to the Court of Appeal requires the leave of that court, a party seeking leave shall apply to the Court of Appeal. The notice of application for leave shall,
- (a) state that the application will be heard on a date to be fixed by the registrar;
 - (b) set out the specific questions the applicant proposes the court should answer if leave is granted; and
 - (c) be filed with proof of service in the office of the registrar, within five days after service.

Application Record, Factum and Transcripts

- (2) On an application for leave to appeal, the applicant shall serve,
 - (a) an application record containing, in consecutively numbered pages arranged in the following order,
 - (i) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter,
 - (ii) a copy of the notice of application,
 - (iii) a copy of the order or decision from which leave to appeal is sought, as signed and entered,
 - (iv) a copy of the reasons of the court or tribunal from which leave to appeal is sought with a further typed or printed copy if the reasons are handwritten,
 - (v) a copy of all affidavits and other material used before the court or tribunal from which leave to appeal is sought,
 - (vi) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves, and
 - (vii) a copy of any other material in the court file that is necessary for the hearing of the motion;
 - (b) a factum consisting of a concise statement of the specific questions the applicant proposes the court should answer if leave is granted, and a concise statement, without argument, of the facts and law relied on by the applicant; and
 - (c) relevant transcripts of evidence, if they are not included in the application record.
- (3) The applicant shall file four copies of the application record and one copy of the factum and transcripts, if any, with proof of service, within thirty days after the filing of the notice of application for leave to appeal.
- (4)(a) Where the responding party is of the opinion that the applicant's application record is incomplete, the responding party may serve a respondent's application record containing, in consecutively numbered pages arranged in the following order,
 - (i) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and
 - (ii) a copy of any material to be used by the responding party on the application and not included in the application record;
- (b) The responding party may serve a factum consisting of a concise statement, without argument, of the facts and law relied on by the

responding party within 15 days after service of the moving party's application record;

- (c) The responding party shall serve four copies of its application record and one copy of the factum and transcripts, if any, within two days following service.

Date for Hearing

- (5) The registrar shall fix a date for the hearing of the motion which shall not, except with the responding party's consent, be earlier than fifteen days after the filing of the moving party's motion record, factum and transcripts, if any.

Time for Delivering Notice of Appeal

- (6) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave.

COMMENCEMENT OF APPEALS

Time for Appeal and Service of Notice

- 61.03** (1) An appeal to the Court of Appeal shall be commenced by serving a notice of appeal (Form 61 A) and a designation of address for service (Form 16 A.1) together with the certificate required by subrule 61.04(1) on every party whose interest may be affected by the appeal, other than,
- (a) a defendant who was noted in default; or
 - (b) a respondent who has not delivered a notice of appearance, unless the respondent was heard at the hearing with leave,
- and on any person entitled by statute to be heard on the appeal, within thirty days after the date of the filing of the order appealed from, unless a statute or these rules provide otherwise.

Title of Proceeding

- (2) The title of the proceeding in an appeal shall be in accordance with Form 61 B.

Notice of Appeal

- (3) The notice of appeal (Form 61 A) shall state
 - (a) the relief sought;
 - (b) the grounds of appeal; and
 - (c) the basis for the appellate court's jurisdiction, including reference to:
 - (i) any provision of a statute or regulation establishing jurisdiction;
 - (ii) whether the order appealed from is final or interlocutory;

- (iii) whether leave to appeal is necessary and if so whether it has been granted; and
 - (iv) any other facts relevant to establishing jurisdiction.
- (4) The notice of appeal, with proof of service, shall be filed in the office of the registrar within ten days after service.

CERTIFICATE OR AGREEMENT RESPECTING EVIDENCE

Appellant's Certificate Respecting Evidence

- 61.04** (1) In order to minimize the number of documents and the length of the transcript required for an appeal, the appellant shall serve with the notice of appeal an appellant's certificate respecting evidence (Form 61 C) setting out those portions of the evidence that, in the appellant's opinion, are required for the appeal. Such certificate shall comply with Rule 61.04(5).

Respondent's Certificate Respecting Evidence

- (2) Within fifteen days after service of the appellant's certificate, the respondent shall serve on the appellant a respondent's certificate respecting evidence (Form 61 D), confirming the appellant's certificate or setting out any additions to or deletions from it.
- (3) A respondent who fails to serve a respondent's certificate within the prescribed time shall be deemed to have confirmed the appellant's certificate.

Agreement Respecting Evidence

- (4) Instead of complying with subrules (1) to (3), the parties may, within thirty days after service of the notice of appeal, make an agreement respecting the documents to be included in the appeal books and the transcript required for the appeal.

Matters to be omitted from transcript

- (5) Unless such matter relates to a ground of appeal or a judge otherwise orders for any reason, the following are to be omitted from a transcript filed on an appeal:
- (a) proceedings on the challenge of the array or of jurors for cause;
 - (b) opening address of the trial judge;
 - (c) the opening and closing address/argument of a lawyer;
 - (d) proceedings in the absence of the jury and all argument in the absence of the jury (excepting objections to a charge and the trial judge's ruling thereon together with any reasons for their ruling), and all argument where there is no jury; and
 - (e) objections to the admissibility of evidence, excepting only a

notation that an objection was made. However, the ruling of the trial judge, including reasons for the ruling, will be transcribed.

Requesting Transcripts

- (6) The appellant shall within thirty days after filing the notice of appeal file proof that the appellant has,
 - (a) requested a transcript of all oral evidence that the parties have not agreed to omit, subject to any direction under subrule 61.07(4) (relief from compliance);
 - (b) provided the transcriber with a list of the names and addresses of all parties to the appeal; and
 - (c) informed the transcriber of the responsibilities of the transcriber under subrule 61.04(8).
- (7) A party who has previously requested a transcript of oral evidence shall forthwith modify their order in writing to comply with the certificates or agreement.
- (8) When the evidence has been transcribed, the transcriber shall forthwith give written notice to all parties and to the registrar. The party requesting the transcript shall instruct the transcriber to forthwith submit an electronic copy of the transcript to the Court clerk.

Costs Sanctions for Unnecessary Evidence

- (9) The court may impose costs sanctions where evidence is transcribed or exhibits are reproduced unnecessarily.

CROSS-APPEALS

- 61.05** (1) A respondent who,
- (a) seeks to set aside or vary the order appealed from; or
 - (b) will seek, if the appeal is allowed in whole or in part, other relief or a different disposition than the order appealed from,
 - (c) will contend that the order appealed from should be affirmed on grounds other than those relied upon in the court or tribunal appealed from,
- shall, within fifteen days after service of the notice of appeal, serve a notice of cross-appeal (Form 61 E) on all parties whose interests may be affected by the cross-appeal and on any person entitled by statute to be heard on the appeal, stating the relief sought and the grounds of the cross-appeal,
- (2) The notice of cross-appeal, with proof of service, shall be filed in the office of the registrar within ten days after service.
 - (3) Where a respondent has not delivered a notice of cross-appeal, no cross-appeal may be heard except with leave of the court hearing the

appeal.

AMENDMENT OF NOTICE OF APPEAL OR CROSS-APPEAL

Supplementary Notice to be Served and Filed

- 61.06** (1) The notice of appeal or cross-appeal may be amended without leave, before the appeal is perfected, by serving on each of the parties on whom the notice was served a supplementary notice of appeal or cross-appeal (Form 61 F) and filing it with proof of service.

Argument Limited to Grounds Stated

- (2) No grounds other than those stated in the notice of appeal or cross-appeal or supplementary notice may be relied on at the hearing, except with leave of the court hearing the appeal.

Relief Limited

- (3) No relief other than that sought in the notice of appeal or cross-appeal or supplementary notice may be sought at the hearing, except with the leave of the court hearing the appeal.

PERFECTING APPEALS

Time for Perfecting

- 61.07** (1) The appellant shall perfect the appeal by complying with subrules (2) and (3),
- (a) where no transcript of evidence is required for the appeal, within thirty days after filing the notice of appeal; or
 - (b) where a transcript of evidence is required for the appeal, within sixty days after receiving notice that the evidence has been transcribed.

Record and Exhibits

- (2) The appellant shall cause to be forwarded to the registrar the record and the original exhibits from the court or tribunal from which the appeal is taken.

Material to be Served and Filed

- (3) The appellant shall,
- (a) serve on every other party to the appeal and any other person entitled by statute or an order under Rule 13.03 (intervention in appeal) to be heard on the appeal,
 - (i) the appeal book referred to in Rule 61.08;
 - (ii) the transcript of evidence;
 - (iii) the appellant's factum referred to in Rule 61.09;

- (iv) an electronic version of the transcript of evidence and the appellant's factum;
- (b) file with the registrar, with proof of service,
 - (i) four copies of the appeal book and one copy of the transcript and factum served under clause (a); and
 - (ii) an electronic version of the evidence and the appellant's factum.
- (c) serve on every person served under clause (a), and file with the registrar a certificate of perfection stating that the record, exhibits, appeal book, transcript and appellant's factum have been filed, and setting out the name, address and telephone number of the lawyer for,
 - (i) every party to the appeal, and
 - (ii) any person entitled by statute or an order under Rule 13.03 (intervention in appeal) to be heard on the appeal,
 or, where a party or person acts in person, their name, address for service and telephone number.

Relief from Compliance

- (4) Where compliance with the rules governing appeal books or transcripts of evidence would cause undue expense or delay, a judge of the Court of Appeal may give special directions.

Notice of Listing for Hearing

- (5) When an appeal is perfected, the registrar shall place it on the list of cases to be heard at the appropriate place of hearing and shall mail a notice of listing for hearing (Form 61G) to every person listed in the certificate of perfection.

Early Hearing of Appeals

- (6) On motion by any party to an appeal, the Court of Appeal or a judge thereof may, in special circumstances, order an early hearing of an appeal and may give any necessary directions.

APPEAL BOOK

- 61.08** (1) The appeal book shall contain, in consecutively numbered pages arranged in the following order, a copy of,
- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
 - (b) the notice of appeal and any notice of cross-appeal or supplementary notice of appeal or cross-appeal;
 - (c) the order or decision appealed from, as signed and entered;

- (d) the reasons of the court or tribunal appealed from with a further typed or printed copy if the reasons are handwritten;
 - (e) if an earlier order or decision was the subject of the hearing before the court or tribunal appealed from, a copy of the order or decision, as signed and entered, and a copy of any reasons for it;
 - (f) the pleadings, notice of application, notice of motion, or any other document that initiated the proceeding or defines the issues in it;
 - (g) any affidavit evidence, including exhibits, that the parties have not agreed to omit;
 - (h) all documentary exhibits filed at a hearing or marked on an examination that the parties have not agreed to omit, arranged in order by date and not by exhibit number or, where there are documents having common characteristics, arranged in separate groups in order by date;
 - (i) the certificates or agreement respecting evidence referred to in Rule 61.04;
 - (j) any order made in respect of the conduct of the appeal;
 - (k) any other document relevant to the hearing of the appeal; and
 - (l) a certificate (Form 61 H) signed by the appellant, the appellant's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, stating that the contents of the appeal book are complete and legible.
- (2) The registrar may refuse to accept an appeal book if it does not comply with these rules or is not legible.
- (3) With the concurrence of the parties and the Court, an appeal book in electronic form shall be sufficient for use by the parties and the Court throughout an appeal. The appellant shall thereupon be required to serve the appeal book electronically only, to file one bound paper copy, and to submit the appeal book electronically to the Court clerk.

APPELLANT'S FACTUM

- 61.09** (1) The appellant's factum shall be signed by the appellant, the appellant's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, and shall consist of,
- (a) Part I, containing a statement identifying the appellant and the court or tribunal appealed from and stating the result in that court or tribunal;
 - (b) Part II, containing a concise overview statement describing the nature of the case and the issues;

- (c) Part III, containing a concise summary of the facts relevant to the issues on the appeal, with such reference to the evidence by page and line as is necessary;
 - (d) Part IV, containing a statement of each issue raised, immediately followed by a concise argument with reference to the law and authorities relating to that issue;
 - (e) Part V, containing a statement of the order that the Court of Appeal will be asked to make, including any order for costs;
 - (f) Schedule A, containing a list of the authorities referred to; and
 - (g) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws,
- in paragraphs numbered consecutively throughout the factum.
- (2) (a) Subject to subrule 61.09(2)(c), the length of the factum shall not exceed 35 pages;
 - (b) The registrar may refuse to accept a factum that exceeds the limit or is inconsistent with the standards set out in Rule 4.01 regarding, without limitation, double-spacing or font size;
 - (c) Permission to exceed the page limit may be sought by bringing a request in writing to the registrar of the Court of Appeal, or on direction of the registrar to a judge of the Court of Appeal, in either case setting out the reason for and scope of the request for permission.

RESPONDENT'S FACTUM

Filing and Service

- 61.10** (1) Every respondent shall prepare a respondent's factum, serve every other party to the appeal, and any other person entitled by statute or an order under Rule 13.03 to be heard on the appeal, and shall file with the registrar one copy of the respondent's factum with proof of service on all other parties to the appeal.

Time for Delivery

- (2) A respondent's factum shall be delivered within thirty days after service of the appeal book, transcript of evidence and appellant's factum.

Contents

- (3) The respondent's factum shall be signed by the respondent, the respondent's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, and shall consist of,
- (a) Part I, containing a statement of the facts in the appellant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees and a concise summary

of any additional facts relied on, with such reference to the evidence by page and line as is necessary;

- (b) Part II, containing a concise overview statement describing the nature of the case and the issues;
- (c) Part III, containing the position of the respondent with respect to each issue raised by the appellant immediately followed by a concise argument with reference to the law and the authorities relating to that issue;
- (d) Part IV, containing a statement of any additional issues raised by the respondent, the statement of each issue to be immediately followed by a concise argument with reference to the law and the authorities relating to that issue;
- (e) Part V, containing a statement of the order that the Court of Appeal will be asked to make, including any order for costs;
- (f) Schedule A, containing a list of the authorities referred to; and
- (g) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws that are not included in Schedule B to the appellant's factum,

in paragraphs numbered consecutively throughout the factum.

- (3.1) (a) Subject to subrule 61.10(3.1)(c), the length of the factum shall not exceed 35 pages.
- (b) The registrar may refuse to accept a factum that exceeds the limit or is inconsistent with the standards set out in Rule 4.01 regarding, without limitation, double-spacing or font size.
- (c) Permission to exceed the page limit may be sought by bringing a request in writing to the registrar of the Court of Appeal, or on direction of the registrar to a judge of the Court of Appeal, in either case setting out the reason for and scope of the request for permission.

Cross-Appeal

- (4) Where a respondent has served a notice of cross-appeal under Rule 61.05,
 - (a) the respondent shall prepare a factum as an appellant by cross-appeal and deliver it with or incorporate it in the respondent's factum; and
 - (b) the appellant shall deliver a factum as a respondent to the cross-appeal within ten days after service of the respondent's factum.

ABANDONED APPEALS**Delivery of Notice of Abandonment**

- 61.11** (1) A party may abandon their appeal or cross-appeal by delivering a notice of abandonment (Form 61 K).

Deemed Abandonment

- (2) A party who
- (a) serves a notice of appeal or cross-appeal and does not file it within ten days after service; or
 - (b) being an appellant, has not filed proof that a transcript of the evidence that the parties have not agreed to omit was requested within the time prescribed by Rule 61.04(6); or
 - (c) being an appellant, has not perfected the appeal within the time prescribed by Rule 61.07(1) or by an order of the Court of Appeal or a judge thereof; or
 - (d) being a respondent who has served a notice of cross-appeal, has not delivered a factum in the cross-appeal within thirty days after service of the appeal book, transcript of the evidence and appellant's factum

unless the appointed time for carrying out a step is otherwise determined by the registrar before or after the time for performing the step has elapsed, shall be deemed to have abandoned the appeal or cross-appeal; and a notice of abandonment or deemed abandonment (Form 61 I) may be sent by the registrar to the appellant and respondent.

Effect of Abandonment

- (3) Where an appeal or cross-appeal is abandoned or is deemed to have been abandoned, the appeal or cross-appeal is at an end, and the respondent or appellant is entitled to costs of the appeal or cross-appeal unless a judge of the Court of Appeal orders otherwise.
- (4) A person affected by a notice of abandonment or deemed abandonment of the Registrar may make a motion to a judge of the Court of Appeal to set it aside or vary it by a notice of motion that is served forthwith after the notice of abandonment comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

CROSS-APPEAL WHERE APPEAL ABANDONED OR DEEMED ABANDONED

- 61.12** (1) Where an appeal has been abandoned or deemed abandoned, the registrar shall serve notice of such abandonment or deemed abandonment on a respondent who has cross-appealed.
- (2) A respondent who has been served with a notice under subrule (1) may,

- (a) within fifteen days thereafter, deliver a notice of election to proceed (Form 61 L); and
 - (b) make a motion to a judge of the Court of Appeal for directions in respect of the cross-appeal.
- (3) Where the respondent does not deliver a notice of election to proceed within fifteen days, the cross-appeal shall be deemed to be abandoned without costs unless a judge of the Court of Appeal orders otherwise.

MOTIONS IN COURT OF APPEAL

Rule 37 Applies Generally

- 61.13** (1) Rule 37, except Rules 37.02 to 37.04 (jurisdiction to hear motions, place of hearing, to whom to be made), and rule 37.16 (motion before commencement of proceeding), applies to motions in the Court of Appeal, with necessary modifications.

Motion to Receive Evidence

- (2) A motion to have the Court of Appeal receive further evidence shall be made to the panel hearing the appeal.

Motion to be Heard by More than One Judge

- (3) Where a motion in the Court of Appeal is to be heard by more than one judge, the notice of motion shall state that the motion will be heard on a date to be fixed by the registrar.

Motion Record and Factum

- (4) On a motion referred to in subrule (3),
- (a) the moving party,
 - (i) shall serve a motion record, and an electronic version of the appellant's factum, and a factum consisting of a concise argument stating the facts and law relied on by the moving party.

Contents of Motion Record

- (ii) The motion record shall contain in consecutively numbered pages arranged in the following order:
 - (a) a table of contents describing each document, including each exhibit, by its nature and date;
 - (b) a copy of the notice of motion;
 - (c) a copy of all affidavits to be used by the maker of the motion;
 - (d) a list of all relevant extracts from any transcripts of

- evidence;
- (e) a copy of any material in the court file that is necessary for the hearing of the motion;
- (f) a factum, consisting of a concise statement, without argument, of the facts and law relied on by the party;
- (g) a memorandum of authorities, if needed, listing any relevant case law, statute, regulation or rule that the moving party intends to rely on or refer to; and
- (h) draft of any proposed order;
- (iii) shall file four copies of the moving party's motion record and factum, with proof of service, within 30 days after filing the notice of motion.
- (b) the responding party,
 - (i) may, if the responding party is of the opinion that the moving party's motion record is incomplete, serve a responding party's motion record and an electronic version of the respondent's factum.

Contents of Motion Record

- (ii) The motion record shall contain in consecutively numbered pages arranged in the following order:
 - (a) a table of contents describing each document, including each exhibit, by its nature and date;
 - (b) a copy of any material to be used by the responding party on the motion and not included in the motion record of the party making the motion;
 - (c) a factum, consisting of a concise statement, without argument, of the facts and law relied on by the responding party;
 - (d) a memorandum of authorities, if needed, listing any relevant case law, statute, regulation or rule that the responding party intends to rely on or refer to; and
- (iii) shall file four copies of the responding party's motion record and factum, with proof of service, and an electronic version of the appellant's factum, within 25 days after service of the moving party's motion record and factum; and
- (d) a party who intends to refer to a transcript of evidence at the hearing shall ensure that it is included in the motion record, and that an electronic version of the transcript is served and filed.

Review of Single Judge's Order

- (5) A person who moves to set aside or vary the order of a judge of the Court of Appeal under subsection 6(4) of the *Judicature Act* shall do so by notice of motion that is served within ten days after the order is made and states that the application will be heard on a date to be fixed by the registrar.

Motions for Leave to Appeal to the Supreme Court of Canada

- (6) A motion to the Court of Appeal for leave to appeal to the Supreme Court of Canada from an order or decision of the Court of Appeal may be made by notice of motion.

Registrar to Dismiss for Delay

- (7) If the moving party has not served and filed the motion record and other documents in accordance with subrule (4),
- (a) the responding party may make a motion to the Registrar, on 10 days notice to the moving party, to have the motion dismissed for delay;
 - (b) the Registrar may serve notice on the moving party that the motion will be dismissed for delay unless the motion record and other documents are served and filed within 10 days after service of the notice.
- (8) The Registrar shall make an order in Form 61 J dismissing the motion for delay, with costs, if the moving party,
- (a) in the case of a motion under clause (7)(a), does not serve and file the motion record and other documents before the hearing of that motion, or within such longer period as a judge of the appellate court allows;
 - (b) in the case of a notice under clause (7)(b), does not serve and file the motion record and other documents within 10 days after the notice is served, or within such longer period as a judge of the appellate court allows.

Review of Registrar's Order

- (9) A person affected by an order or decision of the registrar dismissing a motion for delay may make a motion to a judge of the Court of Appeal to set it aside or vary it by a notice of motion that is served forthwith after the order or decision comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

Security for Costs

- 61.14** (1) In an appeal where, on motion by the respondent, it appears that,
- (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Prince Edward Island to pay the costs of the appeal;
 - (b) an order for security for costs could be made against the appellant under Rule 56.01; or
 - (c) for other good reason, security for costs should be ordered,
- a judge of the Court of Appeal may make such order for security for costs of the proceeding and of the appeal as is just.
- (2) If an order is made under subrule (1), Rules 56.04, 56.05, 56.07 and 56.08 apply, with necessary modifications.
- (3) If an appellant fails to comply with an order under subrule (1), a judge of the Court of Appeal on motion may dismiss the appeal.

Application of Other Rules

- 61.15** The other provisions of these rules, when, and to the extent not inconsistent with this rule, apply, with any necessary modifications, to any proceeding on appeals or motions for leave to appeal in the Court of Appeal.

The Little Poultry Company Inc. v. Taylor, 2024 PECA 11

The court ordered the appellant to post security for costs for both the appeal and the costs decision of the Supreme Court. The court found that the appeal was frivolous and vexatious based on a multitude of factors including that it was devoid of merit, not prosecuted in a timely manner, and did not comply with the *Rules of Civil Procedure*. The court also considered the appellant's unsatisfied judgments and outstanding costs orders.

Collins and Poirier v. Woodburn, 2024 PECA 9

The appellants were denied leave to appeal costs as they did not meet the high bar of strong grounds for a finding that the lower court erred in exercising their discretion.

R. v. R., 2023 PECA 6

The appellant requested that either the court or government pay for the preparation of the transcript for the appeal. The court found that the appellant did not demonstrate that they were impecunious and did not provide any statutory, regulatory or common-law support for their request.

Doiron v. Doiron, 2020 PECA 8

The time for filing an appeal in a divorce matter shall be measured from the date the order appealed from is filed, not the date on which it is made, pronounced, delivered, or becomes effective.

Thomas v. Thomas Estates, 2016 PECA 13

The court denied an application for an extension of time to commence two appeals. The court

again cited the applicable factors:

1. Does the appeal have merit?
2. Was there a *bona fide* intention to appeal?
3. Is there a reasonable excuse for a delay in not filing within the prescribed time?
4. Are there exceptional or special circumstances justifying the extension of time?

Additionally, the court treats the question of whether the “*justice of the case*” requires that an extension be given as the governing principle and employs all of the mentioned factors, as well as prejudice to the other party, as factors. This approach facilitates a full assessment of the competing interests.

Robinson v. Willis & Fogarty, 2013 PECA 13

The respondents made a motion for security for costs on appeal pursuant to Rule 61.14(1)(b). The appellants were the plaintiffs in the matter. The Court found as the respondents were entitled to an order for security for costs pursuant to Rule 56.01, Rule 61.14(1)(b) would entitle the respondents to an award of costs.

100875 P.E.I. Inc. v. Curran & Briggs, 2010 PECA 8

Pursuant to Rule 61.14(1), the respondent made a motion for security of costs on appeal. Rules 61.14(1)(b) and (c) did not apply to the motion. Pursuant to Rule 61.14(1)(a), the respondent must establish that the appeal is frivolous and vexatious and that the appellant did not have sufficient assets in P.E.I. to pay an order for costs.

Ayangma v. French School Board & Ano., 2009 PECA 10

The appellant’s motion for relief from compliance with Rule 61.04(5) to provide a transcript was denied, as was his motion to have the respondent pay for the cost of that part of the transcript that remained to be prepared.

Ayangma v. Govt. PEI and Ano., 2006 PESCAD 23; (2006), 260 Nfld. & P.E.I.R. 234

The respondents made a motion pursuant to Rule 61.14 for an order for security for costs against the appellant. The respondents were entitled to an order for security for costs pursuant to Rule 61.14(1)(b) only if they were entitled to such an order under Rule 56.01. Rule 61.14(1)(b) is confined to making an order for security for costs against a plaintiff/appellant. As the appellant was the plaintiff, and as the requirements of Rule 56.01 were satisfied, an order requiring the appellant to post security for costs was issued.

Bentham v. Bentham (1999), 170 Nfld. & P.E.I. R. 273 (P.E.I.S.C.-A.D.)

Application for an extension of time to file a Notice of Appeal. The decision of Mitchell J.A. in *Bryant v. Fenton* (1998) 166 Nfld. & P.E.I. R. 109 (P.E.I.S.C.-A.D.) was applied. Despite the fact the time for filing an appeal had elapsed twelve months prior to the application, an extension was granted on certain conditions.

Bryant v. Fenton (1998), 166 Nfld. & P.E.I. R. 109 (P.E.I.S.C.-A.D.)

The appellant sought an order, pursuant to Rule 3.02, to extend the time prescribed by Rule 61.07(1) for perfecting an appeal. Although a motion had been made to the Prothonotary pursuant to Rule 61.11(1) to dismiss the appeal, the Court extended the time for perfecting the appeal because it is desirable to have appeals decided on their merits and because the respondent

would not suffer any prejudice by the granting of the extension. The appellant was, however, ordered to pay the costs of the respondent in making the motion for dismissal.

Canada (Attorney General) v. Clory & Georgetown Shipyards Inc. (1997), 149 Nfld. & P.E.I.R. 183 (P.E.I.S.C.-A.D.)

The defendants appealed from a finding of liability and damages. Although no formal order had been taken out, the plaintiff argued time for filing a notice of appeal had expired.

The Court held it is the filing date of the formal order taken out under Rule 59 that triggers the commencement of the period of time permitted for filing a notice of appeal.

Pitre v. Turner et al. (1997), 149 Nfld. & P.E.I.R. 359 (P.E.I.S.C.-A.D.)

A respondent on cross-appeal applied for an order for security for costs pursuant to Rule 61.15. The appellant on the cross appeal argued the Rule did not apply to a cross-appeal. The Court held Rule 61.16 provides that all provisions of Rule 61 applied, with necessary modification, to any proceeding in an appeal, including a cross-appeal. The motion for security for costs must be filed within the 15 days of the filing of the Notice of Appeal. As that was not done and because the respondent by cross-appeal had not shown sufficient reason for the delay, the motion was dismissed.

Paton v. Shaw (1996), 140 Nfld. & P.E.I.R. 265 (P.E.I.S.C.-A.D.)

The appellant made application to be relieved of the obligation of preparing and paying for the transcription of the evidence at trial on the ground he was impecunious. The application was denied because the appellant had not discharged the onus of establishing his impecuniosity nor did he establish that he had an arguable case on appeal.

Benson v. Labourers International Union of North America et al. (1996), 142 Nfld. & P.E.I.R. 81 (P.E.I.S.C.-A.D.)

Rule 61.05 provides for two categories of cross-appeal: First, Rule 61.05(a) is independent from the issues or the outcome of the main appeal; second, Rule 61.05(b) and (c) provides for the situation where the respondent contests the main appeal filed by the appellant but wishes to obtain certain relief in the event the appellant is successful on the main appeal. Here, the cross-appeal came within the second category and as the respondent was successful in defending the main appeal, the court found it unnecessary to deal with the merits of the cross-appeal.

Dyne Holdings Ltd. et al. v. Royal Insurance Co. of Canada et al. (1996), 138 Nfld. & P.E.I.R. 318 (P.E.I.S.C.-A.D.)

Where the respondent is seeking to have the court affirm the judgment under appeal on grounds other than those relied upon in the court below, there is a requirement to file a cross-appeal in accordance with Rule 61.05(1)(c) and 61.05(3).

Vitex Foods Ltd. v. Haldemann (1993), 110 Nfld. & P.E.I.R. 87 (P.E.I.S.C.-A.D.)

An appeal was abandoned because the issues raised were, as the result of circumstances, moot. The respondent will not be entitled to costs where it was the respondent's actions which rendered the issues moot. In the exercise of its discretion on the matter of costs, it is proper for the court to consider the circumstances that resulted in the appeal being abandoned.

RULE 62**APPEALS TO THE SUPREME COURT****PROCEDURE ON APPEAL****Application of Rule**

- 62.01** (1) Subrules (2) to (9) apply to an appeal that is made to a judge,
- (a) from an interlocutory order of the Prothonotary;
 - (b) from a certificate of assessment of costs; or
 - (c) under any other statute, unless the statute or a rule provides for another procedure.

Time for Appeal

- (2) An appeal shall be commenced by serving a notice of appeal (Form 62 A) and a designation of address for service (Form 16 A.1) on all parties whose interests may be affected by the appeal, within seven days after the date of the order or certificate appealed from.

Hearing Date

- (3) The notice of appeal shall name the first available hearing date that is not less than seven days after the date of service of the notice of appeal, and Rule 37.05 (hearing date for motions) applies, with necessary modifications.

Notice of Appeal

- (4) The notice of appeal (Form 62 A) shall state the relief sought and the grounds of appeal, and no grounds other than those stated in the notice may be relied on at the hearing, except with leave of the judge hearing the appeal.
- (5) The notice of appeal shall be filed in the court office where the appeal is to be heard, with proof of service, not later than seven clear days before the hearing date.

Appeal Record

- (6) The appellant shall, not later than seven clear days before the hearing, serve on every other party and file, with proof of service, in the court office, an appeal record containing, in consecutively numbered pages arranged in the following order,

- (a) a table of contents describing each document, including each exhibit by its nature and date and, in the case of an exhibit, by exhibit number or letter;
 - (b) a copy of the notice of appeal;
 - (c) a copy of the order or certificate appealed from, as signed and entered and the reasons, if any, as well as a further typed or printed copy of the reasons if they are handwritten; and
 - (d) such other material that was before the judge or officer appealed from as is necessary for the hearing of the appeal, and a factum consisting of a concise statement, with argument, of the facts and law relied on by the appellant.
- (7) The respondent shall serve on every other party and file with proof of service, in the court office where the appeal is to be heard at least three clear days before the hearing date,
- (a) any further material that was before the judge or officer appealed from and is necessary for the hearing of the appeal; and
 - (b) a factum consisting of a concise statement, with argument, of the facts and law relied on by the respondent.
- (8) A judge may dispense with compliance with subrules (6) and (7) in whole or in part, before or at the hearing of the appeal.

Abandoned Appeals

- (9) Rule 61.12 applies, with necessary modifications, to the abandonment of an appeal under this rule.

DISMISSAL FOR DELAY

Motion by Respondent

- 62.02** (1) Where an appellant has not perfected the appeal within one year after filing the notice of appeal or within any extension of time granted by a judge of the Supreme Court, the respondent may make a motion to the Registrar, on ten days' notice to the appellant, to have the appeal dismissed for delay.

Notice by Registrar

- (2) Where the appellant has not perfected the appeal within one year after filing the notice of appeal, the Registrar may serve notice on the appellant that the appeal will be dismissed for delay unless it is perfected within ten days after service of the notice.

Registrar to Dismiss Where Default not Cured

- (3) Where the appellant does not cure the default,
- (a) in the case of a motion under subrule (1), before the hearing of the motion; or

- (b) in the case of a notice under subrule (2), within ten days after service of the notice or within such longer period as a judge of the Supreme Court allows, the Registrar shall make an order (Form 62 B) dismissing the appeal for delay, with costs and shall serve the order on the respondent.

Goulet v. College of Physicians & Surgeons PEI, 2025 PESC 72

In an appeal under the *Regulated Health Professions Act*, the court denied the respondent college standing as an adversarial party as there was another respondent who could participate in the appeal, the college is adjudicative, and one of the remedies available for the court was to refer the matter back to the college for further investigation. The court remitted the matter back to the investigation committee.

Perry v. Kings Square Affordable Housing Corporation, 2023 PESC 32

Where a statute provided for an appeal of a decision of an administrative tribunal on a question of law only, the court examined the notice of appeal and supporting submissions to identify the true substance of the appeal, and dismissed the appeal. The court pointed out that this gatekeeping function is important as a signal of respect for the institutional design chosen by the Legislature.

R. v. Stead, 2020 PECA 6

A summary conviction appeal is governed by s.822 and s.686 of the *Criminal Code*. The appeal may be allowed if the trial judge made an error of law or if his application of the facts to the law was unreasonable.

When considering whether a verdict is reasonable, the summary conviction appeal court must be satisfied there was evidence to go to the trier of fact and that the weight of the evidence was sufficient to support the verdict. An appeal court is not to substitute its opinion for that of the trier of fact. The test is whether the verdict is one that a properly directed jury, acting judicially, could reasonably have rendered (see: *Dorgan and Gavin v. R.*, 2008 PESCTD 31, at paras.13-14; *R. v. Brookfield Gardens Inc.*, 2018 PECA 2, at para.56).

Clark v. Simmonds (1999), 171 Nfld. & P.E.I. R. 70 (P.E.I.S.C.-T.D.)

On the facts of this case the party affected by the *ex parte* order of the Prothonotary could either file an appeal from the order pursuant to Rule 62 or make a motion pursuant to Rule 37.

Clark v. Simmonds (1999), 174 Nfld. & P.E.I.R. 21 (P.E.I.S.C.-T.D.)

The appeal pursuant to Rule 62.01(1)(a) is from a formal order and not the written reasons of the Prothonotary. Where the applicant had not obtained a formal order it could not be said the applicant had a *bona fide* intention to appeal, and thus the application for an extension of time to file an appeal was denied.

RULE 63**STAY PENDING APPEAL****EFFECT OF STAY****No Stay of Proceedings**

- 63.01** (1) Subject to subrule (2), the filing of a notice of appeal does not operate as a stay of proceedings under the order appealed from, or invalidate any interlocutory order in the proceedings.

Stay by Order

- (2) An order, whether final or interlocutory, may be stayed on such terms as are just by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken.
- (3) A stay granted under subrule (2) may be set aside or varied, on such terms as are just, by a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken.

Generally

- 63.02** (1) Where an order is stayed, no steps may be taken under the order or for its enforcement except,
- (a) by an order of a judge of the court to which an appeal has been made; or
- (b) as provided in subrules (2) and (3).

Entry of Order and Assessment of Costs

- (2) A stay does not prevent the settling, signing and entering of the order or the assessment of costs.

Writ of Execution

- (3) A stay does not prevent the issue of a writ of execution or the filing of the writ in a sheriff's office or land registry office, but no instruction or direction to enforce the writ shall be given to a sheriff while the stay remains in effect.

Certificate of Stay

- (4) Where an order is stayed, the Registrar shall issue, on requisition by a party to the appeal, a certificate of stay (Form 63 A) and, when the certificate has been filed with the sheriff, the sheriff shall not commence or continue enforcement of the order until satisfied that the stay is no longer in effect.

- (4.1) A requisition for a certificate of stay under subrule (4) shall state whether the stay is under subrule 63.01(1) or by order under subrule 63.02(1) and, if by order, shall set out particulars of the order.

Setting Aside Writ of Execution

- (5) A judge of the court to which a motion for leave to appeal has been made or an appeal has been taken may set aside the issue or filing of a writ of execution where the moving party or appellant gives security satisfactory to the court.

DCP v. CEH, DG and PG, 2025 PECA 2

In considering the three-part test for a stay pending appeal in a child protection case, the second and third parts of the test were whether the denial of the stay would harm the child and if so, whether the stay's issuance or denial would better serve, or cause less harm, to the child's best interests. The appellant was successful in their motion and a stay pending appeal was granted.

The Little Poultry Company Inc. v. Kris Taylor, 2024 PECA 1

In considering the three-part test for a stay pending appeal, the court determined that the applicant failed to establish its burden on all three grounds. The applicant did not meet the low bar for whether there was a serious issue to be tried, as there was little connection between the grounds of appeal raised and the findings of the motions judge in the decision under appeal.

DCP (PEI) v. E.W. & Ors., 2020 PECA 15

In an application for a stay of proceedings pending appeal the test is modified in cases involving children. The second and third parts of the test are adjusted and the only consideration is the best interests of the child.

R. v. Doyle, 2016 PECA 9

The motions judge dismissed the appellant's motion for stay pending appeal on the basis that the appeal and motion were premature. The recusal process to be followed is that the application for recusal based on bias should be put to the trial judge, which was done in this case. An appeal of the verdict can then be made to the Court of Appeal and reasonable apprehension of bias can be cited as a ground of appeal.

Morrissey v. Morrissey, 2015 PECA 10

The Court found the appellant satisfied the test for granting interlocutory relief of a stay pending appeal by demonstrating the three-stage test of showing a serious question to be tried; that he would suffer irreparable harm if the application were refused and that he would suffer greater harm from refusal of the remedy pending an appeal decision on the merits than would the respondent if the stay was granted. As a result of the order of the motions judge being stayed, the child support orders contained in the Interim Consent Order as agreed to prior to the motion would continue in effect pending disposition of the appeal.

Noonan Fuels v. Imperial Oil, 2005 PESCAD 20

Stay of proceedings ordered pending the disposition of an appeal from an interlocutory order requiring the disclosure of documents for discovery.

Ayangma v. Government of P.E.I., 2000 PESCAD 5

Plaintiff applied for the stay of an order to pay costs pending the outcome of a further appeal from the assessment of costs. The court held there were exceptional circumstances which warranted the granting of a stay.

Fida Enterprises Ltd. v. Attorney General of Canada, [1998] P.E.I.J. No. 89 (P.E.I.S.C.-A.D.)

Application for stay of proceedings denied because the appellant did not demonstrate the appeal had merit and because the appellant failed to demonstrate there were any special or exceptional circumstances which would warrant the stay.

Georgetown Shipyards Incorporated and Frederick James Clory v. The Attorney General of Canada, [1998] P.E.I.J. No. 37 (Q.L.) (P.E.I.S.C.-A.D.)

Application for stay of proceedings pending appeal denied. Circumstances of the case did not warrant a stay.

United Brotherhood, Local 1338 v. United Brotherhood of America (1997), 148 Nfld. & P.E.I.R. 152 (P.E.I.S.C.-A.D.)

Application for an order staying an interlocutory injunction. Even where an appeal is filed from the order granting the interlocutory injunction, the court should not, unless in exceptional circumstances, usurp the role of the Chambers judge in monitoring the interlocutory injunction by exercising its discretion in favour of granting a stay pending the hearing of the appeal. In this case the failure of the respondents to fulfill the undertaking made upon granting of the interlocutory injunction constituted exceptional circumstances which warranted ordering a conditional stay of proceedings.

P.E.I. Council of the Disabled Inc. v. Pederson (1995), 127 Nfld. & P.E.I.R. 72 (P.E.I.S.C.-A.D.)

Granting a stay of proceedings pending an appeal is a discretionary matter which necessarily will involve the consideration of various factors depending on the circumstances of each case. The essence of these factors is that a stay should only be granted in exceptional or unusual circumstances having regard to the fact that the successful party should not be deprived of the fruits of his/her litigation. Stay granted on conditions.

Johnson v. Murchison, [1994] 1 P.E.I.R. 35 (P.E.I.S.C.-A.D.)

Rule 63.01 provides that the Court may stay an order on such conditions as it deems just. A stay was granted on the condition that the appellants file with the Court a letter of credit from a Canadian chartered bank or other like security satisfactory to the Prothonotary in an amount sufficient to insure prompt payment of the judgment in the event the appeal should be unsuccessful.

Johnston v. Montreal Trust Company of Canada, [1993] 1 P.E.I.R. 125 (P.E.I.S.C.-A.D.)

Application to stay proceedings pending an appeal from an order granting summary judgment on the issue of liability only. The stay was denied as the court was of the opinion the proper time for the stay application was after the quantum of damages had been determined.

PARTICULAR PROCEEDINGS**RULE 64****MORTGAGE ACTIONS****DEFINITION**

64.01 In Rules 64.03 to 64.06, "subsequent encumbrancer" means a person who has a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question in the action.

DEFAULT JUDGMENT WITH REFERENCE

64.02 Where a default judgment in a mortgage action directs a reference, the reference shall be directed to the Prothonotary.

FORECLOSURE ACTIONS**Persons to be Joined**

- 64.03** (1) In an action for foreclosure, all persons interested in the equity of redemption shall be named as defendants in the statement of claim, subject to subrule (2).
- (2) The plaintiff may commence a foreclosure action without naming subsequent encumbrancers as defendants where it appears expedient to do so by reason of their number or otherwise, but the plaintiff may make a motion without notice on a reference after judgment to add as defendants all subsequent encumbrancers who were not originally made parties.
- (3) On a reference, where the referee considers that subsequent encumbrancers should have been named as defendants in the statement of claim, the referee may refuse to allow the additional costs of adding them on the reference.

Statement of Claim

- (4) The statement of claim in a foreclosure action shall be in Form 14 B.

Claims that May be Joined

- (5) In a foreclosure action a mortgagee may also claim,
- (a) payment of the mortgage debt by any party personally liable for it; and
 - (b) possession of the mortgaged property.

Request to Redeem

- (6) A defendant in a foreclosure action who wishes to redeem the mortgaged property shall serve on the plaintiff and file with proof of service a request to redeem (Form 64 A) within the time prescribed by Rule 18.01 for

delivery of a statement of defence, or at any time before being noted in default, whether the defendant delivers a statement of defence or not.

- (7) A request to redeem filed by a defendant who is a subsequent encumbrancer shall contain particulars, verified by affidavit, of the claim and the amount owing.

Effect of Filing Request to Redeem

- (8) A defendant who has filed a request to redeem is entitled to,
- (a) seven days notice of the taking of the account of the amount due to the plaintiff; and
 - (b) sixty days after the taking of the account of the amount due to the plaintiff, to redeem the mortgaged property,
- but a defendant who is a subsequent encumbrancer is entitled to redeem only if the claim is proved on a reference or is not disputed.

Default Judgment where no Request to Redeem

- (9) Where a defendant in a foreclosure action has been noted in default and has not filed a request to redeem, the plaintiff,
- (a) if the plaintiff wishes a reference concerning subsequent encumbrancers, may require the registrar to sign judgment for foreclosure with a reference (Form 64 B); or
 - (b) if the plaintiff does not wish a reference concerning subsequent encumbrancers, may require the registrar to sign judgment for immediate foreclosure (Form 64 C).

Default Judgment where Request to Redeem Filed

- (10) Where a defendant in a foreclosure action has been noted in default but has filed a request to redeem, the plaintiff,
- (a) if the plaintiff wishes a reference concerning subsequent encumbrancers, may require the registrar to sign judgment for foreclosure with a reference (Form 64 B); or
 - (b) if the plaintiff does not wish a reference concerning subsequent encumbrancers, may require the registrar,
 - (i) to take an account of the amount due to the plaintiff,
 - (ii) where more than one party is entitled to redeem, to determine the priority in which each is so entitled, and
 - (iii) to sign judgment for foreclosure (Form 64 D).
- (11) Where, on the taking of the account or in determining priorities, any dispute arises between the parties, or the registrar is in doubt, the registrar may sign judgment for foreclosure with reference (Form 64 B).

Redemption by Named Defendant

- (12) In a foreclosure action, a defendant named in the statement of claim,
- (a) who has filed a request to redeem; and
 - (b) whose claim is proved on a reference or is not disputed, if he or she is a subsequent encumbrancer,
- may redeem the mortgaged property on paying, within the time fixed by the judgment or report on a reference, the amount, including costs, found due to the plaintiff.

Redemption by Encumbrancer Added on Reference

- (13) A subsequent encumbrancer added on a reference who attends on the reference and whose claim is proved or is not disputed is entitled to redeem the mortgaged property within the time fixed by the report on the reference.

Foreclosure of Subsequent Encumbrancer

- (14) Where a subsequent encumbrancer has been served with a notice of reference under subrule 64.06(4), (7) or (8) and fails to attend and prove a claim on the reference, the referee shall so report and, on confirmation of the report, the claim of that party is foreclosed and the plaintiff may obtain a final order of foreclosure (Form 64 E) against that party on motion to the court without notice.

Final Order of Foreclosure

- (15) Where no defendant other than a subsequent encumbrancer has filed a request to redeem, and where no subsequent encumbrancer has attended and proved a claim on the reference, the referee shall so report and, on confirmation of the report, a final order of foreclosure may be obtained against all defendants on motion to the court without notice.
- (16) On default of payment according to the judgment or report on a reference in a foreclosure action, a final order of foreclosure may be obtained against the party in default on motion to the court without notice.

Conversion from Foreclosure to Sale

- (17) A defendant in a foreclosure action who is not a subsequent encumbrancer, and who wishes a sale but does not wish to defend the action, shall serve on the plaintiff and file with proof of service a request for sale (Form 64 F) within the time prescribed by Rule 18.01 for delivery of a statement of defence, or at any time before being noted in default, and the plaintiff may require the registrar to sign judgment for sale (Form 64 G or 64 H).
- (18) A subsequent encumbrancer named as a defendant in the statement of claim in a foreclosure action who wishes a sale, but does not wish to defend the action or redeem the mortgaged property, shall within the time prescribed by Rule 18.01 for delivery of a statement of defence, or at any time before being noted in default,

- (a) pay into court the sum of \$250 as security for the costs of the plaintiff and of any other party having carriage of the sale; and
 - (b) serve on the plaintiff and file with proof of service a request for sale (Form 64 F), together with particulars, verified by affidavit, of the claim and the amount owing,
- and the plaintiff may require the registrar to sign judgment for sale (Form 64 I) conditional on proof of the subsequent encumbrancer's claim.
- (19) A subsequent encumbrancer added on a reference in a foreclosure action who wishes a sale shall within ten days after service on the encumbrancer of notice of the reference, or where the encumbrancer is served outside Prince Edward Island within such further time as the referee directs,
- (a) pay into court the sum of \$250 as security for the costs of the plaintiff and of any other party having carriage of the sale; and
 - (b) serve on the plaintiff, and file with proof of service, a request for sale (Form 64 F), together with particulars, verified by affidavit, of the claim and the amount owing,
- and where the subsequent encumbrancer attends and proves a claim on the reference, the referee shall make an order amending the judgment from a judgment for foreclosure to a judgment for sale.
- (20) On the reference, the referee may require the subsequent encumbrancer to pay an additional sum of money into court as security for costs.
- (21) The referee shall deal with the security given under subrule (18), (19) or (20) in the report on the reference.

Power of Referee to Convert from Foreclosure to Sale

- (22) The referee may on the motion of any party, either before or after judgment, direct a sale instead of foreclosure and may direct an immediate sale without previously determining the priorities of encumbrancers or giving the usual or any time to redeem.

Power of Referee to Reconvert to Foreclosure

- (23) Where a foreclosure action has been converted into a sale action, the referee may, on the motion of any party, either before or after judgment, direct foreclosure instead of a sale where it appears that the value of the property is unlikely to be sufficient to satisfy the claim of the plaintiff.

Where Judgment for Sale Obtained in Foreclosure Action

- (24) Where a judgment for sale has been obtained in a foreclosure action, a subsequent encumbrancer is entitled to notice of the hearing for directions on the reference for sale, whether the encumbrancer has filed a request to redeem the mortgaged property or not.
- (25) A plaintiff who wishes to transfer carriage of the sale to the defendant requesting the sale may do so by serving on the defendant a notice of

election to transfer carriage of the sale and filing it with proof of service, and the defendant then has carriage of the sale and is entitled to the return of the deposit paid into court under subrule (18), (19) or (20).

Procedure on Reference where Foreclosure Action Converted to Sale

- (26) Where a foreclosure action is converted to a sale action under subrule (17), (18), (19), or (22), the reference shall proceed in the same manner as in a sale action.

SALE ACTIONS

Persons to be Joined

- 64.04** (1) In an action for sale of a mortgaged property, all persons interested in the equity of redemption, other than subsequent encumbrancers, shall be named as defendants in the statement of claim.
- (2) In a sale action, subsequent encumbrancers shall be added as parties on a reference after judgment.

Statement of Claim

- (3) The statement of claim in a sale action shall be in Form 14 B.

Claims that may be Joined

- (4) In a sale action, a mortgagee may also claim,
- (a) payment of the mortgage debt by any party personally liable for it; and
 - (b) possession of the mortgaged property.

Request to Redeem

- (5) A defendant in a sale action who wishes to redeem the mortgaged property shall serve on the plaintiff and file with proof of service a request to redeem (Form 64 A) within the time prescribed by Rule 18.01 for delivery of a statement of defence, or at any time before being noted in default, whether the defendant delivers a statement of defence or not.
- (6) In a sale action, a subsequent encumbrancer is not entitled to file a request to redeem, and where a foreclosure action is converted to a sale action, a subsequent encumbrancer is not entitled to redeem even though the encumbrancer has filed a request to redeem.

Effect of Filing Request to Redeem

- (7) A defendant who has filed a request to redeem is entitled to,
- (a) seven days notice of the taking of the account of the amount due to the plaintiff; and
 - (b) sixty days after the taking of the account of the amount due to the plaintiff, to redeem the mortgaged property.

Default Judgment

- (8) Where a defendant in a sale action has been noted in default and,
 - (a) has not filed a request to redeem, the plaintiff may require the registrar to sign judgment for immediate sale with a reference (Form 64 J); or
 - (b) has filed a request to redeem, the plaintiff may require the registrar to sign judgment for sale with a reference (Form 64 K).

Redemption by Named Defendant

- (9) In a sale action a defendant named in the statement of claim who has filed a request to redeem may redeem the mortgaged property on paying, within the time fixed by the report on the reference, the amount, including costs, found due to the plaintiff.

Final Order for Sale

- (10) Where no defendant has filed a request to redeem and where no subsequent encumbrancer has attended and proved a claim on the reference, the referee shall so report and, on confirmation of the report, a final order for sale (Form 64 L) may be obtained on motion to the court without notice.
- (11) On default of payment according to the judgment or a report on a reference in a sale action, a final order for sale may be obtained on motion to the court without notice.

Purchase Money

- (12) Where an order for sale has been obtained, the property shall be sold under the referee's direction, and the purchaser shall pay the purchase money into court unless the referee directs otherwise.
- (13) The purchase money shall be applied in payment of what has been found due to the plaintiff and the other encumbrancers, if any, according to their priorities, together with subsequent interest and subsequent costs.

Order for Payment of Deficiency on Sale

- (14) Where the purchase money is not sufficient to pay what has been found due to the plaintiff, the plaintiff is entitled, on motion to the court without notice, to an order for payment of the deficiency by any defendant liable for the mortgage debt.

REDEMPTION ACTIONS**Persons to be Joined**

- 64.05** (1) In an action for redemption of a mortgaged property, all persons interested in the equity of redemption, other than subsequent encumbrancers, shall be named as plaintiffs or defendants in the statement of claim.

- (2) In a redemption action, subsequent encumbrancers shall be added as defendants only where the plaintiff is declared foreclosed.

Claims that May be Joined

- (3) In a redemption action, a person interested in the equity of redemption may also claim possession of the mortgaged property.

Judgment

- (4) In a redemption action, where the defendant has been noted in default, the plaintiff may require the registrar to sign judgment for redemption (Form 64 M).
- (5) Every judgment for redemption shall direct a reference, whether or not there are any subsequent encumbrancers.

Where Plaintiff Fails to Redeem

- (6) On default of payment according to the report in a redemption action, the defendant is entitled, on motion to the court without notice, to a final order of foreclosure against the plaintiff or to an order dismissing the action with costs.
- (7) Where the plaintiff is declared foreclosed, directions may be given, in the final order foreclosing the plaintiff or by a subsequent order, that the reference be continued for redemption or foreclosure, or for redemption or sale, against any subsequent encumbrancers, or for the adjustment of the respective rights and liabilities of the original defendants.
- (8) Where the reference is continued under subrule (7),
 - (a) for redemption or foreclosure, the reference shall proceed in the same manner as in a foreclosure action;
 - (b) for redemption or sale, the reference shall proceed in the same manner as in a sale action,and for that purpose the last encumbrancer shall be treated as the owner of the equity of redemption.
- (9) Where the plaintiff is declared foreclosed, a subsequent encumbrancer who attends and proves a claim on the reference is entitled to thirty days to redeem the mortgaged property.

Where Nothing Due to Defendant

- (10) Where, on a reference in a redemption action, nothing is found due to the defendant, the defendant is liable for the costs of the action and the defendant shall pay any balance due to the plaintiff forthwith after confirmation of the report on the reference.

PROCEDURE ON MORTGAGE REFERENCES GENERALLY**Rule 55 Applies**

- 64.06** (1) Rule 55 (procedure on a reference) applies to a reference in an action for foreclosure, sale or redemption, except as provided in this rule.

Plaintiff to File Material Concerning Subsequent Encumbrancers

- (2) On a reference in an action for foreclosure, sale or redemption, the plaintiff shall file sufficient evidence to enable the referee to determine who appears to have a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question.

Duties and Powers of Referee

- (3) On the reference the referee shall,
- (a) add subsequent encumbrancers as defendants in accordance with subrule (4);
 - (b) fix a time and place for determining the validity of the claims of subsequent encumbrancers;
 - (c) determine who has a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question;
 - (d) take an account of what is due on the mortgage and what is due to subsequent encumbrancers who prove a claim;
 - (e) fix or assess the costs of the parties;
 - (f) fix a time and place for payment, where applicable;
 - (g) where the reference is for immediate sale, give directions for the sale and defer taking accounts until after the sale is held or proves abortive;
 - (h) where a sale is being conducted on the request of a subsequent encumbrancer, determine that the encumbrancer has a valid claim before giving directions for the sale;
 - (i) take all necessary steps for redemption by or foreclosure of the parties entitled to redeem the mortgaged property and, where applicable, for sale of the mortgaged property; and
 - (j) take subsequent accounts and fix or assess subsequent costs as required.

Adding Subsequent Encumbrancers

- (4) Subject to subrule 64.05(2) (subsequent encumbrancers in redemption action), the referee shall direct all persons who appear to have a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question and who were not named as defendants in the statement of claim to be added as defendants and to be served with a notice of reference to subsequent encumbrancer added on reference (Form 64 N).
- (5) A subsequent encumbrancer added under subrule (4) may be served with documents on the reference,

- (a) in the case of an execution creditor, by mail at the address shown on the writ of execution or the most recent request to renew it or, if the creditor's address is not shown, by serving the creditor's lawyer in a manner authorized by subrule 16.05(1);
 - (b) in the case of a person who has registered a claim for lien under the *Mechanics' Lien Act*, by mail at the address for service shown on the claim for lien; or
 - (c) in any other case, personally or by an alternative to personal service under Rule 16.03.
- (6) A person served with a notice under subrule (4) may move within ten days after service, or where the person is served outside Prince Edward Island, within such further time as the referee directs, to set aside or vary the judgment in the action or the order adding the person as a defendant.
- (7) Where it appears to the referee that a person who was named as a defendant in the statement of claim may have a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question, although the person was not alleged to be a subsequent encumbrancer in the statement of claim, the referee shall direct that defendant to be served with a notice of reference to subsequent encumbrancer named as original party (Form 64 O).

Notice of Reference to Original Defendants

- (8) Subject to subrule (10), all persons who were named as defendants in the statement of claim shall be served with a notice of reference to original defendants (Form 64 P), stating the names and nature of the claims of all those appearing to have a lien, charge or encumbrance on the mortgaged property.
- (9) Any person named as a defendant in the statement of claim who is not a subsequent encumbrancer and who has not filed a request to redeem or a request for sale may be served with the notice of reference by mail at the person's last known address.
- (10) A subsequent encumbrancer who was named as a defendant in the statement of claim and who has not filed a request to redeem or a request for sale is not entitled to notice of a reference for foreclosure.

Adding Parties Other than Encumbrancers

- (11) Where on a reference it appears that there are persons interested in the equity of redemption, other than subsequent encumbrancers, who are not already defendants to the action, the referee may order that they be added as defendants on the reference on such terms as are just, and the order shall be served on them, together with the judgment in the action and a notice to added party (Form 64 Q) personally or by an alternative to personal service under Rule 16.03.

- (12) A defendant added under subrule (11) may move within ten days after service of the material referred to in subrule (11), or where the defendant is served outside Prince Edward Island, within such further time as the referee directs, to set aside or vary the judgment in the action or the order adding the person as a defendant.

Where more than one Party Entitled to Redeem

- (13) One day shall be fixed for payment by all the parties entitled to redeem and, where more than one party is entitled to redeem, the referee shall determine the priority in which they are so entitled.
- (14) Where more than one defendant entitled to redeem makes payment, any such defendant may make a motion on the reference for further directions.

Proof of Account where Mortgage Assigned

- (15) In an action for foreclosure or sale by, or for redemption against, an assignee of a mortgagee, a statement of the mortgage account, verified by affidavit of the assignee, may be taken as proof of the state of the account and an affidavit is not required from the mortgagee or any intermediate assignee denying any payment to the mortgagee or intermediate assignee, unless the mortgagor or the mortgagor's assignee, or any party entitled to redeem, denies by affidavit the correctness of the statement of account.

Referee's Report

- (16) The referee shall set out in the report on the reference,
- (a) the names of,
 - (i) all persons who were parties on the reference,
 - (ii) all subsequent encumbrancers who were served with notice of the reference, and
 - (iii) all subsequent encumbrancers who failed to attend on the reference and prove their claims;
 - (b) the amount and priority of the claims of the parties who attended and proved their claims on the reference, and the report shall show those parties as the only encumbrancers of the property; and
 - (c) the date on which the report was settled.
- (17) The report shall be served on all parties who attended on the reference and on any defendant who filed a request to redeem or a request for sale and shall be filed with proof of service.
- (18) Where any period fixed for payment expires within fifteen days after confirmation of the report, a new account shall be taken.

Mortgagee to Transfer Property where Redeemed

- (19) Where a party pays the amount found due on the mortgage, the mortgagee shall, unless the judgment directs otherwise, transfer the mortgaged

property to the party making the payment or his or her nominee, free and clear of all encumbrances incurred by the mortgagee, and the mortgagee shall deliver up all instruments in his or her possession, control or power that relate to the mortgaged property.

Prothonotary May Request Directions

- (19.1) A Prothonotary who is of the opinion that a mortgage reference ought to be dealt with by a judge may request directions from a judge.

Change of Account

- (20) Where the state of account as ascertained by an order or report has changed before the day fixed for payment, the mortgagee may, at least fifteen days before that day, serve notice of the change of account on the person required to pay, giving particulars of the change of account and of the sum to be paid.
- (21) Where notice of a change of account has been served and the sums mentioned in it are proper, the court may make a final order without further notice or, on the motion for a final order, may fix a new day for payment and may require notice to be served.
- (22) A party served with notice of change of account who is dissatisfied may make a motion to the court to determine the amount to be paid and to fix a new day for payment.
- (23) Where the state of account has changed before the day fixed for payment and notice of change has not been served,
- (a) where the amount payable for redemption is reduced, a new day shall be fixed for payment, on notice to the persons entitled to redeem; or
 - (b) where the amount payable for redemption has increased, the mortgagee may move for a final order after the day fixed for payment, without the fixing of a new day.
- (24) Where the state of the new account has changed after the day fixed for payment, it is not necessary to fix a new day, unless the court so directs on the motion for a final order.
- (25) Where it becomes necessary to fix a new day for payment after the expiration of the original period, the further time allowed shall be thirty days, unless the court orders otherwise.
- (26) Despite subrule (25), the court may, on motion of any party, extend or abridge the time for redemption for such time and on such terms as are just.

RULE 65**ESTATES OF DECEASED PERSONS****ACTING REGISTRAR**

65.01 An acting registrar appointed by the Lieutenant-Governor-in-Council shall have all the power and authority of a registrar and shall perform the duties assigned by a judge or registrar.

SEAL

65.02 The seal to be used in the Estates Section shall be the seal established and declared and which seal shall be impressed on all documents requiring to be issued, exemplified or otherwise authenticated under the seal in that section.

SIGNING AND SEALING GRANTS

- 65.03** (1) All grants of probate, administration or guardianship and every exemplification thereof, all orders and decrees issued by the court, and all citations, warrants and subpoenas shall be signed by the registrar and issued under the seal of the Estates Section.
- (2) Any copy of a will or other document forming part of or attached to a grant or other document issued under the seal of the court shall be authenticated by the signature of the registrar.
- (3) A judge may sign all documents requiring the signature of the registrar and in lieu of the registrar.
- (4) All decrees passing accounts shall, in addition to being signed by the registrar, be signed on the face thereof by a judge.

WILLS TO BE COPIED

65.04 Every will filed with the registrar shall be copied in a book kept for the purpose, and such copy when certified by a judge or registrar shall be deemed to be a true copy of such will.

PAPERS TO BE DRAWN BY PARTIES

65.05 The registrar is not permitted to draw up or prepare any petitions, inventories or other papers to be presented for filing but the same shall be furnished by the applicant or person presenting the same for filing.

FORMALITIES OF DOCUMENTS

65.06 Every document filed in the Estates Section shall be dated and identified with the name of the court and the section and the matter to which it relates. The nature of every such document shall be designated by appropriate words on the face thereof above or below the name of the court, eg., "Petition for Probate", "Inventory", "Affidavit". Numbers may be stated in figures.

FILING

65.07 Unless otherwise directed by a judge, all documents filed in the court shall be so filed with the registrar.

SIZE OF PAPER

65.08 All proceedings in court shall be written on sheets of paper eight and one-half inches in width and eleven inches in length but a judge may permit any document to be written on paper of other size. No document purporting to be a copy of the original shall be accepted for filing unless otherwise ordered by a judge.

REMAIN IN COURT

65.09 All proceedings of the section shall remain of record in the section but they may at all reasonable times be inspected by any person upon payment of a search fee.

PROCEEDINGS ON SEARCH

65.10 Every person making a search shall declare to the registrar the name of the matter or estate which the person may be searching.

PETITION FOR PROBATE AND ADMINISTRATION

- 65.11** (1) All applications for Letters Probate or Letters of Administration shall be made by Petition setting out:
- (a) the date of the death of the person whose will is to be probated or whose estate is to be administered;
 - (b) the marital status of the deceased at the time of death;
 - (c) whether any marriage of the deceased, or a person with whom a form of marriage was celebrated, has been dissolved or annulled and if so the particulars of such dissolution or annulment;
 - (d) the name, age and address of every child of the deceased.
- (2) Petitions shall be in the following forms:
- (a) Petition for Probate, Form 65 A;
 - (b) Petition for Administration with will annexed, Form 65 B;
 - (c) Petition for Administration, Form 65 C;
 - (d) Petition for Administration of Goods Unadministered either with will annexed or on intestacy (no form provided, other forms may be varied to set up such a petition).
- (3) The personal representative shall file an inventory of the estate as required by section 48 of the *Probate Act* and may be in Form 65 E.

WITNESS MAY NOT ACT AS A COMMISSIONER

65.12 No proof of any will shall be accepted where the commissioner taking the affidavit of proof is a witness to the will.

INVENTORY NECESSARY WHEN WILL FILED AND REGISTERED

65.13 Every will presented for filing unaccompanied by a petition for probate shall be accompanied by an inventory of the property owned by the testator at the time of his or her death, and such inventory shall state the date of death.

INVENTORIES AND ACCOUNTS TO BE TOTALLED

65.14 All inventories and accounts before being accepted for filing shall be totalled both as to assets or receipts and liabilities, notwithstanding that additional items may be furnished subsequently to such filing.

VERIFICATION

65.15 All petitions, inventories and accounts presented for filing shall be verified by affidavit.

PRACTICE ON RE-SEALING

- 65.16** (1) On an application for resealing a document, pursuant to Section 44 of the *Probate Act*, the following papers shall be filed:
- (a) the original grant and exemplification or other verified copy of the original grant;
 - (b) petition of the executor or other person receiving the original grant setting forth the relevant facts and requesting that the original grant (or as the case may be) may be sealed with the seal of the Estates Section;
 - (c) an inventory of the property of the deceased detailed as to property within and general as to property outside the Province;
 - (d) a statement of the names, ages and relationship to the deceased of the beneficiaries of the property passing on the death of the deceased; and
 - (e) certificate required by section 44(3) of the *Probate Act*.
- (2) Filing of the original grant may be dispensed with by order of the court if it is established that the original grant cannot be obtained.
- (3) Where there is real estate in Prince Edward Island it shall be shown that the will was executed in manner and form sufficient to pass real estate in Prince Edward Island.
- (4) Upon the application being so perfected the presiding judge shall make an order for the sealing of the original grant or other document submitted for the purpose with the seal of the Estates Section and the registrar shall duly affix such seal after endorsing the substance of the judge's order on the document so to be sealed.

GRANT OF ANCILLARY PROBATE AND ADMINISTRATION

65.17 Where probate or administration has been granted by a court in a foreign country in which the deceased was domiciled, and there is real or personal property of

the deceased within the Province, ancillary letters probate or ancillary letters of administration shall issue upon application and upon payment of the prescribed fees.

PROCEDURE ON APPLICATION FOR ANCILLARY PROBATE AND ADMINISTRATION

65.18 On an application for ancillary letters probate or ancillary letters of administration with the will annexed, the following papers shall be filed:

- (1) Exemplification of the foreign grant including a copy of the will;
- (2) Petition of the executor, or other person receiving the foreign grant, substantially in the form of the petition for such a grant in the estate of a deceased domiciled in the Province;
- (3) An inventory of all the property of the deceased detailed as to property within and general as to property outside the Province;
- (4) Unless described in the petition a statement of the names, ages and relationships to the deceased of the beneficiaries of the property passing on the death of the deceased;
- (5) On Ancillary Administration only, a bond in double the amount of the personal property and real estate in the Province or otherwise as the presiding judge may direct, which bond shall be guaranteed by a person having assets in this Province or by a guarantee company;
- (6) Petitioner's oath of office;
- (7) Where there is real estate in Prince Edward Island it shall be shown that the will was executed in manner and form sufficient to pass real estate in Prince Edward Island.

DOUBLE PROBATE

- 65.19** (1) Where all of the executors named in a will have not made application for probate and the right has been reserved to one or more of them to make application for probate at some future time, or if an alternative executor is called upon to complete the administration, and, in either case, if it is desired to have the appointment of such executor or executors confirmed by the court, the grant for which the application is made shall be termed "double probate".
- (2) The application shall state, in addition to the fact of the original probate having been granted to the original applicant, the reason for the second application.
 - (3) The will or the copy contained in the original grant shall be marked as an exhibit to the affidavit of the applicant and shall be identified by his or her signature.
 - (4) The original letters probate shall be surrendered with the application.

UNDATED WILL

65.20 If a will is not dated or is dated imperfectly, one of the attesting witnesses shall furnish evidence of the date of execution, or where such evidence cannot be obtained, evidence shall be furnished of the execution between two definite dates, or that search has been made and that no will of presumably later date has been found.

CITATION TO ACCEPT PROBATE

- 65.21** (1) Where an executor fails to bring in a will for probate, any person interested may cite the executor to accept or refuse the probate and execution of the will, or to show cause why probate or administration with the will annexed, as the case may be, should not be granted to the applicant or to such other person having the prior right thereto who is willing to accept the same.
- (2) No such citation shall issue until after the lapse of thirty days from the testator's death.

CITATION TO BRING IN WILL

65.22 Where it is shown to the satisfaction of the judge that any testamentary document may be in the custody of a person, a citation may be issued to such person, calling upon them to deposit in the office of the registrar any testamentary document in their possession or control, or to state under oath that no such document is in their possession or control.

SUBPOENA TO EXAMINE PERSON HAVING KNOWLEDGE OF WILL OR ASSETS OF AN ESTATE

65.23 Where it is shown to the satisfaction of a judge that a person has knowledge of any will or other document or any asset relating to or purporting to relate to or belong to an estate, a subpoena may by leave of the judge be served upon such person calling upon them to attend at a time and place to be named and to be examined concerning the same.

CITATION WHERE INTESTACY

- 65.24** (1) Where upon an intestacy, letters of administration have not been issued, any person interested shall before themselves applying for grant cite those having a prior right to accept or refuse administration, and in default of application being made by them, they may file their own petition and proofs.
- (2) Unless otherwise ordered, no such citation shall issue until after the expiration of thirty days from the date of death of the intestate.

REVOCATION OF GRANT

65.25 (1) Where it is sought to revoke a grant, a citation may issue calling upon the person in whose favour the grant has been made to bring the grant into the registrar's office within the time specified in the citation and pending the

determination of the proceedings, the person holding the grant shall not act thereunder without the leave of the judge.

- (2) Upon the revocation of a grant of probate, administration or guardianship, an entry thereof shall be made by the registrar across the face of the grant recorded by the registrar in the following form:

"Revoked by Judge's Order, dated the ____ day of ____, 20__."

CAVEATS AND OBJECTIONS

- 65.26** (1) A caveat pursuant to section 39 of the *Probate Act* shall be in Form 65 EE and the registrar shall thereafter, during the validity of the caveat, provide notice of any application made in the matter of the estate in Form 65 HH.
- (2) A caveat pursuant to section 40 of the *Probate Act* shall be in Form 65 CC and the registrar shall thereafter, during the validity of the caveat, provide notice of any application made in the matter of the estate in Form 65 HH and such caveator shall, within 30 days, make a motion seeking directions pursuant to Rule 65.30.
 - (3) Any person claiming an interest in an estate may file a caveat in Form 65 DDD, and the registrar shall thereafter, during the validity of the caveat, provide notice of any application made in the matter of the estate in Form 65 HH and such caveator may make a motion seeking directions pursuant to Rule 65.30.

PROOF IN SOLEMN FORM

- 65.27** Any person filing a caveat pursuant to section 39 of the *Probate Act* shall within 30 days of filing the caveat or a renewal thereof deliver a notice in Form 65 II upon the executor, administrator, or party acting in place of the executor, calling upon the said executor, administrator, or party to prove the will in solemn form within 30 days of the service of such notice and prior to further proceedings being taken by such caveator, the executor, administrator, or party may proceed according to Rule 65.28.
- 65.28** (1) Any person seeking to propound a will by proof in solemn form may file a petition therefor in Form 65 BBB, and such petition shall allege due execution of the will and capacity of the testator.
- (2) Such petition shall be accompanied by an inventory of the property owned by the alleged testator at the time of death and made to the best of the propounder's knowledge and information, and an Affidavit of the Petitioner verifying the allegations contained in the petition.
 - (3) Upon filing of such petition the petitioner shall present a citation in Form 65 FF, and the same shall thereupon be issued by the Registrar.
 - (4) A citation issued under Rule 65.28 (3) shall be served on any person who has

filed a caveat under section 39 of the *Probate Act*.

- (5) Following the issuance of a citation under Rule 65.28 (3) the propounder may move for directions under Rule 65.30.
- 65.29** (1) After the expiration of 30 days from the service of the notice referred to in Rule 65.27, any person who has filed a caveat under section 39 of the *Probate Act* may file a petition in Form 65 CCC calling upon the propounder of the will to prove the same in solemn form due to one or more of the following grounds:
- (a) lack of due execution;
 - (b) lack of capacity of the testator;
 - (c) lack of knowledge and approval of the contents of the will;
 - (d) allegation of undue influence or fraud.
- (2) Such a petition shall be accompanied by an Affidavit of the Petitioner verifying the allegations contained in the petition.
 - (3) Upon the filing of such petition by the caveator, the caveator shall present a citation in Form 65 FF and same shall be issued by the Registrar.
 - (4) A citation issued under Rule 65.29 (3) shall be served on any person who has filed a caveat under section 39 of the *Probate Act* as well as executor, administrator, or party acting in place of the executor.
 - (5) Following the issuance of a citation under Rule 65.29 (3) the caveator may move for directions under Rule 65.30 if the executor, administrator, or party acting in place of the executor has failed to propound the will.

MOTIONS FOR DIRECTIONS

- 65.30** (1) Any person who appears to have an interest in an estate may move for directions, or move for directions in another proceeding under this rule, as to the procedure for bringing or continuing any matter before the court.
- (2) A motion for directions shall be served on all persons appearing to have a financial interest in the estate, or as the court directs, at least 10 days before the hearing of the motion.
 - (3) On a motion for directions, the court may direct,
 - (a) the issues to be decided;
 - (b) the conduct of any Discovery of Documents or Examination for Discovery;
 - (c) who are parties, and the order of presentation at the hearing of the motion;
 - (d) who shall be served with the order for directions, and the method and times of service;
 - (e) procedures for bringing the matter before the court in a summary fashion, where appropriate;

- (f) that an estate trustee be appointed during litigation, and file such security as the court directs;
 - (g) that a settlement conference be conducted under Rule 50.1;
 - (h) direct a reference under Rule 55;
 - (i) such other procedures as are just.
- (4) Rule 37 shall apply to any motion under this Rule, with necessary modifications.

PROCEEDING ON RETURN OF CITATION

- 65.31** (1) On the return of every citation to prove a will in solemn form the petitioner shall first present to the court his or her petition, citation, and proof that all persons to be notified have been duly notified according to any order for service in the citation or otherwise.
- (2) The propounder of the will, except as to the fourth ground denoted in Rule 65.29(1), shall proceed as and be in the position of the plaintiff (and be designated as such) in a civil action and the caveator shall proceed as and be in the position of the defendant (and be designated as such).
- (3) Where there is an allegation of undue influence or fraud the party so alleging shall proceed as and be in the position of a counterclaiming defendant in a civil action.

JOINDER OF PARTIES

- 65.32** After proof of service as required in Rule 65.30 the court may join any person with the plaintiff or the defendant, as their interest may appear, upon such directions as to costs as the court may order.

VESTING ORDER

- 65.33** The practice as to proceedings and forms under section 108 of the *Probate Act*, sub-sections (2) and (3), shall mutatis mutandis be comparable to the practice and forms in the Rules of Court relating to sales of land for like proceedings.

NOTICE OF MOTION

- 65.34** Any application in any action or proceeding the procedure for which is not prescribed by the *Probate Act* or these Rules and the practice whereon is not clearly defined may, unless otherwise directed by the judge, be made by motion, and notice of the motion shall be given to all parties to be affected by order sought.

NOTICE TO BE GIVEN

- 65.35** If on the hearing of a motion it appears that any person to whom notice has not been given ought to have had notice, the court may adjourn the hearing thereof in order that proper notice may be given.

ORDER FOR PRODUCTION OF DOCUMENT

- 65.36** (1) No subpoena for the production of an original record or of an original document from the Estates Section shall be issued, but an order for its production or transmission to any other section of the Supreme Court may be made by any Judge of the Supreme Court.
- (2) Except in special circumstances requiring or justifying the production of the original, no such order shall be made where the document may be proved by a certified copy.

MODE OF SERVICE

- 65.37** (1) All notices, citations and other documents requiring or ordered to be served shall be served in the same manner as an originating process may be served if no other method of service is specified.
- (2) An order or direction for service by registered mail shall be deemed to mean and include the mailing of a copy of the document to be served by registered mail prepaid for acknowledgement of receipt addressed to the person to be served at his or her last known address.

PASSING OF ACCOUNTS

- 65.38** Executors, administrators and trustees who are passing accounts shall render an account of the administration of the estate to the court in accordance with section 54 of the *Probate Act*.
- 65.39** Any person who appears to have an interest in the estate may, where a petition to pass accounts has been filed, move for directions under Rule 65.30.

PROCEDURE

- 65.40** (1) A petition with inventories and accounts duly verified by affidavits shall be filed with the registrar and thereupon the judge shall fix a time and place for the passing of the accounts and shall issue a citation to pass accounts.
- (2) Before a citation to pass accounts is issued the petitioner shall satisfy the registrar by affidavit that the provisions of section 49 of the *Probate Act* have been complied with and no such citation shall issue until after the expiration of the time limits for presentation of claims in accordance with the notice of the personal representative published as required by section 47 of the *Probate Act*.
- (3) The judge shall give all necessary directions for the service and publication of the citation, and, if he or she deems it proper, for the service of a copy of the accounts, upon those interested therein including a representative of any deceased beneficiary.
- (4) Where an infant is concerned, contingently or otherwise, notice shall be given to the official guardian who shall be informed of the name and interest of the

infant and given the address of the person with whom the infant resides, and there shall also be served upon the official guardian a copy of the petition, the inventories and accounts duly verified by affidavits and a copy of the letters probate or letters of administration.

- (5) Where a person who lacks capacity is concerned, contingent or otherwise, notice shall be given to their guardian or trustee.
- (6) Where there is no guardian or trustee of such person notice shall be given to the Public Guardian and Trustee who shall be informed of the name and interest and the latest known address of such person and there shall also be served upon the Public Guardian and Trustee a copy of the petition, the inventories and accounts duly verified by affidavits and a copy of the letters probate of the last will and testament of the deceased.
- (7) The accounts shall be passed before the judge sitting in chambers.

CONTENTS

- 65.41** (1) The accounts shall contain a true and perfect inventory of the whole property in question, including:
- (a) an account showing of what the original estate consisted;
 - (b) an account of all money received;
 - (c) an account of all money disbursed;
 - (d) an account of all property remaining on hand;
 - (e) statement of compensation claimed by the executor or administrator; and
 - (f) such other accounts as the judge requires.
- (2) Where principal and income are dealt with separately by the will or instrument creating any trust estate, the accounts shall be divided as to show separately, receipts and disbursements in respect of principal and income and in every other case the amounts may be so divided if the accounts of principal and income have been kept separate.
- (3) Where executors, administrators, trustees or guardians have made investments of trust funds, the accounts shall show separately particulars of:
- (a) all money so invested;
 - (b) all money received by way of repayment of or realization upon such investments in whole or in part; and
 - (c) the balance of all such investments remaining on hand.
- (4) The inventory shall be in Form 65 AAA.

COSTS

65.42 Upon passing accounts, the judge may reduce any bill of costs and charges of lawyers employed by the executors, administrators, trustees, or guardians, or refer the same for assessment by the Prothonotary.

DECREE IN DUPLICATE, FILING AND SERVICE

- 65.43** (1) Every decree made upon passing accounts shall be made in duplicate and one of such duplicates shall be filed with the registrar.
- (2) The decree shall be served by registered mail or in such other manner as the judge directs upon the persons who attended or were represented at the passing of the accounts.

FORMS

- 65.44** (1) Forms 65 A to 65 AAA shall be used for the purposes of this rule with such variations or modifications as circumstances may require, but any variance therefrom, not being in matter of substance, does not affect their regularity.
- (2) The provisions contained in the forms prescribed shall be deemed to be authorized by these Rules.

APPLICATION OF RULES

65.45 Insofar as the *Probate Act* and this Rule (Rule 65) do not specifically provide, the general Rules applying in the Supreme Court shall apply to proceedings in the Estates Section.

RULE 66**PARTITION PROCEEDINGS****GENERAL**

- 66.01** (1) The originating process for the commencement of a proceeding for the partition of land under Part 3 of the *Real Property Act* is a notice of application or statement of claim.
- (2) A proceeding for partition may be commenced by any person who is entitled to compel partition.
- (3) A proceeding for partition shall be in accordance with the provisions of Part 3 of the *Real Property Act*.
- (4) These rules apply to such proceedings with necessary modifications except where the rules are inconsistent with the provisions of Part 5 of the *Real Property Act* in which case the rules do not apply to the extent of any such inconsistency.
- (5) A proceeding for partition by or on behalf of a minor shall be on notice to the Official Guardian.

Form of Judgment

- 66.02** A judgment for partition shall be in Form 66 A.

Proceeds of Sale

- 66.03** All money realized in a partition proceeding from a sale of land shall forthwith be paid into court, unless the parties agree otherwise, and no money shall be distributed or paid out except by order of a judge or, on a reference, by order of the referee.

Redmond v. Walsh, 2022 PECA 15

On an application for partition, the court must consider all relevant evidence that permits a solution that is advantageous for all owners.

Campbell, Harris and Kays v. Ford and Harris, 2022 PESC 13

Where seven family members disagreed on the method of sale of real property owned by them, the court ordered the sale to be facilitated by the prothonotary, based on the goals of maximizing selling price, and a fair, transparent and timely sale.

RULE 67

PROCEEDINGS CONCERNING REAL PROPERTY OF MINORS

PROCEDURE

- 67.01** (1) The originating process for commencement of a proceeding for the sale, mortgage, lease or other disposition of the property of a minor is a notice of application on notice to the Official Guardian.
- (2) The proceeding shall be in accordance with Part 5 of the *Real Property Act* (Minors - proceedings relating to).
- (3) These rules apply to such proceedings with necessary modifications except where the rules are inconsistent with the provisions of Part 5 of the *Real Property Act* in which case the rules do not apply to the extent of any such inconsistency.

RULE 68**PROCEEDINGS FOR JUDICIAL REVIEW****HOW COMMENCED**

68.01 An application under the *Judicial Review Act* shall be commenced by notice of application in Form 68 A.

APPLICABLE PROCEDURE

68.02 Rule 38, with necessary modifications, applies to applications under the *Judicial Review Act*.

HEARING DATE

68.03 A notice of application shall state that the application is to be heard on a date to be fixed by the Registrar.

APPLICATION RECORDS AND FACTUMS**Applicant**

- 68.04** (1) The applicant shall deliver an application record and a factum,
- (a) where the nature of the application requires a record of the proceeding before the court or tribunal whose decision is to be reviewed, within thirty days after the record is filed with the Registrar; or
 - (b) where the nature of the application does not require such a record, within thirty days after the application is commenced.
- (2) The applicant's application record shall contain, in consecutively numbered pages arranged in the following order,
- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
 - (b) a copy of the notice of application;
 - (b.1) a copy of the reasons, of the court or tribunal whose decision is to be reviewed, with a further typed or printed copy if the reasons are handwritten.
 - (c) a copy of all affidavits and other material served by any party for use on the application;
 - (d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and
 - (e) a copy of any other material in the court file that is necessary for the hearing of the application.

- (3) The applicant's factum shall be signed by the applicant, the applicant's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, and shall consist of
- (a) Part I, containing a statement identifying the applicant and the court or tribunal whose decision is to be reviewed and stating the result in that court or tribunal;
 - (b) Part II, containing a concise summary of the facts relevant to the issues on the application, with specific reference to the evidence;
 - (c) Part III, containing a statement of each issue raised, immediately followed by a concise statement of the law and authorities, together with argument, relating to that issue;
 - (d) Part IV, containing a statement of the order that the court will be asked to make, including any order for costs;
 - (e) Schedule A, containing a list of the authorities referred to; and
 - (f) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws
- in paragraphs numbered consecutively throughout the factum.

Respondent

- (4) The respondent shall deliver an application record and a factum within thirty days after service of the applicant's application record and factum.
- (5) The respondent's application record shall contain, in consecutively numbered pages arranged in the following order,
- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and
 - (b) a copy of any material to be used by the respondent on the application and not included in the application record.
- (6) The respondent's factum shall be signed by the respondent's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, and shall consist of,
- (a) Part I, containing a statement of the facts in the applicant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees and a concise summary of any additional facts relied on, with specific reference to the evidence;
 - (b) Part II, containing the position of the respondent with respect to each issue raised by the applicant, immediately followed by a concise statement of the law and the authorities, together with argument, relating to that issue;

- (c) Part III, containing a statement of any additional issues raised by the respondent, the statement of each issue to be immediately followed by a concise statement of the law and the authorities, together with argument, relating to that issue;
- (d) Part IV, containing a statement of the order that the court will be asked to make, including any order for costs;
- (e) Schedule A, containing a list of the authorities referred to; and
- (f) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws that are not included in Schedule B to the applicant's factum,

in paragraphs numbered consecutively throughout the factum.

Copies for Use of the Court

- (7) The parties shall file one copy of their application records and factums for the use of the court.

Material may be Filed as Part of Record

- (8) Any material served by a party for use on an application may be filed, together with proof of service, as part of the party's application record and need not be filed separately if the record is filed within the time prescribed for filing the notice or other material.

Transcript of Evidence

- (9) Despite subrule 34.18(2)(time for filing transcript), a party who intends to refer to a transcript of evidence at the hearing shall file two copies of the transcript with the application record and factum.

Early Hearing of Applications

- (10) On application by any party to a proceeding under this rule, the court may, in special circumstances, order an early hearing of an application and may give any necessary directions.

CERTIFICATE OF PERFECTION

- 68.05** (1) The applicant shall file with the application record a certificate of perfection (Form 68 B),
- (a) stating that all the material required to be filed by the applicant for the hearing of the application has been filed; and
 - (b) setting out, with respect to every party to the application and any other person entitled by statute or by an order under Rule 13 (intervention) to be heard on the application,
 - (i) the name, address, telephone number and email address of the lawyer for every party or other person, or
 - (ii) the name, address, telephone number, and email address of every party or other person, if acting in person.

- (2) When the certificate of perfection has been filed, the registrar shall place the application on a list for hearing and give notice of listing for hearing (Form 68 D) by mail to the parties and the other persons named in the certificate of perfection.

DISMISSAL FOR DELAY

Motion by Respondent

- 68.06** (1) Where the applicant has not,
- (a) delivered an application record and factum within the time prescribed by subrule 68.04(1); or
 - (b) filed a certificate of perfection as required by subrule 68.05(1),
- the respondent may make a motion to the Registrar at the place of hearing, on ten days' notice to the applicant, to have the application dismissed for delay.

Notice by Registrar

- (2) Where the applicant has not delivered an application record and factum and filed a certificate of perfection within one year after the application was commenced, the Registrar may serve notice on the applicant that the application will be dismissed for delay unless the applicant delivers an application record and factum and files a certificate of perfection within ten days after service of notice.

Registrar to Dismiss where Default not Cured

- (3) Where the applicant does not cure the default within ten days after service of a notice under subrule (1) or (2) or such longer period as a judge allows, the Registrar shall make an order in Form 68 C dismissing the application for delay.
- (4) Where an application is dismissed pursuant to subrule (3), the application is at an end, and the respondent is entitled to costs, unless the Court or a judge thereof orders otherwise.

Review of Registrar's Dismissal

- (5) A party affected by an order of the registrar under subrule (3) may make a motion under subrule 61.13(9) to set aside or vary the order.

PEI Public Schools Branch v. PEI Teachers' Federation, 2023 PESC 18

An applicant for judicial review sought to include an affidavit which was not before the arbitrator. The court denied the motion, as it fell outside the exceptions for supplementing the record.

H.P. v. IIDI, 2022 PESC 1

The court declined to order additional documents to be included in the record, as they were either not relevant to the proceeding, or subject to solicitor-client privilege.

R. v. Handregan (1992), 97 Nfld. & P.E.I.R. 330 (P.E.I.S.C.-T.D.)

Generally, the Rules of Civil Procedure intend that proceedings should be upheld and allowed to proceed and not defeated for irregularities or defects where no wrong or injustice will be done to any party thereby.

No precise rules can be laid down as to the exact circumstances which call for the exercise of the discretion of the court as provided in Rule 68.01. The court must be satisfied that the delay will not cause substantial prejudice to anyone when granting an extension of time for commencing an application under the *Judicial Review Act*.

Note: There are cases addressing the extension of time for filing an application for judicial review; however, such applications are made pursuant to s. 3(1) of the *Judicial Review Act* and not the Rules of Civil Procedure. They are: *Anne & Gilbert v. Prince Edward Island (Minister of Finance & Municipal Affairs)*, 2012 PECA 4; *McKenna's Furniture v. The Office of the Provincial Fire Marshall and Department of Provincial Affairs and Attorney General*. (1997), 152 Nfld. & P.E.I.R. 212 (P.E.I.S.C.-T.D.); *Reiten v. Prince Edward Island (Human Rights Commission)* (1997), 153 Nfld. & P.E.I.R. 327 (P.E.I.S.C.-T.D.); *Concerned Citizens of Borden and Carleton Siding v. Prince Edward Island (Minister of Environmental Resources)* (1994), 119 Nfld. & P.E.I.R. 167 (P.E.I.S.C.-T.D.); and *Thibodeau v. P.E.I. Human Rights Commission* (1993), 110 Nfld. & P.E.I.R. 249 (P.E.I.S.C.-T.D.)

69.01 PROCEEDINGS UNDER THE ADULT GUARDIANSHIP AND TRUSTEESHIP ACT

RULE 69

PROCEEDINGS UNDER THE ADULT GUARDIANSHIP AND TRUSTEESHIP ACT

PROCEDURE

- 69.01** Proceedings in the Supreme Court relating to the capacity, or lack thereof, of a person shall be taken in accordance with the *Adult Guardianship and Trusteeship Act* but these rules, with necessary modifications, shall apply to such proceedings except to the extent of any inconsistency with the said statute.
- 69.02** In addition to the items outlined in the *Adult Guardianship and Trusteeship Act*, and any regulations made thereto, accounts filed with the Prothonotary under the legislation shall include such other information that the Prothonotary requires.
- 69.03** In passing the accounts, the Prothonotary may cause parties to be examined, and to produce books, papers and writings, as the Prothonotary thinks fit and may determine what books, papers and writings are to be produced, and where and how long they are to be left with the Prothonotary or the court.
- 69.04** The Prothonotary has the authority to order a guardian, personal representative, or trustee to undertake an audit, or to directly order that an audit be undertaken, of the accounts by a qualified person or firm and filed with the court.
- 69.05** In addition to rendering true and correct accounts of the person under disability in accordance with the *Adult Guardianship and Trusteeship Act*, the Prothonotary or the court may also require the personal representative to pass its accounts.

RULE 70**DIVORCE ACTIONS****APPLICATION OF RULES OF CIVIL PROCEDURE**

70.01 All the Rules of Civil Procedure that apply in a proceeding apply in a divorce action, with necessary modifications, except where Rules 70.02 to 70.28 provide otherwise.

DEFINITIONS

70.02 In Rules 70.03 to 70.28,

- (a) "Act" means the *Divorce Act*;
- (b) "child of the marriage" has the same meaning as in section 2 of the Act;
- (c) "contact order" has the same meaning as in section 16.5(1) of the Act;
- (d) "designated authority" has the same meaning as in section 18 of the Act;
- (e) "designated jurisdiction" has the same meaning as in section 18 of the Act;
- (f) "financial statement" means one or more of Forms 70 I(A) through 70 I(D) that is directed to be filed by a judge or the Rules;
- (g) "order assignee" has the same meaning as in section 2(1) of the Act;
- (h) "parenting order" has the same meaning as in section 16.1 of the Act;
- (i) "responsible authority" has the same meaning as in section 18 of the Act;
and
- (j) "uncontested action" means an action in which the respondent has failed to deliver an answer or the answer has been withdrawn or struck out.

PETITION**General**

- 70.03** (1) The originating process for the commencement of a divorce action is a petition for divorce (Form 70 A), varied as the circumstances of the proceeding require, except as provided by paragraph 70.09(6) (counterpetition against person not already a party (Form 70 B)).
- (2) A certificate of the marriage from Vital Statistics (P.E.I.), or the equivalent thereof from another jurisdiction, shall be filed with the petition for divorce before a petition is issued, unless the petition states that it is impossible to obtain the certificate.
- (3) The party commencing the action is called the petitioner and the opposite party is called the respondent.
- (4) The petition shall be signed, sealed and dated by the registrar and shall then be deemed to be issued.

- (5) The original petition shall be filed with the registrar at the time of issuing.

Person Alleged to Have Been Involved in Adultery

- (6) In a petition in which it is alleged that the respondent spouse has committed adultery, it is not necessary to set out the name of the other person alleged to have been involved.

Joint Petition for Divorce

- (7) Spouses may commence a divorce action jointly without a respondent.

Claim for Relief

- (8) A petition that contains a claim for support or division of property shall set out the nature and amount of relief claimed.

Joinder of Claim

- (9) Any claim for relief under the *Children's Law Act* or under any Act, providing for spousal or child support, may be joined with a proceeding for divorce provided that the claim is specifically pleaded.
- (10) Unless the court determines otherwise, a petition shall have the effect of raising all issues concerning or in any way relating to the matters for which relief is specifically sought notwithstanding that an issue is not specifically referred to in the petition and the court may make any judgment or order which the justice of the case may require.

SERVICE OF PETITION

Manner of Service

- 70.04** (1) A petition shall be served on the respondent personally or in accordance with subrules 16.03 (2) to (4) (acceptance of service by a lawyer, service by mail with acknowledgement of receipt card), unless the court makes an order under Rule 16.04 for substituted service or dispensing with service.
- (2) A person who effects personal service of a petition shall
- (a) ask the respondent to complete and sign the acknowledgement of service on the back of the petition and shall sign as witness to the respondent's signature, or record the fact that the respondent declined to sign the acknowledgement of service, as the case may be; or
- (b) file an affidavit of service in accordance with Rule 16.09(1).

Person Alleged to Have Been Involved in Adultery

- (3) If a petition sets out the name of a person alleged to have been involved in adultery with the respondent, it shall be served on the person, unless the court orders otherwise, by any method authorized by Rule 16 for service of an originating process, or by mailing a copy of the petition to the person at their last known address.

Petitioner not to Effect Personal Service

- (4) A petition that is served personally shall be served by someone other than

the petitioner.

Service Outside Prince Edward Island

- (5) A petition may be served outside Prince Edward Island without a court order.

Substituted Service by Advertisement

- (6) Where substituted service of a petition by advertisement in a newspaper is ordered by the court, the advertisement shall be in Form 70 C.

TIME FOR SERVICE OF PETITION

70.05 A petition shall be served within six months after it is issued or within such further time as the court may allow on an ex parte motion made before or after the expiration of the time for service.

PLEADINGS

- 70.06** (1) In a divorce action, pleadings shall consist of the petition (Form 70 A), answer (Form 70 D) and reply (Form 70 E), if any.
- (2) In a counterpetition, pleadings shall consist of the counterpetition (Form 70 B), answer to counterpetition (Form 70 F) and reply to answer to counterpetition (Form 70 G), if any.
- (3)(a) Within 45 days of the filing of the answer, the case management coordinator shall set a date for a case management conference with a judge;
- (b) Following each case management conference, the court shall provide to the parties a case management conference report which shall include any directions provided by the judge at the case management conference.

ANSWER

Time for Delivery of Answer

- 70.07** (1) A respondent who wishes to oppose a claim made in the petition shall deliver an answer,
- (a) within twenty days after service of the petition, where the respondent is served in Prince Edward Island;
- (b) within forty days after service of the petition, where the respondent is served elsewhere in Canada or in the United States of America; or
- (c) within sixty days after service of the petition, where the respondent is served anywhere else,
- except as provided in subrule (3), 19.01(5) (late delivery of defence) or 70.10(2) (counterpetition against petitioner and non-party).

Notice of Intent to Defend

- (2) A respondent served with a petition who intends to defend the action may deliver a notice of intent to defend (Form 70 H) within the time prescribed for delivery of the answer.

- (3) A respondent who delivers a notice of intent to defend within the prescribed time is entitled to ten days, in addition to the time prescribed by subrule (1), within which to deliver an answer.

Discontinuance of Intent to Defend and/or Answer

- (4) A respondent who has delivered a notice of intent to defend or an answer may file a notice of discontinuance of intent to defend or a notice of discontinuance of answer anytime before the date for trial and the action shall then continue as an uncontested action.

REPLY

70.08 A reply, if any, shall be delivered within ten days after service of the answer.

COUNTERPETITION

Where Available

- 70.09** (1) A respondent who claims any relief against the petitioner, other than dismissal of the action and costs, shall do so by way of counterpetition.
- (2) A respondent who counterpetitions against the petitioner may join as a respondent to the counterpetition any other person, whether a party to the main action or not, who is a necessary or proper party to the counterpetition.

Person Alleged to Have Been Involved in Adultery

- (3) Subrules 70.03(6) and 70.04(3) (naming and service of person alleged to have been involved in adultery) apply, with necessary modifications, to a counterpetition.

Counterpetition to be in Same Document as Answer

- (4) A respondent shall include the counterpetition (Form 70 B) and the answer in a single document entitled an answer and counterpetition.

Claim for Relief

- (5) A counterpetition that contains a claim for support or division of property shall set out the nature of relief claimed.

Counterpetition to be Issued where Respondent to Counterpetition not Already Party to Main Action

- (6) Where a person who is not already a party to the main action is made a respondent to the counterpetition, the answer and counterpetition,
- (a) shall be issued,
- (i) within the time prescribed by Rule 70.07 for the delivery of an answer in the main action, or at any time before the respondent is noted in default, or
- (ii) subsequently with leave of the court; and
- (b) shall contain a second title of proceeding showing who is petitioner by counterpetition and who are respondents to the counterpetition.

Service Outside Prince Edward Island

- (7) A counterpetition may be served outside Prince Edward Island without a court order.

TIME FOR DELIVERY OR SERVICE OF ANSWER AND COUNTERPETITION

Where all Parties are Parties to the Main Action

- 70.10** (1) Where a counterpetition is only against the petitioner, or only against the petitioner and another person who is already a party to the main action, the answer and counterpetition shall be delivered within the time prescribed by Rule 70.07 for the delivery of the answer in the main action, or at any time before the respondent has been noted in default.

Where New Party is Brought In

- (2) Where a counterpetition is against the petitioner and a respondent to the counterpetition who is not already a party to the main action, the answer and counterpetition shall be served, after it has been issued, on the parties to the main action and, together with all the pleadings previously delivered in the main action, on the respondent to the counterpetition who is not already a party to the main action, and shall be filed with proof of service,
- (a) within thirty days after the answer and counterpetition is issued or at any time before the respondent is noted in default; or
- (b) subsequently with leave of the court.
- (3) An answer and counterpetition need not be served personally on any person who is a party to the main action, except where a respondent to the counterpetition is also a respondent in the main action and has failed to deliver a notice of intent to defend or an answer in the main action, in which case the respondent shall be served in the manner prescribed by subrule 70.04(1), whether or not the respondent has been noted in default in the main action.

AMENDING ANSWER TO ADD COUNTERPETITION

- 70.11** (1) A respondent who has delivered an answer that does not contain a counterpetition and who wishes to counterpetition only against the petitioner, or only against the petitioner and another person who is already a party to the main action, may amend the answer in accordance with Rules 26.02 and 26.03 in order to add the counterpetition, and Rule 26.05 (responding to amended pleading) applies to the amended answer and counterpetition.
- (2) A respondent referred to in subrule (1) who wishes to counterpetition against the petitioner and another person who is not already a party to the main action may, with leave of the court, have the registrar issue an amended answer and counterpetition, and Rule 26.05 (responding to amended pleading) applies to the amended answer and counterpetition.

ANSWER TO COUNTERPETITION

By Petitioner and Other Party to Main Action

- 70.12** (1) The petitioner and any other respondent to a counterpetition who is already a party to the main action shall deliver an answer to counterpetition (Form 70 F) within twenty days after service of the counterpetition.
- (2) Where the petitioner delivers a reply in the main action, the answer to counterpetition and the reply shall be included in a single document entitled a reply and answer to counterpetition.

By Respondent added by Counterpetition

- (3) A respondent to a counterpetition who is not already a party to the main action shall deliver an answer to counterpetition (Form 70 F),
- (a) within twenty days after service of the answer and counterpetition, where the respondent to the counterpetition is served in Prince Edward Island,
 - (b) within forty days after service of the answer and counterpetition, where the respondent to the counterpetition is served elsewhere in Canada or in the United States of America; or
 - (c) within sixty days after service of the answer and counterpetition, where the respondent to the counterpetition is served anywhere else, except as provided in subrule (5) or 19.01(5) (late delivery of defence).
- (4) Where a respondent to a counterpetition who is not already a party to the main action is served with a counterpetition and intends to defend the action, the respondent may deliver a notice of intent to defend (Form 70 H) within the time prescribed for delivery of the answer to counterpetition.
- (5) A respondent to a counterpetition who delivers a notice of intent to defend within the prescribed time is entitled to ten days, in addition to the time prescribed by subrule (3), within which to deliver an answer to counterpetition.

REPLY TO ANSWER TO COUNTERPETITION

- 70.13** A reply to answer to counterpetition (Form 70 G), if any, shall be delivered within ten days after service of the answer to counterpetition.

FINANCIAL STATEMENTS

Where Required

- 70.14** (1) The petitioner and the respondent shall file financial statements as directed by the case management conference judge or the pre-motion conference judge, which shall include the specific form or forms to be filed [Form 70 I(A), 70 I(B), 70 I(C), and/or 70 I(D)], and the required time for filing.
- (2) Revoked.

Waiver of Financial Statements

- (3) Subrule (1) does not apply in respect of a claim for support under the Act if both spouses have filed a waiver of financial statements (Form 70 J),

but the spouses may not waive the obligation to deliver financial statements in respect of a claim under the *Family Law Act*.

~~Registrar to Refuse Documents Unless Accompanied by Financial Statements~~

- (4) Revoked.

Respondent Must File Even When Not Defending

- (5) A respondent spouse who does not intend to defend a claim for support or division of property shall nevertheless deliver such financial information as is required by the court but the failure of the respondent spouse to do so does not prevent the petitioner from setting the action down for trial or moving for judgment.

Order to Require Delivery

- (6) Where a respondent spouse fails to deliver a financial statement as directed by a case management conference judge or pre-motion conference judge, or otherwise as directed by the Rules, the court may, on motion without notice, make an order requiring the delivery of a financial statement within a specified time.
- (7) If a claim is made in the action for custody of a child, the court may order the parties to deliver financial statements within a specified time.

Particulars of Financial Statement

- (8) Where a financial statement lacks particularity a spouse may demand particulars and if the other spouse fails to supply them within seven days the court may, on such terms as are just,
- (a) order particulars to be delivered within a specified time; or
 - (b) strike out the financial statement and order that a new financial statement be delivered within a specified time.

Sanctions for Failure to Deliver Financial Statement or to Give Particulars

- (9) Where a spouse fails to comply with an order to deliver a financial statement, a new financial statement or particulars,
- (a) the court may dismiss the spouse's action or strike out the spouse's answer; and
 - (b) a judge may make a contempt order against the spouse.

Cross-examination on Financial Statement

- (10) A spouse may cross-examine the other spouse on their financial statement.
- (11) A cross-examination on a financial statement may be used,
- (a) on a motion for interim relief; and
 - (b) at trial, in the same manner as an examination for discovery.

- (12) A spouse who has set the action down for trial or who has consented to the action being placed on a trial list may not cross-examine before trial on the other spouse's financial statement without leave of the court, but is not relieved of the obligation imposed by subrules (13) to (15).

Duty to Correct Financial Statement and Answers on Cross-examination

- (13) A spouse who has delivered a financial statement and subsequently discovers,
- (a) that any information in the financial statement or answer on cross-examination on it was incorrect or incomplete when made; or
 - (b) that there has been a material change in any information contained in it,
- shall forthwith provide information concerning the change or correction in writing to the other spouse, and subrules 31.09(2) and (3) (correcting answers and sanction for failure to correct) apply, with necessary modifications.

- (14) Revoked.

Financial Statement

- (15) Revoked.

INTERIM RELIEF

Notice of Motion

- 70.15** (1) A notice of motion for interim relief shall set out the precise relief sought.
- (1.1) Unless subrule (2.1) applies, the notice of motion shall state that the motion will be heard on a date and time to be fixed.

Pre-motion Conference

- (2) Prior to the hearing of the motion and prior to the filing of affidavits in support of the motion, a pre-motion conference shall be held before a judge of the court to consider whether any or all of the issues raised by the motion or the action can be settled or resolved on an interim or final basis.
- (2.1) Subrule (2) does not apply:
- (a) to applications and motions made pursuant to the *Victims of Family Violence Act*, unless the parties consent to a pre-motion conference; and
 - (b) where the court, at the request of one or more of the parties, has waived the requirement for a pre-motion conference.
- (2.2) A notice of pre-motion conference (Form 70 AA) and a pre-motion conference memorandum (Form 70 BB or Form 70 BB.1 for contact orders only) shall be served together with the notice of motion.
- (2.3) The party making the motion shall serve and file, with proof of service,

a copy of the notice of motion, a copy of the notice of pre-motion conference (Form 70 AA), and a copy of the pre-motion conference memorandum (Form 70 BB or Form 70 BB.1 for contact orders only) at least ten days before the hearing of the pre-motion conference. Where service is effected outside of Prince Edward Island, the material shall be served and filed, with proof of service, at least twenty days before the hearing of the pre-motion conference.

- (2.4) The responding party shall serve and file, with proof of service, a copy of the responding party's pre-motion conference memorandum at least four days before the hearing of the pre-motion conference.
- (2.5) Where a party fails to file material required for the pre-motion conference, or files material late, or fails to appear at the hearing of the pre-motion conference, the court may grant all or part of the relief sought in the motion, costs, or such other relief as is just in the circumstances.
- (2.6) Statements made by the parties at the hearing of the pre-motion conference shall be confidential and shall not be disclosed to the judge hearing the motion.
- (2.7) Following each pre-motion conference, the court shall provide to the parties a pre-motion conference report which shall include any directions provided by the judge at the pre-motion conference.
- (3) Unless otherwise ordered at the hearing of the pre-motion conference, costs of a pre-motion conference shall be assessed as part of the costs of the motion or action.
- (4) A judge who conducts a pre-motion conference under subrule (2) shall not preside at a motion, trial, a reference in the action or a motion for judgment, except
 - (a) where the pre-motion conference has resolved all the issues and the parties consent to the judge presiding at a motion for judgment; or
 - (b) where the respondent party has failed to appear at the hearing of the pre-motion conference and the judge, after considering all of the circumstances, grants an order arising from the pre-motion conference on such terms as is just.

Written Proposal for Settlement and Costs of Interim Motion

- (5) In exercising their discretion concerning costs, the judge who hears a motion for interim relief shall take into account any written proposal for settlement of the motion or the failure to make such a proposal.

Failure to Comply with Interim Order

- (6) Where a party fails to comply with an order for interim relief and the court is satisfied that the party is able to comply with the order, the court may postpone the trial of the action or strike out any pleading or affidavit of the party in default.

Setting Aside Varying or Amending Interim Orders

- (7) A person who is affected by an order for interim relief may, after the expiration of six months from the granting of the order for interim relief, move to set aside, vary or amend the order for interim relief.
- (8) On a motion under subrule (7), the court may set aside, vary or amend the order for interim relief on such terms as are just.

Counter-Motion for Interim Relief

- (9) Where a notice of motion has been served and the responding party also wishes to make a motion for interim relief, the responding party shall serve and file a notice of motion setting out the precise relief sought and the court may hear the motion at the same place and time.

CHILDREN AND DIRECTOR OF CHILD PROTECTION'S REPORT**Application of Rule**

- 70.16** (1) Subrules (2) to (13) apply where there is a child of the marriage within the meaning of s. 2 of the Act.

Children to be Identified

- (2) The name and birth date of every child of the marriage shall be set out in the petition or counterpetition.

Service of Notice of Proceeding on the Director of Child Protection

- (3) Where a parenting order or a contact order is claimed, the party making the claim shall serve the petition, counterpetition, notice of application or counter-application, as the case may be, on the Director of Child Protection in accordance with Rule 16, and file proof of service with the court. The Director of Child Protection shall forward a letter to the registrar, with a copy to counsel for the parties, indicating whether or not the Director intends to investigate the matter.

Notice of Intention to Investigate and Report

- (4) Where the Director of Child Protection intends to investigate and report to the court concerning a claim for a parenting order or contact order, the Director shall serve notice of that intention (Form 70 M) on the parties and shall file a copy of the notice with proof of service.
- (5) Service of the notice on a party who has been noted in default shall be effected by mail addressed to the party at their last known address, unless the court orders otherwise.

Service of Subsequent Documents on the Director of Child Protection

- (6) A party who subsequently serves an answer, reply, or notice of motion that relates to a parenting order or contact order shall also serve it on the Director of Child Protection within the time prescribed for service on the other parties.
- (6.1) A party shall also serve the Director of Child Protection with such other documents as directed by the Court.

Discovery by Director of Child Protection

- (7) Where the Director of Child Protection has served notice, the Director has the right to discovery in respect of any matter that relates to a parenting order or contact order.

Service of Report

- (8) The Director of Child Protection shall serve the report of the Director on the parties interested in a parenting order or contact order within sixty days after serving notice under subrule (4), and shall then forthwith file a copy of the report and supporting affidavit, if any, with proof of service.
- (9) Subrule (5) applies, with necessary modifications, to service of the report.

Dispute of Report

- (10) A party on whom the report is served may dispute a statement in it or in any supporting affidavit by serving a concise statement of the nature of the dispute on every other party interested in a parenting order or contact order and on the Director of Child Protection, and filing the statement, with proof of service, within fifteen days after service of the report.
- (11) Where the Director of Child Protection has served notice under subrule (4), the action shall not be tried and no motion for judgment shall be heard until,
 - (a) all disputes have been filed or the time for filing disputes has expired; or
 - (b) every party interested in a parenting order or contact order has filed a waiver (Form 70 N) of the right to dispute the report.

Court Appointment of Counsel for the Child

- (12) On motion of the Director of Child Protection, a judge shall designate a lawyer as counsel for the child and direct that such counsel may intervene for the purpose of protecting the interests of the child concerned.

~~Court Appointment of Queen's Proctor~~

- (13) Revoked.

NAMING PLACE OF TRIAL

- 70.17** The petitioner shall name in the petition the place of trial and the trial shall be held at the place named in the petition unless an order is made to change the place of trial under Rule 46.02.

MARRIAGE CERTIFICATE AND CERTIFICATE RESPECTING PRIOR PENDING PROCEEDINGS

70.18 No divorce action shall be tried and no motion for judgment in a divorce action shall be heard until the registrar has received and attached to the trial or motion record,

- (a) a certificate of the marriage, or equivalent thereof from another jurisdiction, unless the petition states that it is impossible to obtain a certificate; and
- (b) a certificate or report with respect to prior pending proceedings commenced by either spouse, issued under the *Regulations to the Divorce Act* after the petition was filed.

MOTION FOR JUDGMENT - UNCONTESTED PROCEEDING**Requisition and Notice of Motion**

- 70.19** (1) Where a respondent fails to deliver an answer within the prescribed time, the petitioner may, on filing proof of service of the petition, request the registrar to note the respondent in default and file a notice of motion for judgment in a divorce action and thereafter the respondent shall not deliver an answer without the consent of the petitioner or leave of the court.
- (2) Where a respondent has been noted in default, it shall not be necessary to give the respondent any notice of the date set for the hearing of the proceeding.
- (3) A requisition to note the respondent in default and a notice of motion for judgment in a divorce action shall be combined in Form 70 O.
- (4) The motion for judgment shall state whether the petitioner intends to present evidence to prove the claim by way of affidavit evidence or oral evidence.

Petitioner's Affidavit

- (5) The affidavit of the petitioner in support of the motion (Form 70 P) shall,
- (a) contain sufficient information for the court to satisfy itself that there is no possibility of the reconciliation of the spouses, or that the circumstances of the case are of such a nature that it would clearly not be appropriate to do so;
 - (b) confirm that all the information in the petition is correct, except as specified in the affidavit;
 - (c) if no certificate of marriage or equivalent thereof from another jurisdiction has been filed in the action, state,
 - (i) what efforts have been made to obtain a certificate and why it is impossible to obtain one,
 - (ii) the date and place of marriage, and
 - (iii) sufficient particulars to prove the marriage;

- (d) set out particulars of the grounds for divorce;
- (e) state that there has been no agreement, conspiracy, understanding or arrangement to which the petitioner is either directly or indirectly a party for the purpose of subverting the administration of justice, fabricating or suppressing evidence or deceiving the court;
- (f) if the petitioner is relying on the respondent's adultery or cruelty, state that the petitioner has not condoned or connived at the act or conduct complained of, or if there has been condonation or connivance, set out the circumstances that indicate that the public interest would be better served by granting the divorce;
- (g) provide particulars of the present and proposed arrangements for parenting time and decision-making responsibility in respect of each child of the marriage, if different from those set out in the petition;
- (h) if the petitioner claims support:
 - (i) provide particulars of the petitioner's and the children's needs;
 - (ii) provide particulars of the petitioner's and respondent's means, including proof of current income, and most recent Income Tax Return and Notice of Assessment/Reassessment, where available; and
 - (iii) set out particulars of any change in circumstances since any financial statements in the action were filed;
- (i) if the petitioner does not claim a division of property, confirm that the petitioner does not wish to claim a division of property at this time and state that the petitioner is aware that a claim for a division of property may be barred after the divorce;
- (j) if the petitioner wishes to include in the judgment provisions of a consent, settlement, separation agreement or previous court order, refer to the document as an exhibit and refer to the specific provisions to be included;
- (k) if the petitioner claims costs, set out sufficient facts to enable the court to determine whether costs should be awarded;
- (l) if the petitioner seeks to have the divorce take effect earlier than thirty-one days after it is granted, set out the special circumstances that justify the earlier effective date, state that the spouses have agreed that no appeal will be taken from the judgment, and refer to the agreement as an exhibit;
- (m) provide the respondent's last known address and state the means by which the address is known;
- (n) if a divorce is sought on the basis of separation, contain information that the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding

and were living separate and apart at the commencement of the proceeding;

- (o) where a divorce is sought on the basis of physical or mental cruelty, contain information that the conduct of the respondent spouse has rendered continued cohabitation intolerable; and
- (p) where the divorce is sought on the basis of adultery, refer to the affidavit of the respondent spouse admitting adultery, with particulars of it, or such other information as may satisfy the court that the respondent has committed adultery.

Respondent's Affidavit

- (6) An affidavit made by a respondent spouse in support of the motion (Form 70 Q) shall,
 - (a) state that the respondent is the petitioner's spouse;
 - (b) provide the respondent's address for service of the judgment;
 - (c) if the petitioner is relying on the respondent's adultery and the respondent is prepared to admit the adultery, state that the respondent is aware that the respondent is not obliged to give evidence that the respondent has committed adultery, but that the respondent is willing to give that evidence;
 - (d) contain the matters referred to in clauses (5)(a), (b), (f), (g), (h) and (i); and
 - (e) if the respondent does not claim a division of property, confirm that the respondent does not wish to claim a division of property at this time and state that the respondent is aware that a claim for a division of property may be barred after the divorce.

Where Counterpetitioner Moves for Judgment

- (7) If the motion for judgment is made by the counterpetitioner, subrules (5) and (6) (petitioner's and respondent's affidavits) apply and references to the petition and petitioner shall be deemed to be references to the counterpetition and counterpetitioner.

Affidavit of Person Involved in Adultery

- (8) Where a person with whom a respondent spouse is alleged to have committed adultery is prepared to admit the adultery and files an affidavit in support of the motion, the affidavit shall state that the person is aware that the person is not obliged to give evidence that the respondent spouse committed adultery with the person, but that the person is willing to give that evidence.

Oral Evidence at Hearing of Motion

- (9) Instead of or in addition to filing an affidavit in support of the motion, the petitioner or counterpetitioner may examine witnesses at the hearing of the motion and subrule 39.03(3) (leave to examine witness at hearing)

does not apply.

Presence of lawyer

- (10) In an uncontested proceeding, where the information is to be presented by affidavit, the judge may,
- (a) grant a judgment without an appearance by a lawyer or the parties; or
 - (b) direct that the lawyer or the petitioner appear or that oral evidence be presented at the hearing.

Registrar to Present Motion to Judge

- (11) The registrar shall present the notice of motion and the evidence filed in support to a judge.
- (12) Before presenting the motion to a judge, the registrar shall examine the notice of motion, the evidence filed in support and the draft divorce judgment and shall complete a registrar's certificate (Form 70 R).

MOTION FOR JUDGMENT - CONTESTED PROCEEDING

Setting Down for Trial

- (13) (a) Where an answer has been delivered, a date for trial of a proceeding shall not be assigned until a pre-trial conference is held unless otherwise ordered by the court.
- (b) The provisions of Rule 48 shall apply to the setting down for trial of a proceeding.

~~Draft Judgment—Contested or Uncontested~~

- (14) Revoked.

~~Judgment~~

- (15) Revoked.
- (16) Revoked.

ADJOURNMENT OF TRIAL

Resumption after Adjournment

- 70.20** (1) Where a judge grants an adjournment of the trial under subsection 10(2) of the Act before hearing any evidence, a motion for resumption of the trial under subsection 10(3) of the Act may be made to any judge.
- (2) Where a judge grants an adjournment of the trial under subsection 10(2) of the Act after commencing the hearing of evidence, a motion for resumption of the trial under subsection 10(3) of the Act may be made only to the same judge.

Notice to Attorney General

- (3) The judge trying a divorce action may adjourn the trial for any reason to such time and place as is just and, in a proper case, may direct that the

registrar forthwith give notice to the Attorney General of the proceeding, its state and the reasons of the judge for directing that notice be given.

- (4) Where notice is given, the Attorney General may appear by a lawyer on the adjourned trial and make submissions and otherwise participate in the proceeding to the extent that the judge allows.

REFERENCE TO A DISPUTE RESOLUTION PROFESSIONAL OR CLINICIAN

- 70.21** (1) A judge may on their own motion or, on consent of the parties, refer any question or issue arising in the action relating to a parenting order or contact order, or order for support to an individual who would qualify to be appointed
- (a) under section 3 of the *Family Law Act* as a mediator;
 - (b) as a dispute resolution professional under section 13 of the *Children's Law Act*; or
 - (c) to provide an assessment under section 38 of the *Children's Law Act*.
- (2) Where a reference is directed under subrule (1), the family mediator or clinician shall inquire into the question or issue referred and shall make a report.
- (3) The report of the family mediator or clinician shall be filed and upon an action either party may cross-examine the family mediator or clinician on the contents of their report.
- (4) The judge may require the family mediator or clinician to give reasons for their findings or conclusions and may confirm the report in whole or in part or make such other order as is just.

CERTIFICATE OF DIVORCE

- 70.22** The registrar in the office where a divorce action was commenced shall issue a certificate of divorce (Form 70 T) when,
- (a) the divorce has taken effect;
 - (b) a requisition (Form 70 U) has been filed with the registrar, accompanied by an affidavit (Form 70 V) sworn after the divorce took effect and stating that,
 - (i) no appeal from the divorce is pending, or any such appeal has been abandoned or dismissed, and
 - (ii) no order has been made extending the time for appealing from the divorce, or if any such order has been made, the extended time has expired without an appeal being taken; and
 - (c) the registrar has searched the court records and ascertained that there is no indication that the affidavit is incorrect.

VARIATION OF FINAL ORDER FOR COROLLARY RELIEF**By Application**

- 70.23** (1) A person who wishes to vary, suspend or rescind a final parenting order, contact order, or order for support under section 17 of the Act shall do so by notice of application.
- (1.1) Rule 70.15 (Interim Relief) applies, with necessary modifications, to applications under this Rule.
- (1.2) Any application under section 17 of the Act must:
- (a) in respect of a parenting order or support order, address questions 37 to 40 of the Petition for Divorce (Form 70 A) (“Other court proceedings or orders”);
 - (b) include a statement by the party certifying that they are aware of their duties under sections 7.1 to 7.5 of the Act; and
 - (c) if the party has a lawyer, include a statement by the lawyer certifying that they have complied with section 7.7 of the Act.
- (1.3) Any document that responds to an application under section 17 of the Act must:
- (a) include a statement by the party certifying that they are aware of their duties under sections 7.1 to 7.5 of the Act; and
 - (b) if the party has a lawyer, include a statement by the lawyer certifying that they have complied with section 7.7 of the Act.

~~Filing of Financial Statement~~

- (2) Revoked.
- (3) Revoked.
- (4) Revoked.
- (5) Revoked.
- (6) Revoked.

Assigned Support Order

- (6.1) In an application under subrule (1) in respect of a support order that has at any time been assigned in accordance with subsection 20.1(1) or its predecessor of the Act,
- (a) the applicant shall also serve the order assignee with the applicant’s notice of application, affidavit in support and financial statement; and
 - (b) the respondent shall also serve the assignee with the respondent’s notice of appearance, responding affidavit and financial statement.
- (6.2) On delivering a notice of appearance, the assignee becomes a respondent

to the extent of its financial interest.

- (6.3) The assignee is not required to serve a financial statement.
- (6.4) If the applicant does not serve the assignee as required by subrule (6.1), the court may at any time, on motion by the assignee on notice to the parties to the application, set aside an order made in the application so far as it deals with an issue in which the assignee has a financial interest.
- (6.5) On a motion referred to in subrule (6.4), the burden of proving that the order should not be set aside is on the party who asked for the variation order.
- (6.6) If the order made in the application is set aside, the order assignee is entitled to costs of the motion to set aside, unless the court orders otherwise.

Contents of Affidavit in Support

- (7) An affidavit in support of the application shall set out,
 - (a) the place or habitual residence of the parties and the children of the marriage;
 - (b) the current marital status of the parties;
 - (c) particulars of the change in circumstances relied on;
 - (d) particulars of current arrangements for parenting time, decision-making responsibility, and contact in respect of a child and of any proposed change;
 - (e) particulars of current support arrangements and any proposed change;
 - (f) particulars of any arrears of support under an order or agreement;
 - (f.1) in an application to vary a support order, whether the support order was assigned and any particulars of the assignment known to the applicant; and
 - (g) particulars of any efforts made to mediate the matters in issue or of any assessment made in relation to a parenting order or contact order.

~~Interprovincial Variation~~

- (8) Revoked.
- (9) Revoked.
- (10) Revoked.
- (11) Revoked.
- (12) Revoked.
- (13) Revoked.

REGISTRATION OF ORDERS FROM OTHER PROVINCES

- 70.24** (1) An order under sections 15, 16 or 17 of the Act that was made by a court outside Prince Edward Island may be registered under paragraph 20(3)(a) of the Act by filing a certified copy with the registrar and the order shall then be entered as an order of the court.
- (2) The certified copy of the order may be filed with the registrar by forwarding it to the registrar by ordinary mail, accompanied by a written request that it be registered under paragraph 20(3)(a) of the Act.

COSTS

70.25 Revoked.

PROCEEDINGS BETWEEN PROVINCES AND BETWEEN A PROVINCE AND A DESIGNATED JURISDICTION TO OBTAIN, VARY, RESCIND OR SUSPEND SUPPORT ORDERS

Applications under section 17(1) of the *Divorce Act* if a former spouse resides in another province

Application by Prince Edward Island resident

- 70.26** (1) Unless the applicant elects to proceed under section 18.1 of the Act, an application by a Prince Edward Island resident to vary, suspend or rescind a support order under the Act where the other spouse habitually resides in another province shall be made in accordance with Rule 70.23.

Order assignee

- (2) In an application to vary, suspend, or rescind a support order where the respondent habitually resides in another province, the applicant shall contact the applicable social assistance authorities in that province to determine if there is an order assignee under subsection 20.1(1) of the Act. If so, the applicant shall serve the order assignee with a copy of all documents served on the respondent.

Opposition to variation if respondent resides in another province

- (3) Where a respondent who habitually resides in another province wishes to oppose an application under subsection 17(1)(a) of the Act and convert it to an application under section 18.1 of the Act, the respondent shall, within 40 days after being served with the application, file a Request for Conversion (Form 70 CC).
- (3.1) An order assignee may request to convert an application under subsection 17(1)(a) of the Act to an application under section 18.1 of the Act by filing a Request for Conversion (70 CC) within 40 days after being served with the application.

Automatic conversion to inter-jurisdictional application under section 18.1 of the *Divorce Act*

- (4) Where
- (a) an application is made under clause 17(1)(a) of the Act to vary a support order only;
 - (b) the respondent habitually resides in another province; and
 - (c) the respondent or the order assignee files a Request for Conversion (Form 70 CC) within the time set out in Rule 70.26(3);

the court shall direct that the application be converted into an application under section 18.1 of the Act, and the registrar shall provide a copy of the application and the evidence in support of it to the designated authority in Prince Edward Island.

Process for support and parenting order variation if conversion request made by respondent who resides in another province

- (5) Where
- (a) an application is made under clause 17(1)(a) and (b) of the Act to vary a support order and a parenting order;
 - (b) the respondent habitually resides in another province; and
 - (c) the respondent or other assignee files a Request for Conversion (Form 70 CC) within the time set out in Rule 70.26(3);

the application under clause 17(1)(a) shall first proceed to the court in Prince Edward Island to determine whether the application to vary the support order should be converted into an application under section 18.1 of the Act.

- (5.1) Where the court determines that the request to vary the support order should not be converted into an application under section 18.1 of the Act, the court shall hear both the application to vary the support order and the application to vary the parenting order.

Notification of conversion of application

- (6) Where the application made by a Prince Edward Island resident under clause 17(1)(a) of the Act is converted into an application under section 18.1 of the Act, the designated authority shall inform the applicant of the conversion.

APPLICATIONS UNDER SECTION 18.1 OF THE *DIVORCE ACT* BY A PRINCE EDWARD ISLAND RESIDENT

Application by Prince Edward Island resident

- 70.27** An application made by a Prince Edward Island resident under section 18.1 of the Act to obtain, vary, rescind or suspend a support order shall be made on the forms approved by the designated authority in Prince Edward Island and

include all information specified on those forms.

**APPLICATIONS UNDER SECTION 18.1 OR 19 OF THE *DIVORCE ACT* BY A
RESIDENT OF ANOTHER PROVINCE OR A DESIGNATED
JURISDICTION**

Application of Rule

- 70.28** (1) This rule applies to
- (a) an application under section 18.1 of the Act received by the designated authority in Prince Edward Island from a designated authority in another province, and
 - (b) an application under section 19 of the Act received by the designated authority in Prince Edward Island from a responsible authority in a designated jurisdiction.

Applications under section 18.1 or 19 of *Divorce Act* from another province

- (2) An application under section 18.1 or 19 of the Act made by a habitual resident of another province or of a designated jurisdiction shall be accompanied by a copy of the divorce judgment and all applicable corollary relief orders.

Serving documents from outside Prince Edward Island

- (3) When the court receives an application under subrule (2) from the designated authority in Prince Edward Island, the registrar shall serve the respondent with
 - (a) a copy of the application and all supporting documents received from the designated authority in Prince Edward Island;
 - (b) a notice to the respondent (Form 70 DD); and
 - (c) a notice of hearing (Form 70 EE).

Request for further evidence

- (4) Where the court makes an order that further evidence is required from the applicant, the registrar shall forward a copy of the order to the designated authority in Prince Edward Island.

Receipt of further evidence

- (5) On receipt of the applicant's further evidence, the designated authority shall serve the respondent and file the evidence with the court.

Forwarding order to designated authority in Prince Edward Island

- (6) Where the court makes an order, the registrar shall forward a copy of the order to the designated authority in Prince Edward Island.

Reasons for decision refusing order

- (7) Where the court refuses to make a support order or an order varying, rescinding or suspending a support order, the registrar shall forward a copy

of the court's reasons for decision to the designated authority in Prince Edward Island and to the respondent.

Matthews v. Gallant, 2015 PESC 12

In a case involving a claim for spousal support and retroactive spousal support, the Court reminded the parties of the necessity in filing timely and accurate financial statements. The Court cautioned that delays in the filing of sworn financial statements may result in the refusal to set a motion date, or in the case of a responding party, a much higher assessment of income than was earned. The Court denied the claim for spousal support.

A.C.H. v. L.R.H., 2010 PESC 28

The petitioner named Wells Fargo as a third party in a divorce proceeding. The proceeding was dismissed because Rule 70.06, relating to divorce proceedings, does not provide for third party procedure.

TARIFF C

Revoked.

RULE 71**FAMILY LAW PROCEEDINGS****APPLICATION OF THE RULE**

71.01 Rules 71.02 to 71.12 apply to proceedings under the *Family Law Act* and the *Children's Law Act*.

DEFINITIONS

71.02 In Rules 71.03 to 71.12,

- (a) "applicant" includes a plaintiff;
- (b) "contact order" has the same meaning as in Rule 70.02(c);
- (c) "financial statement" means one or more of Forms 70 I(A) through 70 I(D) that is directed to be filed by a judge or the Rules;
- (d) "parenting order" has the same meaning as in Rule 70.02(h);
- (e) "respondent" includes a defendant; and
- (f) "responding document" means a statement of defence, defence to counterclaim or affidavit in opposition to an application.

ORIGINATING PROCESS**Claim for Relief**

- 71.03** (1) An originating process that contains a claim for support or division of property shall set out the nature of relief claimed.
- (1.1) An originating process pursuant to the *Children's Law Act* must:
- (a) include a statement by the party certifying that they are aware of their duties under section 3 of the *Children's Law Act*; and
 - (b) if the party has a lawyer, include a statement by the lawyer certifying that they have complied with section 4 of the *Children's Law Act*.
- (1.2) A document that responds to an originating process pursuant to the *Children's Law Act* must:
- (a) include a statement by the party certifying that they are aware of their duties under section 3 of the *Children's Law Act*; and
 - (b) if the party has a lawyer, include a statement by the lawyer certifying that they have complied with section 4 of the *Children's Law Act*.
- (1.3) An originating process under the *Children's Law Act* in which a party seeks a child support order, contact order or parenting order must address questions 37 to 40 of the Petition for Divorce (Form 70 A) ("Other court proceedings or orders"), with necessary modifications.

Application by Government Agency

- (2) Where an application is made pursuant to s. 33(3) of the *Family Law Act* the originating process shall be served on the defendant.

Case Management Conference

- (3)(a) Within 45 days of the filing of the defence, the case management co-ordinator shall set a date for a case management conference with a judge.
- (b) Following each case management conference, the court shall provide to the parties a case management conference report which shall include any directions provided by the judge at the case management conference.

FINANCIAL STATEMENTS**Where required**

- 71.04** (1) Where an order is sought for a division of property, support or variation of support, the parties shall file financial statements as directed by the case management conference judge or the pre-motion conference judge, which shall include the specific form or forms to be filed [Form 70 I(A), 70 I(B), 70 I(C), and/or 70 I(D)], and the required time for filing.
- (2) Revoked.
- (3) Revoked.
- (4) Revoked.

~~Registrar to Refuse Documents Unless Accompanied by Financial Statements~~

- (5) Revoked.

Order for Delivery

- (6) Where a respondent fails to comply with a direction by the court to file a financial statement, the applicant may move without notice for an order requiring the delivery of a financial statement within a specified time.
- (7) In a proceeding in which a claim is made for a parenting order, the court may order the parties to deliver financial statements within a specified time.

Subrule 70.14(8) to (13) Apply

- (8) Subrules 70.14(8) to (13) (particulars, failure to deliver, cross-examination, duty to correct) apply, with necessary modifications, to financial statements referred to in subrules (1) to (7).

~~Financial Statement~~

- (9) Revoked.

Divorce Action

- (10) Where a claim under the *Family Law Act* or the *Children's Law Act* is made in a divorce action, the obligations of the spouses respecting

financial statements are governed by Rule 70.14.

PLACE OF HEARING

- 71.05** (1) An applicant who makes a claim for a parenting order or contact order in respect of a child who habitually resides in Prince Edward Island shall name in the originating process the place of hearing, Charlottetown or Summerside, whichever is closest to where the child habitually resides.
- (2) Where a claim referred to in subrule (1) is made in a divorce action, the place of trial is governed by Rule 70.17.
- (3) The hearing shall be held at the place named in the originating process unless an order is made under Rule 46.02 to change the place of hearing, and for the purpose of changing the place of hearing an application shall be treated as an action.

DIRECTOR OF CHILD PROTECTION'S REPORT

- 71.06** Subrules 70.16(1) to (13) (Children and Director of Child Protection's Report) apply, with necessary modifications, to proceedings under the *Children's Law Act* and applications for a victim assistance order or variation of an emergency protection order under the *Victims of Family Violence Act*.
- 71.06.1** Where the proceeding referred to in Rule 71.06 is an application for a victim assistance order or variation of an emergency protection order, the Director of Child Protection shall
- (a) provide the notice required by Subrule 70.16(4) within three days of the application for variation being filed; and
- (b) if the Director intends to intervene, file the report referred to in Subrule 70.16(8) within 14 days of receiving notice of the application.

REFERENCE TO A MEDIATOR OR CLINICIAN

- 71.07** Rule 70.21 (reference to mediator or clinician) applies, with necessary modifications, to any question or issue arising under the *Family Law Act* and the *Children's Law Act*.

INTERIM RELIEF

- 71.08** Rule 70.15 (interim relief) applies, with necessary modifications, to a motion for interim relief in a proceeding under the *Family Law Act* or the *Children's Law Act*.

VARIATION APPLICATION

- 71.08.1** A person who wishes to vary, suspend or rescind a final support order under the *Family Law Act*, or a final parenting order, contact order, or support order under the *Children's Law Act*, shall do so by Notice of Application (Form 14 E).
- 71.08.2** Rule 70.23(1.1), and (6.1) to (7) (variation of final order) applies, with necessary modifications, in respect of a support order made under the *Family*

Law Act or the *Interjurisdictional Support Orders Act* or an order made under Part 5 (care of and time with children) or Part 6 (child support) of the *Children's Law Act*.

WARRANT FOR ARREST

71.09 A warrant for the arrest of a debtor referred to in the *Family Law Act* shall be in Form 71 A.

RECOGNIZANCE

71.10 A recognizance required by an order made under the *Family Law Act* or the *Children's Law Act* shall be in Form 71 B and shall be entered into before the Registrar or such other person as a judge directs.

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

71.11 Revoked.

REQUEST BY EXTRA-PROVINCIAL TRIBUNAL FOR EVIDENCE IN CUSTODY CASES

Issuing Summons to Give Evidence

71.12 (1) Where the Attorney General refers a request of an extra-provincial tribunal to the court under section 76 of the *Children's Law Act*, the registrar shall issue a summons in Form 71 E requiring the person named in the request to produce or give evidence in accordance with the request.

Service of Summons

- (2) The summons and a copy of the request of the extra-provincial tribunal and any supporting material that accompanied the request shall be served on the person named in the request, personally and not by an alternative to personal service, at least five days before the person is required to produce or give evidence.
- (3) Where the person named in the request is not a party to the proceeding before the extra-provincial tribunal and the summons requires the person to give oral evidence, attendance money calculated in accordance with Tariff A shall be paid or tendered to the person when the summons is served.
- (4) A copy of the summons shall be served on the Attorney General within the time prescribed by subrule (2).

Affidavit Evidence

- (5) Where the summons does not require the person to give oral evidence, the person may file with the registrar the evidence required, verified by the person's affidavit.

Oral Evidence

- (6) Where the summons requires the person to give oral evidence, the person shall attend before a judge or officer of the court, as set out in the summons, to be examined in accordance with the summons.

Evidence to be Sent to Extra-Provincial Tribunal

- (7) The registrar shall send to the extra-provincial tribunal a certified copy of evidence produced or given under this rule.

Sanctions for Disobeying Summons

- (8) Subrules 53.04(7) and (8) apply, with necessary modifications, to a person who after having been served in accordance with subrules (2) and (3) fails to comply with the summons.

RULE 72**PAYMENT INTO AND OUT OF COURT****PAYMENT INTO COURT**

- 72.01** (1) A person who seeks to pay money into court shall file with the Registrar,
- (a) a requisition for payment into court that refers to any statutory provision or rule that authorizes the payment into court; and
 - (b) a copy of any order, report, offer to settle or acceptance of offer under which the money is payable.
- (2) On receiving the material referred to in subrule (1), the Registrar shall receive the money.
- (3) The party paying the money into court shall pay it into the court in the name of the Registrar.
- (4) On receiving the money, the Registrar shall give a receipt to the party paying the money in.
- (5) A party paying into court under an offer to settle or an acceptance of offer shall forthwith serve a notice of payment into court (Form 72 A) on every interested party, but the notice shall not be filed.

PAYMENT OUT OF COURT**Authority for Payment Out**

- 72.02** (1) Money may be paid out of court only in accordance with an order or report or on consent under subrule (4).

Payment Out under Order or Report

- (2) A person who seeks payment of money out of court in accordance with an order or report shall file with the Registrar,
- (a) a written request for payment out;
 - (b) a certified copy of the order or report, unless one has already been filed with the Registrar; and
 - (c) an affidavit stating,
 - (i) in the case of a report, that the report has been confirmed and the manner of confirmation, or
 - (ii) in the case of an order, that the time prescribed for an appeal has expired and no appeal is pending,unless such an affidavit has already been filed with the Registrar and the Registrar shall then pay the money to the person to whom the order or report directs that it be paid.
- (3) Where the Official Guardian or Public Guardian and Trustee seeks

payment out in accordance with an order or report the Official Guardian or Public Guardian and Trustee may file one written request dealing with more than one proceeding and need not file the affidavit referred to in clause (2)(c).

Payment Out on Consent

- (4) A party who seeks payment out of court, on consent, of money paid into court shall file with the Registrar,
- (a) a written request for payment out;
 - (b) the consent of all parties or their lawyers; and
 - (c) an affidavit stating that all parties have consented to the payment and that neither the party who paid the money into court nor the party to whom it is to be paid is under disability,
- and the Registrar shall then pay the money out to the party in accordance with the consent.
- (4.1) Subrule (4) does not apply if the money was paid into court under an order that provides that a further order of the court is required for the money to be paid out of court.

Payment Out of Interest

- (5) Money paid out of court under subrule (2) or (4) shall be paid out with accrued interest, if any, unless the order, report or consent provides otherwise.

Consent by Insurer on Behalf of Party

- (6) Where the insurer of a party has paid money into court on behalf of the party and an affidavit setting out the relevant facts is filed with the Registrar, the consent required by clause (4)(b) may be given by the insurer on behalf of the party and, where the party is entitled to payment out, the money may be paid out to the insurer.

Minor Attaining Age of Majority

- (7) Money in court to which a party is entitled under an order or report when the party attains the age of majority may be paid out to the party on filing with the Registrar,
- (a) a requisition for payment out; and
 - (b) an affidavit proving the identity of the party and that the party has attained the age of majority.

Payment Directly to Lawyer

- (8) Where money has been paid into court as security for costs or an order has been made for payment of costs out of money in court and the order does not provide for payment out directly to a lawyer, the money may be paid out to the lawyer for the party entitled, on filing with the Registrar the material required by subrule (2) or (4) and the affidavit of the party stating

that the party consents to payment of the money directly to the lawyer rather than to the party.

Payment to Personal Representative

- (9) Where money or securities in court are to be paid out or transferred to a person named in an order or report who has died, the money or securities may be paid or transferred to the deceased person's personal representative on proof to the satisfaction of the Registrar of the person's death and of the personal representative's authority.

Party under Disability

- (10) An order for payment out of court of money in court to the credit of a person under disability may be obtained on motion to a judge by or on notice to the Official Guardian, unless the Public Guardian and Trustee is trustee of the person, in which case the motion shall be made by or on notice to the Public Guardian and Trustee.
- (11) A motion under subrule (9), other than a motion made by the Official Guardian or the Public Guardian and Trustee, shall be supported by an affidavit in Form 72 B.
- (12) A motion under subrule (9) by the Official Guardian or the Public Guardian and Trustee may be made without notice unless the court orders otherwise.
- (13) In an order under subrule (9), the judge may fix the costs of the moving party and direct that they be paid out of the money in court directly to the moving party's lawyer.

DISCHARGE OF A MORTGAGE

- 72.03** (1) A person entitled to the discharge of a mortgage held by the Prothonotary may send to the Prothonotary the document required discharging the mortgage with a request that the Prothonotary execute the document.
- (2) Where the Prothonotary is satisfied that the money secured by the mortgage has been paid in full and that the discharge document is in proper form, the Prothonotary shall execute the discharge document.
- (3) After executing the discharge document, the Prothonotary shall hand over all documents that relate to the mortgage in return for a receipt for the documents and shall assign any policy of insurance in respect of the mortgaged property to the person entitled to the discharge or as the person directs in writing.

STOP ORDER

- 72.04** (1) On motion without notice in a proceeding or, where there is no proceeding pending, on application without notice by a person who claims to be entitled to money or securities held or to be held in the future by the Registrar for the benefit of another person, the court may make a stop order (Form 72 C) directing that the money or securities shall not be dealt with except on notice to the moving party or applicant.

- (2) On a motion or application for a stop order, the moving party or applicant shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to any person for which the moving party or applicant ought to compensate the person.
- (3) A person who has obtained an order under subrule (1) may make a motion on notice to all interested parties for an order for payment out.

RULE 73

RECIPROCAL ENFORCEMENT OF UNITED KINGDOM JUDGMENTS

DEFINITIONS

73.01 In Rules 73.01 to 73.03,

- (a) "Act" means the *Canada-United Kingdom Judgments Recognition Act*;
- (b) "Convention" means the convention appearing as a schedule to the Act;
- (c) "judgment" means a judgment to which the Convention applies.

APPLICATION FOR REGISTRATION OF JUDGMENT

Notice of Application

73.02 (1) Notice of an application under the Act for registration of a judgment granted by a court in the United Kingdom shall be in Form 73 A.

Supporting Material

- (2) The application shall be supported by an affidavit that confirms the statements contained in the notice of application and sets out any additional facts necessary to establish that the applicant is entitled to register and enforce the judgment.
- (3) The judgment and the original proof of service of the originating process of the United Kingdom court, or certified copies of them, shall accompany the affidavit as exhibits.
- (4) The affidavit 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.

ENFORCEMENT OF JUDGMENT

73.03 A judgment registered under the Act may be enforced as if it had been granted by the court.

RULE 74**SMALL CLAIMS**

NOTICE: THE SMALL CLAIMS SECTION RULES AND FORMS ARE PUBLISHED IN A SEPARATE BOOKLET, AVAILABLE AT THE COURT REGISTRY, AND AVAILABLE ELECTRONICALLY ON THE COURT'S WEBSITE.

Rule **74** relating to proceedings in the Small Claims Section of the Supreme Court of Prince Edward was amended as of January 1, 2004.

By the Ninth Series of Amendments to the Rules of Civil Procedure in The Supreme Court of Prince Edward Island approved on the 16th of August, 2005 by Order-in-Council No. 2005-459, to come into effect on September 1, 2005 the following Rules & Forms within Rule 74, relating to proceedings in the Small Claims Section, were amended: Forms: 7A, 10A, 20 E & G; Rules: 19.01 to 19.03, 20.06(2), 20.08(9)&(10), 20.08(12)(b), 20.08(16)to(21).

By the Eleventh Series of Amendments to the Rules of Civil Procedure in The Supreme Court of Prince Edward Island approved on the 17th of July, 2007 by Order-in-Council No. 2007-454, to come into effect on September 1, 2007 the following Rules & Forms within Rule 74, relating to proceedings in the Small Claims Section (Actions Where the Debt or Damages Claimed Do Not Exceed \$8,000.) were amended: Forms: 11A, 11B, 11C, 11D, 13A, 13B, 14A, 20E, 20F, 20H, 20I, 20J, 20K, 20L, 20M; Rules: 1.03, 8.01, 9.01, 9.03, 10.01(2) and (4), 11.01, 11.05, 11.06, 11.07, 12.01, 13.01(1), 13.02 to 13.05, 14.05, 20.08(3), 20.08(6).

Chief Justice Gerard Mitchell
September 1, 2007

By the Thirteenth Series of Amendments to the Rules of Civil Procedure in the Supreme Court of Prince Edward Island approved on the 14th of July, 2009 by Order-in-Council No. EC2009-357, to come into effect on September 1, 2009 the following Rules & Forms within Rule 74, relating to proceedings in the Small Claims Section (Actions Where the Debt or Damages Claimed Do Not Exceed \$8,000.) were amended: Forms: 7A, 10A; Rules: 1.01, 1.02, 1.03(1), 1.03(2), 4.03(2)(d)(ii), 8.01(6), 13.06.

Chief Justice David H. Jenkins
Chair, Rules Committee
September 1, 2009

Executive Council by Order-in-Council No. EC2017-387 raised the Small Claims limit from \$8,000. to \$16,000. effective July 8, 2017, published in the July 8, 2017 issue of the **Royal Gazette**.

By the Twenty-first Series of Amendments to the Rules of Civil Procedure in the Supreme Court of Prince Edward Island approved on the 8th of August, 2017 by Order-in-Council No. EC2017-462, to come into effect on September 1, 2017 the following Rule within Rule 74, relating to proceedings in the Small Claims Section (Actions Where the Debt or Damages Claimed Do Not Exceed \$16,000.) was amended: Rule 14.06(a).

Chief Justice David H. Jenkins
Chair, Rules Committee
September 1, 2017

The Twenty-ninth Series of Amendments to the Rules of Civil Procedure, effective September 1, 2023, were made, formulated and adopted by the Rules Committee, approved on the 7th day of July, 2023, by Executive Council Order-in-Council No. EC2023-569, published in the July 22, 2023 issue of the **Royal Gazette**, the proposed amendments to Rule 74 – all its subrules 1 – 21, and all the associated Forms 4A – 20K, relating to proceedings in the Small Claims Section (Actions Where the Debt or Damages Claimed Do Not Exceed \$16,000).

Chief Justice James W. Gormley
Chair, Rules Committee
September 1, 2023

The Thirtieth Series of Amendments to the Rules of Civil Procedure, effective September 1, 2024, were made, formulated and adopted by the Rules Committee, approved on the 18th day of July, 2024, by Executive Council Order-in-Council No. EC2024-685, published in the July 27, 2024 issue of the **Royal Gazette**, the proposed amendments to Rule 74 – all its subrules 1 – 21, and all the associated Forms 4A – 20K, relating to proceedings in the Small Claims Section (Actions Where the Debt or Damages Claimed Do Not Exceed \$16,000).

Chief Justice James W. Gormley
Chair, Rules Committee
September 1, 2024

The Thirty-first Series of Amendments to the Rules of Civil Procedure, effective September 1, 2025, were made, formulated and adopted by the Rules Committee, approved on the 10th day of June 2025, by Executive Council Order-in-Council No. EC2025-573, published in the June 21, 2025, issue of the **Royal Gazette**, the proposed amendments to Rule 74 – rules 1.02 “disability” (b), 12.01(2), 18.02(1), and Form 4A 2, relating to proceedings in the Small Claims Section (Actions Where the Debt or Damages Claimed Do Not Exceed \$16,000).

Chief Justice James W. Gormley
Chair, Rules Committee
September 1, 2025

Three Rivers v. Power, 2023 PESC 43

Rule 19.03 expresses an expectation that costs up to 15% of the amount claimed be ordered to a successful party. However, a costs award should also be just and proportionate in all of the circumstances. The court ordered costs below 15% of the claimed amount, a counsel fee, and filing/service fees.

King v. Charlottetown (City) and Shaw's Towing, 2023 PECA 3

Where an offer to settle under Rule 14.07(2) lacks certainty, so that a comparison between the judgment of the court and the offer is incomplete and inaccurate, the offer will not be taken into account in the determination of costs. Here, a litigant who did not conduct themselves with civility during court proceedings had their costs reduced by one-third.

Ayangma v. Amfoubalela, 2022 PECA 11

The first issue in a motion to set aside default judgment is proof of service by the plaintiff. Here, where the process server did not indicate how they were able to identify the defendant, service was defective. Where service is not defective, the defendant must also show that the motion to set aside was made as soon as possible after they became aware of the judgment, there is a plausible explanation for the default, and the defendant’s case is arguable on its merits. The motions judge should lean in favour of setting aside, and the Court of Appeal will intervene only

where the motions judge is “clearly wrong”. A litigant who argues that a matter should not be heard on its merits because of a minor legal technicality should expect skepticism from the court.

Grafton Management Inc. v. Charlottetown (City), 2021 PECA 11

The court set out a framework for assessing costs of a self-represented litigant. Costs are in the discretion of the judge, and when exercising that discretion judges should be mindful of the purpose for awarding costs. Lost opportunity cost may be a factor but is not a condition precedent to an award of costs to a self-represented litigant. A self-represented litigant should not be compensated in relation to time and effort expended on a case which flow from the simple fact of being a litigant. Self-represented litigants are not entitled costs on the same basis as a litigant who retains counsel.

Peni Brook v. Town of Montague, 2016 PESC 19

In exercising their discretion under Rule 12.02 and 13.04, the Prothonotary must provide reasons for striking out a Plaintiff’s Claim.

Peni Brook v. Town of Montague, 2016 PESC 33

The court stated that costs for self-represented parties may include expenses associated with activities reasonably required by the case. The Plaintiff was awarded costs for travel, research and filing fees.

Kelly v. Aliant Telecom, 2008 PESCTD 12

The general power of the court, in Rule 2.02, to act in the interest of justice permits the court to depart from Rule 19.02, which states that an award of costs shall not exceed 15 percent of the amount claimed. The court stated that it is implicit in Rule 19.02 that costs shall not exceed \$1,200 (15% of the \$8000 limit), barring unreasonable behaviour in the proceeding. The court awarded costs of \$1000 and disbursements of \$250.

Whiteway v. O’Halloran, 2007 PESCAD 22; (2007), Nfld. & P.E.I.R. 239

On an appeal from a decision in a small claims matter, costs are to be fixed in accordance with the provisions of Rule 57 because Rule 74, pursuant to sub-rule 1.01 thereof, is applicable only to proceedings in the small claims section of the trial division.

Hawkes v. Aliant, 2006 PESCTD 48; (2006), 263 Nfld. & P.E.I.R. 175

The Prothonotary made an order at a pre-trial conference striking out the plaintiff’s statement of claim because it disclosed no reasonable cause of action. The order was made pursuant to subrules 13.03(3)(b) and 12.02(1)(a) of the **Rules of Civil Procedure** governing cases in the Small Claims Section. The motions judge set aside the Prothonotary’s order as he concluded the statement of claim did disclose a reasonable cause of action.

MRSB v. Cardinal & Ors., 2006 PESCTD 16

Sub-rule 19.02 of the Small Claims Rules, while a factor to consider in awarding costs in a small claim proceeding, does not reduce or otherwise affect the authority of the court to award costs under s-s.53(1) of the **Supreme Court Act**, R.S.P.E.I. 1988, Cap. S-10.

O’Hanley v. Wheatley & Gulf Surveys, 2005 PESCTD 20

The court allowed costs against the plaintiff under Rules 19.01, 19.02, 19.03, 19.04, in the amount of \$1,194 plus taxes in favour of one defendant, and \$3,364 plus taxes in favour of the

second defendant.

Baxter v. Crosby's Auto Sales, 2004 PESCTD 59

The parties allegedly entered into an agreement on the issues in dispute. The defendant made a motion under Rule 14.06 of the Small Claims Rules for judgment in accordance with the terms of the agreement. In the circumstances, there being an allegation by the plaintiff the agreement was entered into on the basis of a fraudulent misrepresentation by the defendant, the motion judge declined to grant judgment on the terms of the agreement. The proceeding was to continue to trial.

RULE 75**PARTICULAR PROCEEDINGS QUICK RULING****STATEMENT OF PURPOSE**

75.01 This rule is intended to provide a quick and inexpensive procedure for resolving disputes.

Definitions

75.02 In this rule, unless the context requires otherwise,

- (a) "dispute" means a dispute between persons which is being litigated, or is likely to be litigated, under these rules, except one which may arise in a divorce or other matrimonial proceeding,
- (b) "party" means a person involved in a dispute whether or not a proceeding has been commenced under these rules.

Special Judges

75.03 The Chief Justice of the Supreme Court may assign one or more judges to be special judges for the purpose of this rule.

Request for a Quick Ruling

- 75.04** (1) A party to a dispute may request the consent of the other party to submit the whole or any part of the dispute to a quick ruling.
- (2) A request under paragraph (1) shall be made in writing and shall state
- (a) that the party requests a quick ruling, and
 - (b) that the party requires the opposite party to agree in writing
 - (i) to a statement of facts and issues accompanying the notice, or
 - (ii) to have a special judge determine the facts and issues.
- (3) A party served with a request under paragraph (2) shall respond in writing within 10 days.
- (4) Where agreement is reached under paragraph (2)(b), the party who made the request may apply to a special judge for a quick ruling
- (a) where proceedings have not been commenced, by Notice of Application, or
 - (b) where proceedings have been commenced, by Notice of Motion.
- (5) At least seven days before the hearing, each party shall file with the Registrar and serve on each other party a written brief containing
- (a) a chronological summary of relevant facts,
 - (b) a brief statement of the applicable law,

- (c) the relief sought or his defence, as may be, and
- (d) copies of documents which are relevant to the dispute.

Hearing

- 75.05** (1) On the hearing, the special judge may
- (a) where he is not satisfied that a quick ruling can be made with respect to the whole or any part of the dispute, refuse to hear it,
 - (b) conduct the hearing in any manner he deems fair, and may
 - (i) ask questions of parties, lawyers or other persons in attendance, and
 - (ii) receive evidence, in any form, or
 - (c) adjourn the hearing.
- (2) the court reporter shall file the transcript of the hearing with the Registrar.

Judgment

- 75.06** (1) The special judge shall give a decision at the hearing or within 30 days thereafter and shall file a copy with the Registrar.
- (2) If the special judge decides to make a quick ruling, he may
- (a) rule with respect to the whole or any part of the dispute,
 - (b) assess any damages, or give directions for an assessment, and
 - (c) make an order as to costs.
- (3) If a special judge decides that the dispute is not one upon which a quick ruling can be made, he may treat the hearing as a conference between the parties and
- (a) recite the results of the conference, and
 - (b) give directions which the special judge considers necessary or advisable with respect to resolving the dispute.

Non-acceptance of Quick Ruling

- 75.07** (1) Within 5 days after a quick ruling is given, a party may file with the Registrar and serve on every party a Notice of Non-acceptance (Form 75 A).
- (2) If a Notice of Non-acceptance is filed under paragraph (1), the Registrar shall not permit anyone except the parties to see either the transcript or the quick ruling, unless the special judge orders otherwise and the documents relating to the quick ruling shall not be included or referred to in the trial record.
- (3) The transcript of the hearing may be used in cross-examination at a subsequent trial or hearing with respect to the dispute.
- (4) If a party files and serves a Notice of Non-acceptance under paragraph (1),

and the result of a subsequent trial or hearing with respect to the dispute is

(a) the same as the quick ruling, or

(b) less advantageous than the quick ruling to that party,

then, unless ordered otherwise, any costs which he is ordered to pay shall be increased by the Prothonotary by 50% and any costs ordered to be paid to the party shall be decreased by the Prothonotary by 50%.

Acceptance of Quick Ruling

75.08 A party who does not file and serve a Notice of Non-acceptance shall be deemed to accept the quick ruling.

Signing and Entering Final Judgment

75.09 If all parties accept or are deemed to accept the quick ruling, any of them may prepare a Judgment on Quick Ruling (Form 75 B) and present it to the Registrar to be signed and entered.

Appeals

75.10 (1) A decision of a special judge under this rule cannot be appealed.

(2) A judgment signed and entered under Rule 75.09 may be appealed on procedural grounds only.

Limitation on Special Judges

75.11 A special judge who conducts a hearing under this rule shall not participate in any subsequent proceeding involving the same or any part of the same dispute, unless the Chief Justice of the Supreme Court orders otherwise.

Hazelbrook Community v. Maintenance Services Ltd., 2012 PESC 34

Where the action is brought within the Simplified Procedure Rule 75, a motion for partial summary judgment is not made pursuant to Rule 20. Rule 75.1.07(9) permits a motion for partial summary judgment. However, the evidentiary requirements of Rule 75.1.07(3) and (4) are the same as those in Rule 20.02.

RULE 75.1

No action may be commenced under Simplified Procedure

Rule 75.1 after September 1, 2019.

SIMPLIFIED PROCEDURE**APPLICATION OF RULE**

- 75.1.01(1)** The simplified procedure set out in this Rule does not apply to:
- (a) actions under the *Mechanics Lien Act*;
 - (b) actions under the *Family Law Act*;
 - (c) actions under the *Divorce Act*;
 - (d) actions under the jurisdiction of the Small Claims Section of the Supreme court as provided for in s-s.15(1) of the *Judicature Act*;
 - (e) actions arising out of a personal injury or contract of insurance related thereto;
 - (f) actions commenced on or after September 1, 2019, and no action commenced prior to this date may be amended to continue under this Rule.

Application of Other Rules

- (2) The rules that apply to an action apply to an action that is proceeding under this Rule, unless this Rule provides otherwise.

AVAILABILITY OF SIMPLIFIED PROCEDURE**When Mandatory**

- 75.1.02(1)** Unless the court otherwise orders, the procedure set out in this Rule shall be used in an action if the following conditions are satisfied:
- (a) The plaintiff's claim is exclusively for one or more of the following:
 - (i) Money.
 - (ii) Real Property.
 - (iii) Personal Property.
 - (b) The total of the following amounts is \$25,000 or less, exclusive of interests and costs:
 - (i) The amount of money claimed, if any,
 - (ii) The fair market value of any real property and of any personal property, as at the date the action is commenced.
- (2) If there are two or more plaintiffs, the procedure set out in this Rule shall be used if each plaintiff's claim, considered separately, meets the requirements of subrule (1).

When Optional

- (3) Subject to Rule 75.1.01(1), the procedure set out in this Rule may be used in any other action at the option of the plaintiff, subject to subrules (4) to (10).

Originating Process

- (4) The statement of claim (Form 14 A, 14 B or 14 D) or notice of action (Form 14 C) shall indicate that the action is being brought under this Rule.

Action Continues to Proceed Under Rule

- (5) An action commenced under this Rule continues to proceed under this Rule unless,
- (a) the defendant objects in the statement of defence to the action proceeding under this Rule because the plaintiff's claim does not comply with subrule (1), and the plaintiff does not abandon in the reply the claims or parts of claims that do not comply; or
 - (b) a defendant by counterclaim, crossclaim or third party claim objects in the statement of defence to the counterclaim, crossclaim or third party claim proceeding under this Rule because the counterclaim, crossclaim or third party claim does not comply with subrule (1), and the defendant does not abandon in the reply to the counterclaim, crossclaim or third party claim the claims or parts of claims that do not comply.

Continuance Under Ordinary Procedure B Where Notice Required

- (6) If an action commenced under this Rule may no longer proceed under this Rule because of an amendment to the pleadings or as a result of the operation of subrule (5),
- (a) the action is continued under the ordinary procedure; and
 - (b) the plaintiff shall deliver, after all the pleadings have been delivered or at the time of amending the pleadings, as the case may be, a notice (Form 75.1 A) stating that the action and any related proceedings are continued as an ordinary action.

Continuance Under Simplified Procedure B Where Notice Required

- (7) An action that was not commenced under this Rule is continued under this Rule if,
- (a) the consent of all the parties is filed; or
 - (b) no consent is filed but,
 - (i) the plaintiff's pleading is amended to comply with subrule (1), and
 - (ii) all other claims, counterclaims, crossclaims and third party claims comply with this Rule.

- (8) The plaintiff shall deliver a notice (Form 75.1 A) stating that the action and any related proceedings are continued under this Rule.

Effect of Abandonment

- (9) A party who abandons a claim or part of a claim or amends a pleading so that the claim, counterclaim, crossclaim or third party claim complies with subrule (1) may not bring the claim or part in any other proceeding.

Motion for Transfer of Proceeding

- (10) (a) Any party to a proceeding under this Rule, may make a motion in accordance with Rule 37.07 for an order that the proceeding be heard and determined in accordance with the general Rules of Court, instead of in accordance with Rule 75.1.
- (b) On a motion under subrule (1)(a), the court may consider the following factors:
- (i) the nature of the claim being made;
 - (ii) the complexity of the proceeding;
 - (iii) the nature of evidence usually required or presented in such a proceeding;
 - (iv) the extent to which the fairness or efficiency of the trial may be affected by:
 - a. the unavailability of pre-trial discovery as prescribed by Rule 75.1.04;
 - b. the limitations placed on the presentation and cross-examination of witnesses prescribed by Rule 75.1.11;
 - c. whether the issues to be tried may be those with respect to which expert evidence is ordinarily called or may be of assistance to the court;
 - d. the likelihood and nature of the consequences to the parties beyond the relief claimed in the action;
 - e. the extent to which the determination of issues in the action may involve the assessment of the credibility of witnesses;
 - f. the costs consequences of removing the proceeding from the application of Rule 75.1;
 - g. any other relevant matter.
- (c) Subrule 10(1) applies, with necessary modifications, to a counterclaim, cross-claim or third party claim.

AFFIDAVIT OF DOCUMENTS

Copies of Documents

- 75.1.03** (1) A party to an action under this Rule shall, within 30 days after the close

of pleadings and at the party's own expense, serve on every other party,

- (a) an affidavit of documents (Form 30 A or 30 B) disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power; and
- (b) copies of the documents referred to in Schedule A of the affidavit of documents.

List of Potential Witnesses and Witness Statements

- (2) Unless the court otherwise orders, the affidavit of documents shall include,
 - (a) a list of the names and addresses of persons who might reasonably be expected to have knowledge of matters in issue in the action; and
 - (b) a summary of the substance of the evidence to be given by each witness, including experts, that a party intends to give evidence at trial whether orally or by affidavit.

Effect of Failure to Disclose

- (3) At the trial of the action, unless the court otherwise orders,
 - (a) a party may not call as a witness a person whose name has not been disclosed in the party's affidavit of documents or any supplementary affidavit of documents; and
 - (b) a witness may not give evidence on direct examination or by affidavit that differs substantially or materially from that which was indicated in the summary provided pursuant to subrule (2).

Lawyer's Certificate

- (4) The lawyer's certificate under subrule 30.03(4) (full disclosure in affidavit) shall include a statement that the lawyer has explained to the deponent the necessity of complying with subrules (1) and (2).

NO DISCOVERY, CROSS-EXAMINATION ON AN AFFIDAVIT OR EXAMINATION OF WITNESS

75.1.04 The following are not permitted in an action under this Rule:

- (a) Examination for discovery under Rule 31.03 or 31.10.
- (b) Examination for discovery by written questions and answers under Rule 35.
- (c) Cross-examination of a deponent on an affidavit under Rule 39.02.
- (d) Examination of a witness on a motion under Rule 39.03.

MOTIONS

Motion Form

- 75.1.05(1)** The moving party shall serve a motion form (Form 75.1 B) in accordance with Rule 37.07 and shall submit it to the court before the motion is heard.

Procedure

- (2) Depending on the practical requirements of the situation, the motion may be made,
 - (a) with or without supporting material or a motion record;
 - (b) by attendance, in writing, by fax or under Rule 1.07 (telephone and video conferences).

Motions Dealt With By Prothonotary

- (3) When a motion described in subrule (5) meets one of the following conditions, the Prothonotary shall make an order granting the relief sought:
 - (a) The motion is for an order on consent, the consent of all parties is filed and the consent states that no party affected by the order is under disability.
 - (b) No responding material is filed and the notice of motion or the motion form states that no party affected by the order is under disability.
- (4) Subrule (3) applies to a motion for
 - (a) amendment of a pleading or notice of motion;
 - (b) addition, deletion or substitution of a party whose consent is filed;
 - (c) removal of a lawyer as lawyer of record;
 - (d) setting aside the noting of a party in default;
 - (e) setting aside a default judgment;
 - (f) discharge of a certificate of pending litigation;
 - (g) security for costs in a specified amount; or
 - (h) dismissal of a proceeding with or without costs.

Disposition

- (5) The court or the Prothonotary shall record the disposition of the motion on the motion form.
- (6) No formal order is required unless
 - (a) the court or Prothonotary orders otherwise;
 - (b) an appeal is made to a judge; or
 - (c) an appeal or motion for leave to appeal is made to an appellate court.

DISMISSAL BY PROTHONOTARY**If no Defence Filed**

- 75.1.06(1)** The Prothonotary shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:

- (a) More than 180 days have passed since the date of the originating process was issued.
- (b) No statement of defence has been filed.
- (c) The action has not been disposed of by final order or judgment.
- (d) The action has not been set down for trial or summary trial.
- (e) The registrar has given 45 days notice that the action will be dismissed as abandoned.

If Defence Filed

- (2) The Prothonotary shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:
 - (a) More than 150 days have passed since the filing of the first statement of defence or notice of intent to defend.
 - (b) The action has not been disposed of by final order or judgment.
 - (c) The action has not been set down for trial or summary trial.
 - (d) The registrar has given 45 days notice that the action will be dismissed as abandoned.

Service on Parties

- (3) The registrar shall serve a copy of the order made under subrule (1) or (2) on the parties.

Effect on Subsequent Action

- (4) The dismissal of an action as abandoned has the same effect as a dismissal for delay under Rule 24.05.

SUMMARY JUDGMENT**Where Available**

- 75.1.07(1)** After the close of pleadings, a party may move before a judge with supporting affidavit material for summary judgment.

Application of Summary Judgment Procedure

- (2) Rules 20.02 to 20.09 apply to the motion.

SETTLEMENT DISCUSSION AND DOCUMENTARY DISCLOSURE

- 75.1.08** Within 60 days after the filing of the first statement of defence or notice of intent to defend, the parties shall, in a meeting or telephone call, consider whether

- (a) all documents relating to any matter at issue have been disclosed; and
- (b) settlement of any or all issues is possible.

PRE-TRIAL CONFERENCE**Notice**

- 75.1.09(1)** The registrar shall serve notice of a pre-trial conference at least 45 days before the scheduled date.

Attendance

- (2) A party and his or her lawyer shall, unless the court orders otherwise, participate in the pre-trial conference
- (a) by personal attendance; or
 - (b) under Rule 1.07 (telephone and video conferences) if personal attendance would require undue amounts of travel time or expense.

Authority to Settle

- (3) A party who requires another person's approval before agreeing to a settlement shall, before the pre-trial conference, arrange to have ready telephone access to the other person throughout the conference, whether it takes place during or after regular business hours.

Documents

- (4) At least five days before the pre-trial conference, each party shall
- (a) file
 - (i) a copy of the party's affidavit of documents and copies of the documents relied on for the party's claim or defence,
 - (ii) a copy of any expert report, and
 - (iii) any other material necessary for the conference;
 - (b) deliver
 - (i) a two-page statement setting out the issues and the party's position with respect to them, and
 - (ii) a trial management checklist (Form 75.1 C).

Trial Date

- (5) The pre-trial conference judge or the registrar shall fix a date for trial.

Mode of Trial

- (6) The parties may agree that the trial shall be an ordinary trial or a summary trial under Rule 75.1.11; if they do not agree, the pre-trial conference judge shall determine the mode of trial that is appropriate in all the circumstances.
- (7) If the trial is to be a summary trial under Rule 75.1.11, the pre-trial conference judge
- (a) shall set a timetable for the delivery of all the parties' affidavits; and
 - (b) may vary the order and time of presentation.

PLACING DEFENDED ACTION ON TRIAL LIST**Registrar**

- 75.1.10(1)** The registrar shall place a defended action on the appropriate trial list immediately after the pre-trial conference.

Trial Record

- (2) At least 10 days before the date fixed for trial, the party who set the action down for trial shall serve a trial record on every party to the action and any counterclaim, crossclaim or third party claim, and file the record with proof of service.
- (3) In the case of an ordinary trial, the trial record shall be prepared in accordance with Rule 48.03.
- (4) In the case of a summary trial under Rule 75.1.11, the trial record shall contain, in consecutively numbered pages arranged in the following order:
 - (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
 - (b) a copy of the pleadings, including those relating to any counterclaim, crossclaim or third party claim;
 - (c) a copy of any demand or order for particulars of a pleading and the particulars delivered in response;
 - (d) a copy of any order respecting the trial;
 - (e) a copy of all the affidavits served by all the parties for use on the summary trial; and
 - (f) a certificate signed by the lawyer of the party filing the trial record, stating that it contains the documents described in clauses (a) to (e).

SUMMARY TRIAL**Procedure**

- 75.1.11(1)** At a summary trial, the evidence and argument shall be presented as follows, subject to any direction under subrule 75.1.09(7):
- (a) The plaintiff shall adduce evidence by affidavit.
 - (b) A party who is adverse in interest may cross-examine the deponent of any affidavit served by the plaintiff.
 - (c) The plaintiff may re-examine any deponent who is cross-examined under this subrule for not more than 10 minutes.
 - (d) When any cross-examinations and re-examinations of the plaintiff's deponents are concluded, the defendant shall adduce evidence by affidavit.
 - (e) A party who is adverse in interest may cross-examine the deponent of any affidavit served by a defendant.

- (f) A party shall complete all of the party's cross-examinations within 50 minutes.
 - (g) A defendant may re-examine any deponent who is cross-examined under this subrule for not more than 10 minutes.
 - (h) When any cross-examinations and re-examinations of the defendant's deponents are concluded, the plaintiff may, with leave of the trial judge, adduce any proper reply evidence.
 - (i) After the presentation of evidence, each party may make oral argument for not more than 45 minutes.
- (2) The trial judge may extend a time provided in subrule (1).
 - (3) A party who intends to cross-examine the deponent of an affidavit at the summary trial shall, at least 10 days before the date fixed for trial, give notice of that intention to the party who filed the affidavit, who shall arrange for the deponent's attendance at the trial.

Judgment after Summary Trial

- (4) The judge shall grant judgment after the conclusion of the summary trial.

COSTS CONSEQUENCES**Opting In**

- 75.1.12(1)** Regardless of the outcome of the action, if this Rule applies as the result of amendment of the pleadings under subrule 75.1.02(7), the party whose pleadings are amended shall pay, on a substantial indemnity basis, the costs incurred by the opposing party up to the date of the amendment that would not have been incurred had the claim originally complied with subrule 75.1.02(1), unless the court orders otherwise.

Plaintiff Denied Costs

- (2) Subrules (3) to (9) apply to a plaintiff who obtains a judgment that satisfied the following conditions:
 - (a) The judgment awards exclusively one or more of the following:
 - (i) Money.
 - (ii) Real property.
 - (iii) Personal property.
 - (b) The total of the following amounts is \$25,000 or less, exclusive of interest and costs:
 - (i) The amount of money awarded, if any;
 - (ii) The fair market value of any real property and of any personal property awarded, as at the date the action is commenced.
- (3) The plaintiff shall not recover any costs unless
 - (a) the action was proceeding under this Rule at the commencement of

- the trial; or
- (b) the court is satisfied that it was reasonable for the plaintiff
 - (i) to have commenced and continued the action under the ordinary procedure, or
 - (ii) to have allowed the action to be continued under the ordinary procedure, by not abandoning claims or parts of claims that do not comply with subrule 75.1.02(1).
- (4) Subrule (3) applies despite subrule 49.10(1) (plaintiff's offer to settle).
- (5) Subrule (3) does not apply if this Rule was unavailable because of the counterclaim, crossclaim or third party claim of another party.

Plaintiff May be Ordered to Pay Defendant's Costs

- (6) The plaintiff may, in the trial judge's discretion, be ordered to pay all or part of the defendant's costs, including substantial indemnity costs, in addition to any costs the plaintiff is required to pay under subrule 49.10(2) (defendant's offer to settle).

Defendant Objecting to Simplified Procedure

- (7) In an action that includes a claim for real or personal property, if the defendant objected to proceeding under this Rule on the ground that the property's fair market value exceeded \$25,000 at the date the action was commenced and the court finds the value did not exceed that amount at that date, the defendant shall pay, on a substantial indemnity basis, the costs incurred by the plaintiff that would not have been incurred had the claim originally complied with subrule 75.1.02(1), unless the court orders otherwise.

Burden of Proof

- (8) The burden of proving that the fair market value of the real or personal property at the date of commencement of the action was \$25,000 or less is on the plaintiff.

Counterclaims, Crossclaims and Third Party Claims

- (9) Subrules (1) to (8) apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Li v. Macnutt & Dumont, 2018 PESC 5

A motion for summary judgment was made in a simplified procedure matter. The Court found that the summary judgment process was not the appropriate process for adjudicating the dispute as it would not provide a fair and just adjudication. The Court was of the view that there were a number of genuine issues requiring a trial.

Durrell v. Lloyd Underwriters, 2005 PESCAD 17

Rule 75.1.02(7) as it read prior to an amendment effective September 1, 2004, did not foreclose the operation of Rule 26 when a plaintiff wished to amend a statement of claim to bring the action within Rule 75.1 – Simplified Procedure.

It is the procedure under Rule 75.1 which is meant to be simple – not the issues in the cases. The procedure is available for any action, except those referred to in Rule 75.1.01(1).

Irving Oil v. WCI Inc. & ADI Inc., 2004 PESCTD 28

The threshold test for granting summary judgment in an action brought under the Simplified Procedure Rule is much lower than the threshold test for obtaining summary judgment under Rule 20. If the court is satisfied there is sufficient material on which to resolve that issue on the motion, the court may grant summary judgment under Rule 75.1.07, notwithstanding there may be a genuine issue for trial.

RULE 75.2**STATED CASE PROCEDURE****APPLICATION**

- 75.2.01** Where an enactment provides that a tribunal, commission or panel thereof may refer a question of law to the court for an opinion, the tribunal, commission or panel shall state a case in writing setting forth the question or questions of law to be answered and shall file it with the court.

MOTION FOR DIRECTIONS**Motion to Seek Directions re Conduct of Case**

- 75.2.02** (1) Upon filing the stated case the tribunal, commission or panel shall make a motion to the Court seeking directions as to the conduct of the stated case.
- (2) The motion shall set forth the issues raised by the questions of law posed and it shall also provide the court with the particulars any person or class of persons who, to its knowledge, may have an interest in the issues raised by the questions.

Giving of Notice to Interested Parties

- (3) The court upon hearing the motion for directions may order that any person, or any one or more of a class of persons, interested in the issues raised by the questions posed in the stated case be given notice of the filing of the stated case which notice shall provide for a period of time within which to file a motion for leave to intervene.

Publication of Notice to Interested Parties

- (4) The court may also direct that notice of the stated case be published in a local newspaper and the Royal Gazette as many times as the court in its discretion deems necessary, notifying the public of the stated case and providing a specific period of time to file an application to intervene and to make submissions, either oral or written, on the stated case.

Motion by Interested Parties Seeking to Intervene

- (5) Any person wishing to intervene and make submissions to the court on the questions raised in the stated case shall make a motion to the court, within the time prescribed in the notice, for leave to intervene in the stated case.
- (6) The motion shall:
- (i) briefly describe the intervener and its interest in the stated case;

- (ii) identify the position to be taken by the intervener on the questions posed in the stated case; and
- (iii) set out a summary of the arguments to be advanced in the stated case as well as the reasons why the intervener's submissions will be of assistance to the court.

Exercise of Court's Discretion

- (7) The court may exercise its discretion in deciding whether to allow an application to intervene; however in exercising such discretion the court shall have regard to whether the applicant:
- (a) has an interest in the subject matter of the stated case;
 - (b) may be adversely affected by the answers given to the questions posed;
 - (c) represents a class of persons that has a public interest in the subject matter of the stated case; and
 - (d) will assist the court in answering the questions posed in the stated case.

COST OF INTERVENTION**Self-represented Interveners**

- 75.2.03(1) Where any person permitted by the court to intervene is not represented by a lawyer, the court may appoint a lawyer to argue on behalf of the interested person and order the tribunal, commission or panel thereof to pay the reasonable expenses of the lawyer.

Represented by a Lawyer

- (2) Where any person permitted by the court to intervene is represented by a lawyer and requests that the tribunal, commission or panel thereof stating the case pay its costs of intervention, the court may make such order as to costs as it deems just in the circumstances.

QUESTION RE CONSTITUTIONALITY OF ACT/REGULATION**Notice of Intention**

- 75.2.04(1) Where a question relates to the constitutional validity or constitutional applicability of an Act of Parliament of Canada or the Legislature, or a regulation or bylaw made thereunder the Attorney General of Canada and the Attorney General of Prince Edward Island shall be notified and both are entitled to make written and oral submissions to the court.

TERMS OF ORDER GRANTING INTERVENTION

- 75.2.05(1) In the order granting leave to intervene, the court may:
- (i) specify the filing date for the filing of a factum and case book by the tribunal, commission or panel stating the case;

- (ii) specify the date for the filing of the factum of the intervener and, if applicable, the Attorneys General;
- (iii) direct the times for filing of written submissions by the tribunal, commission, or panel stating the case as well as those for the interveners;
- (iv) give directions as to who shall be entitled to make oral submissions at the hearing; or
- (v) set a date for the hearing of oral submissions.

MOTION TO BE HEARD BY ONE /THREE JUDGES

- 75.2.06(1)** A motion made under this rule to the Court of Appeal may be heard by a single judge or a panel of three judges.

JUDGES' RULES

RULE 76

**RULES PROMULGATED UNDER THE WINDING-UP AND RESTRUCTURING
ACT**

RSC. 1985, C. W-10

PETITION TO WIND UP CORPORATION

Title of Petition

- 76.01** A petition for the winding up of a company by the court, and any notice, affidavit and other document in the proceeding, shall be entitled "in the matter of the *Winding-up and Restructuring Act*" and of the company, naming the company to which the petition relates.

Service of Petition, Etc.

- 76.02** A copy of a petition endorsed with, or accompanied by a notice of an application for a winding-up order and copies of any affidavit and other material upon which the petitioner proposes to rely in support of the application, shall, unless the petition is presented by the company, be served at the principal or last known principal office or place of business of the company, if it can be found, upon any member, officer or servant of the company there, or when a member, officer or servant cannot, after due diligence, be found there, then in the manner provided for service on a company of ordinary process, or in such other manner as the court may direct.

Contributories, Etc. Entitled to Copies of Papers, Etc.

- 76.03** Any contributory or creditor of the company shall be entitled to be furnished by the lawyer for a petitioner, or by a petitioner if the contributory or creditor presents a petition in person, with copies of the petition, affidavit and other material or of any portion thereof as is required, within twenty-four hours after the same is demanded, on paying the sum of twenty cents per page.

WINDING-UP ORDER

Order to Be Advertised and Served

- 76.04** Every order for the winding up of a company by the court, or subject to its supervision, shall within fifteen days after the date thereof, be advertised in a newspaper having a general circulation in the place where the head office or principal place of business of the company is situated, and in The Canada Gazette or The Royal Gazette as the court may direct, and shall be served upon any person and in such manner as the court may direct.

Entry of Order, Etc.

- 76.05** (1) A winding-up order shall be entered with the Prothonotary within seven days after it is made up, and in default thereof any other person interested in the winding up may draw the order and the court may give the carriage and prosecution of the order to such person.

- (2) Upon a winding-up order being entered, the person having the carriage of the proceeding shall cause a notice of application to be issued forthwith and served upon all parties who have appeared on the hearing of the petition.
- (3) On the application, the court may fix a time and place for the appointment of a liquidator, the proof of debts, and the list of contributories to be brought in, and give directions for any advertisement and notice, and generally as to the proceeding or parties to attend thereon.

Evidence, Etc.

- 76.06** To enable the court to determine the most satisfactory method of giving notice of an application to appoint a liquidator and the parties to whom notice should be given, a petitioner or other person having the carriage of the proceeding shall furnish to the court the best evidence, obtainable by them on reasonable enquiry and to the satisfaction of the court, as to the names of the creditors, contributories and shareholders respectively and their places of residence, and the court may require any further evidence on these or other points to be furnished.

Provisional Liquidator

- 76.07** Where it is desired to appoint a provisional liquidator, an application for that purpose may be made at any time after the presentation of a petition for winding up, without notice or advertisement unless the court otherwise directs, and the court may appoint the provisional director, if it thinks fit, without security.

Winding-Up Order

- 76.08** Notwithstanding the provisions of any other rule, if it appears to the court, upon the presentation of a petition that all proper parties had notice, the court may make an order for winding up the company and the appointment of a liquidator.

LIQUIDATOR

Advertising

- 76.09** When a time and place has been fixed for the appointment of a liquidator, notice of the time and place shall be given to creditors, contributories and shareholders or members, or advertised in such manner as the court may direct, but the first or only advertisement, if any, shall be published within fifteen days and not less than seven days before the day so fixed.

Contents of Notice

- 76.10** Notice of the application for the appointment of a liquidator shall give the name, address and occupation of the person proposed to be appointed, and the court may appoint the person named in the notice or any other person, with or without further notice to any person.

Qualifications of Liquidator

- 76.11** An application for the appointment of a liquidator shall be accompanied by satisfactory evidence of the qualifications and character of the party sought to be appointed as liquidator and of their fitness for the office.

Security

- 76.12** Unless otherwise ordered by the court, a liquidator shall give security in such manner and in such sum as the court may direct.

Order Appointing Liquidator

- 76.13** A liquidator shall be appointed by order, which shall
- (a) fix a time within which the liquidator shall give security, unless the liquidator has done so or it has been dispensed with;
 - (b) fix the times or periods at which the liquidator is to leave their accounts of receipts and payments at the office of the Prothonotary; and
 - (c) direct all monies received by the liquidator to be paid into a chartered bank to the account of the liquidator immediately after their receipt in an account opened therefor, and an office copy of the order shall be lodged with the bank.

Sureties of Liquidator

- 76.14** A liquidator, if required to furnish security, shall, on each passing of their account and whenever the court requires, satisfy the court that the liquidator's security remains in full force and effect, and in default thereof the liquidator may be required to enter into fresh security as directed.

Death, Etc. of Liquidator

- 76.15** In case of the death, removal or resignation of a liquidator, another or others shall be appointed in their place as in the case of a first appointment, and the proceeding for the purpose may be taken by any interested party.

Duties of Liquidator

- 76.16** A liquidator shall, with all convenient speed after being appointed, proceed to make up, continue, complete and rectify the books of account of the company, and shall provide and keep such books of account as are necessary or as the court may direct, for the purpose aforesaid and for showing the debts and credits of the company, including a ledger which shall contain the separate accounts of the contributories and in which every contributory shall be debited from time to time with the amount payable by the contributory in respect of any call made under the Act.

Accounts of Liquidator

- 76.17** The accounts of a liquidator shall be filed in the office of the Prothonotary at such time as may from time to time be required by the court, and the accounts shall, whenever required by the court and upon notice to any party as the court may direct, be passed and verified in the same manner as receivers' accounts.

PROOF OF DEBTS

Advertisement for Debts, Etc.

- 76.18** (1) For the purpose of ascertaining the creditors and claimants of a company and requiring them to come in and prove their debts or claims, such advertisements shall be published as the court may direct.
- (2) The advertisements shall fix a time for the creditors and claimants to send in to the liquidator, their names and addresses, the particulars of their debts or claims, the nature and amount of the security, if any, held by them respectively, with the valuation thereof on oath, and the names and addresses of their lawyers, if any, and the advertisements shall appoint a day for adjudicating thereon.

Proof of Claims

- 76.19** The creditors and claimants need not attend the adjudication or prove their debts or claims, unless they are required to do so by notice from the liquidator, or any creditor, contributory, shareholder or member of the company, but upon the notice being given they shall come in and prove their debts or claims at the time therein specified or such other time as the court may allow.

Duties of Liquidator as to Debts and Claims

- 76.20** A liquidator shall investigate the debts and claims sent in to the liquidator and ascertain, so far as the liquidator is able, which of them are justly due from the company, and the liquidator shall make out and leave with the Prothonotary a list of all debts and claims sent to the liquidator, distinguishing the debts and claims or parts thereof so claimed that are in the liquidator's opinion justly due and proper to be allowed without further evidence from those that in the liquidator's opinion ought to be proved by the creditors, and the liquidator shall make and file with the Prothonotary, prior to the time appointed for adjudication, an affidavit setting forth the debts and claims that in the liquidator's opinion are justly due and proper to be allowed without further evidence.

Claims of Which Liquidator has not Notice

- 76.21** If by examination of the books, accounts or papers of a company, or by any other means, a liquidator is led to believe that any person is a creditor of or has a claim against the company, for which the party is entitled to rank against the assets of the company, and the party has not sent in notice of their claim to the liquidator, the liquidator shall mention the claim and the probable amount thereof in the affidavit required by Rule 76.20, with the address or supposed address of the person.

Judge May Allow Debts, Etc.

- 76.22** At the time appointed for adjudicating up on the debts or claims, or at any adjournment thereof, the court may either allow the debts and claims upon the affidavit of the liquidator, or require the same, or any of them, to be proved by any claimant and adjourn the adjudication thereon to a time to be fixed, and the liquidator shall give notice to any creditor whose debts or claims have been allowed.

Service of Notice of Hearing

- 76.23** Notice of the time and place, fixed for hearing and determining debts and claims

RULES PROMULGATED UNDER THE WINDING-UP AND RESTRUCTURING ACT
of which proof is required, shall be served upon the creditors or claimants asserting the debts or claims, and such other parties, including persons who may be mentioned by the liquidator as a probable creditor or claimant under Rule 76.21, as the court shall direct at least four days before the day so fixed.

Costs of Proof of Claims

- 76.24** Unless the court otherwise orders, any creditor who comes in and proves their debt or claim pursuant to notice may be allowed their costs of proving it, and a person unsuccessful in proving a claim may be ordered to pay costs.

LIST OF CONTRIBUTORS

List of Contributories

- 76.25** (1) A liquidator shall, with all convenient speed after being appointed or at such time as the court shall direct, make out and file with the Prothonotary a list of the contributories of the company.
- (2) A list of contributories shall be verified by the affidavit of the liquidator, and shall, so far as is practicable, state the respective addresses of, the number of shares or extent of interest to be attributed to each contributory, and distinguish the several classes of contributories, and the list may, from time to time by leave of the court, be varied or added to by the liquidator.

Appointment to Settle List, Etc.

- 76.26** Upon the list of contributories being filed with the Prothonotary, the liquidator shall obtain an appointment for the court to settle the same, and shall give at least four days' notice in writing of the appointment to every person included in the list, stating in what character the person is included, and the extent of the liability of the person as a contributory; and in case any variation or addition to the list is at any time made by the liquidator, a similar notice in writing shall be given to every person to whom the variation or addition applies.

Prothonotary's Certificate

- 76.27** The result of the settlement of the list of contributories shall be set out in a certificate made by the Prothonotary, and certificates may be made from time to time for the purpose of stating the result of a settlement down to any particular time, or as to any particular person or stating any variation in the list.

CALLS

Application to Make Call, Etc.

- 76.28** An application to the court, to make a call on any contributory, shall be made by notice stating the proposed amount of the call, which shall be served four days at least before the day appointed for making the application on every contributory proposed to be included in the call, and upon the copy, so served on each contributory, shall be written or printed a memorandum specifying the amount that the contributory will be required to pay upon the basis of the proposed call.

Notice of Intended Call

- 76.29** (1) When the court directs, notice of an intended call may be given by advertisement, and no further notice of the application need be given to any contributory unless the court so orders.
- (2) When notice of an intended call is given by advertisement, notice need not be given of the particular amount required of each contributory and the memorandum specified in Rule 76.28 may be dispensed with.

Contents of Order for Call

- 76.30** An order for a call may direct payment, not merely of the amount of the call, but also of the amounts or balances payable by the respective contributories, or by such of them as may seem proper, and the time and place of payment, provided that a contributory shall not be ordered to pay a larger sum than specified in the memorandum filed on the application without notice to the contributory or their lawyer that a larger sum is to be paid by them; but the court may, upon such notice as may seem just or, if the party appears, then without further notice, cause the memorandum to be amended by increasing the amount, or otherwise, and may direct the liquidator, or other party having the conduct of the proceeding, to pay any additional costs to be thus incurred and make such other order as is just.

Order Where Memo Not Served

- 76.31** Unless it shall seem just and proper, where the memorandum specified in Rule 76.28 is not served either by advertisement or otherwise, an order shall specify merely the amount of the call to be made and shall not direct payment of specific sums by the respective contributories.

Service of Order, Etc.

- 76.32** A copy of an order for a call shall be served forthwith upon each contributory included in the call; and upon each contributory so included, who is not directed by the order itself to pay a specific sum in respect of the call, there shall be served, with the order, a notice from the liquidator, or other party having the conduct of the proceedings for a call, specifying the amount of balance due from the contributory in respect of the call, but an order for a call need not be advertised unless the court directs.

Adjournment of Call Proceedings

- 76.33** (1) At the time of making an order for a call, if the order does not specify the particular sum payable by each contributory included in the call, or if the court otherwise deems it proper, any further proceeding shall be adjourned until after the day appointed for the payment thereof, and afterwards from time to time so long as may be necessary.
- (2) At the time appointed by an adjournment or upon an application to enforce payment of a call, and upon proof of the service of an order and notice of the amount due as required by Rule 76.32 and the non-payment thereof, an order may be made for any contributory who is in default, or against whom it is thought proper to make the order, to pay the sum that they were respectively required to pay by an earlier order and notice, or any lesser sum that appears to be due from them respectively, and any order may be

made that is just and proper for the payment by any contributory of the costs of the adjournment, or further application and order, or of any portion thereof.

Receipt of Bank for Amount of Call

- 76.34** A contributory may deposit with the Prothonotary a receipt of the bank where a call is payable, or of the Prothonotary where the call is payable into court, or of the party authorized by an order to receive such payment, and the receipt shall show the amount paid in respect of the call.

Issue of Non-Payment of Call

- 76.35** Where a contributory is, by an order for a call or by a subsequent order, directed to pay a specific amount in respect of a call, then at the expiration of the time for payment, if a receipt for the payment has not been deposited with the Prothonotary, or if the receipt deposited does not show that the proper amount has been paid, an execution order may, without further order, be issued by the Prothonotary to realize the amount so ordered, or any deficiency appearing from the receipt, and with this may be included any sum for taxed costs where the same can be conveniently included according to the usual practice.

PROCEEDINGS BEFORE THE COURT

Application to be Made in Chambers

- 76.36** Any application under a winding-up order shall be made in chambers, unless the court otherwise directs, and the application shall, unless it is a proper one for an ex parte order, be made upon notice.

Affidavit for Sanction of Compromise, Etc.

- 76.37** (1) An application for the sanction of the court to a compromise or other arrangement with any contributory or other person indebted or liable to a company, or with creditors or persons claiming to be creditors of a company, shall be supported by an affidavit of the liquidator deposing that the liquidator believes the proposed compromise will be beneficial to the company, stating reasons for their belief and showing, where the state of affairs of such contributory or other person is one of such reasons that the liquidator has investigated the affairs of the contributory or other person and the result of their investigation.
- (2) Any facts supporting the reasons for the liquidator's belief shall, as far as is practicable, be proved, and upon an application any further evidence may be required by the court.

Sanction to Be Testified by Memo

- 76.38** The sanction of the court under Rule 76.37 shall be testified by a memorandum signed by the Prothonotary on the agreement of compromise or arrangement, unless a party desires to appeal from the decision of the court when an order shall be drawn up and issued for that purpose.

ADVERTISEMENTS

Advertisements

- 76.39** Where an advertisement is required for any purpose, it shall be published only in the newspaper or other publication, and for such number of times, as is provided by this rule or by order of the court, provided that the court may in any case dispense with any advertisement required by this rule.

REGISTER AND FILE OF PROCEEDINGS

Register of Proceedings

- 76.40** A Prothonotary shall attend before the court upon a proceeding and shall keep a register of all proceedings in chambers or in court or on appeal in each matter under the Act.

Deposit and Filing of Documents

- 76.41** Any document or other record, required to be filed in court, shall be filed with the Prothonotary in whose office the petition has been filed.

Custody of Documents Not Filed

- 76.42** Any order, exhibit, admission, memorandum or other document relating to the winding-up of a company, not required by Rule 76 or the usual practice or the special direction of the court to be filed in court, shall be filed and kept by the liquidator in their own office and shall be produced in court and otherwise as may be required.

Inspection of Documents

- 76.43** Every contributory, and every creditor whose debt or claim has been allowed, is entitled at all reasonable times to inspect any document filed with the liquidator or Prothonotary in a proceeding under the Act free of charge, and to take copies thereof or extracts therefrom at their own expense, not removing the same from the office where the same is filed, or to be furnished with any copy or extracts on paying for them at a rate not exceeding twenty cents per page.

PROVISIONAL LIQUIDATOR

Provisional Liquidators

- 76.44** All rules relating to liquidators shall, with any necessary modification, and subject to the direction of the court, apply to any provisional liquidator.

ATTENDANCE AND APPEARANCE OF PARTIES

Attendance and Appearance of Parties

- 76.45** Any person, on a list of contributories filed with the Prothonotary, or having a debt or claim against a company that is allowed by the court, shall be at liberty, at their own expense, to attend the proceedings on the winding up of the company, and be entitled, upon payment of the costs occasioned thereby, to have notice of any proceeding that they request in writing to have notice of; but if the court is of the opinion that the attendance of any such person at a proceeding has occasioned any additional costs which ought not to be borne by the company,

the person may be directed to pay the costs, or a gross sum in lieu thereof, and such person shall not be entitled to attend any further proceeding until the person pays the same, and the liquidator may take any measure to collect the same as the liquidator might take for the collection of any costs awarded by the court.

Appointment of Representative of Class

- 76.46** (1) The court may, from time to time, appoint any one or more of the contributories or creditors to represent, at the expense of the company or otherwise as shall seem proper, all or any class of the contributories or creditors upon any question as to a compromise with any of the contributories or creditors, or in and about any proceeding before it relating to the winding up of the company, and may remove any person so appointed.
- (2) In case more than one person is appointed, they shall employ the same lawyer to represent them.
- (3) Costs shall not be allowed against a company to any such person in respect of any proceeding unless the person is specially requested by the court to attend on the proceeding.

Conditions of Attendance in Chambers

- 76.47** A contributory or creditor shall not be entitled to attend any proceeding before the court until they have entered their name and address, and the name and address of their lawyer, if any, in a book to be kept for that purpose by the Prothonotary, and until, upon any change of their address or their lawyer, the contributory or creditor has entered in the book their new address, and the name and address of their new lawyer.

SERVICE OF SUMMONS, NOTICES, ETC.

Service by Post

- 76.48** Service upon any contributory or creditor shall be effected, except when personal or other service is specifically required, by sending any notice, order or other document through the mail, in a postage prepaid letter addressed to the lawyer of the party to be served, if any, or otherwise to the party, at the address entered or last entered pursuant to Rule 76.47 or, if no address has been so entered, at the address of the party appearing on the records of the company, and the notice or order or other proceeding shall be considered as served at the time it ought to be delivered in due course of delivery by the post office, and notwithstanding it may be returned by the post office, the court shall not be obliged to receive proof on oath of the time but may act on its own knowledge of the course of the mails, or on any information as it may think reliable.

TERMINATION OF WINDING UP

Balance Sheet of Liquidator

- 76.49** Upon the termination of a proceeding in court for the winding up of a company, a balance sheet shall be brought in by the liquidator of their receipts and payments, which shall be verified by affidavit, and the liquidator shall pass their

final account and any balance due thereon shall be certified, and upon payment of the balance in such manner as the court shall direct, any recognizance entered into by the liquidator and their sureties may be vacated.

Prothonotary's Certificate of Dissolution

- 76.50** When a liquidator has passed their final account and any balance certified to be due thereon has been disbursed as the court directs, a certificate shall be issued by the Prothonotary that the affairs of the company have been completely wound up and, in case the company has not already been dissolved, the liquidator shall, immediately after the certificate has become binding, apply to the court for an order that the company be dissolved from the date of the order.

Deposit of File

- 76.51** When the proceedings for winding up any company have been completed, the file of the proceedings and the book containing the official liquidator's account shall be deposited with the Prothonotary.

LAWYER OF LIQUIDATOR

Lawyer to Conduct Proceedings, Etc.

- 76.52** The lawyer of a liquidator shall conduct any proceeding as is ordinarily conducted by a lawyer; and where an attendance is required in court the liquidator need not attend in person, except where the liquidator's presence is necessary in addition to that of their lawyer, or the court shall direct the liquidator to attend.

FORMS

Forms

- 76.53** Until other forms are directed, the forms in use in winding-up proceedings in England, with such variations as may be necessary to adapt them to the practice under these rules and the Act, and as the circumstances of each case require, may be used.

DELEGATION

Delegation of Powers of Court

- 76.54** When a winding-up order has been made, the court may, by the order or by any subsequent order, refer and delegate to a referee any of the power conferred upon the court.

COSTS

Fees

- 76.55** The fees allowed to lawyers, counsel, sheriffs and the Prothonotary in a proceeding under the Act shall, so far as is applicable and unless otherwise directed by the court, be those authorized under these rules.

Taxation

- 76.56** Where an order is made by the court for the payment of any costs and unless otherwise directed, the same shall be taxed by the Prothonotary, subject to appeal

from the taxation as in an ordinary proceeding in the court.

POWER OF COURT

Power of Court to Enlarge or Abridge Time

- 76.57** The power of the court to enlarge or abridge the time to do any act, take any proceeding, adjourn or review any proceeding, or give any directions to the conduct of the proceeding, is unaffected by these rules.

GENERAL DIRECTIONS

General Practice to Apply

- 76.58** The general practice and Rules of the Court shall, in cases not provided for by the Act or Rule 76, and so far as the same are applicable and not inconsistent with the Act or Rule 76, apply to any proceeding for winding up a company.

WINDING-UP ACT, CANADA

Made, framed and settled by the Judges of the Supreme Court of Prince Edward Island this 21st day of December 1989 to become effective on the coming into force of the new Rules of Civil Procedure with respect to proceedings commenced on or after that date, and all forms, rules and regulations heretofore made, framed and settled under the *Winding-up Act* shall cease to be in force except as to proceedings commenced before the coming into force of the new Rules of Civil Procedure.

RULE 77

**RULES MADE UNDER THE
CONTROVERTED ELECTIONS (PROVINCIAL) ACT
(PRINCE EDWARD ISLAND)**

INTERPRETATION

- 77.01** (1) In Rule 77,
- (a) "Act" means the *Controverted Elections (Provincial) Act*;
 - (b) "court" means the Supreme Court, or any judge thereof;
 - (c) "petition" means an election petition;
 - (d) "Prothonotary" means the Prothonotary of the county in which lies the electoral district to which the petition relates;
 - (e) "sheriff" means the sheriff of the county in which lies the electoral district to which the petition relates;
 - (f) "returning officer" means the returning officer of the electoral district to which the petition relates.
- (2) A reference to a section in Rule 77 is to the applicable section of the *Controverted Elections Act*, or to the section as amended.

Petition

- 77.02** (1) The petition may be in Form 77.02 A and shall state,
- (a) the right of the petitioner under section 5 to present a petition to the court;
 - (b) the holding and result of the election; and
 - (c) the complaint, and the facts and grounds relied upon in support of the complaint and prayer.
- (2) A petition shall be divided into paragraphs with each being confined to a distinct subject and numbered consecutively.
- (3) A petition shall conclude with a prayer, as for instance, that a specific person be declared duly returned or elected, or that the election be declared void, or that a return be enforced.
- (4) A petition shall be signed by the petitioner, or by all the petitioners, if there are more than one.
- (5) Evidence shall not be stated in the petition.

Endorsements on Petition

- 77.03** (1) There shall be endorsed upon a petition and any copy thereof the name of the petitioner's lawyer, or a statement that the petitioner is self-

represented.

- (2) The endorsement shall give an address within the jurisdiction to which a notice or document may be served upon the petitioner.
- (3) In default of the endorsement, any notice or document may be served on the petitioner by posting it in the office of the Prothonotary.
- (4) There shall also be endorsed on the petition and all copies thereof a memorandum to the effect that in default of the respondent giving an address for service as provided in Rule 77.07 within one week after service of the petition, any notice or document may be served on the respondent by posting it in the office of the Prothonotary.
- (5) The endorsements may be in Form 77.03 A.

Presentation of Petition and Copy for Returning Officer

- 77.04** A petition is presented by delivering it and a copy at the office of the Prothonotary within the time prescribed by section 12(1) and the Prothonotary shall send a copy to the returning officer by registered mail.

Security and Cost of Publication

- 77.05** (1) The deposit of money as security for the payment of costs, charges and expenses that are payable by the petitioner, shall be made with the Prothonotary as provided by section 14.
- (2) The Prothonotary shall, on receipt of the deposit on the filing of the petition, forthwith deposit the same to bear interest in a chartered bank having an office in the county where the office of the Prothonotary is situate.
- (3) The cost of publication of any matter required to be published by any officer shall be paid by the petitioner or person moving in the matter, and shall form part of the general costs of the petition.

Title of Proceeding

- 77.06** Any document in the proceeding may be entitled as in Form 77.06 A.

Appointment of Lawyer by Respondent

- 77.07** (1) A person returned as a member and any other person who may be a respondent under the Act may, at any time after the election, file with the Prothonotary a memorandum signed by the person or the person's agent appointing a lawyer to act for the person in case a petition is presented against the person, or stating that the person intends to be self-represented.
- (2) The memorandum shall give an address within the jurisdiction where any notice or document requiring service may be served upon the respondent.
- (3) When the memorandum is not received by the Prothonotary within one week after service of the petition on the respondent, any notice or document may be served on the respondent by posting in the office of the Prothonotary.

Interlocutory Proceedings

- 77.08** Any interlocutory question or matter shall be heard and disposed of on application to a judge in chambers.

Petition When at Issue

- 77.09** Unless otherwise ordered by the court, after the expiration of ten days after personal service of a petition on the respondent or respondents as provided by section 12 the petition shall be deemed to be at issue.

Production and Inspection of Books, Etc.

- 77.10** (1) When a petition is at issue under Rule 77.09, the court may order the production and inspection of all books, lists, commissions, ballots, certificates, statements, papers, documents and returns relating to the election, that are in the possession of the Chief Electoral Officer, returning officer, adverse party or any other person, at such place and in such manner, and upon such terms as the court directs.
- (2) The books, lists, commissions, ballots, certificates, statements, documents, papers and returns shall be returned to the custody of the Chief Electoral Officer, returning officer, adverse party or other person, after the trial of the petition, or when the purpose has been served for which their delivery or transmission was required.

Particulars to Be Delivered

- 77.11** (1) Where a petitioner claims a seat for an unsuccessful candidate alleging that the candidate had a majority of lawful votes, the party complaining of and the party defending the election or return shall each, six days before the day appointed for trial, deliver to the Prothonotary and also at the address, if any, given by the petitioner and respondent, a list of the votes intended to be objected to, and of the nature of the objection to each such vote.
- (2) Where a petition alleges corrupt practices against a respondent or their agents, the petitioner shall, six days before the day appointed for the trial, deliver to the Prothonotary, and also at the address, if any, given by the petitioner, particulars in writing of the specific corrupt practices charged, which shall state,
- (a) the name and address, as far as known, of any person alleged to have been guilty of each such act;
 - (b) the time and place where each such act was committed; and
 - (c) each illegal practice intended to be relied upon as affecting the result of the election.
- (3) Where a respondent, who is complaining of an undue return and a seat from some person, intends to give evidence to prove the election of the person was undue under the Act, the respondent shall, six days before the day appointed for trial, deliver to the Prothonotary, and also at the address, if any, given by the petitioner, a list of the objections to the election upon

which the respondent intends to rely.

- (4) The court may, at any time, order any further and other particulars by a party as may be necessary to prevent surprise or unnecessary expense and to ensure a fair and effectual trial, and upon such terms as to costs and otherwise as the court may order.
- (5) The Prothonotary shall, upon request, allow inspection by, and furnish copies of the particulars specified in the four next preceding paragraphs to all interested parties.
- (6) Evidence shall not be given against the validity of any vote, or upon any objection to the election, or of any corrupt or illegal practice not specified in the particulars delivered, except by leave of the court granted upon such terms as to amendment of the particulars, postponement of the inquiry, payment of costs, or otherwise, as may be ordered.

Election List

77.12 A Prothonotary shall make out the election list. In it the Prothonotary shall insert the names of the lawyer of any petitioner and respondent, and the addresses to which notices may be sent, if any. The list may be inspected at the office of the Prothonotary at any time during office hours, and shall be put up for that purpose upon a notice board appropriated to proceedings under the Act, and headed the "*Controverted Elections Act*".

Trial, Notices Thereof, Postponement

- 77.13** (1) The time and place of trial of a petition shall be fixed by the court, and notice thereof shall be given in writing by the Prothonotary,
- (a) affixing the same in some conspicuous place in the office of the Prothonotary; and
 - (b) sending by registered mail a copy thereof to each of the following persons,
 - (i) the petitioner or their lawyer at the address stated in the endorsement,
 - (ii) the respondent or their lawyer at the address given under Rule 77.07, if any,
 - (iii) the sheriff, and
 - (iv) the returning officer,
- not less than fourteen days before the day appointed for the trial.
- (2) The sheriff shall forthwith publish the notice in the county by causing copies thereof to be posted up in the most public places therein.
 - (3) The affixing of the notice of trial in the office of the Prothonotary is deemed and taken to be notice in the prescribed manner within the meaning of the Act, and the notice is not vitiated by any miscarriage of or relating to the copy or copies thereof to be sent or posted as herein

directed.

- (4) A notice of trial may be in the Form 77.13 A.
- (5) The court may, from time to time, upon the application of a party to the petition, or by notice in such form as the court may direct to be sent to the sheriff, postpone the commencement of the trial to such day as the court may name, and the notice when received shall be forthwith made public by the sheriff.

Adjournment of Trial

- 77.14** (1) In the event of the failure of a judge to arrive at the time appointed for the trial or to which it is postponed, the commencement thereof shall stand adjourned to the ensuing day, and so from day to day until the arrival of the judge.
- (2) No formal adjournment of the trial shall be necessary, but unless otherwise ordered by the court it shall be continued from day to day until it is concluded.
- (3) Should the judge, who begins the trial, be disabled by illness or otherwise, it may be recommenced, and concluded by any other judge.

Returning Officer to Deliver Poll Books

- 77.15** The returning officer shall, on or before the day fixed for the trial, deliver or cause to be delivered to the Prothonotary, the poll books relating to the election, and the Prothonotary shall, if required, give a receipt thereof, safely keep the books until the termination of the trial, and then return them to the returning officer.

Copies of Proceedings for Court

- 77.16** (1) At the time appointed for the trial of an election petition, the petitioner shall leave with the Prothonotary, for the use of the court at the trial, a copy of the petition and all proceedings thereon that show the several matters to be tried, including all particulars delivered on either side, and the Prothonotary shall forthwith transmit the same to the court.
- (2) The court may allow an amendment of the copy or in default of the copy being delivered, the court may refuse to try the petition, or may allow a further time for delivery of the copy, or may adjourn the trial, in every case upon such terms as to costs or otherwise, as the court sees fit to impose.

Special Case

- 77.17** An application to state a special case may be made on notice to the opposite party.

Findings of court

- 77.18** After the trial of an election petition, the court shall return to the Prothonotary the evidence and proceedings before the court, and forthwith certify in writing its determination to the speaker as provided by sections 58 to 61 of the Act.

Appointment of Reporter

- 77.19** The court may appoint a suitable person to take the evidence at the trial, who before entering upon their duties shall be sworn to the faithful performance of the same.

Withdrawal of Petition, Substituted Petitioner

- 77.20** (1) Notice of an application for leave to withdraw a petition shall be in writing in Form 77.20 A, signed by the petitioner or their lawyer, and state the grounds of the application.
- (2) The petitioner shall file the notice with the Prothonotary who shall forthwith cause a notice thereof in Form 77.20 B to be published in at least one newspaper, if any, published or circulating in the electoral district.
- (3) Any person who might have been a petitioner in respect of the election to which the petition relates may, within five days after the notice is published, give notice in writing signed by the person or on their behalf, to the Prothonotary, of their intention to apply at the hearing to be substituted for the petitioner, but the failure to give the notice shall not defeat the application.
- (4) The court shall fix the time and place for hearing the application, but the time fixed shall not be less than a week after the notice of the application has been given to the Prothonotary as herein before provided, and notice of the time and place appointed for the hearing shall be given to the respondent and to every person who has given notice to the Prothonotary of their intention to apply to be substituted as petitioner.
- (5) The court may also direct such other notice to be given as it sees fit.

Abatement of Petition, Application to Be Substituted

- 77.21** Notice of the abatement of a petition by death of the sole petitioner or surviving petitioner shall be given by the respondent or any person who might have been a petitioner, in the same manner as notice of an application to withdraw a petition, and the time within which application may be made to the court to be substituted as a petitioner, shall be one calendar month or such further time as the court may allow.

Respondent, Death of, Etc.

- 77.22** (1) When a respondent dies, or the House of Assembly resolves that the respondent's seat is vacant, or the respondent gives the prescribed notice that the respondent does not intend to oppose or further to oppose the petition, any person who might have been a petitioner may give notice of the fact in writing signed by the person or their lawyer.
- (2) The notice is given by filing it in the office of the Prothonotary.
- (3) Upon receipt of the notice, the Prothonotary shall forthwith,
- (a) affix it in a conspicuous place in the office of the Prothonotary,
- (b) notify the judge assigned to try the petition that the notice has been

received,

- (c) send a copy thereof by registered post to the petitioner or their lawyer at the address stated in the endorsement, and
- (d) send a copy thereof by registered post to the sheriff.
- (4) The sheriff shall forthwith publish the notice in the county by causing copies thereof to be posted up in the most public places therein.
- (5) A respondent, who does not intend to oppose or to further oppose the petition, may give notice of the fact in writing signed by the respondent or on their behalf.
- (6) The notice in paragraph (5) shall be given in the manner prescribed by paragraphs (1) and (2), and the Prothonotary and sheriff shall deal with the same in the manner prescribed in paragraphs (3) and (4) with regard to the notice therein referred to.

Application to Be Admitted as Respondent

- 77.23** The time for applying to be admitted as a respondent in any of the events mentioned in section 81, shall be within ten days after the notice is published as directed in Rule 77.22, or such further time as the court may allow.

Non-Compliance

- 77.24** (1) Non-compliance with any rule, shall not render any proceeding void, unless the court so directs, but the proceeding may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with, in such manner and upon such terms as the court thinks just.
- (2) An application to set aside a proceeding for irregularity shall not be allowed, unless made within a reasonable time, or if the party applying has taken any fresh step after knowledge of the irregularity.
- (3) Where an application is made to set aside a proceeding for irregularity, any objection intended to be relied upon shall be stated in the notice.
- (4) Where an application is made to set aside any process or proceeding for irregularity, and the application is dismissed generally, without any special direction as to costs, it is to be understood as dismissed with costs.
- (5) A proceeding under the Act shall not be defeated by any formal objection.

Money Deposited, How Dealt With

- 77.25** (1) Any claim to money deposited, or to be deposited, for payment of costs, charges and expenses, payable by a petitioner pursuant to the Act shall be disposed of as the court orders.
- (2) Money so deposited shall, if and when it is no longer needed for securing payment of the costs, charges and expenses, be returned or otherwise disposed of, as the court orders.
- (3) An order may be made after proof that all just claims have been satisfied, or otherwise sufficiently provided for, as the court may require.

- (4) An order may direct payment, either to the party who deposited the same, or to any person entitled to receive it.
- (5) Upon an order being made, the amount may be paid by the Prothonotary.

Rules of the Supreme Court to Apply

- 77.26** In all cases not provided for by Rule 77 the Civil Procedure Rules and practice of the Supreme Court of Prince Edward Island apply and, with any necessary modification, to any proceeding under the Act.

CONTROVERTED ELECTIONS ACT
(PRINCE EDWARD ISLAND)

Made by the Judges of the Supreme Court of Prince Edward Island this 21st day of December 1989 to become effective on the coming into force of the new Rules of Civil Procedure with respect to proceedings commenced on or after that date, and all Rules heretofore made under the *Controverted Elections (Provincial) Act* shall cease to be in force except as to proceedings commenced before the coming into force of the new Rules of Civil Procedure.

Amendments to the corresponding forms to Rule 77 as necessitated by the proclamation of the *Judicature Act* were approved by the Judges of the Supreme Court of Prince Edward Island on the 25th day of June, 2009, to become effective on the coming into force of the new Rules of Civil Procedure.

RULE 78

**RULES MADE UNDER THE
DOMINION CONTROVERTED ELECTIONS ACT**

This Rule has been deleted. Act repealed by the *Canada Elections Act*, S.C. 2000, c.9.

RULE 79**PRINCE EDWARD ISLAND RULE OF PRACTISE RESPECTING
APPLICATIONS AND HEARINGS CONCERNING A
REDUCTION IN THE NUMBER OF YEARS OF
IMPRISONMENT WITHOUT ELIGIBILITY FOR PAROLE****Short Title**

79.01 This Rule may be cited as the *Prince Edward Island Criminal Rule of Practice Respecting Reduction in the Number of Years of Imprisonment Without Eligibility for Parole*.

Interpretation

79.02 In this Rule,

"applicant" means a person who makes an application and includes, according to the context, counsel acting for that person; (demandeur)

"application" means an application made pursuant to subsection 745(1) of the Criminal Code; (demande)

"Attorney General" means the Attorney General of Prince Edward Island and includes counsel acting for the Attorney General; (procureur general)

"Chief Justice" means the Chief Justice of the Supreme Court of Prince Edward Island; (juge en chef)

"judge" means the judge of the Supreme Court of Prince Edward Island designated by the Chief Justice to empanel a jury pursuant to subsection 745(2) of the *Criminal Code* in respect of an application; (juge)

"Registrar" means the Registrar of the Supreme Court of Prince Edward Island. (greffier)

APPLICATION**Contents of Application**

79.03 An application shall be in writing in Form 79.03 A and shall contain

- (a) the applicant's given names, surname and date of birth;
- (b) the name and place of each institution in which the applicant has been detained since the time of the applicant's arrest for the offence that is the subject of the application and the date of entry into each of those institutions;
- (c) the offence that is the subject of the application, the sentence imposed, the dates of conviction and sentencing and the place of the trial;
- (d) the applicant's number of years of imprisonment without eligibility for parole;

- (e) the applicant's criminal record;
- (f) the grounds to be relied on, stated precisely and concisely;
- (g) a statement of the relief sought; and
- (h) the applicant's address for service.

Affidavit

79.04 An application shall be supported by an affidavit of the applicant in Form 79.04 A.

Filing of Application

79.05 An application, together with an affidavit referred to in Section 79.04, shall be filed with the Registrar.

Service

79.06 An applicant shall cause the application to be served on

- (a) the Solicitor General of Canada;
- (b) the Attorney General; and
- (c) the officer in charge of the institution in which the applicant is detained.

79.07 Service of an application may be effected by registered mail, in which case it shall be deemed to have been effected on the seventh day after the day on which it was mailed.

79.08 Proof of service of an application may be established by filing with the Registrar an affidavit of the person who effected the service or by any other means satisfactory to the Chief Justice.

Delivery of Application

79.09 An application shall be delivered by the Registrar to the Chief Justice on receipt by the Registrar of proof of service of the application in accordance with sections 79.06 to 79.08.

Determination

- 79.10** (1) On receipt of an application, the Chief Justice shall determine whether subsection 745(1) of the Criminal Code applies to the applicant.
- (2) Where the Chief Justice determines that subsection 745(1) of the Criminal Code does not apply to an applicant, the Chief Justice shall dismiss the application and, where the Chief Justice determines that that subsection applies to an applicant, the Chief Justice shall send the application to the judge.

Notice

79.11 On receipt of an application, the judge shall

- (a) set the date and place for a preliminary hearing; and

79.12 IMPRISONMENT WITHOUT ELIGIBILITY FOR PAROLE

- (b) send a written notice of the date and place of the preliminary hearing to the Attorney General.

79.12 On receipt of a notice referred to in paragraph 79.11(b), the Attorney General shall cause a written notice of the date and place of the preliminary hearing to be sent by registered mail to, or served on,

- (a) the applicant;
- (b) the Solicitor General of Canada; and
- (c) the officer in charge of the institution in which the applicant is detained.

79.13 A copy of each notice referred to in paragraph 79.11(b) or section 79.12 shall be filed with the registrar.

PRELIMINARY HEARING

Procedure

- 79.14** (1) At a preliminary hearing held in connection with an application, the judge may determine any matter that may promote a fair and expeditious hearing of the application and may make any orders and give any directions necessary for the hearing of the application.
- (2) At the preliminary hearing, the applicant and the Attorney General shall inform the judge of any evidence they intend to present and of the manner in which they intend to present it.
- (3) Where, at a preliminary hearing the applicant or the Attorney General informs the judge that the applicant or the Attorney General proposes to present evidence by affidavit, the judge may require the attendance of the deponent for the purpose of cross-examination and may give directions regarding the use to be made of that evidence at the hearing of the application.
- (4) The judge may adjourn the preliminary hearing as the judge considers appropriate.

Parole Eligibility Report

- 79.15** (1) At the preliminary hearing, the judge may order that a parole eligibility report be prepared in respect of an applicant and having regard to the matters referred to in subsection 745(2) of the Criminal Code.
- (2) A parole eligibility report in respect of an applicant shall be prepared by a person designated by the Solicitor General of Canada and shall contain
- (a) a summary of the applicant's social and family background;
 - (b) a summary of the applicant's classification and discipline evaluations;
 - (c) a summary of the regular reports on the applicant's conduct;
 - (d) a summary of any psychological and psychiatric assessments that

have been made of the applicant; and

- (e) any other information relevant to a complete description of the applicant's character and conduct.
- (3) A parole eligibility report in respect of an applicant may contain any information relevant to the issue of the parole eligibility of the applicant.
- (4) Where the judge at a preliminary hearing orders a parole eligibility report to be prepared, the judge shall adjourn the preliminary hearing to allow for the preparation of that report.
- (5) A parole eligibility report shall be filed with the registrar.
- (6) The registrar on receipt of a parole eligibility report in respect of an applicant shall deliver a copy of the report to the applicant and to the Attorney General.

Preliminary Hearing Resumed

- 79.16** (1) The judge, on being informed that a parole eligibility report has been filed, shall notify the applicant and the Attorney General that the preliminary hearing is being resumed.
- (2) In setting the date for the resumption of a preliminary hearing, the judge shall allow at least 30 days for the applicant and the Attorney General to study the parole eligibility report in respect of the applicant.

Cross-Examination on Report

- 79.17** Where the applicant or the Attorney General disputes any part of the parole eligibility report in respect of the applicant, the applicant or the Attorney General may require the attendance of the author of that report at the preliminary hearing for the purpose of cross-examination.

Judge to Decide in Case of Dispute

- 79.18** In the case of a dispute at a preliminary hearing, the judge shall decide what parts of the parole eligibility report in respect of the applicant and what additional evidence, if any, are to be presented at the hearing of the application.

Conclusion of Preliminary Hearing

- 79.19** (1) At the end of the preliminary hearing, the judge shall
- (a) order that a jury be empanelled and determine the date and place for the hearing of the application; or
 - (b) where the judge considers that subsection 745(1) of the Criminal Code does not apply to the applicant, refer the application back to the Chief Justice.
- (2) Where an application is referred back to the Chief Justice pursuant to paragraph 1(b) and the Chief Justice determines that subsection 745(1) of the Criminal Code does not apply to the applicant, the Chief Justice shall dismiss the application.

HEARING OF APPLICATIONS**Jury**

- 79.20** (1) A jury referred to in subsection 745(2) of the Criminal Code shall be empanelled in accordance with Part XX of that Act with the modification set out in subsection (2) and with such other modifications as the circumstances require.
- (2) For the purposes of subsection (1) the applicant and the Attorney General are entitled to the same number of peremptory challenges as they would be entitled to if the applicant were being tried for the offence that is the subject of the application.

Powers of Judge

- 79.21** (1) At the hearing of an application, the judge may
- (a) hold a voir dire on the admissibility of the parole eligibility report referred to in subrule 79.15(1) in respect of the applicant;
 - (b) subject to the rules of evidence applicable in respect of a sentencing hearing, admit any evidence that the judge considers credible and trustworthy; and
 - (c) order any investigations that the judge considers necessary.
- (2) The judge at the hearing of an application may adjourn the hearing as the judge considers appropriate.

Standing

- 79.22** No person other than the applicant and the Attorney General may present evidence at the hearing of an application.

Order of Presentation of Evidence

- 79.23** At the hearing of an application, the applicant shall present evidence first and may, if the judge so permits, present rebuttal evidence after the evidence of the Attorney General is presented.

Determination by Chief Justice

- 79.24** (1) Where, after the evidence is presented at the hearing of an application, the judge considers that subsection 745(1) of the Criminal Code does not apply to the applicant, the judge shall refer the application back to the Chief Justice and adjourn the hearing pending a determination by the Chief Justice.
- (2) Where an application is referred back to the Chief Justice pursuant to subsection (1) and the Chief Justice determines that subsection 745(1) of the Criminal Code does not apply to the applicant, the Chief Justice shall dismiss the application and the judge shall discharge the jury.

Address to the Jury

- 79.25** Where, after the evidence is presented at the hearing of an application, the judge

considers that subsection 745(1) of the Criminal Code applies to the applicant, the applicant, followed by the Attorney General, shall address the jury.

Address by Judge

- 79.26** After the applicant and the Attorney General have addressed the jury pursuant to section 79.25, the judge shall address the jury on the applicable law and evidence.

Decision of Jury

- 79.27** The jury at the hearing of an application shall base its decision exclusively on the evidence presented to it at the hearing.

GENERAL PROVISIONS

General Powers of Judge

- 79.28** (1) The judge may at any time make
- (a) an order setting time limits;
 - (b) an order requiring that an applicant be brought before the court; and
 - (c) any further orders in relation to an application that the judge considers necessary in the interest of justice.
- (2) Where the judge is of the opinion that it is necessary to do so in the interest of public morals, the maintenance of order or the proper administration of justice, the judge may, at any time, order that any proceeding in relation to an application be held in camera or may order a total or partial ban on the publication of any evidence presented at any such proceeding.
- (3) Where a judge makes an order pursuant to paragraph (1)(b), section 527 of the Criminal Code applies with such modifications as the circumstances require.

Transcript

- 79.29** A transcript of all proceedings in connection with an application shall be prepared and filed with the registrar.

Effective Date

- 79.30** This rule shall come into force on the 1st day of September, 1992. This rule is made pursuant to Section 745 of the *Criminal Code of Canada* on the 15th day of June, 1992, by The Honourable Kenneth R. MacDonald, Chief Justice of the Prince Edward Island Supreme Court - Trial Division, and becomes effective on the 1st day of September, 1992, upon proclamation in the Canada Gazette and the Royal Gazette of Prince Edward Island.

Kenneth R. MacDonald
Chief Justice of the Supreme Court
of Prince Edward Island – Trial Division

- 79.31** This rule was amended as necessitated by the proclamation of the *Judicature Act* by the Judges of the Supreme Court of Prince Edward Island on the 25th of June,

79.30 IMPRISONMENT WITHOUT ELIGIBILITY FOR PAROLE

2009, to become effective on the 1st day of September, 2009.

Jacqueline R. Matheson
Chief Justice of the Supreme Court of Prince Edward Island

RULE 80**CRIMINAL RULE RESPECTING PRE-TRIAL CONFERENCES
UNDER SECTION 625.1(2) OF THE CRIMINAL CODE****PRE-TRIAL CONFERENCE**

80.01 When an accused is to be tried with a jury, a pre-trial conference shall be held at a time, date, place and manner as directed by a judge of the court, or at such further dates and times as may be ordered by the judge of the court who presides at the pre-trial conference.

Attendance at Conference

80.02 Unless otherwise ordered, the pre-trial conference shall be attended by:

- (a) the counsel who will represent the accused at trial, or the accused if he does not have counsel; and
- (b) by the prosecutor who will appear at trial, or a senior counsel in charge of prosecutions.

Purpose

80.03 The purpose of the pre-trial conference is to consider such matters as will promote a fair and expeditious trial.

Held in Chambers

80.04 Unless otherwise ordered, a pre-trial conference shall be an informal meeting conducted in chambers at which a full and free discussion of the issues raised may occur.

Disclosures

80.05 At the pre-trial conference, counsel shall disclose to the judge the nature and particulars of any preliminary motion which counsel intend to make.

Motions

80.06 The presiding judge, in his discretion, may direct that such motion be reduced to writing, and be heard at such time as he deems fit, prior to the date fixed for trial, or he may direct that the motion be heard at the outset of the trial.

Matters Dealt with in Absence of Jury

80.07 At the pre-trial conference, counsel shall disclose to the presiding judge the nature and particulars of any matters which they foresee may arise in the course of the trial, and which would ordinarily be dealt with in the absence of the jury after it has been sworn, and the anticipated length of time which such matter would require for hearing.

Matters Dealt with Before Jury Selected

80.08 The trial judge, in his discretion, may direct that any such matter as is referred

80.09 CRIMINAL RULE RESPECTING PRE-TRIAL CONFERENCES

to in Rule 80.07 be dealt with before any juror on a panel of jurors is called, at such date and time as the judge deems fit, or may direct that the matter be dealt with in the absence of the jury after it has been sworn.

Endorsement

80.09 A judge conducting a pre-trial conference shall upon its completion endorse the indictment, or a true copy thereof, as to the date the pre-trial conference was held.

Other Pre-Trial Conferences

80.10 Nothing contained in these rules shall preclude the court from conducting other informal pre-trial conferences in addition to the mandatory conference provided for in s. 625.1(2) on such terms as the judge sees fit.

This rule was made pursuant to section 482 of the *Criminal Code* by the Judges of the Supreme Court of Prince Edward Island, with the concurrence of a majority of the judges thereof, at a meeting held on December 21, 1989, to become effective on the coming into force of the new Rules of Civil Procedure.

RULE 81**SUMMARY CONVICTION APPEAL RULE**

This rule is made pursuant to the provisions of section 482 of the *Criminal Code*, R.S.C. 1985, c. C-46 and amendments by the Judges of the Supreme Court of Prince Edward Island.

APPLICATION AND INTERPRETATION

81.01 In these rules,

- (a) "Code" means the *Criminal Code* R.S.C. 1985, c. C-46 and amendments;
- (b) the interpretation and definition sections of the Code apply;
- (c) "Appeal" means an appeal from a summary conviction court pursuant to Part XXVII of the Code;
- (d) "Appeal Court" means a judge of the Supreme Court;
- (e) "Judge" means a Judge of the Supreme Court; and
- (f) "Registrar" means the registrar of the Supreme Court.

Notice of Appeal

- 81.02** (1) Every notice of appeal under or by virtue of section 815 of the Code shall be dated and signed by the appellant or his counsel, directed to the registrar and in conformity with Form 81 A or 81 B, as the case may be.
- (2) The notice of appeal shall set forth
- (a) the summary conviction court that made the conviction or order appealed from or imposed the sentence appealed against;
 - (b) the conviction or order appealed from or the sentence appealed against, including dates;
 - (c) the appellant's address for service, including telephone number;
 - (d) the grounds upon which the appeal is based;
 - (e) the nature of the order which the appellant intends to ask the court to make;
 - (f) whether or not the appellant desires to be present in person or by counsel on the hearing of the appeal; and
 - (g) whether the appellant desires to present his case in writing, by oral presentation or both.
- (3) Where the appellant is the defendant the notice of appeal shall be in conformity with Form 81 A and where the appellant is the prosecutor or informant the notice of appeal shall be in conformity with Form 81 B.

Service and Filing

- 81.03** (1) The appellant shall within 30 days after the conviction or order appealed from or sentence appealed against, whichever is the later,
- (a) file the notice of appeal with the registrar and serve a copy on the summary conviction court from which the appeal is taken; and
 - (b) if the respondent is His Majesty the King in right of Prince Edward Island, serve the notice of appeal upon the respondent by sending a true copy thereof by prepaid registered mail to the Crown attorney's office in Charlottetown or by personal service upon the Crown attorney or a member of his staff; or
 - (c) if the respondent is His Majesty the King in the right of Canada, serve the notice of appeal by sending a true copy thereof by prepaid registered mail to the counsel or agent who represented His Majesty the King in right of Canada at the trial or by personal service upon the said counsel or agent or a member of his staff; and
 - (d) in other cases, cause the notice of appeal to be served on the respondent personally or on such other person or in such manner as a judge may direct.
- (2) The appellant shall, except where there has been personal service under subrule (1)(b) or (c), supra, and service has been admitted on the notice of appeal, file with the registrar proof of service of the notice of appeal, in affidavit form, not later than 10 days after the last day for service of the notice of appeal.

Transmission of Materials

- 81.04** (1) The registrar shall, forthwith after the filing of the notice of appeal, deliver to or send by prepaid registered mail to the summary conviction court a copy of such notice of appeal;
- (2) The summary conviction court shall, within 10 days after receipt of the notice of appeal, transmit to the registrar the material referred to in section 821(1) of the Code.

Transcripts

- 81.05** (1) The appellant shall, unless a judge otherwise orders, file with the notice of appeal a certificate in Form 81 C signed by a court reporter, stating the number of copies of the transcript of evidence taken in the summary conviction court, including any reasons for judgment or sentence, that have been ordered by the appellant and that will be provided by the reporter;
- (2) The appellant shall order one copy for the Appeal Court and one copy for each of the respondents;
- (3) Upon signing the certificate, the reporter shall proceed with reasonable diligence to prepare and certify the transcript and upon completion shall notify the appellant;

- (4) The appellant shall obtain the transcript from the reporter and shall deposit the required copies with the registrar within five days of being informed by the reporter that the transcript was ready and shall cause a copy thereof to be delivered or sent by prepaid registered mail to the respondent at the address for service on file with the Appeal Court or in such other manner as a judge shall direct;
- (5) The court may dispense with a transcript of evidence if the parties agree on a statement of facts, and upon such an agreement, a signed copy of the agreed statement of facts shall be filed with the registrar within thirty days after the notice of appeal has been filed;
- (6) An agreed statement of facts may be signed by counsel for the parties or personally by the parties or either of them if not represented by counsel;
- (7) The parties to an appeal may agree in writing or a judge may, on motion, order that part of the transcript be omitted; and
- (8) Where an agreement or order is made under subrule (5) or (7) the appellant or Attorney General shall modify or withdraw his request for preparation of a transcript.

Entry for Hearing

- 81.06** (1) An appeal is ready to be set for hearing as soon as:
- (a) the material referred to in section 821(1) of the Code has been received by the registrar;
 - (b) the required copies of the transcript of evidence taken before the summary conviction court have been received by the registrar or a judge has dispensed with or made some other order with respect to the transcript;
 - (c) any application brought under section 822(4) of the Code has been disposed of; and
 - (d) the appellant's memorandum (Rule 81.09(1)) has been filed with the registrar.
- (2) As soon as an appeal has been made ready for hearing, the registrar shall, subject to the directions of the Appeal Court,
- (a) cause the appeal to be set down for hearing and cause at least fourteen days notice of such hearing to be given to the appellant and the respondent; or
 - (b) arrange a special date for the hearing of the appeal, where so ordered by a judge as a result of an application brought by the appellant or respondent, with such hearing date to be at least 14 days after the judge's order unless all parties otherwise consent.
- (3) Unless a judge otherwise orders, service of a notice under clause 2(a) above, and service of a notice of application under clause 2(b) above, shall

be by prepaid registered mail to the party or parties, as the case may be, at their address for service on file with the Appeal Court or by personal service.

- (4) The registrar shall file a certificate that each of the parties has been notified as required by Rule 81.06(2)(a) and such certificate shall be prima facie evidence that such notice has been received by the parties.

Trial de novo

- 81.07** (1) An application under section 822(4) of the Code for a trial de novo shall be made by application before a date for the hearing of the appeal has been fixed.
- (2) At least seven days' notice of any such application shall be given to the opposite party in the manner provided by Rule 81.03.

Written Appeal

- 81.08** If a party does not wish to be present on the hearing of the appeal, he shall file a document to that effect with the court prior to the date fixed for the hearing, including in such document his argument on appeal.

Memorandum on Appeal

- 81.09** (1) Unless otherwise ordered by a judge, the appellant shall within 20 days of the filing of the transcript of the evidence or agreed statement of facts, file with the registrar and serve upon the respondent a memorandum which shall contain the following:
- (a) the grounds of appeal with each ground of appeal followed by a statement of the argument, law and authorities relied upon together with references to the evidence to be discussed, if any, in relation to the ground of appeal;
 - (b) the relief sought;
 - (c) Schedule A containing a list of the authorities referred to; and
 - (d) Schedule B containing the text of all relevant authorities referred to, in paragraphs numbered consecutively throughout the memorandum.
- (2) Unless otherwise ordered by a judge, the respondent shall within 20 days of service upon them of the appellant's memorandum, file with the registrar and serve upon the appellant a memorandum which shall contain the following:
- (a) the grounds of appeal with each ground of appeal followed by a statement of the argument, law and authorities relied upon together with references to the evidence to be discussed, if any, in relation to the ground of appeal;
 - (b) the relief sought;
 - (c) Schedule A containing a list of the authorities referred to; and

- (d) Schedule B containing the text of all relevant authorities referred to, in paragraphs numbered consecutively throughout the memorandum.
- (3) On the hearing of the appeal, the appellant and the respondent shall be restricted in their argument to the grounds set out in the notice of appeal unless leave of the court is obtained to argue other matters.

Failure of Appearance

- 81.10** (1) If an appellant both
- (a) fails to appear personally or through counsel on the day fixed for the hearing, and
 - (b) fails to file a written argument on appeal, the Appeal Court may dismiss the appeal.
- (2) If a respondent both
- (a) fails to appear personally or through counsel on the day fixed for the hearing, and
 - (b) fails to file a written argument on appeal, the Appeal Court may proceed with the appeal in the absence of the respondent.

Abandoned Appeals

- 81.11** (1) When an appellant wishes to abandon his appeal he shall forthwith file with the court and serve on the respondent a notice of abandonment signed personally, or signed by his counsel and the registrar shall, upon receipt of such notice, forthwith cause a copy of such notice to be delivered to or served upon the respondent by prepaid registered mail at the address for service of such party on file with the Appeal Court, or in such other manner as a judge may order.
- (2) The Appeal Court may thereupon dismiss the appeal as an abandoned appeal, without the attendance of the parties or their counsel, if any.
- (3) An appellant who abandons their appeal after the appeal is ready for hearing may have costs awarded against them.

Order after Appeal

- 81.12** (1) The successful party shall take out an order immediately after the disposition of the appeal and shall file a copy of the order with the registrar and serve a copy on the other party.
- (2) The registrar shall cause a copy of the order, including any written reasons or endorsements made by the judge, to be delivered to or be sent by registered prepaid mail to the summary conviction court.

Extension or Abridgment of Time, and Non-compliance

- 81.13** (1) Any time limited by these rules may be extended or abridged by a judge, before or after the expiration of the time prescribed, provided however that the time prescribed under Rule 81.16(1) for the bringing of an application

under section 822(4) of the Code shall not be extended;

- (2) Notice of an application to extend or abridge time shall, unless made on consent or unless otherwise ordered by a judge, be given to the opposite party; and
- (3) Non-compliance with these rules shall not render any proceedings void, but a judge may amend any document, give directions, and make any order necessary to validate the proceedings or may set them aside as irregular or otherwise deal with them as may be just.

Application for Release from Custody

- 81.14** An application under section 816(1) of the *Criminal Code* may be made verbally but one clear day's written notice of its presentation must be given to the prosecutor and deposited with the registrar of the Appeal Court.

Exhibits

- 81.15** (1) Subject to the provisions of section 821 of the *Criminal Code* and of these rules, the summary conviction court shall retain all exhibits received at a trial until 90 days after the expiry of the time limited for giving notice of appeal or any extension thereof.
- (2) Where the exhibits are forwarded to the appeal court under section 821 of the *Criminal Code*, the registrar shall retain custody or control of them until
- (a) the appeal is abandoned;
 - (b) he is served with a notice of appeal to the Court of Appeal; or
 - (c) the expiry of 30 days after the time for taking an appeal to the Court of Appeal.
- (3) When an appeal is abandoned, upon the expiry of 30 days after the time for taking an appeal to the Court of Appeal, or when the exhibits are returned from the Court of Appeal, the registrar shall return the exhibits to the summary conviction court.
- (4) A summary conviction court shall
- (a) upon the expiry of the time limited in subrule (1), if no appeal is taken, or
 - (b) when the exhibits are returned to it under subrule (3),
- return the exhibits to the parties who put them in evidence at the trial.
- (5) Nothing in this rule affects the provisions of any Act relating to exhibits or things seized or forfeiture thereof.

Application for Trial de Novo

- 81.16** (1) An application for a trial de novo as provided by section 822, subsection (4) of the *Criminal Code* shall be made by way of notice of application, with an affidavit in support filed with the registrar of the appeal court

within seven (7) days of the time for the filing of the notice of appeal, and shall be returnable for hearing not later than fourteen (14) days thereafter;

- (2) Service of a copy of the notice of application and affidavit shall be made on the opposite party not later than seven (7) days prior to the said return, and proof of service shall be filed at least two (2) days prior to the return date;
- (3) If the application for a trial de novo is granted, the registrar shall set the appeal for hearing in the manner provided by these rules; and
- (4) If a trial de novo is ordered, a judge shall give directions as to the documentation required on the trial.

Failure to Comply with Rule

- 81.17** (1) Where a party to an appeal or his counsel is at fault in failing to comply with this rule, the court on motion of any other party to the appeal or on the motion of the registrar, may
- (a) if the party failing to comply is the appellant
 - (i) dismiss the appeal, or
 - (ii) direct the appellant to comply with the rule within a specified time
 - (b) fix a date for hearing of the appeal, or
 - (c) make such other order as may be just
- (2) If an appeal is not ready to be set for hearing within four months of the date of the trial decision, the registrar may give to the parties a notice of motion returnable before the court or a judge for an order dismissing the appeal for non-compliance with the Rules.

Operative Date

- 81.18** This rule was made pursuant to section 482 of the *Criminal Code* by the Judges of the Supreme Court of Prince Edward Island, with the concurrence of a majority of the judges thereof, at a meeting held on December 21, 1989, to become effective on the coming into force of the new Rules of Civil Procedure with respect to summary conviction appeals commenced on or after that date, and all summary conviction appeals commenced prior to that date shall continue under the rules as existed prior to that date, as if this rule had not been enacted.

This rule was amended by the Judges of the Supreme Court of Prince Edward Island by adding Rule 81.17 and renumbering old Rule 81.17 as 81.18, at a meeting held on February 28, 1996, to become effective on the 1st day of September 1996.

This rule was amended by the Judges of the Supreme Court of Prince Edward Island as necessitated by the proclamation of the *Judicature Act* on the 25th day

of June, 2009, to become effective on the 1st day of September, 2009, by amending Rules 81.01(d) and (e), Rule 81.15(2)(b) and (c), and 81.15(3).

R. v. R.S.D., 2024 PESC 15

The general rule is that death causes a criminal appeal to abate, whether the deceased is the appellant or the respondent. However, the appellate court retains jurisdiction to proceed with the appeal and may continue if it is in the interests of justice to do so. Here, it was not.

R. v. Arora, 2023 PESC 19

In a motion to adjourn an appeal, there is no exhaustive checklist. The court exercised its discretion to deny the motion, due to the indeterminate and potentially lengthy delay.

RULE 82**CRIMINAL APPEAL RULE****INTERPRETATION AND DEFINITIONS**

- 82.01** (1) In this rule, unless the context requires otherwise:
- (a) "appeal" includes an application for leave to appeal and a cross-appeal; (*appel*)
 - (b) "appellant" means the person who is appealing from conviction or sentence, or both, and in an appeal by the Crown means His Majesty the King represented by the Attorney General and includes an appellant by cross-appeal; (*appellant*)
 - (c) "Attorney General" means the Attorney General as defined in section 2 of the **Code** and includes counsel instructed by them for the purpose of appeal, and His Majesty the King represented in an appeal by the Attorney General; (*procureur général*)
 - (d) "Chief Justice" means the Chief Justice of Prince Edward Island or in the absence of the Chief Justice of Prince Edward Island, the next senior judge of the Court; (*juge en chef*)
 - (e) "Code" means the **Criminal Code**, R.S.C. 1985, c. C-27; (*Code*)
 - (f) "Court" means the Prince Edward Island Court of Appeal; (*Cour*)
 - (g) "Chief Court Reporter" means a person designated as such under the **Court Reporters Act** R.S.P.E.I. 1988 Cap. S-10.1; (*sténographe judiciaire en chef*)
 - (h) "Court Reporter" means a person designated as such under the **Court Reporters Act** R.S.P.E.I. 1988 Cap. S-10.1 or a person designated to record proceedings in the Provincial Court or youth justice court; (*sténographe judiciaire*);
 - (i) "court transcriber" means a person designated as such under the **Court Reporters Act** R.S.P.E.I. 1988 Cap. S-10.1 or a person designated to transcribe proceedings in the Provincial Court or youth justice court; (*transcripteur judiciaire*)
 - (j) "judge" means a judge of the Court and includes a judge of the Supreme Court of Prince Edward Island, whenever any such judge is sitting *ex-officio*, as a judge of the Court; (*juge*)
 - (k) "judgment" means the formal disposition of an appeal by the Court and includes an order for judgment; (*jugement*)
 - (l) "notice of appeal" includes notice of application for leave to appeal and notice of cross-appeal; (*avis d'appel*)

- (m) "Prisoner Appeal" means an appeal by a person who, when the notice of appeal is given, is in custody and is not represented by counsel; (*appel d'un détenu*)
 - (n) "Provincial Court" means the Provincial Court of Prince Edward Island; (*Cour provinciale*)
 - (o) "Registrar" means the officer of the Court appointed as registrar or as a deputy registrar; (*registraire*)
 - (p) "respondent" means His Majesty the King represented by the Attorney General in the case of a person who appeals against conviction or sentence, and where the appeal is by His Majesty the King represented by the Attorney General, means the person whose acquittal or sentence is appealed, or in whose favour a court refused to exercise its jurisdiction or has issued an order to quash or stay an indictment; (*intimé*)
 - (q) "trial Court" means the court appealed from; (*tribunal de première instance*);
 - (r) "trial judge" means the judge who presided at the trial; (*juge de première instance*);
 - (s) "youth justice court" means a youth justice court referred to in section 13 of the *Youth Criminal Justice Act*. (*tribunal pour adolescents*)
- (2) The interpretation and definitions in sections 2 and 673 of the **Code** apply to this rule.

APPLICATION OF RULES

- 82.02** (1) These rules shall apply to appeals under Part XXI, Part XXVI and under section 839 of the **Code** and to any other appeal filed in the Court in relation to any cause or matter processed in accordance with criminal procedures, so far as this Rule is not inconsistent with any provision of the **Code** or any other statute or any uniform rules of court made by the Governor in Council under subsection 482(5) of the **Code**.
- (2) The provisions of these Rules relating to prisoner appeals, apply, with the necessary modifications, to an appeal by any person who, although not convicted, is detained in custody and appeals under section 672.72 of the **Code**.

APPLICATION OF CIVIL RULES

- 82.03** Any matter of procedure or practice not provided for by the **Code** or this rule shall be governed by the Rules of Civil Procedure in force from time to time.

NOTICE OF APPEAL

- 82.04** (1) An appeal shall be commenced by issuing a notice of appeal that sets out the grounds of appeal. In prisoner appeals the notice shall be in Form 82

B. In all other appeals by a convicted person or by the Attorney General, the notice shall be in Form 82 A.

- (2) The senior official of every penal institution shall supply to any prisoner in custody, on request, notice of appeal forms for the prisoner's use as well as a copy of this rule and all other forms as may be required for the prisoner's use.
- (3) Except where subsections (4), (5) and (6) apply, a notice of appeal
 - (a) from conviction, or conviction and sentence, or sentence only, shall be filed not later than 30 days after the date of the sentence; and
 - (b) from acquittal shall be filed not later than 30 days after the date of the acquittal.
- (4) Where a person is acquitted of an offence but is convicted of an included offence, a notice of appeal from acquittal shall be filed not later than 30 days after the date of the sentence imposed in respect of the included offence.
- (5) Where an appeal is to be taken in respect of one or more counts in an indictment, a notice of appeal from conviction, acquittal or sentence shall be filed not later than 30 days after the acquittal or sentence, in respect of any count in the indictment.
- (6) Where an appeal is to be taken under section 784 or 839 of the *Code*, a notice of appeal shall be filed not later than 30 days after the date of pronouncement of the decision in the court appealed from or, if the decision is reserved, after the date of the filing of written reasons for the decision.

FILING AND SERVICE OF NOTICE OF APPEAL

- 82.05** (1) In a prisoner appeal, the filing of a notice of appeal shall be effected by delivering the notice of appeal to the senior official of the penal institution in which the appellant is imprisoned. The senior official shall endorse on the document the date of receipt and shall then return a copy so endorsed to the appellant and forthwith forward the original to the Registrar.
- (2) In all cases where the Attorney General is not the appellant, other than in a prisoner appeal, the filing of a notice of appeal shall be effected by
 - (a) filing the original and four copies of a notice of appeal with the Registrar; or
 - (b) sending the documents to the Registrar by prepaid registered mail.
 - (3) The Registrar shall, on receipt of the notice of appeal under subrules (1) and (2), effect service by forwarding a copy to the Attorney General and to the court appealed from.
 - (4) In an appeal by the Attorney General, the notice of appeal shall be filed with the Registrar. Service by the Attorney General on the respondent and

other parties shall be effected within 30 days after such filing by

- (a) personal service on the respondent;
 - (b) service on the respondent's legal counsel if counsel accepts service on behalf of the respondent or if counsel already appears as counsel of record in the Court;
 - (c) service on the appropriate senior official of the penal institution if the respondent is in custody;
 - (d) verified facsimile transmission; or
 - (e) any other manner as may be directed by the Court or a judge thereof.
- (5) Proof of service of the notice of appeal, in appeals under sub-rule (4), shall be filed with the Registrar forthwith.
- (6) A notice of cross-appeal shall be filed not later than 30 days after receipt by the cross-appellant of the notice of appeal and shall be served in accordance with this Rule.

LEAVE TO APPEAL

- 82.06** (1) Where leave to appeal is required, arguments respecting leave shall be presented at the hearing of the appeal unless
- (a) the appeal is from sentence only and the appellant has applied pursuant to section 679 of the *Code* for release from custody pending the appeal;
 - (b) the appellant or respondent applies, with appropriate supporting materials, for the issue of leave to be determined prior to the hearing of the appeal; or
 - (c) the Court of its own motion requires the parties to appear, with appropriate supporting materials, at a hearing to determine the issue of leave.
- (2) On the hearing of an application, the Court may grant leave, refuse leave or postpone the decision until the hearing of the appeal.

REPORT OF A TRIAL JUDGE

- 82.07** (1) Where the Court requests that the trial judge furnish a report on the case or on any matter relating to the case, notice shall be given to the parties who shall have the opportunity to make submissions to the Court concerning
- (a) whether the trial judge's report is to be furnished; and
 - (b) if the report is to be furnished, the scope of the report to be requested.
- (2) Where the Court directs that a report of the trial judge is to be furnished, the Registrar shall, on receipt of the report, mail copies to the parties to

the appeal.

APPEALS IN WRITING

- 82.08** (1) Where an appellant desires to present their argument in writing without appearing in person or by counsel, they shall state their intention to do so in their notice of appeal and may
- (a) include their points of argument in their notice of appeal, or
 - (b) file and serve an appellant's factum within the time prescribed by subsection 82.14(1).
- (2) Where a respondent desires to present their argument in writing instead of appearing in person or by counsel they shall, within the time prescribed by subsection 82.14(3), file and serve a respondent's factum and a written notice that they do not intend to appear in person or by counsel.

TRANSCRIPTS

- 82.09** (1) Subject to subsections (2) to (15), the parties to an appeal shall file with the Court only those portions of the transcript of the proceedings in the court appealed from that are necessary to enable the issues raised on appeal to be determined.
- (2) Except in the following cases, an appellant shall file with the notice of appeal a copy of the request for transcript and certificate in Form 82 C requesting the preparation of a transcript of the record in the proceeding and containing certificates stating that the request has been sent to the other parties and to the court reporter's office:
- (a) a prisoner appeal,
 - (b) an appeal from a summary conviction appeal court, or
 - (c) a judge otherwise orders.
- (3) The appellant shall, within 15 days after filing the notice of appeal, file with the Registrar a certificate of the Chief Court Reporter or a court reporter in Form 82 E certifying receipt of the request for transcript.
- (4) In a prisoner appeal, the Attorney General shall, after receiving a notice of appeal
- (a) forthwith send to the Chief Court Reporter a request for transcript and certificate in Form 82 C and a certificate of court reporter in Form 82 E, with such modifications as may be necessary;
 - (b) file copies of the completed certificate with the Registrar; and
 - (c) forward copies to the prisoner.
- (5) The transcript shall not contain
- (a) proceedings on the challenge for cause of a juror,
 - (b) the opening address of the trial judge,

- (c) the opening and closing addresses of counsel,
- (d) proceedings in the absence of the jury except
 - (i) rulings on the admissibility of evidence following a *voir dire* or otherwise;
 - (ii) submissions as to the proposed content of the charge and the trial judge's ruling and reasons;
 - (iii) objections to the trial judge's charge and the trial judge's ruling and reasons;
 - (iv) submissions respecting questions from the jury and the trial judge's ruling and reasons;
- (e) objections to the admissibility of evidence other than a statement that an objection was made, however the trial judge's ruling and reasons in respect of the objection shall be set out in full in the transcript unless
 - (i) the grounds of appeal relate to a matter referred to in the statement,
 - (ii) in respect of the items in paragraphs (a) to (e), the court or a judge orders that one or more of those parts of the proceeding be included, or
 - (iii) the appellant and respondent agree that one or more of the parts of the proceeding be included.
- (6) In an appeal from a summary conviction appeal court, the transcript shall, unless otherwise ordered by the Court, consist of
 - (a) the transcript of proceedings in the trial court as it was submitted on appeal to the summary conviction appeal court, and
 - (b) only those portions of the transcript of proceedings in the summary conviction appeal court as may be necessary to enable the issues on appeal to be determined.
- (7) The appellant shall file with the notice of appeal a request for transcript and certificate in Form 82 C and, within 15 days thereafter, a certificate of the Chief Court Reporter or a court reporter in Form 82 E, with such modifications as may be necessary, in relation to any portions of the proceedings in the summary conviction appeal court that the appellant believes are necessary to enable the issues on appeal to be determined.
- (8) Unless the Court otherwise orders, where an appeal is against sentence only, the transcript shall include:
 - (a) any evidence given on the issue of sentence,
 - (b) where there was a plea of guilty, the statement of facts,
 - (c) any submissions of counsel for the prosecution and the defence,

- (d) any statement by the accused prior to the passing of sentence made under section 726 of the *Code*, and
 - (e) the trial judge's reasons for sentence.
- (9) Where a party to an appeal receives a copy of a request for transcript and certificate prepared by another party, the receiving party may, if the following conditions are met, deliver a request for further portions of transcript and certificate in Form 82 D to the Chief Court Reporter or a court reporter and to the other parties to the appeal, file a copy of it with the Registrar, and within 15 days thereafter file with the Registrar a certificate of a court reporter in Form 82 E, with such modifications as may be necessary, certifying receipt of the request for additional portions of the transcript:
- (a) where he or she believes that additional portions of the transcript of the proceedings are necessary to enable the issues on appeal to be determined, and
 - (b) within 15 days after receipt, or within such longer time as the Court may allow.
- (10) A party to an appeal may at any time apply to the Court for an order
- (a) excising portions of the transcript of the proceedings that have been requested or prepared and that are unnecessary or inappropriate for the determination of the issues on an appeal; and
 - (b) adding such further portions of the transcript of the proceedings as may be determined to be necessary for the determination of the issues on an appeal.
- (11) The Court may at any time of its own motion order that the transcript of the proceedings be abridged or amplified.
- (12) The parties to an appeal may agree, in writing to be filed in the Court:
- (a) to substitute an agreed statement of facts in place of all or any portion of the transcript of the proceedings and the exhibits; and
 - (b) to submit a joint request for transcript in Form 82 C and certificate of court reporter in Form 82 E, with such modifications as may be required.
- (13) A judge may order that a party need not file a transcript or may omit anything from a transcript.
- (14) When the transcript of the proceedings has been prepared, the Chief Court Reporter, a court reporter or a court transcriber shall forthwith forward to the Registrar the original transcript and three copies, together with one copy in an electronic format satisfactory to the Registrar.
- (15) The Registrar shall, on receipt of the original transcript and copies, notify the parties that the transcript has been received by the Court and deliver

copies to the parties or their counsel upon payment of any prescribed fees. In a prisoner appeal, the Attorney General shall be responsible for the payment and delivery of the transcript to the appellant.

EXHIBITS

- 82.10** (1) Subject to subsections (2) and (6), all documents, exhibits and things connected with a trial shall be retained by the trial judge or by the clerk of the trial court for ninety (90) days after sentence or acquittal, as the case may be.
- (2) At any time after a trial, the trial judge or a judge may make such order as to the custody or conditional release of any document, exhibit or thing as the special circumstances of the case may require.
- (3) Upon the filing of written consents by the accused or his or her counsel, and by the Attorney General or his or her counsel, the trial judge or the clerk of the trial court shall deliver any document, exhibit or thing in accordance with such consents.
- (4) Upon receipt of a copy of a notice of appeal, the trial judge or the clerk of the trial court shall forward to the registrar all documents, exhibits and things connected with the proceedings at the trial, other than such as may already have been released pursuant to subsections (2) and (3).
- (5) Upon the expiry of the period referred to in subsection (1) and if no appeal is filed or, when an appeal is abandoned, the registrar shall return the exhibits to the clerk of the trial court.
- (6) Nothing in this rule affects the provisions of any Act relating to exhibits or things seized or forfeited.

APPEAL BOOK

- 82.11** (1) Subject to subsection (3), the appellant shall prepare an appeal book which shall contain, where applicable, in the following order:
- (a) an index;
- (b) a copy of the notice of appeal and notice of cross-appeal;
- (c) a copy of any order respecting conduct of the appeal;
- (d) a copy of the information or indictment;
- (e) a copy of any decision and order of the trial court that is the subject of the appeal or related to it and which is not included in the transcript;
- (f) a copy of any agreed statement of facts entered at the trial or agreed to under this Rule;
- (g) any agreement to limit the contents of the transcript or the appeal book;
- (h) a list of all exhibits;

- (i) a copy of each documentary exhibit or electronic information entered into evidence, indexed and numbered as at the trial, including affidavits and written admissions; and
 - (j) any other item that was before the trial court which the appellant deems necessary for the appeal.
- (2) In the case of an appeal against sentence, in addition to the items mentioned in subsection (1) there shall be filed
 - (a) a copy of any pre-sentence report and victim impact statement;
 - (b) a copy of any restitution, probation, or conditional sentence order or any other order that is the subject of the appeal;
 - (c) a copy of the offender's criminal record if one is entered at the trial;
 - (d) any medical or psychiatric reports filed at the time of sentence; and
 - (e) a copy of any exhibits entered at the sentencing and not at the trial.
- (3) Where the appeal is a prisoner appeal, the Attorney General shall, unless otherwise ordered by the Court, prepare the appeal book required under this section and shall forward a copy of it to the appellant free of charge.
- (4) The respondent may file an appeal book.
- (5) The parties to an appeal may agree in writing to omit from the appeal book anything the parties consider unnecessary to an appeal.
- (6) A judge may order that a party may omit anything from an appeal book.
- (7) The Registrar may refuse to accept an appeal book that does not comply with these Rules or that is not legible.

FACTUMS

Appellant's Factum

- 82.12** (1) An appellant shall prepare an appellant's factum unless
- (a) the appellant is not represented by counsel and has stated in the notice of appeal that he or she desires to present oral argument only; or
 - (b) the Court orders otherwise.
- (2) The appellant's factum shall be signed by the appellant, the appellant's counsel, or on counsel's behalf by someone he or she has specifically authorized, and shall consist of
- (a) Part I, containing a concise summary of the facts relevant to the issues in the appeal, including identification of the trial court and the result in the trial court, with reference to the evidence by page and line of the transcription;
 - (b) Part II, containing a concise statement setting out clearly and

particularly the points in issue in the appeal;

- (c) Part III, containing a concise statement of the argument, law and authorities relied on;
- (d) Part IV, containing a statement of the order that the Court will be asked to make; and
- (e) Schedule A, containing a list of the authorities relied on; and
- (f) Schedule B, containing
 - (i) an index,
 - (ii) the headnote and the relevant portions of the text, or the complete text if most of the text is relevant to the issues in the appeal, of the authorities relied on, and
 - (iii) all relevant provisions of statutes, regulations and by-laws, with each authority.

Respondent's Factum

- 82.13** (1) The respondent shall prepare a respondent's factum unless
- (a) the respondent is not represented by counsel and has given notice that he or she desires to present oral argument only; or
 - (b) the Court orders otherwise.
- (2) The respondent's factum shall be signed by the respondent, the respondent's counsel, or on counsel's behalf by someone he or she has specifically authorized, and shall consist of,
- (a) Part I, containing a statement of the facts in the appellant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees and a concise summary of any additional facts relied on, with such reference to the evidence by page and line of the transcript as is necessary;
 - (b) Part II, containing the position of the respondent with respect to each issue raised by the appellant, immediately followed by a concise statement of the law and the authorities relating to that issue;
 - (c) Part III, containing a statement of any additional issues raised by the respondent, the statement of each issue to be immediately followed by a concise statement of the law and the authorities relating to that issue;
 - (d) Part IV, containing a statement of the order that the court will be asked to make;
 - (e) Schedule A, containing a list of the authorities relied on; and
 - (f) Schedule B, containing
 - (i) an index,

- (ii) the headnote and the relevant portions of the text, or the complete text if most of the text is relevant to the issues in the appeal, of the authorities relied on, and
- (iii) all relevant provisions of statutes, regulations and by-laws.

PERFECTING APPEALS

- 82.14** (1) Subject to subsection (2), within 30 days after being notified that the evidence has been transcribed or, if no evidence is to be transcribed, within 30 days after the issue of the notice of appeal, an appellant shall serve on each party a copy of the appeal book, and a copy of the appellant's factum, if one is required, and file with the Registrar
- (a) if the notice of appeal was served under subsection 82.05(4), the original notice of appeal with proof of service;
 - (b) four copies of the appeal book,
 - (c) four copies of the appellant's factum, if one is required, and
 - (d) a certificate that service has been made under paragraphs (a) and (b) where applicable.
- (2) Where the appeal is a prisoner appeal, within the time prescribed by subsection (1)
- (a) the Attorney General shall file with the Registrar four copies of the appeal book,
 - (b) the appellant shall file with the Registrar five copies of the appellant's factum, if one is required, and
 - (c) the Registrar shall forward to the respondent a copy of the appellant's factum, if any.
- (3) Within 30 days after service of the appellant's factum, the respondent shall
- (a) file with the registrar four copies of the respondent's factum, if one is required; and
 - (b) serve on each party a copy of the respondent's factum, if one is required.
- (4) When subsection (1) or (2) are complied with, the appeal is perfected and the Registrar, under the direction of the Chief Justice, may, as appeals are perfected, set times for the hearing thereof and in so doing shall have regard as much as possible to advice from the parties or their counsel as to the probable length of the hearing and convenient dates thereof.

HEARING OF APPEALS

- 82.15** (1) The Registrar shall give each party notice of the time set for the hearing of an appeal under subsection 82.14(4).
- (2) The Registrar shall file a certificate in Form 82 F indicating that each of

the parties has been notified as required by subsection (1) and such certificate shall be *prima facie* evidence that such notice has been received by the parties.

- (3) On the hearing of an appeal the appellant and the respondent shall be restricted in their argument to the grounds set out in their respective notices of appeal and factums unless leave of the court is obtained to argue matters not set out in their grounds of appeal or factums.
- (4) On application by any party to an appeal, the court or a judge, may, in special circumstances, order an early hearing of an appeal and may give any necessary directions.

ABANDONMENT OF APPEALS

- 82.16** (1) An appellant who wishes to abandon an appeal may, before the hearing of the appeal
- (a) serve on the respondent a notice of abandonment in Form 82 G, and
 - (b) file with the Registrar the notice with proof of service.
- (2) A notice of abandonment may be signed by the appellant or his or her counsel but if it is signed by the appellant, his or her signature shall be verified by affidavit or witnessed by a lawyer or by an officer of the penal institution in which the appellant is confined.
- (3) An abandoned appeal shall be deemed to be dismissed without any formal order being necessary but the respondent may apply, without notice, to the Court or a judge for a formal order dismissing the appeal.
- (4) Notwithstanding subsection 82.16(3), a judge may at any time, on notice of motion, grant leave to withdraw a notice of abandonment if it is in the interest of justice to do so.

TIMING WITH RESPECT TO INTERLOCUTORY APPLICATIONS

- 82.16.1** (1) Any party may seek from the Registrar a date and time for the hearing of an interlocutory application. When the date and time are set, the applicant shall serve copies of the documentation to be relied on, on all other parties at least four clear days before the hearing, unless the application is made by consent or the Court orders otherwise.
- (2) Any written response to the application shall be filed with the Registrar and served on all other parties at least one clear day before the hearing.

APPLICATIONS FOR DISCLOSURE, PRODUCTION OF THIRD PARTY RECORDS AND FRESH EVIDENCE

- 82.17** (1) In seeking to obtain disclosure, the production of third party records and to adduce fresh evidence on appeal and pursuant to the applicable

provisions of the **Code**, the applicant shall file and serve a notice of motion, which shall concisely set out the nature of the disclosure, the third party records being sought and/or the evidence sought to be adduced and the manner in which such evidence is said to bear on a decisive or potentially decisive issue at trial.

- (2) The notice of motion shall
 - (a) be supported by affidavit(s) as to the facts raised and to be relied on in support of the application;
 - (b) set out the order sought; and
 - (c) be accompanied by a memorandum of the points of argument and a list of authorities relied on.
- (3) A party opposing the application shall file with the Registrar any affidavit or memorandum on which that party relies and serve a copy of it on the applicant and on any other parties. The memorandum shall contain the points of argument and a list of authorities relied on.
- (4) Motions for disclosure and the production of third party records shall be made to the panel hearing the appeal, and they shall be scheduled at a time prior to the panel hearing argument on the merits of the appeal.
- (5) Unless otherwise ordered, a motion to adduce fresh evidence shall be made to the panel hearing the appeal and at the same time as the argument of the appeal on its merits.
- (6) Either prior to or after ruling on the admissibility of the proposed fresh evidence, the Court may, of its own motion or that of counsel, order that the evidence be taken by oral examination before the Court, by affidavit, by commission evidence, by deposition or in any other manner that the Court directs.

APPLICATION FOR ASSIGNMENT OF COUNSEL UNDER SECTION 684 OF THE CRIMINAL CODE

- 82.18** (1) An application by an appellant or a respondent for the assignment of counsel under section 684 of the **Code** shall be made by filing the original and two copies of a Notice of Motion for Assignment of Counsel in Form 82 H, together with an affidavit of the appellant or respondent in Form 82 I.
- (2) The Registrar shall provide a copy of the Notice of Motion and the affidavit to the Attorney General and the Office of Legal Aid.

RELEASE FROM CUSTODY PENDING APPEAL

- 82.19** (1) An application, under the provisions of section 679 of the **Code**, for release from custody pending appeal shall be made by notice of motion.
- (2) An application for release pending appeal shall not be heard unless the appellant has filed a notice of appeal as well as a request for transcript and

certificate in Form 82 C.

- (3) Where the appeal is from sentence only, a judge shall determine the application for leave to appeal the sentence before determining the application for release pending appeal.
- (4) The application shall be accompanied by an affidavit or affidavits, including where practicable an affidavit of the appellant, setting forth
 - (a) the particulars respecting the conviction and sentence;
 - (b) any grounds of appeal not specified in the notice of appeal;
 - (c) the applicant's
 - (i) age, marital status, and dependents if any,
 - (ii) places of residence in the three years preceding conviction,
 - (iii) proposed place of residence if released,
 - (iv) employment prior to conviction and expected employment and address of employment if released, and
 - (v) criminal record, if any; and
 - (d) where the appeal is from sentence only, any unnecessary hardship that would be caused if the appellant were detained in custody.
- (5) Where the Attorney General desires to assert that the detention of the applicant is necessary in the public interest and to rely on material other than that contained in the material filed by the applicant, the Attorney General shall file an affidavit setting out the facts on which the Attorney General relies.
- (6) The applicant and the Attorney General may, with leave of the Court, cross-examine on affidavits filed by the opposite party.
- (7) A judge may dispense with the filing of the affidavits referred to in this Rule and act on a statement of facts agreed on by the appellant and the Attorney General.
- (8) The applicant shall file a concise memorandum of fact and law and any portions of the transcript of the trial or hearing that may be required, in support of the requirements stipulated by section 679 of the *Code* for release pending the appeal and, if applicable, in support of the argument that the appeal or application for leave to appeal is not frivolous. The Attorney General shall file a memorandum in reply.
- (9) When granting an application for release, the judge may make a separate order requiring the applicant to file his or her factum within a specified time period after receipt of the transcript by the Registrar, or after release is granted, if the transcript has been filed. The factum shall not be filed after the time specified except with the leave of the Chief Justice or the Court.

- (10) Unless otherwise ordered by the judge hearing the application, all orders for release from custody pending appeal shall contain the following conditions:
- (a) that the appellant will surrender into custody at the courthouse or at such other place as may be specified in the order, on the day of the hearing of the appeal or such other day as may be specified in the order;
 - (b) that the appellant acknowledges that failure to surrender into custody in accordance with the terms of the order will be deemed to constitute an abandonment of the appeal;
 - (c) that the appeal will be pursued with all due diligence;
 - (d) that the appellant will keep the peace and be of good behaviour;
 - (e) that the appellant will advise the Registrar of his or her place of residence.
- (11) Where release pending appeal is granted, the appellant shall prepare and file with the Registrar the order for judicial interim release, any recognizance or undertaking, which may take the form provided in the *Code* or the *Youth Criminal Justice Act* and a notice to release from custody in Form 82 J.
- (12) Where release is granted in a prisoner appeal, the Attorney General shall prepare the documentation required under subsection (10).

VARIATION OF AN ORDER FOR RELEASE FROM CUSTODY PENDING APPEAL

- 82.20** (1) A judge may, on cause being shown, revoke an order previously made under section 679 of the *Code* and may make any order that could have been made under that section.
- (2) An order for a new recognizance or undertaking varying a condition may be made by a judge without the attendance of counsel, upon the filing of the written consent of counsel for the respondent.
- (3) Where the appellant seeks an order under subsection (1) which varies a condition contained in an order made under section 82.19, the material filed in support of the application shall contain a summary of the status of the appeal, an explanation for any failure to comply with these rules and, where applicable, a statement of the earliest feasible date on which the appeal may be heard.

POST-SENTENCE REPORT

- 82.21** (1) A party to the appeal may apply to the Court for an order that a post-sentence report be prepared.
- (2) A party to the appeal may, with consent of the other party or with leave of the Court, file post-sentence information.

- (3) Where the preparation of a post-sentence report is ordered by the Court and the subject of the report is in a penal institution, the report shall be prepared in writing by the appropriate official of the penal institution and filed with the Registrar within any time limits specified in the order, and the Registrar shall forward a copy of the report to counsel for each party to the appeal and to any party who is not represented by counsel.
- (4) Where a post-sentence report is ordered by the Court and the subject of the report is not in a penal institution, the report shall be prepared by a probation officer and filed with the Registrar within any time limits specified in the order, and the Registrar shall forward a copy of the report to counsel for each party to the appeal and to any party who is not represented by counsel.

FORMAL ORDER

- 82.22** (1) On a decision having been filed or deemed filed, an order shall be prepared by the appellant or may be prepared by any party stating the disposition of the appeal as directed by the Court and served on the opposite party. The order shall be approved by the judge who acted as chairperson of the appeal panel, or in the absence of that judge, the next senior judge on the panel, and shall be signed by and filed with the Registrar, who shall then notify all parties of the filing.
- (2) Any party to an appeal who wishes the order amended to better express the intent of the Court's decision may apply to the Court, which may correct or otherwise amend the formal order, and the amended order shall then without a change of date, be signed and entered by the Registrar as the formal order disposing of the appeal.

EXTENSION OR ABRIDGEMENT OF TIME

- 82.23** (1) Any time prescribed by this Rule, including the time prescribed for the filing of a notice of appeal, may be extended or abridged by the Court or a judge thereof, before or after the expiration of the period.
- (2) Notice of an application to extend or abridge the time shall be given to the opposite party, unless such application is made by consent or unless otherwise directed by the Court.
- (3) An application to extend or abridge the time for filing a notice of appeal shall include an affidavit and any other relevant material indicating
- (a) the potential merits of the appeal, including any questions of law that may be in issue on the appeal;
 - (b) an explanation for the failure to have filed the notice of appeal in accordance with the time limits prescribed by these Rules;
 - (c) whether the applicant had demonstrated an intention to appeal within the appeal period;
 - (d) the existence of any prejudice to the intended respondent and any

- third parties if the appeal were allowed to proceed;
- (e) the existence of any special circumstances that might cause an injustice to the applicant if the application were refused; and
 - (f) any other information or factors that might reasonably have a bearing on the application.
- (4) An appellant who is not represented by counsel may apply for an extension or abridgement of time by including with the proposed Form 82 B notice of appeal an application for such extension. The Court may, on notice to the Attorney General and on giving the Attorney General an opportunity to be heard, consider the application and either grant or refuse the requested extension. The Registrar shall send to each party a copy of the Court's order.

EFFECT OF NON-COMPLIANCE WITH RULES

- 82.24** (1) Subject to subsection 82.23(3), non-compliance with these Rules does not render a proceeding void, but where non-compliance occurs, the Court may give any direction or make any order it considers appropriate to give effect to the intent of these Rules.
- (2) Where a party to an appeal or their counsel fails to perfect the appeal within a period of six months after the filing of the transcript or, where no transcript is filed, within a period of six months after the filing of the notice of appeal, or a party or their counsel otherwise fails to comply with these Rules, the Court, on application of any other party to the appeal or of its own motion, on giving to the parties such notice, if any, as the Registrar is able to effect, or without notice if reasonable notice cannot be effected, may
- (a) strike out the appeal;
 - (b) direct the appellant to perfect the appeal within a specified time;
 - (c) fix a date for hearing of the appeal; or
 - (d) make any other order as may be just.
- (3) Where the notice of appeal was filed prior to the coming into effect of this Rule and six months have passed since the Rule came into effect with no order or step being made or taken under this Rule, the appeal shall be deemed to have been abandoned and the Registrar shall file a notice of deemed abandonment.
- (4) On filing a notice of deemed abandonment of the appeal, the Registrar shall send a copy of the notice by ordinary mail or by facsimile transmission to counsel of record or to the parties at the last known addresses, if any, of such counsel or parties indicated in the documents filed in the appeal.
- (5) Inability or failure of the Registrar to effect any notice required by this Rule shall not affect the deemed abandonment or striking out of an appeal.

- (6) No proceedings shall thereafter be taken in any appeal deemed abandoned or struck out under this Rule unless the appeal is reinstated by the Court, which the Court may do on application and on such terms as the Court deems just.
- (7) The Court may, on application by a party prior to the date on which the appeal would be deemed to be abandoned, on such terms as the Court deems just, order that the appeal not be deemed abandoned.

GENERAL

Timing with Respect to Motions

- 82.25** (1) Any party may seek from the Registrar a date and time for the hearing of a motion. When the date and time are set, the applicant shall serve copies of the documentation to be relied on, on all other parties at least four clear days before the hearing, unless the application is made by consent or the Court orders otherwise.
- (2) Any written response to the application shall be filed with the Registrar and served on all other parties at least one clear day before the hearing.

Manner of Service of Other Notices and Documents in Prisoner Appeals

- 82.26** (1) In a prisoner appeal, service of all notices and other documents pertaining to the appeal, other than the notice of appeal, shall be effected by delivery to the senior official of the penal institution in which the appellant is imprisoned.
- (2) Where a notice or document is initiated by the appellant, the official shall endorse on it the date of receipt, return a copy so endorsed to the appellant and forthwith forward the original to the Registrar. The Registrar shall file the original and forward a copy to the Attorney General.
- (3) Where a notice or document is initiated by the Attorney General, the original shall be filed with the Registrar. Service shall be effected by delivery to the senior official of the penal institution in which the appellant is imprisoned who shall forthwith deliver the notice or document to the appellant. Delivery may be carried out by
- (a) delivery to the official;
 - (b) prepaid registered or certified mail or courier to the official;
 - (c) verified facsimile transmission, except in respect of transcripts, appeal books, factums and other documents exceeding 10 pages; or
 - (d) any other manner that may be directed by the Court.

Manner of Service of Other Notices and Documents in All Other Appeals

- 82.27** (1) In all other appeals, where the Attorney General is not the appellant, or a party is not represented by counsel, or both, service of notices and documents, other than the notice of appeal,

- (a) when directed to the Attorney General shall be effected by
 - (i) service on legal counsel instructed by the Attorney General,
 - (ii) prepaid registered mail to the Attorney General or counsel directed by the Attorney General, or
 - (iii) verified facsimile transmission, except in respect of transcripts, appeal books, factums and other documents exceeding 10 pages; and
- (b) when directed to another party, shall be effected by
 - (i) personal service,
 - (ii) prepaid registered or certified mail to the address of the party set out in the notice of appeal or as filed with the Registrar,
 - (iii) verified facsimile transmission, except in respect of transcripts, appeal books, factums and other documents exceeding 10 pages, or
 - (iv) any other manner that may be directed by the Court.
- (2) In all appeals referred to in this Rule, the original notice or document, and documents evidencing proof of service, if necessary, shall be filed with the Registrar.

R. v. Sark, 2020 PECA 1

An accused's legal counsel accepted service of an appeal on his behalf; however, the accused was not provided notice of the appeal. The court held that the appeal hearing and the orders which flowed from it are a nullity.

R. v. McInnis, 2018 PECA 27

The Court of Appeal granted intervenor status to the Mi'kmaq Confederacy of P.E.I. a friend of the court rather than as an added party in a sentencing appeal. The Court determined the proposed intervenor demonstrated a sufficient interest in the subject matter of the appeal and that it would advance different and valuable insights and perspectives that could further the court's determination of the matter and promote effective adjudication by assuring all matters are presented on appeal. The intervention would not significantly lengthen the appeal proceeding.

R. v. Doyle, 2016 PECA 9

The motions judge dismissed the appellant's motion for stay pending appeal on the basis that the appeal and motion are premature. The recusal process to be followed is that the application for recusal based on bias should be put to the trial judge, which was done in this case. An appeal of the verdict can then be made to the Court of Appeal and reasonable apprehension of bias can be cited as a ground of appeal.

RULE 83**MANDAMUS, CERTIORARI, PROHIBITION
AND
HABEAS CORPUS IN CRIMINAL MATTERS****PRACTICE AND PROCEDURE**

83.01 Where no other express provision is made in this rule, the provisions of Rule 68, Proceedings for Judicial Review, where not inconsistent with,

- (a) any provision of the *Criminal Code*, R.S.C. 1985, c. C-46 or any other Act of Parliament, or
- (b) any uniform rules of court made by the government in council under subsection 482(5) of the Criminal Code,

apply with respect to proceedings under this Rule.

83.02 In an urgent case, a proceeding under this rule may be heard and determined before the notice of application has been issued on the applicant's undertaking to have the notice of application issued forthwith.

83.03 Proceedings in criminal matters by way of certiorari, mandamus or prohibition shall be brought by application to a judge of the Supreme Court of Prince Edward Island and, where appropriate, may include an application to quash a conviction, order, warrant or inquisition, and an application for discharge of a person in custody.

83.04 Notice of an application that includes an application to quash shall be served within thirty days of the conviction, order, warrant or inquisition sought to be quashed, shall be returnable within ten days of service of the application and shall be served at least seven days before the return date thereof upon the provincial court judge, justice or justices making the conviction or order or issuing the warrant, or the coroner making the inquisition, and upon the informant (if he is not a peace officer), and upon the Attorney General (if he is not the applicant). The notice shall specify the objections intended to be raised, and no other objection may be raised save by leave of the judge hearing the application.

83.05 Upon a notice of application under Rule 83.04 shall be endorsed a notice in the following form, addressed to the provincial court judge, justice or justices or coroner as the case may be:

By virtue of Rule 83 of the Rules Respecting Criminal Proceedings of the Supreme Court of Prince Edward Island, you are, upon receiving this notice to return forthwith to the Registrar's Office at _____ true copies of the conviction (or as the case may be) herein referred to, together with true copies of the indictment, information, exhibits and other papers or documents touching

the matter, as fully and as entirely as they remain in your custody, together with this notice and the certificate prescribed in the said rule.

DATED this _____ day of _____ 19 ____.

C.D.

Lawyer for the Applicant

TO: A. B.
Provincial Court Judge at _____
(or as the case may be).

83.06 Upon receiving the notice so endorsed the provincial court judge, justice or justices, or coroner, shall forthwith return to the Registrar's Office at the place where the application is returnable true copies of the conviction, order, warrant or inquisition, together with true copies of the indictment, information, exhibits and any other papers or documents touching the matter and the notice served upon them with a certificate attached thereto in the following form:

Pursuant to the accompanying notice I herewith return to this Honourable Court the following:

True copies of:

1. the indictment or information;
2. the conviction (or as the case may be);
3. the exhibits; and
4. any other papers or documents touching the matter.

AND I HEREBY CERTIFY to this Honourable Court that I have above truly set forth all exhibits, papers and documents in my custody or power relating to the matter set forth in the said notice of application.

DATE _____

- 83.07** (1) Subject to Rule 83.08(1), the documents listed in the certificate, together with the transcript of the proceedings (if any be supplied by the applicant) shall have the same effect as a return to a writ of certiorari.
- (2) The judge hearing the application may direct a further or amended return.
- 83.08** (1) Subject to subrule (2), service of a notice of application under Rule 83.04 upon the provincial court judge, justice or justices or coroner, suspends the proceedings which are the subject of the application.
- (2) A judge may, at any time, make an order permitting the proceedings to continue.
- (3) Service of a notice of motion for an order under subrule (2) may be made in such manner as the judge directs or may be dispensed with if the judge so directs.

83.09 A judge hearing the application shall have all the powers of the court in like matters and may order the production of all such papers and documents as the judge may deem necessary.

HABEAS CORPUS

83.10 An application for a writ of habeas corpus shall be brought by application to a judge and may be joined with one or more of the applications referred to in Rule 83.03. The notice of application shall be served upon the person having custody of the person in respect of whom the application is brought and upon the Attorney General.

83.11 A writ of habeas corpus shall be in Form 83 A with such variations, not being matters of substance, as the nature of the case may require.

83.12 Upon the hearing of the application the issue of the writ of habeas corpus and the return thereto and the presence before the judge of the person in respect of whom the application is made may be dispensed with on consent, in which event the judge may proceed to dispose of the matter forthwith as the justice of the case may require.

This rule was made pursuant to section 482 of the *Criminal Code* by the Judges of the Supreme Court of Prince Edward Island with the concurrence of the majority of the judges thereof, at a meeting held on the 27th day of May, 1992, to become effective on the 1st day of September, 1992.

Rule 83.03 was amended pursuant to section 482 of the *Criminal Code* by the Judges of the Supreme Court of Prince Edward Island on the 25th day of June, 2009, and as necessitated by the proclamation of the *Judicature Act*, to become effective on the 1st day of September, 2009.

Mol v. AG, 2015 PESC 13

The plaintiff was charged that he committed violations of the *Occupational Health & Safety Act*, R.S.P.E.I. 1988, Cap. O-1.01. He sought the production of third party records. The Court found it did not have jurisdiction to expand the parameters of the rule to include overturning an evidentiary ruling. The Court also stated if it was wrong and it did have jurisdiction, it would not grant the application.

Island Meat Packers (1996), Ltd. et al. v. MacKinnon, J.P., et al. (1997), 155 Nfld. & P.E.I.R. 352 (P.E.I.S.C.T.D.)

The principles for consideration on an application to extend the time for filing an application for judicial review should apply, *mutatis mutandis*, to an application for *certiorari* under this Rule. See: cases noted under Rule 68.