

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 he 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 their 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 53E) 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 53A) 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 53C.

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 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:

$$g = \frac{(1 + i) - 1}{(1+d)}$$

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).

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.