

## **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(1)(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 proprietorship 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 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 Trustee, Public Guardian 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,

unless the court orders or the parties agree otherwise.

### **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 31A.

#### **Costs 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 31B) may, within 10 days of service of the notice of

examination, apply to the court for an order that he 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 his costs of the discovery to be paid by the party conducting the discovery;
  - (d) relieve the person to be discovered from his 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 trial under subrule 31.11(1).

### **USE OF EXAMINATION FOR DISCOVERY AT TRIAL**

#### **Reading in Examination of a 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 lawyer'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; [2008] P.E.I.J. No. 38; (2008), 58 C.P.C. (6<sup>th</sup>) 195*

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.