

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 34A) 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 34B), 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 34E and shall, if the moving party requests it, provide for the issuing of,
- (a) a commission (Form 34C) authorizing the taking of evidence before a named commissioner; and
 - (b) a letter of request (Form 34D) 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 he or she 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.