

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 34E.

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 or committee;
 - (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.