

## **MOTIONS AND APPLICATIONS**

### **RULE 37**

#### **MOTIONS - JURISDICTION AND PROCEDURE**

**NOTICE OF MOTION** [See [Practice Note 41](#) on Pre-Motion Conference where applicable.]

**37.01** A motion shall be made by a notice of motion (Form 37A) 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.

### **CONTENT OF NOTICE**

**37.06** Every notice of motion (Form 37A) 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 34.17.

#### **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;
  - (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 sub rule (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.

*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.