

RULE 39

EVIDENCE ON MOTIONS AND APPLICATIONS

EVIDENCE BY AFFIDAVIT

Generally

- 39.01** (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

Service and Filing

- (2) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served with the notice of motion or notice of application and shall be filed with proof of service in the court office where the motion or application is to be heard at least ten days before the hearing.
- (3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed with proof of service in the court office where the motion or application is to be heard at least four days before the hearing.
- (3.1) The moving party or applicant only may file a reply affidavit which shall be concise and filed with proof of service in the court office where the motion or application is to be heard one clear day before the hearing.

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- (4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

Contents - Applications

- (5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

Full and Fair Disclosure on Motion or Application Without Notice

- (6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

Expert Witness Evidence

- (7) Opinion evidence provided by an expert witness for the purpose of a motion or application shall include the information listed under subrule 53.03(3).

EVIDENCE BY CROSS-EXAMINATION ON AFFIDAVIT

On a Motion or Application

- 39.02** (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under Rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application.
- (1.1) Subrule (1) does not apply to an application made under subsection 65(1) of the *Judicature Act*.
 - (2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under Rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under Rule 39.03.

To be Exercised with Reasonable Diligence

- (3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence.

Additional Provisions Applicable to Motions

- (4) On a motion other than a motion for summary judgment or a contempt order, a party who cross-examines on an affidavit,
 - (a) shall, where the party orders a transcript of the examination, purchase and serve a copy on every adverse party on the motion, free of charge; and
 - (b) is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise.

EVIDENCE BY EXAMINATION OF A WITNESS

Before the Hearing

- 39.03** (1) Subject to Rule 39.02(2) a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.
- (2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination.
- (2.1) Subrules (1) and (2) do not apply to an application made under subsection 65(1) of the *Judicature Act*.

To be Exercised with Reasonable Diligence

- (3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence.

At the Hearing

- (4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial.

Summons to Witness

- (5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial.

EVIDENCE BY EXAMINATION FOR DISCOVERY

Adverse Party's Examination

- 39.04** (1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and Rule 31.11 (use of discovery at trial) applies with necessary modifications.

Party's Examination

- (2) On the hearing of a motion, a party may not use in evidence the party's own examination for discovery or the examination for

discovery of any person examined on behalf or in place of, in addition to, the party unless the other parties consent.

DCP v. J.B. and D.J. 2017 PESC 16

The court refused to consider portions of the affidavits and viva voce evidence provided on the basis of hearsay.

DCP v. A.D.D. and J.D., 2018 PESC 16

The court reviewed criteria for admission of hearsay and affidavits of the director's witnesses, as well as other documents.

PEI Atlantic Baptist v. CUPE, et al, 2018 PESC 39

The applications judge allowed *viva voce* evidence at the hearing of the application pursuant to Rule 39. The court disregarded portions of an affidavit that were mere speculation or legal argument. The court denied the employer's motion for a stay of an arbitrator's decision, concluding the employer had failed to meet the applicable three-part test.

CASP et al. v. AG of Canada 2015 PESC 9

In a motion for recusal, the judge reviewed the rules relating to the submission of evidence. The Court struck the affidavits of one of the affiants in its entirety as it contained substantial commentary, and were replete with hearsay, speculation, scandalous allegations, illogical conclusions, and improper opinion.