

## **RULE 38**

### **APPLICATIONS - JURISDICTION AND PROCEDURE**

#### **APPLICATION OF THE RULE**

- 38.01** (1) Rules 38.02 to 38.12 apply to all proceedings commenced by a notice of application under Rule 14.05.
- (2) Rules 38.02 to 38.13 apply to an application made under subsection 65(1) of the *Judicature Act* unless otherwise provided in Rule 38.14 and subject to any modifications set out in that rule.

#### **JURISDICTION**

- 38.02** A judge of the court in which a proceeding is pending has jurisdiction to hear any application.

#### **APPLICATIONS - TO WHOM TO BE MADE**

##### **Judge**

- 38.03** An application in the court may be made to a judge or to the Prothonotary where the Prothonotary has been assigned jurisdiction by a statute or by the Rules of Court.

#### **PLACE AND DATE OF HEARING**

##### **Place**

- 38.04** (1) Unless the court orders otherwise, the place of hearing an application shall be at the place named in the application.
- (2) A hearing date should be obtained from the registrar before the notice of application is issued.

##### **Counter-Application**

- (3) Where a notice of application has been served, and the respondent wishes to make an application against the applicant, or against the applicant and another person, the respondent may make the application at the same place and time to the same judge.

#### **CONTENT OF NOTICE**

- 38.05** Every notice of application (Form 14E) shall state,
- (a) the precise relief sought;
- (b) the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

- (c) the documentary evidence to be used at the hearing of the application.

### **ISSUING OF NOTICE**

**38.06** A notice of application shall be issued as provided by Rule 14.07 before it is served.

### **SERVICE OF NOTICE**

#### **Generally**

**38.07** (1) The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions.

#### **Where Notice Ought to Have Been Served**

- (2) Where it appears to the judge hearing the application that the notice of application ought to have been served on a person who has not been served, the judge may,
  - (a) dismiss the application or dismiss it only against the person who was not served;
  - (b) adjourn the application and direct that the notice of application be served on the person; or
  - (c) direct that any judgment made on the application be served on the person.

#### **Minimum Notice Period**

- (3) The notice of application shall be served at least ten days before the date of the hearing of the application, except where the notice is served outside Prince Edward Island, in which case it shall be served at least twenty days before the hearing date.

#### **Filing Proof of Service**

- (4) Where service of the notice of application is effected outside Prince Edward Island, the notice of application shall be filed with proof of service at least ten days before the hearing.

### **NOTICE OF APPEARANCE**

- 38.08** (1) A respondent who has been served with a notice of application shall serve a notice of appearance (Form 38A).
- (2) A respondent who has not delivered a notice of appearance is not entitled to,
    - (a) receive notice of any step in the application;

- (b) receive any further document in the application, unless,
    - (i) the court orders otherwise, or
    - (ii) the document is an amended notice of application that changes the relief sought;
  - (c) file material, examine a witness or cross-examine on an affidavit on the application; or
  - (d) be heard at the hearing of the application, except with leave of the presiding judge.
- (3) Despite subrule (2), a party who is served with a notice of application outside Prince Edward Island may make a motion under subrule 17.06(1) before delivering a notice of appearance and is entitled to be served with material responding to the motion.
- (4) The notice of appearance and any affidavit to be used be filed with proof of service at least four days before the hearing.

### **ABANDONED APPLICATIONS**

- 38.09** (1) The applicant may abandon an application by delivering a notice of abandonment.
- (2) An applicant who fails to appear at the hearing shall be deemed to have abandoned the application unless the court orders otherwise.
- (3) Where an application is abandoned or is deemed to have been abandoned, a respondent on whom the notice of application was served is entitled to the costs of the application, unless the court orders otherwise.

### **MATERIAL FOR USE ON APPLICATIONS**

#### **Application Record and Factum**

- 38.10** (1) The applicant shall,
- (a) serve an application record, together with a factum consisting of a concise argument stating the facts and law relied on by the applicant, at least ten days before the hearing, on every respondent who has served a notice of appearance; and
  - (b) file the application record and factum, with proof of service, at least ten days before the hearing, in the court office where the application is to be heard.

- (2) The applicant's application 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 and, in the case of an exhibit, by exhibit number or letter;
  - (b) a copy of the notice of application;
  - (c) a copy of all affidavits and other material served by any party for use on the application;
  - (d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves;
  - (e) a copy of any other material in the court file that is necessary for the hearing of the application; and
  - (f) a draft of any proposed order.

#### **Respondent's Application Record and Factum**

- (3) The respondent shall serve on every other party, at least four days before the hearing, a factum consisting of a concise argument stating the facts and law relied on by the respondent.
  - (3.1) If of the opinion that the application record is incomplete, the respondent may serve on every other party, at least four days before the hearing, a respondent's application 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 and, in the case of an exhibit, by exhibit number or letter; and
    - (b) a copy of any material to be used by the respondent on the application and not included in the applicant's application record.
  - (3.2) The respondent's factum, and the respondent's application record, if any, shall be filed with proof of service in the court office where the application is to be heard, at least four days before the hearing.

#### **Dispensing with Record and Factum**

- (3.3) A judge, before or at the hearing of the application, may dispense with compliance with this rule in whole or in part.

#### **Material May be Filed as Part of Record**

- (4) Any material served by a party for use on an application may be filed, together with proof of service, as part of the party's application record and need not be filed separately if the record is filed within the time prescribed for filing the notice or other material.

#### **Transcript of Evidence**

- (5) A party who intends to refer to a transcript of evidence at the hearing of an application shall file a copy of the transcript as provided by Rule 34.18.

#### **DISPOSITION OF APPLICATION**

- 38.11** (1) On the hearing of an application the presiding judge may,
- (a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms;  
or
  - (b) order that the whole application or any issue proceed to trial and give such directions as are just.
- (2) Where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action, subject to the directions in the order directing the trial.
- (3) Where a trial of an issue in the application is directed, the order directing the trial may provide that the proceeding be treated as an action in respect of the issue to be tried, subject to any directions in the order, and shall provide that the application be adjourned to be disposed of by the trial judge.

#### **SETTING ASIDE JUDGMENT ON APPLICATION MADE WITHOUT NOTICE**

- 38.12** (1) A party or other person who is affected by a judgment on an application made without notice or who fails to appear at the hearing of an application through accident, mistake or insufficient notice may move to set aside or vary the judgment, by a notice of motion that is served forthwith after the judgment comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.
- (2) A motion under subrule (1) may be made,
- (a) to the judge who granted the judgment, or
  - (b) to any other judge.
- (3) On a motion under subrule (2), the judgment may be set aside or varied on such terms as are just.

## **HEARING BY CONFERENCE TELEPHONE**

**38.13** By appointment obtained from the judge or officer before whom the application is to be heard, the application may be heard in whole or in part by means of a conference telephone call.

## **APPLICATIONS UNDER S. 65(1) OF THE JUDICATURE ACT**

**38.14** (1) This rule applies to applications made under subsection 65(1) of the *Judicature Act*.

### **Written Hearing**

(2) An application made under subsection 65(1) of the *Judicature Act* shall be heard in writing without the attendance of the parties, unless the court orders otherwise.

### **Commencement**

(3) The application shall be commenced by filing both a notice of application and the application record described in subrule 38.10(2).

### **Factum not Required**

(4) A factum described in clause 38.10(1)(a) is not required to be filed, but any factum that is filed shall be filed together with the notice of application and the application record.

### **Interpretation of Service of Notice Rule**

(5) Subrules 38.07(1) and (2) shall be read as if the reference to the notice of application includes reference to the application record and, if applicable, the applicant's factum.

### **Service on Attorney General**

(6) In addition to serving the notice of application, application record and, if applicable, factum, on all parties under subrule 38.07(1), the applicant shall serve the documents on the Attorney General of Prince Edward Island in the manner described in clause 16.02(1)(h).

### **Timing of Service**

(7) The notice of application, application record and, if applicable, factum shall be served within 15 days after the documents were filed or, if the service is on a person outside Prince Edward Island, within 25 days after the documents were filed.

### **Proof of Service**

- (8) Proof of service of the notice of application, application record and, if applicable, factum shall be filed immediately after they are served.
- (9) Subrules 38.07(3) and (4), rule 38.08, and subrules 38.10(1) and (2) do not apply to applications made under subsection 65(1) of the *Judicature Act*, unless the court orders otherwise.

**Opportunity to Respond Before Making Order**

- (10) Despite subrule (9), the court shall not make an order under 65(3) of the *Judicature Act* granting leave to institute or continue a proceeding, or rescinding an order made under 65(1) of the *Judicature Act*, without giving the other parties and the Attorney General of Prince Edward Island an opportunity to serve and file a respondent's application record and factum.

*Estate of Lewis v. Lewis and Credit Union*, 2018 PESC 30

The motions judge held she had the jurisdiction to hear a motion requesting the application be converted to an action. The court denied the Credit Union's motion to convert the application to an action in its entirety, but rather bifurcated the issues and ordered that some issues be heard by way of application, while other issues would, if necessary, proceed to an applications judge who could further determine whether those issues would be converted to a trial.

*Urquhart v. Loane*, 2016 PECA 15

The court stated the general practice is that counter applications will be heard at the same time and have the same court file number. Relying upon R. 38.04(3) and Practice Note 7 the court found the issues raised in the respondent's application were properly before the court.

*Guptill v. Noble*, 2006 PESCTD 29

Rule 38.04(3) is to be interpreted as meaning that counter-applications may be filed.

*Ward v. University of Prince Edward Island* (1997), 157 Nfld. & P.E.I.R. 129 (P.E.I.S.C.-T.D.)

Rule 38 applies to applications for judicial review. The Rule addresses affidavit evidence within applications and as some affidavit evidence may be admissible for a particular purpose in an application, leave is not required before the affidavit is filed. Any disagreement with respect to the admissibility of affidavit evidence filed in an application for judicial review can be addressed as a preliminary matter before factums are filed.