RULE 42 – EVIDENCE AND PROCEDURE AT TRIAL

Application

(1) This rule does not apply to summary trials under Rule 19, except as provided in that rule.

Witness to testify orally

(2) Subject to any Act, statute or regulation and these rules,

(a) a witness at a trial of an action shall testify in open court, and

(b) unless the parties otherwise agree, the witness shall testify in person or by videoconference.

Court may vary order

(3) An order made under this rule concerning the mode of proving a fact or document or of adducing evidence may be revoked or varied by a subsequent order made at or before the trial.

Use of transcript of other proceedings

(4) Where a witness is dead, or is unable to attend and testify because

(a) of age, infirmity, sickness,

(b) of imprisonment,

(c) he or she is out of the jurisdiction, or

(d) his or her attendance cannot be secured by subpoena,

the court may permit a transcript of any evidence, including an audio or videotape, of that witness taken in any proceeding, hearing or inquiry at which the evidence was taken under oath, whether or not involving the same parties, to be put in as evidence. A party seeking such permission shall give reasonable notice of their intention to do so.

Transcript for the court

(5) In an action in which evidence or argument is taken down by an official reporter or is recorded digitally, or on audio or video tape, a party shall, if required by the court, furnish it with a certified transcript of the evidence or argument or any portion of it, the costs of which shall form part of the costs of the action. Where payment of the costs of providing a transcript would be a hardship on a party, the court may order that the transcript be prepared.

Use of recording device

(6) With the consent of the court, a party or their lawyer may use a recording device to record evidence, or a personal computer, provided it does not interfere with the trial.

Failure to prove a material fact

(7) Where a party omits or fails to prove some fact material to the party's case, the court may proceed with the trial, subject to that fact being proved afterwards, as the court shall direct, and,

(a) if the case is being tried by a jury, the court may direct the jury to find a verdict as if that fact had been proved, and,

(b) unless the court otherwise orders, judgment shall be entered according to whether or not that fact is or is not proved afterwards, as directed.

No evidence application

(8) At the close of the plaintiff's case, the defendant may apply to have the action dismissed on the ground that there is no evidence to support the plaintiff's case.

(9) A defendant is entitled to make an application under subrule (8) without being called upon to elect whether or not to call evidence.

Insufficient evidence application

(10) At the close of the plaintiff's case, the defendant may apply to have the action dismissed on the ground that the evidence is insufficient to make out the plaintiff's case.

(11) Unless the court otherwise orders, an application under subrule (10) may be made only after the defendant has elected not to call evidence.

Notice to produce

(12) By delivering a notice in Form 40 at least 2 days before a trial, a party may require any other party to bring to the trial

(a) any document in the other party's possession or control relating to the matters in question in the action, without the necessity of identifying the document, and

(b) any physical object in the other party's possession or control which the party contemplates tendering at the trial as an exhibit, but the notice shall identify the object.

Numbering exhibit pages

(13) If a copy of a document is introduced as an exhibit,

(a) each page of the exhibit must be numbered consecutively, beginning with the first page of the exhibit and ending with the last page of the exhibit, or

(b) if the exhibit is divided by tabs,

(i) each page of the exhibit that is not behind a tab must be numbered sequentially, beginning with the first of those pages and ending with the last of those pages, and

(ii) each page of the exhibit that is behind a tab must be numbered sequentially, beginning with the first page behind the tab and ending with the last page behind the tab.

Opportunity to inspect exhibit

(14) Unless the court otherwise orders or the parties agree, no plan, photograph, electronic record, or object shall be received in evidence at the trial of an action unless, at least 7 days before the commencement of the trial, the opposing party has been given an opportunity to inspect it.

Registry to take charge of exhibits

(15) A clerk of the registry shall take charge of each document or object put in as an exhibit, mark or label each exhibit with a number, and make a list of the exhibits, giving a short description of each and stating by whom it was tendered.

Adverse party as witness

(16) Subrules (17) to (20) apply where a party wishes to call as a witness at the trial

(a) an adverse party, or

(b) a person who, at the time the notice referred to in subrule (17) is delivered, is a director, officer, partner, employee or agent of an adverse party.

Notice to call adverse party as witness

(17) If a party wishes to call as a witness a person referred to in subrule (16), the party may deliver to the adverse party a notice in Form 41 together with proper witness fees at least 7 days before the day on which the attendance of the intended witness is required.

Exceptions

(18) Notwithstanding subrule (17), a party may

(a) call as a witness, without payment of witness fees or previous notice, an adverse party or a current director, officer, partner, employee or agent of an adverse party if the person called is in attendance at the trial, or

(b) subpoena an adverse party or a current director, officer, partner, employee or agent of an adverse party.

Application to set notice aside

(19) The court may set aside a notice delivered under subrule (17) on the grounds that

(a) the adverse party is unable to procure the attendance of the person named in the notice,

(b) the evidence of the person is unnecessary,

(c) it would work a hardship on the person or the adverse party to require the person to attend the trial, or

(d) the person is not a person referred to in subrule (16)(a) or (b).

Court may make order

(20) On an application under subrule (19), the court may make any order it thinks just including, without limitation, an order adjourning the trial.

"Adverse party" defined

(21) For the purpose of subrules (16) to (19), "adverse party" means a party who is adverse in interest.

Refusal to comply with notice

(22) If a person or party called as a witness in accordance with subrule (17) or (18) refuses or neglects to attend at the trial, to be sworn or to affirm, to answer a proper question put to the person or to produce a document that the person is required to produce, the court may do one or more of the following:

(a) pronounce judgment in favour of the party who called the witness;

(b) adjourn the trial;

(c) make an order as to costs;

(d) make any other order it thinks just.

Adverse party as witness may be cross-examined

(23) A party calling a witness in accordance with subrule (17) or (18) is entitled to cross-examine the witness generally on one or more issues. Examination of the witness by a lawyer for the adverse party shall be confined to explanation of matters brought out in the first party's cross-examination. Cross-examination of the witness by other

parties may be general or limited, as the court may direct. Re-examination shall be confined to new matters brought out in cross-examination.

Examination of witnesses

(24) The court may permit a party

(a) to examine a witness, either generally or with respect to one or more issues,

(i) by the use of leading questions,

(ii) by referring the witness to a prior statement made by the witness, whether or not made under oath,

(iii) respecting the interest of the witness, if any, in the outcome of the proceeding, or

(iv) respecting any relationship or connection between the witness and a party, or

(b) to cross-examine a witness, either generally or with respect to one or more issues.

Any party may contradict testimony

(25) A party may contradict or impeach the testimony of any witness.

Use of deposition evidence

(26) A transcript and any other recordings of a deposition under Rule 40 may be given in evidence at the trial by any party and, notwithstanding that the deposition of a witness has or may be given in evidence, the witness may be called to testify orally at the trial.

Proof of deposition evidence

(27) A transcript of a deposition may be given in evidence if certified as an accurate transcription by the person taking the deposition, without proof of the signature of that person. A videotape, film or other electronic recording of a deposition may be presented as evidence without proof of its accuracy or completeness, but the court may order such investigation as it thinks fit to verify the accuracy or completeness. A videotape, film or other electronic recording given in evidence shall become an exhibit at the trial.

Deposition to be given in full

(28) Where a deposition is given in evidence,

(a) subrule (31) applies, and

(b) the deposition shall be presented in full, unless otherwise agreed by the parties or ordered by the court.

Use of discovery evidence

(29) Discovery evidence may be used as follows:

(a) If otherwise admissible, the evidence given on an examination for discovery by a party or by a person examined under Rule 27(4) to (11) may be given in evidence at trial, unless the court otherwise orders, but the evidence is admissible only against

(i) the adverse party who was examined, or

(ii) the adverse party whose status as a party entitled the examining party to conduct the examination under Rule 27(4) to (11).

(b) Where the person examined was, at the time of the examination, a former director, officer, employee, agent or external auditor of a party, any part of his or her evidence may be given at trial if notice has been delivered to all parties at least 14 days before trial specifying that part of the evidence intended to be given at trial.

(c) Any party may require the attendance at trial of a person whose evidence taken on examination is intended to be given under paragraph (b), and if the evidence is given, all parties may cross-examine that person.

(d) Where part of an examination for discovery is given in evidence, the court may review the whole or any part of that examination and if, following the review, it considers that another part of the examination is closely connected with the part given in evidence, it may direct that the other part be put in as evidence.

Discovery evidence of person under legal disability

(30) Where, at the time of an examination for discovery, the person examined was a minor or a person under legal disability, the examination shall not be given in evidence unless the trial judge, at the time the evidence is tendered, determines that the person, at the time of the examination, was competent to give evidence.

Transcripts of discovery evidence

(31) A transcript of an examination for discovery may be given in evidence if certified as an accurate transcription by the official reporter without proof of the reporter's signature.

Use of pre-trial examination of a witness

(32) A party may give in evidence at the trial part or all of the examination of a person taken under Rule 28

(a) to contradict or impeach the testimony of the deponent at trial, or

(b) where the deponent is dead or is unable to attend and testify because of age, infirmity, sickness or imprisonment or is out of the jurisdiction or his or her attendance cannot be secured by subpoena and where it is necessary in the interests of justice,

but where part only of the examination is given in evidence, the court may look at the whole of the examination and if it is of the opinion that any other part is so connected with the part given that the last mentioned part ought not to be used without the other part it may direct the other part to be put in as evidence.

Objection to transcript evidence at trial

(33) At the trial a party may object to the admissibility of any question and answer in a transcript, videotape, film or other electronic recording given in evidence, although no objection was taken at the examination.

Custody of transcripts

(34) If a transcription of an examination for discovery, a pre-trial examination of a witness or a deposition examination is made, the party who conducted the examination shall keep the original transcript unmarked and shall have it available at the trial.

Use of interrogatories at trial

(35) At the trial of an action a party may give in evidence an answer, or part of an answer, to interrogatories, but the court may look at the whole of the answers and, where it is of the opinion that any other answer or part of an answer is so connected with an answer or part thereof given in evidence that the one ought not to be used without the other, it may direct that the other answer or part thereof be put in as evidence.

Form of subpoena

(36) A subpoena shall be in Form 25 and may contain any number of names.

Party may prepare and serve subpoena

(37) A party may prepare a subpoena and serve it on any person.

Subpoena not to be filed or sealed

(38) A subpoena need not be filed in or bear the seal of the court.

Service of subpoena

(39) A subpoena must be personally served and, where an affidavit is filed for the purpose of proving the service, it must state when, where, how and by whom service was effected.

Fees to accompany subpoena

(40) A person served with a subpoena is entitled to be paid the proper fees set out in Appendix C, Schedule 3 at the time of service.

Production of documents and physical objects

(41) A party, by subpoena, may require any person to bring to the trial

(a) any document in the person's possession or control relating to the matters in question, without the necessity of identifying the document, and

(b) any physical object in the person's possession or control which the party contemplates tendering at the trial as an exhibit, but the subpoena shall identify the object to be brought.

Order for attendance of witness in custody

(42) The court may order the attendance of a witness who is in the lawful custody of another person, including the custodian of a penal institution.

Failure of witness to attend, etc.

(43) Upon proof

(a) of the personal service of a subpoena on a witness who fails to attend or to remain in attendance in accordance with the requirements of the subpoena,

(b) that proper witness fees have been paid to that witness, and

(c) that the presence of that witness is material to the ends of justice,

the court, by its warrant in Form 42 directed to a sheriff or other officer of the court or to a peace officer, may cause that witness to be apprehended and promptly brought before the court and to be detained in custody or released on terms the court may order, and the court may order that witness to pay the costs arising from his or her failure to attend or to remain in attendance.

Order setting aside subpoena

(44) A person who has been served with a subpoena may apply to the court for an order setting aside the subpoena on the grounds that compliance with it is unnecessary or

that it would work a hardship upon the person, and the court may make any order, as to postponement of the trial or otherwise, as it thinks just.

Clerk to note time of trial

(45) On each day of a trial, a clerk shall note the time the trial commences and terminates, the name of each witness and the time the witness' evidence begins and ends.

Affidavit evidence

(46) On the application of a party at or before trial, a judge may order that the evidence-in-chief of a witness may be given by affidavit.

Copy of affidavit must be furnished

(47) The party seeking to tender evidence by affidavit must furnish a copy of the affidavit to all parties of record at least 30 days, or such lesser period as may be ordered by the court, before the hearing of the application referred to in subrule (46).

Cross-examination

(48) If an affidavit of a witness is furnished under subrule (47), any party may, unless the court otherwise orders, require the witness to be called for cross-examination at trial in person or by videoconference, provided that that party gives to the party seeking to tender the evidence by affidavit notice of the requirement within 14 days after receiving the affidavit.

Court may extend or abridge time to require witness attendance

(49) If an affidavit is furnished under subrule (47) less than 30 days before the hearing of the application referred to in subrule (46), the court may extend or abridge the time referred to in subrule (48) within which parties may require the attendance of the witness at trial for cross-examination.

Contents

(50) The deponent of an affidavit under subrule (46) may state only what he or she would be permitted to state were the evidence to be given orally.

(51) Cross-examination under subrule (48) or (49) is not confined to matters contained in the affidavit.

Costs where attendance unnecessary

(52) Where a witness has been required to give evidence under subrule (48), and the court is of the opinion that the evidence obtained does not materially add to the information in the affidavit furnished under subrule (46), the court may order the

party that required the attendance of the witness to pay, as costs, a sum the court considers appropriate.

Evidence of particular facts

(53) At or before a trial, the court may order that evidence of a fact or document may be presented at the trial in any manner, including,

(a) by statement under oath on information and belief,

(b) by documents or entries in books,

(c) by copies of documents or entries in books, or

(d) by a specified publication which contains a statement of that fact.

Order of speeches

(54) Addresses to the jury or the court shall be as follows:

(a) the party who bears the onus of proof may open his or her case before giving evidence;

(b) at the close of the case of the party who began, the opposite party, if that party announces his or her intention to give evidence, may open his or her case;

(c) at the close of all of the evidence, the party who began may address the jury or the court, and the opposite party may then address the jury or the court and the party who began may then reply and the court may allow the opposite party to be heard in response to a point raised in the reply;

(d) where a defendant claims relief against a co-defendant, that defendant may address the jury after that co-defendant; and

(e) where a party is represented by a lawyer, the rights conferred by this rule shall be exercised by the party's lawyer.

Court may make order respecting submissions

(55) At or before a trial, the court may make one or both of the following orders in respect of a party's submissions to the court at the trial:

(a) all or any part of the submissions be in writing;

(b) all or any part of the submissions be of limited length.

Return of exhibits

(56) After the time for appeal from judgment has expired or after the disposition of an appeal, new trial or further appeal, whichever is latest, the clerk may return an exhibit to the party who tendered it. The parties may agree, or the court may order, that an exhibit be returned at an earlier time or to a person other than the party who tendered it.

Disposal of exhibits after final disposition

(57) The clerk may, with the approval of the Senior Judge, destroy or otherwise dispose of an exhibit tendered in evidence in a proceeding if the return of the exhibit has not been applied for within one year after the later of

(a) the date of the judgment at trial in, or any other final disposition of, the proceeding, and

(b) the date of the judgment on, or any other final disposition of, any appeal, new trial or further appeal.

Notice respecting disposal of exhibits before final disposition

(58) If an exhibit is tendered in evidence in a proceeding and nothing is filed in that proceeding for a period of 1 year, the clerk may deliver to the parties of record notice that the clerk intends to destroy or otherwise dispose of the exhibit unless, within 30 days after the date of the notice,

(a) a request in writing is made for the return of the exhibit or casebook, or

(b) a Notice of Intention to Proceed is served on all parties of record and a copy of the notice and proof of its service has been filed in the proceeding.

Disposal of exhibits before final disposition

(59) After a notice is delivered under subrule (58), the clerk may,

(a) if a person requests in writing to the clerk within 30 days after the date of the notice for a return of the exhibit, return the exhibit to the party who tendered it or to such other person as the parties may agree or the court may order, or

(b) if no such application is made and if none of the parties comply with subrule (58) (b) within 30 days after the date of the notice, destroy or otherwise dispose of the exhibit with the approval of the Senior Judge.

If exhibit disposed of

(60) If an exhibit is disposed of under subrule (57) or (59)(b),

(a) any money received as a result of the disposition must be paid to the Minister of Finance, and

(b) the exhibit list must be endorsed to indicate the date and method of disposition and the amount of any money recovered.

If exhibit destroyed

(61) If an exhibit is destroyed under subrule (57) or (59)(b), the exhibit list must be endorsed to indicate the date and method of destruction.