

**RULE 21**

**DETERMINATION OF AN ISSUE BEFORE TRIAL**

**WHERE AVAILABLE**

**To any Party on a Question of Law**

- 21.01** (1) A party may move before a judge,
- (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
  - (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
- and the judge may make an order or grant judgment accordingly.
- (2) No evidence is admissible on a motion,
- (a) under clause (1)(a), except with leave of a judge or on consent of the parties;
  - (b) under clause (1)(b).

**To Defendant**

- (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

**Jurisdiction**

- (a) the court has no jurisdiction over the subject matter of the action;

**Capacity**

- (b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

**Another Proceeding Pending**

- (c) another proceeding is pending in Prince Edward Island or another jurisdiction between the same parties in respect of the same subject matter; or

**Action Frivolous, Vexatious or Abuse of Process**

- (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

**MOTION TO BE MADE PROMPTLY**

- 21.02** A motion under Rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs.

## **FACTUMS REQUIRED**

- 21.03** (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.
- (2) The moving party's factum shall be served at least four days before the hearing.
- (3) The responding party's factum shall be served at least two days before the hearing.
- (4) Each party's factum shall be filed, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing.

*HZPC Americas v. True North and Ors.* 2007 PESCTD 23

The court dismissed the defendants' motion to strike out the plaintiff's statement of claim as disclosing no reasonable cause of action.

*BMO v. City of Charlottetown* 2006 PESCAD 26; (2006), 262 Nfld. & P.E.I.R. 155

The Court of Appeal made an order dismissing the statement of claim because it did not disclose a reasonable cause of action.

*R.D. Financial v. Lapegna and ors.* 2005 PESCTD 43

The applicants applied to strike the statement of claim pursuant to Rule 21.01(1)(b) as disclosing no reasonable cause of action and pursuant to Rule 21.02(3)(d) as being frivolous or vexatious or otherwise an abuse of the process of the court. The Court found, applying the plain and obvious test, that the statement of claim disclosed a reasonable cause of action and that it was not an abuse of the process of the court.

*Kloosterman v. Grimme* 2005 PESCTD 46; (2005), 251 Nfld. & P.E.I.R. 300

The applicant applied pursuant to Rule 21.01(1)(a) to have a question of law determined by the court. The motion was denied. The court held that it was not the purpose of the rule to enable a party to obtain the opinion or a determination of the Court as to the validity of a contractual provision on submissions without evidence when there is a factual dispute.

*M & M Amusement v. Govt. of P.E.I.* 2005 PESCTD 50; (2005), 252 Nfld. & P.E.I.R. 1

A motion brought under Rule 21.01(1)(a) to determine a question of law should not be granted where the resolution of the issues between the parties depends on a finding of fact.

*Ayangma v. Govt. of P.E.I. and Ors.* 2005 PESCTD 25; (2005), 249 Nfld. & P.E.I.R. 34

A motion to strike a pleading under Rule 21.01(1)(b) as disclosing no reasonable cause of action, and a motion to strike a pleading under Rule 21.01(3)(d) or 25.11 as being vexatious, frivolous, an abuse of the process of the court or because it may prejudice or delay the fair trial of the action, requires different standards in the disposition because the consequences are different. On a motion under Rule 21.01(1)(b), some parts of the pleading may be struck while others are permitted to stand.

*Ayangma v. Govt. of P.E.I. & Ors.* 2005 PSCTD 25; (2005), 249 Nfld. & P.E.I.R. 34

Pleadings may be struck out in their entirety for repeated violations of the Rules respecting pleadings because this renders the pleading frivolous, vexatious or an abuse of process or something which may prejudice or delay the fair trial of the action.

*City of Charlottetown v. MacIssac* 2003 PESCTD 07; (2003), 223 Nfld. & P.E.I.R. 95

The court, on the motion of the defendant pursuant to Rule 74.01(4), agreed to apply Rule 21.01(b) to the proceeding commenced by the plaintiff in the Small Claims Section. The court went on to find that it was plain and obvious the statement of claim issued by the plaintiff disclosed no reasonable cause of action and accordingly, it was struck out pursuant to Rule 21.01(1)(b).

*Gallant v. Workers' Comp. Bd.(PEI)* 2002 PESCTD 71; (2002), 218 Nfld. & P.E.I.R. 297

The motion by the Board to dismiss the statement of claim because it disclosed no reasonable cause of action was granted. The motion by the Board to strike the statement of claim on the ground the action was not commenced within the time prescribed by the *Statute of Limitations*, R.S.P.E.I. 1988 Cap. S-7, was denied. Where the application of the limitation period depends upon findings of fact for its resolution, a motion for its determination cannot be made under this Rule. Furthermore, the Board had the burden of establishing it was plain and obvious the plaintiff could not assert new facts, other than those disclosed in the pleading, that would preserve the action against an assertion that the limitation period had expired. The Court found the Board did not discharge this burden as there could be additional facts brought forward by the plaintiff to show the limitation period had not expired.

*Polar Foods v. Jensen* 2002 PESCTD 63; (2002), 218 Nfld. & P.E.I.R. 6

The defendant's motion to stay the proceeding on the ground that the court did not have jurisdiction was dismissed. See: Annotation - Rule 46.02

*Ayangma v. Wyatt* 2001 PESCTD 4; (2001), 198 Nfld. & P.E.I.R. 126

The plaintiff's statement of claim was struck out because it did not disclose a reasonable cause of action. The statements in the "fact" section of the statement of claim were not tied to the specific allegations previously made and the plaintiff had not set out the facts to support the requirements of the allegations of deceit, conspiracy, negligence, malice or the breach of s. 7 of the *Charter*.

*Cameron v. Medical Society* 2002 PESCTD 31; (2002), 215 Nfld. & P.E.I.R. 233

The Court refused to answer a question of law because the full factual background necessary to address the question was not available at this stage of the proceeding. The court adopted the test that to answer a question of law posed as a stated case pursuant to this Rule it must be plain and obvious the issue of law raised by the question has been fully settled in our jurisprudence. When the answer to a novel question of law will affect a professional association, the input of the affected profession is very important.

*Rofe v. Kay Aviation b.v.* 2001 PESCAD 7; (2001), 202 D.L.R. (4<sup>th</sup>) 683

The statement of claim was struck out because it did not disclose a reasonable cause of action or alternatively, as being frivolous or vexatious or otherwise an abuse of the process of the court.

*Aluma Systems v. Cherubini Metal Works* 2000 PESCAD 9; (2000), 185 D.L.R. (4<sup>th</sup>) 343

On appeal, the third party notice, which had been struck out by the motions judge, was reinstated. The third party notice was not an abuse of process as it did not raise issues which had been previously adjudicated in another action in another jurisdiction.

*Ayangma v. The Government of Prince Edward Island & ors.* (1998), 168 Nfld. & P.E.I.R. 1 (P.E.I.S.C.-T.D.)

The court considered the general principles applicable to an application to strike out a pleading pursuant to Rule 21.01(1)(b) as disclosing no reasonable cause of action. They are: (1) the pleading must disclose a cause of action in law; (2) the material facts as pleaded are to be taken as proved; (3) if the facts taken as proved disclose a cause of action with some chance of success, the action may proceed; and (4) the pleading in issue must be read as generously as possible.

*Kinch v. Tignish Credit Union*, [1997] 1 P.E.I.R. 455 (P.E.I.S.C.T.D.)

The plaintiff's statement of claim was struck because it did not disclose a reasonable cause of action.

*Fobes v. University of Prince Edward Island*, [1997] 2 P.E.I.R. 157 (P.E.I.S.C.T.D.)

Only in plain and obvious cases will a statement of claim be struck. This was one of those cases as the statement of claim did not comply with Rule 25.06(1).

*Gallant et al. v. Gaudet et al* (1996), 149 Nfld. & P.E.I.R. 31 (P.E.I.S.C.-T.D.)

Motion brought to have the court determine, as a preliminary issue, whether plaintiffs had standing to bring the action. The court held the plaintiffs did not have standing as they had no interest in their father's estate which was the subject of the action.

*Morgentaler v. P.E.I. (Minister of Health and Social Services)* (1994), 117 Nfld. & P.E.I.R. 181 (P.E.I.S.C.-T.D.)

Motion brought to determine standing. The status of a person to maintain judicial proceedings to question legislation is a matter for the discretion of the court, and relative to the exercise of that discretion is the nature of the legislation under attack. The onus is on the applicant to establish standing. He needs to show: (1) that he is affected by the action or application directly or that he has a genuine interest in its validity; (2) that there is no other reasonable and effective manner by which the issue may be brought before the court and; (3) that there is a serious or justiciable issue.

*Pitre et al. v. MacNutt et al.* (1994), 123 Nfld. & P.E.I.R. 18 (P.E.I.S.C.-T.D.)

Motion to strike a statement of claim pursuant to Rule 21.01(1)(b). The test to be applied on a motion to strike a statement of claim is whether it is plain and obvious the statement of claim discloses no reasonable cause of action. In applying the test, the material facts pleaded are to be taken as proved and the statement of claim is to be read generously.

*Jessaume v. Holland College*, 1994, 5 C.C.E.L. (2d) 188

The defendant sought an order to strike the plaintiff's statement of claim. The court struck the statement of claim on the grounds that the subject matter of the claim had been struck in previous decision and thus the claim was *res judicata*. Reversed on appeal; See: *Jessaume v. Holland College*, [1994] 1 P.E.I.R. 364 (P.E.I.S.C.A.D.).

*Johnston v. Charlottetown Area Development Corp. et al* (1993), 113 Nfld. & P.E.I.R. 154 (P.E.I.S.C.-T.D.)

Motion to strike a statement of claim. A motion brought pursuant to this rule will only be granted where it is plain and obvious that a part of, or the entire statement of claim, discloses no reasonable cause of action.

*Skinner v. Scales & Ghiz et al.*, [1992] 1 P.E.I.R. 12 (P.E.I.S.C.T.D.)

The defendant applied to strike the statement of claim pursuant to Rule 21.01 (1)(b) on the grounds it did not disclose a cause of action by reason of the fact such an action was barred by the *Statute of Limitations*. On an application to strike a pleading the parties may not adduce evidence but are restricted to relying on the pleadings. On the face of the pleadings it was not apparent the action was barred and the application to strike the statement of claim was dismissed.