

**RULE 20**  
**SUMMARY JUDGMENT**

**WHERE AVAILABLE**

**To Plaintiff**

- 20.01** (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.
- (2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

**To Defendant**

- (3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

**EVIDENCE ON MOTION**

- 20.02** (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.
- (2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

**FACTUMS AND PRE-MOTION CONFERENCE REQUIRED**

- 20.03** (1) On a motion for summary judgment, 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, and file it, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing.
- (2) The moving party's factum shall be filed with proof of service in the court office where the motion is to be heard at least ten days before the hearing.
- (3) The responding party's factum shall be filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.
- (4) Prior to the motion being set down for hearing by the trial coordinator, the parties shall have a conference call or meeting

with a judge, who could be the motions judge, to determine the amount of time needed for the motion and determine any additional steps either party needs to take before the motion is heard.

- (5) The judge may make such order as may be necessary to ensure timely and just procedure and hearing of the motion.

## **DISPOSITION OF MOTION**

### **General**

- 20.04** (1) The court shall grant summary judgment if,
- (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
  - (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

### **Only Genuine Issue is Amount**

- (2) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

### **Only Genuine Issue is Question of Law**

- (3) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly.

### **Only Claim is for an Accounting**

- (4) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.
- (5) In determining under clause 20.04(1) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
  - (a) weighing the evidence;
  - (b) evaluating the credibility of a deponent;
  - (c) drawing any reasonable inference from the evidence.
- (6) A judge may, for the purposes of exercising any of the powers set out in subrule (5), order that oral evidence be presented by

one or more parties, with or without time limits on its presentation.

## **WHERE A TRIAL IS NECESSARY**

### **Powers of Court**

- 20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

### **Directions and Terms**

- (2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,
- (a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;
  - (b) that any motions be brought within a specified time;
  - (c) that a statement setting out what material facts are not in dispute be filed within a specified time;
  - (d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them.
  - (e) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;
  - (f) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;
  - (g) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;
  - (h) that any oral examination of a witness at trial be subject to a time limit;
  - (i) that the evidence of a witness be given in whole or in part by affidavit;
  - (j) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of

disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

- (i) there is a reasonable prospect for agreement on some or all of the issues, or
- (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;
- (k) that each of the parties deliver a concise summary of his or her opening statement;
- (l) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;
- (m) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the Chief Justice of the Supreme Court;
- (n) for payment into court of all or part of the claim; and
- (o) for security for costs.

#### **Specified Facts**

- (3) At the trial, any facts specified under subrule (1) or clause (2)(c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

#### **Order re Affidavit Evidence**

- (4) In deciding whether to make an order under clause (2)(i), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

#### **Order re Experts' Costs**

- (5) If an order is made under clause (2)(j), each party shall bear his or her own costs.

#### **Failure to Comply with Order**

- (6) Where a party fails to comply with an order under clause (2)(n) for payment into court or under clause (2)(o) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.
- (7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

#### **Costs Sanctions for Improper Use of Rule**

- 20.06** The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if

- (a) the party acted unreasonably by making or responding to the motion;  
or
- (b) the party acted in bad faith for the purpose of delay.

### **EFFECT OF SUMMARY JUDGMENT**

**20.07** A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

### **STAY OF EXECUTION**

**20.08** Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

### **APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS**

**20.09** Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

*Bradley v. Bradley, Holmes & MacKay, 2020 PESC 1*

Two of the defendants made a motion for partial summary judgment dismissing the plaintiff's claims against them, but not as against the remaining defendants. The court granted the motion after finding that even taking the allegations in the plaintiff's claims as being true, by virtue of the applicable limitation period, the plaintiff's claim was filed out of time and there was, therefore, no genuine issue of fact or law requiring a trial.

*CMT et al v. Gov't of P.E.I. et al, 2020 PECA 12*

The Court of Appeal confirmed the motions judge's findings regarding the claims of misfeasance in public office and spoliation of evidence. The Court agreed there was no genuine issue requiring a trial and there was an absence of evidence to prove the requisite elements of these claims.

Regarding the breach of contract claim, the Court of Appeal allowed the appeal finding material questions of fact remain that amount to a genuine issue requiring a trial. The Court found the determination that there was no genuine issue requiring a trial is dependent on an exercise in contractual interpretation that was not performed and the exercise as performed employed an inapplicable rule of contraction. The Court stated that contractual interpretation involves consideration of the factual matrix and since that consideration did not occur, material questions of fact comprising a genuine issue requiring a trial remain.

*McNally v. Health PEI, 2018 PECA 14*

The order for summary judgment dismissing the plaintiff's action against the defendant physicians as barred by the applicable limitation period was set aside. The limitation period commenced when the plaintiff became aware that he had suffered damage which was caused by the physician defendants' breach.

*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.

*Marques v. National Bank of Canada*, 2019 PECA 8

The Court of Appeal confirmed the motion judge's finding which granted the Bank summary judgment. The Court agreed, on the evidence, there was no material fact in issue that would create a genuine issue for trial.

*Mallett v. Richard, et ors.*, 2018 PESC 50

After a review of the law on summary judgment since *Hryniak v. Mauldin*, 2014 SCC 7, and the law regarding occupiers liability, the court found there was no genuine issue requiring a trial and dismissed the claim as against the moving parties' defendants.

*Havenlee Farms Inc. v. HZPC Americas*, 2017 PECA 20

The Court acknowledged that the newly added powers on summary judgment permit a motions judge to weigh the evidence, evaluate credibility of deponents and draw reasonable inferences from the evidence. However, the Court found in the course of determining that there is no genuine issue requiring a trial, a legal error occurred in the application of the principles of contractual interpretation in which material terms of the contract made between the parties were not considered, and an order for summary judgment was not made on a proper foundation and cannot stand.

*McQuaid v. Govt. of PEI et al.*, 2017 PECA 21

The moving party bears the onus of establishing on an evidentiary basis there is no genuine issue requiring a trial.

The respondent physicians did not adduce expert evidence to show they satisfied the applicable standard of care and therefore the second part of the test requiring the responding party to establish there is evidence which offers a real chance of success to the responding party based on the pleadings did not arise.

The respondent physicians cross-appealed on the limitation period. The respondent physicians adduced evidence to show that for several of the defendant physicians the statement of claim was filed outside the limitation period. The appellant adducing no evidence to meet her evidentiary burden, the cross-appeal was allowed.

*Royal Bank of Canada v. Trainor*, 2017 PESC 13

The Court granted judgment in favour of the Bank finding there was no genuine issue requiring a trial.

*MacInnis v. Rayner & Raylink*, 2016 PESC 40

The court confirmed that the caselaw continues to support a two part test (*MacPherson v. Ellis*, 2005 PECA 10) to determine whether there is a genuine issue for trial. However, the court directed the amended rule 20.04(1)(a) requires the court to be satisfied there is no genuine issue "requiring" a trial. In determining whether there is a genuine issue requiring a trial the court must consider the evidence submitted by the parties. The evidence need not be

equivalent to that which would be offered at trial but must be such that the judge is confident he or she can fairly resolve the dispute.

*O'Halloran v. Watterson et.ors.*, 2015 PESC 3

In a personal injury claim, the defendant, Village of O'Leary, made a motion for summary judgment on the ground that there was no genuine issue for trial.

The Court refused to grant the motion finding that the statement of claim raises a genuine issue requiring a trial.

*Johnston v. Stewart McKelvey Stirling Scales*, 2014 PECA 8

The court confirmed the motions judge correctly interpreted and applied the principles relating to summary judgment. The judge was correct in finding the plaintiff's statement of claim which alleged conspiracy, did not create any genuine issue requiring a trial.

*Simpson v. Carewco Holdings Inc.*, 2010 PESC 7; [2010] P.E.I.J. No. 5

The motions judge found there was no genuine issue for trial and granted the motions of the various defendants for summary judgment.

*Coles v. FitzGerald*, 2007 PESCTD 28

Summary judgment is not available in an action commenced pursuant to the ***Mechanics Lien Act*** R.S.P.E.I. 1988 Cap. M-4. Summary judgment against some of the defendants as well as partial summary judgment was denied because the court found there was a genuine issue for trial.

*Ayangma v. French School Board and Ano.*, 2006 PESCTD 37

A motion for summary judgment is not to be heard in stages but is to be considered as a whole after both parties have filed their evidence with respect to the motion. It is not proper to split a motion for summary judgment requiring the respondent to only file evidence if and when the mover meets the burden of establishing a basic case.

*Metro Credit Union Ltd. v. McInnis*, 2005 PESCTD 39

The court granted partial summary judgment; granted a stay on the execution of that judgment pursuant to Rule 20.08 pending resolution of the remainder of the claims and, pursuant to Rule 20.05(2), the court made some material factual findings regarding part of the claim.

*MacPherson v. Ellis*, 2005 PESCAD 10

Pursuant to Rule 20.04 the onus is on the moving party to establish there is no genuine issue for trial. Once this onus has been discharged, the responding party has the evidentiary burden of showing there is a real chance of success on the pleading it has filed.

*Gallant v. Piccott*, 2000 PESCAD 17

A statutory onus provision - s.287 of *Highway Traffic Act*, R.S.P.E.I. 1988 Cap. H-5 - created a genuine issue for trial which, in the circumstances of this case, could only be resolved by a trial.

*Canfield et al. v. P.E.I* (1996), 144 Nfld. & P.E.I.R. 165 (P.E.I.S.C.-T.D.)

Applicant seeking order for summary judgment. Mechanism to resolve a proceeding when

there is no genuine issue for trial. Party making motion must satisfy the court of this.

*Simmonds v. Murphy* (1996), 137 Nfld. & P.E.I.R. 332 (P.E.I.S.C.-T.D.)

Application for summary judgment - Purpose of Rule 20 is to remove from the trial system all matters where there is no genuine issue to go to trial. On hearing a motion, the chambers judge is to take a hard look at the evidence that is brought forth on the motion. The onus of establishing there is no triable issue is on the moving party; however, a respondent cannot sit back. If the respondent wishes to succeed it should put its best foot forward. When an issue of genuine credibility arises, a trial is required.

*Read v. Read et al.* (1995), 133 Nfld. & P.E.I.R. 166

Partial summary judgment can be obtained in a situation where the claims are separate and distinct. Summary judgment can also be obtained for part of a single claim where such part is severable and liability for the balance of the claim is not affected.

*Westland Homes Ltd. et al. v. Schurman (M.F.) Ltd.* (1993), 101 Nfld. & P.E.I.R. 122 (P.E.I.S.C.A.D.)

On hearing an application for summary judgment, the chambers judge may assess the facts and the applicable law to determine if there is a genuine issue for trial.

*Barclays Bank Agricultural Finance Corp. v. Miscouche Sales & Service Ltd. et al.* (1992), 100 Nfld. & P.E.I.R. 129 (P.E.I.S.C.-T.D.)

The applicant must set out specific facts and cogent evidence organized to show that there is a genuine issue for trial.