

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 and filed with proof of service at least ten days before the hearing.
- (3) The responding party's factum shall be served and filed with proof of service at least four days before the hearing.

McMillan Point Homeowners Assn. v. Jay, 2019 PECA 18

The Court of Appeal determined that Rule 21.01(1)(a) was not available to the parties. The Court stated that the Rule is not available for determination of a fact-based question. The Rule permits a motion only on a question of law at the very preliminary stage of a proceeding and covers a very narrow scope.

The Rule asks whether (i) based entirely on the content of the pleading; (ii) there is a question of law that will dispose of the action or an issue therein. No evidence is considered on the motion, except on leave of the court or consent of the parties. Where a factual background is employed or needed to ensure that the question posed is answered correctly, Rule 21.01(1)(a) is not available and the question should not be determined.

McKenna v. Stewart, 2018 PESC 46

Rule 21.01-the defendant sought a determination of whether the claim was statute barred by virtue of the *Highway Traffic Act*. The court considered whether an amended claim constituted a new action, and applied a functional approach and the special circumstances doctrine. The court concluded that the claim did not contain a new cause of action and was therefore not statute barred.

Acadian Marine v. Highfield Construction & Parks Canada, 2019 PESC 3

The court dismissed an application by an owner to strike the claim of a subcontractor where the scope of the work required exceeded that which was described in the tender.

Ayangma v. Canada Health Infoway, 2017 PECA 13

Rule 21.01(1)(a)

The court found the determination of the applicable limitation period is such a question of law contained in Rule 20.01(1)(a). The limitation issue being determinative, the appeal was dismissed.

Martell v. AG of Canada & Ors., 2016 PECA 8

The Court of Appeal confirmed the finding of the motions judge that the court's jurisdiction was ousted in favour of the grievance procedure in the Collective Agreement and the dispute resolution process contained in the *Public Service Labour Relations Act*. The Court also found that those portions of the claim which were post-employment events should not have

been struck as they are not matters arising in the course of employment which could have been resolved by the grievance procedure.

Donovan v. QCRS, 2016 PECA

In a motion to dismiss a claim pursuant to Rule 21.01(3)(a), the Court found that the Supreme Court should not have granted the defendant's motion to dismiss the claim. The Court found that the Court would have jurisdiction of a claim where it is made pursuant to the **Fatal Accidents Act**.

James Heath v. Mercantile Financial Service Ltd., 2015 PECA 11

On appeal, the Court upheld the trial judge's finding that it is plain and obvious that Heath's counterclaim discloses no reasonable cause of action and dismissed the appeal.

CMT et al. v. Gov't of PEI et al, 2016 PESC 4

The plaintiffs claimed against the defendants for \$25 million dollars for breach of contract and interference in economic relations. The Government and one defendant filed a motion to strike numerous paragraphs of the claim and one defendant claimed to have it struck in its entirety.

The motions judge found the statement of claim should be struck in its entirety. He found the claim was a "wholesale violation of the rules of pleadings." The claim could not be repaired by amendments or deletions. The claim constituted an abuse of the courts processes.

However, pursuant to Rule 25.11 the motions judge granted the plaintiffs the opportunity to start afresh and file a newly drafted statement of claim.

Lauer v. Attorney General of Canada 2015 PESC 15

The Court found the claims in the Statement of Claim were a) out of time; b) already decided and failed to raise a reasonable cause of action.

Shore & Johnson v. Province of PE et al 2015 PESC 10

The Court struck the statement of claim as it failed to disclose a reasonable cause of action. The Court was of the view the claim contained assertions of irrelevant evidence and completely lacked in any material facts.

The Court also stated that while the Court should not be a slave to form, the Rules have been established for good reason.

The Court also struck the claim in its entirety as it did not identify any possible claim and was incapable of being fixed by amendment. The Court considered the action to be frivolous, vexatious and an abuse of the processes of the court.

Mercantile Finance Service Ltd. v. James Heath 2014 PESC 30

The Court granted Mercantile's motion and struck the counterclaim of the Defendant stating it did not disclose any cause of action known to law.

Lanigan v. Eastern School District (c.o.b. Eastern School Board) 2013 PESC 12

The Eastern School Board made a motion to dismiss the plaintiff's statement of claim pursuant to Rule 21.01(3)(a) on the ground the court did not have jurisdiction to adjudicate the action. While the motions judge found the jurisdiction of the Court was not ousted by the relevant statutory provisions, the motions judge ruled the Court should decline to exercise jurisdiction because of the grievance review process provided for in the applicable collective agreement.

Visser Potato Ltd v. Canadian Food Inspection Agency 2012 PESC 18

The plaintiffs commenced an action against the defendant, a federal government agency, alleging negligent misrepresentation. On a motion by the defendant, the court found the defendant did not owe the plaintiffs a duty of care and the plaintiffs' statement of claim was struck.

Ayangma v. Metro Credit Union Ltd. 2011 PESC 18; [2011] P.E.I.J. No. 27; (2011), 313 Nfld. & P.E.I.R. 248

The plaintiff's claim of defamation against two defendants was struck out because it did not disclose sufficient material facts or particulars upon which a successful claim could be based. Therefore, it was plain and obvious the statement of claim failed to disclose a reasonable cause of action.

Vail v. Workers Compensation Board of Prince Edward Island 2011 PESC 6.

In considering whether a statement of claim discloses a reasonable cause of action, the court may answer a question of law and consider whether the question has been finally determined by a previous and binding decision. Also, where a claim asserts conclusions without a legal basis, it could be struck as being frivolous or vexatious. Confirmed on appeal. See: *Vail v. Prince Edward Island (Workers Compensation Board)* 2012 PECA 18.

Kelly v. Canada (Attorney General) 2010 PECA 17; [2010] P.E.I.J. No. 44; (2010), 301 Nfld. & P.E.I.R. 317.

The determination of the applicable limitation period is a question of law that can be determined on a motion to strike a statement of claim as disclosing no reasonable cause of action.

McGowan v. Bank of Nova Scotia 2010 PESC 17; [2010] P.E.I.J. No. 13; (2010), 296 Nfld. & P.E.I.R. 321.

On a motion for the determination of a question of law before trial, the statement of claim was struck out because it did not disclose a reasonable cause of action. The statement of claim disclosed a derivative action on behalf of shareholders, an action which, in this jurisdiction, is not founded in law. Affirmed on appeal: *McGowan v. Bank of Nova Scotia* 2011 PECA 20; [2011] P.E.I.J. No. 35; (2011), 317 Nfld. & P.E.I.R. 62.

Kelly v. Canada (Attorney General) 2009 PESC 41; [2009] P.E.I.J. No. 67; (2009), 294 Nfld & P.E.I.R.

Motions were brought to determine a legal issue before trial and to strike out and dismiss the plaintiff's statement of claim. The statement of claim was dismissed because the action was barred by the *Statute of Limitations*. The court also found that aside from the action being out of time, the statement of claim did not disclose a reasonable cause of action.

McQuaid v. A.G. (Canada) & Ors. 2009 PESC 40

The Court considered a motion to strike a statement of claim under Rule 21 and Rule 25. The motions judge explained the circumstances when each is applicable. The motion to strike the statement of claim pursuant to Rule 21 was denied. With respect to the motion to strike the statement of claim pursuant to Rule 25, the motions judge found deficiencies in the pleading. Instead of striking the statement of claim, he granted the plaintiff leave to amend.

Cairns v. Eastern School District 2009 PESC 3; [2009] P.E.I.J. No. 4; (1009), 72 C.C.E.L. (3d) 129

The motions judge considered a motion pursuant to Rule 21.02(3)(a) to determine, before trial, whether the court had jurisdiction over the subject matter of the action. The motions judge ruled on two preliminary procedural issues finding, first, that evidence is admissible on hearing such a motion, and secondly, that while facts as pleaded in the statement of claim are not accepted as true on such a motion, they should be considered to determine if the issue on the motion turns on easily ascertainable facts. The motions judge concluded jurisdiction over the action was in the grievance/arbitration procedure contained in a collective agreement and not with the court.

Cooper v. Charlottetown (City) 2008 PESCTD 38; 2008 P.E.I.J. No. 42

The court granted the defendant's motion pursuant to Rule 21.01(1)(b) to strike the plaintiff's statement of claim as disclosing no reasonable cause of action.

Mullin v. PricewaterhouseCoopers 2007 PESCTD 33; [2007] P.E.I.J. No. 47

The defendant made a motion for the determination of a question of law prior to trial. The court denied the motion because relevant facts were in dispute.

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 held that to answer a question of law posed as a stated case, it must be plain and obvious the issue of law raised by the question has been fully settled in our jurisprudence because a full factual background may be required to answer the question correctly. 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. (4th) 683

The statement of claim was struck out because it did not disclose a reasonable cause of action or alternatively, because it was 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. (4th) 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.