

RULE 26
AMENDMENT OF PLEADINGS

GENERAL POWER OF COURT

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

WHEN AMENDMENTS MAY BE MADE

26.02 A party may amend his or her pleading,

- (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;
- (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or
- (c) with leave of the court.

HOW AMENDMENTS MADE

- 26.03** (1) An amendment to a pleading shall be made on the face of the copy filed in the court office, except that where the amendment is so extensive as to make the amended pleading difficult or inconvenient to read the party shall file a fresh copy of the original pleading as amended, bearing the date of the original pleading and the title of the pleading preceded by the word "amended".
- (2) An amendment to a pleading shall be underlined so as to distinguish the amended wording from the original, and the Prothonotary shall note on the amended pleading the date on which, and the authority by which, the amendment was made.
- (3) Where a pleading has been amended more than once each subsequent amendment shall be underlined with an additional line for each occasion.

SERVICE OF AMENDED PLEADING

Service on Every Party to Action and Related Actions

26.04 (1) An amended pleading shall be served forthwith on every person who is, at the time of service, a party to the main action or to a counterclaim, crossclaim or third party claim in the main action, unless the court orders otherwise.

- (2) Proof of service of an amended pleading other than an originating process shall be filed forthwith after it is served.

Amended Originating Process

- (3) Where an amended pleading is an originating process,
 - (a) it need not be served personally on a party who was served with the original pleading and responded to it; and
 - (b) it shall be served personally or by an alternative to personal service under Rule 16.03 on an opposite party who has not responded to the original pleading, whether or not he or she has been noted in default.

RESPONDING TO AN AMENDED PLEADING

- 26.05** (1) A party shall respond to an amended pleading within the time remaining for responding to the original pleading, or within ten days after service of the amended pleading, whichever is the longer period, unless the court orders otherwise.
- (2) Where a party has responded to a pleading that is subsequently amended, the party shall be deemed to rely on his or her original pleading in answer to the amended pleading unless the party responds to it within the prescribed time.

AMENDMENT AT TRIAL

26.06 Where a pleading is amended at the trial, and the amendment is made on the face of the record, an order need not be taken out and the pleading as amended need not be filed or served unless the court orders otherwise.

100251 P.E.I. Inc. (c.o.b. Central Roadways) v. Summerside (City) 2010 PESC 27; [2010] P.E.I.J. No. 24.

The defendant's motion to amend its statement of defence to plead the breach of a limitation period was granted. Unless the prejudice to the party opposite cannot be remedied by costs or an adjournment, Rule 26.01 is mandatory.

Lank v. Government of P.E.I. 2010 PESC 9; [2010] P.E.I.J. No. 7; (2010), 295 Nfld. & P.E.I.R. 149

A motion to amend a pleading filed 11 years previous was denied because the prejudice to the party opposite could not be remedied by either costs or an adjournment.

Peardon v. Long and WTH Funding 2008 PESCAD 13; (2008), 279 Nfld. & P.E.I.R. 32

The decision of the motions judge was confirmed. The motions judge allowed the defendant's motion to amend the statement of defence and declined the request of the plaintiff to include as one of the conditions of allowing the amendment that the plaintiff would have an opportunity to re-examine the defendant in oral discovery.

Durrell v. Lloyd Underwriters 2005 PESCAD 17

Rule 75.1.02(7) as it read prior to an amendment effective September 1, 2004, did not foreclose the operation of Rule 26 when a plaintiff wished to amend a statement of claim to bring the action within Rule 75.1 – Simplified Procedure.

Morin v. Board of Education of Regional Administrative Unit No.3 (1997), 150 Nfld. & P.E.I.R. 200 (P.E.I.S.C.-A.D.)

Rule 26.01 is mandatory on its face. The governing principle is that an amendment to a statement of claim should be granted unless the defendants can demonstrate prejudice which cannot be compensated for either in costs or an adjournment.

Island Opry Inc. et al. v. Tweedy Ross (1996), 138 Nfld. & P.E.I.R. 36 (P.E.I.S.C.-T.D.)

Rule 26.01 is not concerned with the nature or magnitude of the amendment as such, but rather with whether prejudice would result that could not be compensated for by costs or an adjournment; however, the nature and magnitude of the amendment are factors to be considered in determining that question. The rule is mandatory and the only discretion left to the court is to decide whether prejudice will result that could not be compensated for by costs or an adjournment. The court considered that the purpose of Rule 2.01(1)(a) is to secure the just determination of the real matters in dispute and accordingly, the defendant was granted an adjournment to provide time to amend the statement of defence.

MacWilliams v. Bank of Nova Scotia and Walker (1995), 130 Nfld. & P.E.I.R. 251 (P.E.I.S.C.-T.D.)

Motion by the plaintiff pursuant to Rules 5 and 26 seeking leave to amend the statement of claim by adding the third party as a defendant. The Court found: (1) there would be no prejudice to the third party as he had been involved in the proceeding since being joined by the defendant; (2) there were common questions of fact and thus common issues to be dealt with in the action against the defendant and any action against the third party thereby causing a duplication if the plaintiff was compelled to initiate a separate action against the third party.

Continental Insurance Co. v. Lehman Manufacturing (Canada) Ltd. et al. (1991), 94 Nfld. & P.E.I.R. 354 (P.E.I.S.C.-T.D.)

To amend a statement of claim, the threshold test to be met is that the applicant must show no prejudice would result from the amendment which could not be compensated by costs or an adjournment. Once this test has been met by the applicant the court must grant leave to amend.