

**RULE 42**  
**CERTIFICATE OF PENDING LITIGATION**

**ISSUING OF CERTIFICATE**

**Court Order Required**

- 42.01** (1) A certificate of pending litigation (Form 42A) under section 46 of the *Judicature Act* may be issued by the registrar only under an order of the court.

**Claim for Certificate to be in Originating Process**

- (2) A party who seeks a certificate of pending litigation shall include a claim for it in the originating process or pleading that commences the proceeding, together with a description of the land in question sufficient for registration.

**Motion Without Notice**

- (3) A motion for an order under subrule (1) may be made without notice.

**Order to be Served Forthwith**

- (4) A party who obtains an order under subrule (1) shall forthwith serve it, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, on all parties against whom an interest in land is claimed in the proceeding.

**DISCHARGE OF CERTIFICATE**

- 42.02** (1) An order discharging a certificate of pending litigation under subsection 46(6) of the *Judicature Act* may be obtained on motion to the court.

**Factum**

- (2) The moving party's factum shall be served and filed, with proof of service, at least seven 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.

*Hawker v. BNS*, 2021 PESC 21

A motion to set aside a certificate of pending litigation was denied, as the requirement of a triable issue was met.

*Chen and Li v. Dong et al.*, 2019 PESC 10

The court held that the failure of the party seeking a certificate of pending litigation to prosecute the proceeding with reasonable diligence was grounds to discharge the certificate. The court also stated that failure of the party seeking a certificate of pending litigation to serve it forthwith on the defendant is sufficient grounds to allow a discharge of the certificate. Further, the party seeking the certificate must comply with Rule 39.01(6), by disclosing all material facts to the Prothonotary.

*Re Estate of Harry Lewis*, 2019 PECA 1

On a motion for an order discharging a certificate of pending litigation, the motions judge correctly identified the underlying claim as one for debt in a specified amount and granted the motion. The court found an IOU is an acknowledgment of a debt that has arisen. The demonstrated obligation to repay indebtedness evidences a contract which is a juristic reason for the enrichment pleaded in the proceeding.

*Tweel v. Tweel*, 2019 PECA 12

The Court of Appeal upheld discharging a certificate of pending litigation finding the plaintiff's claim did not create a triable issue as to whether the plaintiff has a reasonable claim to an interest in the properties owned by the defendant property development company.

*Tweel v. Tweel, et ors*, 2018 PESC 27

In discharging the Certificate of Pending Litigation, the court held that shareholders of a company do not have an interest in property so as to allow them to obtain a Certificate of Pending Litigation in a shareholders oppression case. The decision was confirmed on appeal.

**Rule 42.02 ( Also Note: s.46(6) of the Judicature Act, S.P.E.I. 2008, Cap. 20)**

*Ellis et al. v. Island Beach Properties Inc. Et al.* (1991), 85 Nfld. & P.E.I.R. 35 (P.E.I.S.C.-T.D.)

Land charged by the certificate was desirable for cottage or resort development. The Court ordered the Certificate be vacated on the condition that the net proceeds from the sale of any part of the land be paid to the Prothonotary pending the resolution of the litigation.

*Rational Development Co. Ltd. v. McQuaid* (1991), 94 Nfld. & P.E.I.R. 289 (P.E.I.S.C.-T.D.)

Considering a number of factors, including the fact damages were claimed as an alternate remedy by the plaintiff and the harm to the defendant if the certificate were left in place, the court ordered the certificate which charged that part of the land upon which the defendant had constructed buildings, be discharged.