

RULE 38 – DISCONTINUANCE AND WITHDRAWAL

Discontinuance by plaintiff

- (1) At any time before a proceeding is set down for trial or hearing, a plaintiff may discontinue it in whole or in part against a defendant by filing and delivering a Notice of Discontinuance in Form 32 to each party of record.

Application

- (2) This rule applies to matters commenced by originating process, and the terms petitioner, respondent or third party may be used instead of plaintiff and defendant, as the case may be.
- (3) After a proceeding has been set down for trial or hearing, a plaintiff may discontinue it in whole or in part against a defendant with the consent of all parties of record or by leave of the court.

Withdrawal by defendant

- (4) A defendant may withdraw their defence or any part of it with respect to any plaintiff at any time by filing a Notice of Withdrawal in Form 33 and delivering a copy of it to each party of record.

Costs and default procedure on discontinuance or withdrawal

- (5) Subject to subrule (3), a person wholly discontinuing a proceeding or wholly withdrawing their defence against a party shall pay the costs of that party to the date of delivery of the notice of discontinuance or withdrawal and if a plaintiff, liable for costs under this rule, subsequently brings a proceeding for the same or substantially the same claim before paying those costs, the court may order the proceeding to be stayed until the costs are paid.
- (6) Where a plaintiff discontinues the whole or any part of a proceeding in which a person has been joined as a third party, the third party, if the discontinuance disposes of the claim against the third party, is entitled to costs and may apply to the court for a direction as to who should pay them.
- (7) A plaintiff's right to recover costs from a defendant under subrule (5) does not preclude the plaintiff from recovering other costs properly incurred.
- (8) Where a defendant wholly or partly withdraws their defence under this rule, the plaintiff may proceed under Rule 17 as though the defendant had delivered no statement of defence or only a partial statement of defence.

Discontinuance not a defence

- (9) Unless otherwise ordered, the discontinuance of a proceeding in whole or in part is not a defence to a subsequent proceeding for the same, or substantially the same, cause of action.