

## **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 his or her 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 his 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 his or her 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.