

**RULE 23**  
**DISCONTINUANCE AND WITHDRAWAL**

**DISCONTINUANCE BY PLAINTIFF**

- 23.01** (1) A plaintiff may discontinue all or part of an action against any
- (a) before the close of pleadings, by serving on all parties who have been served with the statement of claim a notice of discontinuance (Form 23A) and filing the notice with proof of service;
  - (b) after the close of pleadings, with leave of the court; or
  - (c) at any time, by filing the consent in writing of all parties.
- (2) If a party to an action is under disability, the action may be discontinued by or against that party only with leave of a judge obtained on motion under rule 7.07.1.

**EFFECT OF DISCONTINUANCE ON A COUNTERCLAIM**

- 23.02** Where an action is discontinued against a defendant who has counterclaimed, the defendant may deliver within thirty days after the discontinuance a notice of election to proceed with the counterclaim (Form 23B), and if the defendant fails to do so, the counterclaim shall be deemed to be discontinued without costs.

**EFFECT OF DISCONTINUANCE ON CROSSCLAIM OR THIRD PARTY CLAIM**

- 23.03** (1) Where an action is discontinued against a defendant who has crossclaimed or made a third party claim, the crossclaim or third party claim shall be deemed to be dismissed with costs thirty days after the discontinuance unless the court orders otherwise during the thirty day period.

**EFFECT OF DEEMED DISMISSAL ON SUBSEQUENT ACTION**

- (2) The deemed dismissal is not a defence to a subsequent action unless the court orders otherwise during the thirty day period.

**EFFECT OF DISCONTINUANCE ON SUBSEQUENT ACTION**

- 23.04** (1) The discontinuance of all or part of an action is not a defence to a subsequent action, unless the order giving leave to discontinue or a consent filed by the parties provides otherwise.

- (2) Where a plaintiff has discontinued and is liable for costs of an action, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest before payment of the costs of the discontinued action, the court may order a stay of the subsequent action until the costs of the discontinued action have been paid.

### **COSTS OF DISCONTINUANCE**

**23.05** Where a plaintiff discontinues an action against a defendant,

- (a) the defendant is entitled to the costs of the action; and
- (b) where the defendant has made a crossclaim or third party claim that is deemed to be dismissed under Rule 23.03, the defendant is entitled to recover from the plaintiff,
  - (i) the costs payable under Rule 23.03, and
  - (ii) the defendant's own costs of the crossclaim or third party claim,

unless the court orders otherwise.

### **WITHDRAWAL BY DEFENDANT**

- 23.06** (1) A defendant may withdraw all or part of the statement of defence with respect to any plaintiff at any time by delivering to all parties a notice of withdrawal of defence (Form 23C), but,
- (a) where the defendant has crossclaimed or made a third party claim, leave to withdraw must be obtained from the court; and
  - (b) where the defendant seeks to withdraw an admission in the statement of defence, Rule 51.05 (withdrawal of admission) applies.
- (2) Where a defendant withdraws the whole of the statement of defence, the defendant shall be deemed to be noted in default.

### **APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS**

**23.07** Rules 23.01 to 23.06 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

*MacCallum v. Jenkins* (1992), 105 Nfld. & P.E.I.R. 35 (P.E.I.S.C.-A.D.)

The applicant commenced an action against two parties, one of whom was Jenkins. She filed a notice of discontinuance with respect to the action against Jenkins and sought to settle the action against the other party. After the notice of discontinuance was filed, Jenkins sought costs from the applicant. She applied to set aside the notice of discontinuance on the grounds it was filed on the understanding costs would not be sought. The chambers judge allowed the motion and set aside the notice of discontinuance. On appeal the court set aside the order of the chambers judge stating he erred in setting aside the notice of discontinuance on the ground there was a misunderstanding on the part of the applicant with respect to her liability for costs. The Rule makes it very clear that costs are payable on the filing of a notice of discontinuance unless otherwise ordered by the court and as the applicant had not applied for such an order the notice remained in effect and she was responsible for the costs of Jenkins.