

GUIDEBOOKS FOR REPRESENTING YOURSELF IN THE SUPERIOR COURT OF JUSTICE:



## ***Alternatives To Trial***

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Law Help Ontario is a self-help centre for low income, unrepresented litigants appearing before the Superior Court of Ontario (limited civil matters – no family law). Visit us in Toronto at:

**393 University Avenue, Ground Floor, Toronto**  
**Monday to Friday, 9:30 am to 4:00 pm**

Walk-in centre only. No appointments. We do not guarantee assistance to all applicants. You must meet our eligibility requirements.

# Alternatives To Trial

## Where you can get help with your case

### **Information If You Represent Yourself**

Law Help Ontario is a project of Pro Bono Law Ontario that provides pro bono legal services to people who cannot afford to hire a lawyer and are unrepresented in a legal matter. The project is currently piloting two self-help centres in courthouses in the Toronto area. In the future, centres may be launched in other locations across Ontario. The Law Help Ontario web site provides online resources relating to pro bono legal services.

If you live in the Toronto area, have a civil matter and are unrepresented because you cannot afford a lawyer, visit us at our centre in Superior Court or Small Claims Court. You may be eligible for free (pro bono) legal advice.

Get legal help in person on a civil case such as:

- starting or defending a civil action in Superior Court
- motions in Superior Court
- appeals (merit assessment only)

**We CANNOT help you at the centre with: family law matters, criminal cases, human rights, landlord and tenant matters etc. Please refer to our online resources for information that might be available in these areas.**

If you are located in other areas of the province or need help in another area of the law, check out our online resources at [lawhelpontario.org](http://www.lawhelpontario.org).

### **Rules of Civil Procedure**

The *Rules of Civil Procedure* describe how litigation is handled in the Superior Court of Justice. The rules will guide you through every step of your case and set time limits for when certain steps must be done. To view the *Rules of Civil Procedure*, go to <http://www.canlii.org/on/laws/regu/1990r.194/index.html>

### **Forms**

Official court forms must be used when you bring a dispute to court and you must format your forms in accordance with the formatting requirements of the *Rules of Civil Procedure* (e.g. Rule 4.01) before filing them with the court. Visit [www.lawhelpontario.org](http://www.lawhelpontario.org) for help with forms.

***This guidebook provides general information about civil, non-family claims in the Superior Court of Justice of Ontario. It does not explain the law. Court staff (and this guidebook) can only give you legal information, not legal advice. They can help you file documents or swear your affidavits, but they cannot tell you whether you should do something. Legal advice must come from a lawyer.***

Before proceeding with a case in the Superior Court of Justice on your own, consider talking to a lawyer to help you understand the law and the procedures that might apply to your case.

If you do not have a lawyer, you will have to prepare your case and do the legal research to represent yourself. You will have to do all the things a lawyer would do and it will not be easy.

You will need to learn about:

- the court system;
- the law that relates to your case;
- what you and the other side need to prove; and
- the possible legal arguments for your case.

You will also need to know about the court rules and forms that must be used in your case. If you do not understand these things, you might miss something (e.g. a deadline) and hurt your case. You might be ordered to pay some or all of the costs of the other party.

# ***Alternatives To Trial***

## **1. Introduction**

Going to trial to have a judge hear evidence and make a decision is one of the most expensive ways of resolving a legal dispute. It is also one of the least common ways, as most proceedings filed with the court are resolved without going to trial. In fact, over 90 percent of all proceedings settle before getting to the trial stage.

Therefore, you may want to consider an alternative. This guidebook gives you an overview of the following alternatives to trial:

- settlement;
- discontinuance and withdrawal;
- default judgment; and
- alternative dispute resolution.

You may be able to try each of these alternatives at different times during the litigation. Keep them in mind as you move through the process.

## **2. What is Settlement?**

A proceeding is settled when the parties involved negotiate a mutual agreement to resolve the dispute (usually by paying money). A settlement ends or avoids a court proceeding.

If there are claims against more than one party, a settlement can be reached to resolve the claim against one party even though a settlement cannot be reached with the other party. In that case, the proceeding would continue against the party who has not agreed to the settlement.

Cases can be settled:

- before the proceeding begins;
- in the initial stages of the proceeding;
- before or after examination for discovery;
- when the matter is scheduled for trial;
- shortly before trial the starts (including, as the saying goes, “on the courthouse steps”);
- during the trial;
- when a notice of appeal is filed; or
- before the appeal is heard.

Settlement becomes more likely as all parties gather more information and get a better understanding of the claims being made in the proceeding. This information allows them to better assess their chances in the litigation. Proceedings are very expensive and your costs

increase at each stage. Get as much information as possible early on in the process so you can think about settling your claim at the earliest opportunity.

When considering settlement, you need to think about the money you have already spent and the money you will spend in taking the case to trial. Think also about the possibility that you may lose the proceeding and be ordered to pay the other party's costs.

Under the *Rules of Civil Procedure* (Rules), the party who is unsuccessful in a proceeding is generally ordered to pay the other party's costs. The costs of the other party are determined in accordance with Rules 57 and 58 and Tariff A. Although costs only cover a portion of the total expenses that someone must pay to take a case to court or defend a case, they can still be very significant. To view the Rules, see the web link and instructions on the first page of this guidebook.

In addition to the expense and the risk that you will be ordered to pay costs, you also need to think about the amount of time you will have to spend in:

- locating, listing and examining documents;
- preparing for and attending examinations for discovery;
- obtaining experts; and
- preparing for trial and attending the trial.

Consider also the emotional toll of taking your case to trial. You will be doing all this work in addition to your regular daily routine. It may take much longer than you expect and there is no guarantee that you will win.

Getting advice from a lawyer about your case can help you figure out what would be a reasonable settlement of your claim. A lawyer may also be able to help you negotiate a settlement. If you can reach an agreement to settle the case, make sure that your settlement is documented so that it ends the dispute. A lawyer can give you advice on how to properly document a settlement so that the settlement agreement cannot be later questioned and reopened.

Most of the documents that the parties prepare to settle a case are just exchanged between the parties and are not filed with the court. These may include:

- a letter to the other party setting out the terms of the settlement;
- an acknowledgement that the other party accepts the terms of the settlement;
- a release (this is a legal document that the parties sign to acknowledge that they are giving up all claims in connection with the matters giving rise to the dispute as part of the terms of the settlement); and
- any other documents required to complete the settlement – these might include:
  - share transfers;
  - property transfers; or
  - cheques.

Documents prepared in an effort to settle a claim often contain the term “*without prejudice.*” This term means that the information contained in the document cannot later be used against that party in court if the parties are not able to settle the matter. Generally speaking, negotiations to settle disputes are conducted on a without prejudice basis to encourage parties to be forthcoming and to engage in productive discussions.

In most settlements, a document called a ***consent order*** is also prepared and filed with the court. This document tells the court that the case has been settled and that the parties have agreed to have the court dismiss the claim. A consent order has the same effect as if a judge heard the case on the merits and dismissed it. Once all the documents are signed and exchanged, the consent order can be filed with the registry, funds are exchanged, and the settlement is complete.

### 3. Can I Make a Settlement Offer Under the *Rules of Civil Procedure*?

You can make an offer to settle a proceeding by simply communicating the offer to the other side (either verbally or in writing) or you can deliver what is often called a “formal” offer under the Rules. You can do this under Rule 49 as described below.

#### Under Rule 49

Rule 49 applies to both proceedings started by a statement of claim and proceedings started by notice of application.

One advantage of using Rule 49 is that it allows additional costs to be paid (beyond what would normally be paid under the Rules) by a party who unreasonably fails to accept an offer to settle and proceeds to trial. The purpose of the cost penalties in Rule 49 is to encourage parties to settle claims rather than go to trial.

An offer to settle under Rule 49 can be made by preparing a document called an Offer to Settle (Form 49A). You can withdraw an offer made under Rule 49 by preparing a document called a Notice of Withdrawal of Offer (Form 49B). You (or the other party) can accept a Rule 49 offer by preparing a document called an Acceptance of Offer (Form 49C). Forms 49A, 49B, and 49C are attached at the end of this guidebook.

Read Rule 49 for more information about formal offers to settle and, in particular, about the cost consequences of failing to accept a formal offer. If you wish to make a Rule 49 offer or if one is delivered to you, it is a good idea to get some advice from a lawyer so that you fully understand what it means if the offer is not accepted.

The fact that you made an offer to settle your claim under Rule 49 before the trial cannot be used against you before your claim is decided. Under Rule 49, the fact that an offer was made cannot be disclosed in any of the court documents filed. Also, the fact that an offer was not accepted under Rule 49 cannot be disclosed to the court until the court makes a decision about the claim

[Rule 49.06(2)]. This means you cannot tell a judge or master anything about any offer to settle that was delivered under Rule 49 until the trial is over.

## 4. Discontinuance and Withdrawal

After you start a proceeding, you may decide that you no longer wish to continue it against one or more of the other parties. This is called *discontinuance*. Similarly, if you have been sued and you filed the appropriate documents to defend the proceeding, you may wish decide to withdraw your defence. This is called *withdrawal of defence*. Discontinuances and withdrawals apply to both proceedings started by statement of claim and proceedings started by notice of application. They also apply to counterclaims and third party proceedings.

Rule 23 deals with discontinuance and withdrawal. A notice of discontinuance (Form 23A) and notice of withdrawal of defence (Form 23C). Forms 23A and 23C are attached at the end of this guidebook.

Discontinuance or withdrawal may:

- end the need for trial or hearing;
- shorten the time required for a trial, or the complexity of a trial;
- reduce the number of defendants through discontinuance by the plaintiff or withdrawal of the defence by one or more defendants; or
- allow the plaintiff to take default judgment against a defendant who withdraws a defence.

There are cost consequences associated with discontinuance. If you discontinue a claim, Rule 23.05 requires the person discontinuing the action to pay the costs of the defendant. However, you may be able to negotiate an agreement with the other party so that costs do not have to be paid.

### Discontinuance by the plaintiff/applicant

If you are the plaintiff or applicant, you can shorten a trial or application by discontinuing an action or application against a defendant or respondent who:

- is not capable of paying a judgment – that is, he or she might be bankrupt or live elsewhere, and it would be too expensive to try to collect on your judgment;
- is unnecessarily named in the action; or
- has agreed to a settlement.

If you have fewer defendants or respondents, you have fewer documents to review and fewer witnesses at trial or affidavits at the hearing of the application. Your argument is likely to be less complicated.

## Using discontinuance

You can discontinue the proceeding at any time by filing the consent of all the parties. Different rules apply if you want to discontinue *before* the close of pleadings or *after* the close of pleadings.

At any time *before* the close of pleadings, a plaintiff can discontinue the case against any defendant and remove that defendant from the action by serving a notice of discontinuance (Form 23A).

*After* the close of pleadings, a plaintiff can discontinue the case against a specific defendant but must have either the consent of all other parties or an order from the court to allow the discontinuance; and

Note: Where a party is under a disability, leave of the court is required to discontinue an action [Rule 23.01(2)].

## Withdrawal by the defendant/respondent

At any time, the defendant can withdraw by preparing a Notice of Withdrawal of Defence (Form 23C) of:

- all of his or her defence against all of the plaintiffs;
- all of his or her defence against one or more plaintiffs, leaving the defence intact against the rest of the plaintiffs; or
- only part of his or her defence against any or all of the plaintiffs, leaving the balance of the defence intact.

If the defendant withdraws part or all of his or her defence or of all his or her defence against only one or more plaintiffs, it will make the trial less complicated as there will be fewer issues that need to be resolved.

If there is only one defendant, and he or she completely withdraws his or her defence against the plaintiff, the plaintiff can then proceed to get a default judgment. See the section below about default judgments.

## 5. Default Proceedings

There are two stages to default proceedings--being noted in default and then obtaining default judgment. Default proceedings occur when one defendant is not defending the claim or where the defence is struck out. When a defendant to an action fails to take the steps required by the Rules--such as filing a statement of defence--a default judgment can be obtained by the court registrar signing default judgment.

Rule 19 provides that the court registrar may sign judgment against the defendant in regard to claims for:

- a debt or liquidated demand in money, including interest if claimed in the statement of claim (Form 19A);
- the recovery of possession of land (Form 19B);
- the recovery of possession for personal property (Form 19C); or
- the foreclosure, sale or redemption of a mortgage (Forms 64B to 64D, 64G to 64K, and 64M).

Note: You can find all of the forms under Rule 19 and Rule 64 applicable to default proceeding on the Government of Ontario's Court Services website at:

<http://www.ontariocourtforms.on.ca/english/civil>

If you wish to apply for a default judgment against a party who is under a legal disability (for example, someone who has been declared to be incapable of handling his or her affairs by the court), you will need to appear before the court to apply for an order to allow you to have that party noted in default [Rules 19.01(4) and 7.07].

If the registrar declines to sign default judgment then the plaintiff may move before a judge for judgment under Rule 19.05 or make a motion to the court for default judgment for any of claims referred to above.

Generally speaking, in order to apply for a default judgment you must provide the following material to the court:

- i. Proof that the documents (the statement of claim) that the defendant was required to respond to (i.e., by filing a statement of defence) were served on the defendant. You do this by filing an Affidavit of Service (Form 16D). For more information on affidavits of service see the guidebook called *Starting a Civil Proceeding in the Superior Court of Justice* available on Law Help Ontario's website at [www.lawhelpontario.org](http://www.lawhelpontario.org).
- ii. Proof that the defendant has not responded as required under the Rules. If the defendant has not filed a statement of defence, you can obtain this proof by filing a document called a requisition for default judgment (Form 19D).

This can then be filed as part of your application for default judgment. If the defendant has not delivered a statement of defence, then you can file an affidavit that states that you have not received a statement of defence;

- iii. A requisition that asks the court for a judgment on the basis that the defendant is in default. The search for a defence can be requested on the same requisition used to file the application for default judgment.
- iv. A draft judgment (Form 59B).

In cases where you are seeking final judgment, you should also prepare a bill of costs that sets out the costs you claim you are entitled to under the Rules. For more information about

preparing a bill of costs, see the guidebook called *Costs in the Superior Court of Justice* on the Law Help Ontario website at [www.lawhelpontario.org](http://www.lawhelpontario.org).

If you are claiming interest, you must include an interest calculation with your application.

## 6. Alternate Dispute Resolution

Alternate dispute resolution refers to a number of ways that allow parties to resolve disputes outside the court system. Alternate dispute resolution can be used to resolve cases faster and cheaper than going to trial.

Dispute resolution offers a range of choices, from negotiating a settlement (dealt with above at “2. *What is Settlement?*”), through mediation, arbitration and going to court.

The main types of dispute resolution are:

**Negotiation** – any type of non-facilitated communication in which the opposing parties discuss the steps they could take to resolve their dispute. Negotiation can occur directly between the parties or indirectly through agents acting on behalf of the parties, such as lawyers.

**Mediation** – a non-binding process in which a neutral, impartial third party with no decision-making authority attempts to facilitate a settlement between disputing parties. Mediation is generally a private, voluntary, dispute resolution process.

**Arbitration** – disputes are submitted to a neutral adjudicator who receives evidence and arguments from both parties. In disputes subject to arbitration, the arbitrator has the authority to make a binding decision to resolve the dispute. Arbitration is generally a private, voluntary method of adjudication; however, the government sometimes requires that certain disputes be submitted to arbitration. Contracts may also set out that disputes about the contract will be resolved by arbitration rather than litigation.

If the parties have more interest in reaching a solution, they are likely to choose negotiation, mediation or arbitration. If the parties have less interest in reaching a solution, they are likely to choose a trial or arbitration. Alternate dispute resolution has many advantages:

- It is more flexible because the process can be designed to suit the dispute;
- It can be quicker, with less paperwork, and can be less expensive;
- It can resolve the problem quickly;
- The process can be confidential and would be available to media or other outside parties only by agreement;
- The parties can choose their decision maker (mediator or arbitrator) and can choose an expert in the field so he or she understands the problem;
- If agreed to by the parties, the award of an arbitrator can be final and binding – the same as an order of the court;

- It is often easier to maintain your relationship with the other party if you use a less adversarial approach; and
- Mediation enjoys a very high success rate of settlements.

## Mediation

A mediator role is to help people involved in a dispute to communicate and negotiate with each other in a constructive manner, to gain a better understanding of the interests of all the parties, and to find a resolution based on common understanding and mutual agreement. A mediator helps parties negotiate more effectively by:

- establishing the ground rules for the discussion;
- helping parties identify common ground;
- avoiding irrelevant or unproductive discussions;
- keeping the parties focused on the issues;
- moving the parties from fixed positions;
- helping the parties understand the risks of not settling; and/or
- encouraging compromise.

In some cases, mediation is mandatory. Rule 24.1 establishes mandatory mediation for civil, non-family actions. Rule 75.1 brings contested estates, trusts, and substitute decisions proceedings within mandatory mediation. Rules 24.1 and 75.1 apply in Toronto, Ottawa and the County of Essex (Windsor). For more information about the Ontario Mandatory Mediation Program go to the Government of Ontario's website at [www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp](http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp)

## Arbitration

When a dispute is submitted to arbitration, the arbitrator:

- considers and assesses the evidence presented to him or her by the parties;
- may call his or her own witnesses and retain experts;
- cannot exclude evidence that a court would otherwise admit; and
- orders an award based on the evidence presented that is legally binding on all parties.

As you move from negotiation (where you negotiate a resolution to your dispute on your own), to mediation (where the mediator suggests a resolution), to arbitration (where the arbitrator makes a binding award), the process becomes more complicated and more similar to litigation. For that reason, arbitration is generally more expensive than mediation, which is generally more expensive than negotiation.

*For more information about court processes, read the other guidebooks in this series available online at [www.lawhelpontario.org](http://www.lawhelpontario.org).*

*For the definitions of some of the terms used in this guidebook, see the guidebook called: “Common Superior Court of Justice Terms”*

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*Send your response to [lho@pblo.org](mailto:lho@pblo.org) or  
393 University Avenue, Suite 110, Toronto, Ontario M5E 1E6.*

## Appendix 1: Notice of Discontinuance (Form 23A)

*[Insert general heading as described in Part 4 of the guidebook called Starting a Civil Proceeding in the Superior Court of Justice]*

### NOTICE OF DISCONTINUANCE

The plaintiff wholly discontinues this action. *(Where applicable, add against the defendant (name).)*

..... *(Or The plaintiff discontinues that part of this action relating to ..... Where applicable, add against the defendant (name).)*

*(Date)*

*(Name, address and telephone number of plaintiff's lawyer or plaintiff)*

*TO (Name and address of defendant's lawyer or defendant)*

NOTE: If there is a counterclaim, the defendant should consider rule 23.02, under which the counterclaim may be deemed to be discontinued.

NOTE: If there is a crossclaim or third party claim, the defendant should consider rule 23.03, under which the crossclaim or third party claim may be deemed to be dismissed.

## Appendix 2: Notice of Withdrawal of Defence (Form 23C)

*[Insert general heading as described in Part 4 of the guidebook called Starting a Civil Proceeding in the Superior Court of Justice]*

### NOTICE OF WITHDRAWAL

The defendant withdraws the statement of defence in this action.

..... (Or The defendant withdraws paragraphs  
of the statement of defence in this action.)

(Date)

(Name, address and telephone number of defendant's lawyer or defendant)

TO (Name and address of plaintiff's lawyer or plaintiff)

## Appendix 3: Offer to Settle (Form 49A)

*[Insert general heading as described in Part 4 of the guidebook called Starting a Civil Proceeding in the Superior Court of Justice]*

### OFFER TO SETTLE

The (identify party) offers to settle this proceeding (or the following claims in this proceeding) on the following terms: (Set out terms in consecutively numbered paragraphs.)

(Date)

(Name, address and telephone number of lawyer  
or party making offer)

TO (Name and address of lawyer or party to whom offer is made)

## Appendix 4: Notice of Withdrawal of Offer (Form 49B)

*[Insert general heading as described in Part 4 of the guidebook called Starting a Civil Proceeding in the Superior Court of Justice]*

### NOTICE OF WITHDRAWAL OF OFFER

The *(identify party)* withdraws the offer to settle dated *(date)*.

*(Date)*

*(Name, address and telephone number of lawyer or party giving notice)*

TO

*(Name and address of lawyer or party to whom notice is given)*

## Appendix 5: Acceptance of Offer (Form 49C)

*[Insert general heading as described in Part 4 of the guidebook called Starting a Civil Proceeding in the Superior Court of Justice]*

### ACCEPTANCE OF OFFER

The *(identify party)* accepts your offer to settle dated *(date)*.

*(Date)*

*party accepting offer)*

*(Name, address and telephone number of lawyer or party whose offer is accepted)*

TO

*(Name and address of lawyer or party whose offer is accepted)*