

Alternatives to Trial

This guidebook provides general information about civil, non-family claims in the Supreme Court of B.C. It does not explain the law. Court staff (and this guidebook) can only give you legal information, not legal advice. They will tell you how to do something, but not whether you should do it or why you might want to do it. Legal advice must come from a lawyer.

Where You Can Get Help With Your Case

Information if You Represent Yourself

The BC Supreme Court Self-Help Information Centre (www.supremecourtsselfhelp.bc.ca) provides legal information, education, and referral services for family and civil (non-family) cases for unrepresented litigants who are involved in civil actions in the Vancouver location of the Supreme Court of British Columbia.

Legal Advice

You may be eligible for free (pro bono) legal advice. Services are listed under *legal advice* on the website for the BC Supreme Court Self-Help Information Centre.

Rules of Court

The Rules of Court govern the conduct of litigation in the Supreme Court of BC. Not only do they ensure fairness to all parties involved in a lawsuit, they will guide you through every step of your case and set time limits for when certain steps must be done. You can find these Rules at the courthouse library, or on the court's website at www.courts.gov.bc.ca. (Once you are on the Supreme Court page, click on the link for Supreme Court Act, Rules and Forms.)

Forms

Official court documents (called court forms) must be used when you bring a dispute to court. You can print out blank forms for use in your lawsuit from the Supreme Court website. Go to www.courts.gov.bc.ca. (Once you are on the Supreme Court page, click on the link for Supreme Court Act, Rules and Forms).

For information about family law claims, go to www.familylaw.lss.bc.ca.

Before you start your claim, you should consider talking to a lawyer to help you understand the law and the procedures that might apply to your case. You may be eligible to obtain free (pro bono) legal advice.

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;
- the possible legal arguments for your case.

You will also need to know about the Rules of Court and the forms that must be used in your lawsuit. If you do not understand these things, you might miss something (i.e. a deadline) and hurt your case. If you sue and lose, you might be ordered to pay the costs of the other party.

Alternatives to Trial

Going to trial to have a judge hear evidence and make a decision is one of the most expensive ways of resolving a dispute. It is also one of the least common ways, as most lawsuits filed with the court are resolved without going to trial. Therefore, you may want to consider an alternative. This booklet gives you an overview of the following alternatives to trial:

- settlement,
- discontinuance and withdrawal,
- default judgment,
- 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.

What is Settlement?

A lawsuit 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 lawsuit 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 lawsuit. This information allows them to better assess their chances in the litigation. Lawsuits 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 lawsuit and be ordered to pay the other party's costs.

Under the Rules, the party who is unsuccessful in a lawsuit is generally ordered to pay the other party's costs. The costs of the other party are calculated in accordance with the Rules (see Rule 57 and Appendix B of the Rules of Court). 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.

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 which the parties sign to acknowledge that he or she is 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 and which might include:
 - o share transfers;
 - o property transfers; and
 - o 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 dismissal order or 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 dismissal 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 dismissal order can be filed with the registry, funds are exchanged and the settlement is complete.

Can I make a Settlement Offer Under the Rules?

You can make an offer to settle a lawsuit 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 either Rule 37 or Rule 37A as described below.

Under Rule 37

One advantage of using Rule 37 is that it provides for 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 37 is to encourage parties to settle claims rather than go to trial.

An offer to settle under Rule 37 *must* be made by preparing a document called an offer to settle (see Form 64). If you do not use Form 64, the cost penalties in Rule 37 will not apply. You can withdraw an offer made under Rule 37 by preparing a document called a notice of withdrawal of offer (see Form 65). You (or the other party) can accept a Rule 37 offer by preparing a document called an acceptance of offer (see Form 65A). Copies of these forms are attached to this guidebook.

Read Rule 37 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 37 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 37 before the trial cannot be used against you before your claim is decided. Under the Rules, the fact that an offer was delivered under Rule 37 cannot be disclosed to the court until the court makes a decision about the claim (see Rule 37(11)). This means you cannot tell a judge or master anything

about any offer to settle that was delivered under Rule 37 until the trial is over.

Note that Rule 37 applies to both proceedings started by a writ of summons and statement of claim and proceedings started by a petition.

Under Rule 37A

Although most offers to settle are made under Rule 37, it is not always possible to use this Rule to make an offer to settle. If you cannot use Rule 37, you may be able to use Rule 37A instead to make an offer. For example, if there is more than one defendant, an offer to settle can only be made under Rule 37 if all of the defendants agree to make the offer together (see Rule 37(30)). So, if only one of the defendants wanted to make an offer under the Rules, he or she would have to use Rule 37A to make the offer.

There may be other circumstances in which Rule 37 should not be used to make an offer. Because this depends on the circumstances of your particular case, you should get some advice from a lawyer as to which offer to settle is best for your situation.

Unlike an offer under Rule 37, an offer under Rule 37A can be made in any form as long as the offer is in writing and includes the following statement:

“The party delivering the offer of settlement reserves the right to bring it to the attention of the court for consideration in relation to costs after the court has given judgment on all other issues in the proceeding.”

Read Rule 37A for information about the cost consequences of failing to accept an offer to settle made under Rule 37A.

Note that Rule 37A applies to both proceedings started by a writ of summons and statement of claim and proceedings started by a petition.

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. Discontinuances and withdrawals apply to both proceedings started by writ of summons and statement of claim and proceedings started by a petition. They also apply to counterclaims and third party proceedings.

Rule 36 deals with discontinuance and withdrawal, and a copy of the Rule is available from the locations and on the websites set out at the beginning of this guidebook.

Discontinuance or withdrawal may:

- end the need for trial or hearing;
- shorten the time required for, 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 and withdrawal. If you discontinue or withdraw a claim, Rule 36(4) requires the person discontinuing the action against a party or withdrawing the defence to the claim of another party to pay the costs of that party. 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 or petitioner

If you are the plaintiff, you can shorten a trial by discontinuing an action against a defendant 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, you have fewer documents to review and fewer witnesses at trial. Your argument is likely to be less complicated.

Discontinuance can be used at these times:

- At any time before the notice of trial has been filed, a plaintiff can discontinue the case against any defendant and remove that defendant from the action.
- After the notice of trial has been filed, 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.

To discontinue a claim, prepare a document called a notice of discontinuance (see Form 26). A copy of this document is attached to this guidebook.

Withdrawal by the defendant

The defendant can withdraw:

- 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.

To withdraw a claim, prepare the document called a notice of withdrawal (see Form 27). A copy of this form is attached to this guidebook.

Default Judgment

Default judgments are ordered when one party has not complied with the Rules or is not defending the claim. When a party to an action fails to take the steps required by the Rules, such as filing an appearance or a statement of defence, the other party can apply to the court for a default judgment (see Rules 17 and 25). A plaintiff can also apply for a default judgment if the defendant has withdrawn a statement of defence.

If you are the plaintiff, you can apply for either a final judgment or an interlocutory judgment, depending on what type of claim you are making against the defendant.

- *Final judgment:* A final judgment is made when the claim is for “liquidated damages”. Liquidated damages is a term used in the Rules to describe a claim in which the amount being sued for can easily be determined by referring to the documents or other evidence. For example, if you are claiming damages because a purchaser agreed to pay you a certain amount plus interest on any overdue amount but then defaulted, this would be a claim for liquidated damages. In this case, you would file a default

judgment seeking the amount you are owed, plus any interest payable under the *Court Order Interest Act*, plus your costs under Appendix B to the Rules.

- *Interlocutory judgment:* An interlocutory judgment is made when the claim is for “unliquidated damages”. Unliquidated damages is a term used in the Rules to describe a claim in which the amount being claimed must be assessed and determined by the court. For example, if a plaintiff claims an amount for pain and suffering arising from an injury, the court will need to consider evidence to determine the nature of the injury and what amount the plaintiff is owed as a result of the injury. For this reason, the court can only grant an interlocutory judgment, with damages to be assessed. The plaintiff will then have to schedule a further application to the court to have a decision made on the damages. See the guidebook called *Chambers Applications in Supreme Court*.

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 file a default judgment (see Rules 6 (11) and (12)).

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

- Proof that the documents (the writ of summons and/or statement of claim) that the defendant was required to respond to (i.e., by filing an appearance or a statement of defence) were served on the defendant. You do this by filing an affidavit of service. For more information on affidavits of service see the guidebook called *Starting a Civil Proceeding in Supreme Court*.
- Proof that the defendant has not responded as required under the Rules. If the defendant has not filed an appearance, you can obtain this proof by filing a document called a requisition (see Form 2) that asks the registry to search the file for an appearance from the defendant. If there is no appearance, then the requisition will be returned with the word “nil” printed on it. 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;

- A requisition (see Form 2) that asks the court for a judgment on the basis that the defendant is in default. The search for an appearance or defence can be requested on the same requisition used to file the application for default judgment.
- A draft judgment, prepared using Form 86, a copy of which is attached to this guidebook.
- In cases where you are seeking final judgment, prepare also a bill of costs that sets out the costs you claim you are entitled to under Appendix B of the Rules.
- If you are claiming interest, you must include an interest calculation with your application.

When you prepare Form 86 (the draft judgment), make sure you use only the paragraphs required for the particular default judgment you are seeking. There are different procedures to follow depending on what type of judgment you are seeking. Read Rule 17 and 25 for the appropriate procedure and filing requirements for each type of default judgment.

Alternate Dispute Resolution

Alternate dispute resolution refers to a number of approaches 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 under the heading What is Settlement?), through mediation, arbitration and going to court.

According to the British Columbia Dispute Resolution Office, the main types of dispute resolution are:

- **Negotiation** – any form 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 (i.e., disputes under the *Residential Tenancy Act*). 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.
- Mediation enjoys a very high success rate of settlements.

Mediation

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.

Parties going to mediation can arrange that, if mediation is unsuccessful, the dispute can be referred to an arbitrator.

Notice to Mediate regulations have been passed by the government. They allow any party to an action in the Supreme Court to compel all other parties to the action to mediate the matters in dispute. This procedure is not available in proceedings started by petition, family proceedings or in cases involving allegations of physical or sexual abuse. A full explanation of the Notice to Mediate regulations and the procedures you must follow to issue a notice to mediate are available on the internet at:

www.ag.gov.bc.ca/dro

Once on the website, look under Reports and Publications, Dispute Resolution Office, Research and Publications, Notice to Mediate.

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.

The British Columbia Dispute Resolution Office is an office of the BC government that deals with dispute resolution. Their website can help you determine if dispute resolution is right for you see www.ag.gov.bc.ca/dro.

For the next steps, see the guidebooks called:

Starting a Civil Proceeding

Defending a Civil Proceeding

Fast Track Litigation - Rule 66

Discovery Process

Chambers Applications

Summary Judgment and Summary Trial

Preparing for Trial and Trial

Expedited Litigation in Supreme Court - Rule 68

For definitions of common court terms, see the guidebook called:

Common Supreme Court Terms

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Appendix 1: OFFER TO SETTLE

FORM 64 (RULE 37 (2))

[insert style of proceeding]

OFFER TO SETTLE

To: **[insert name of party to whom the offer is addressed]**

The **[insert name of party making the offer]** offers to settle this proceeding **[(1)]** on the following terms **[set out terms of offer (2)]** and costs in accordance with Rule 37 (22) and (37).

Dated **[Insert date signed]**

[Insert your name]

(1) If the total claim is not being settled, this sentence can be revised to say: offers to settle the following claims in this proceeding.

(2) Set out the terms in consecutively numbered paragraphs.

Appendix 2: NOTICE OF WITHDRAWAL OF OFFER

FORM 65 (RULE 37 (8))

[insert style of proceeding]

NOTICE OF WITHDRAWAL OF OFFER

To: **[insert name of party to whom the notice is addressed]**

The **[insert name of party withdrawing the offer]** withdraws the offer
to settle dated **[insert date the offer was made]** .

Dated **[Insert date signed]**

[Insert your name]

Appendix 3: ACCEPTANCE OF OFFER

FORM 65A (RULE 37 (14))

[insert style of cause]

ACCEPTANCE OF OFFER

To: **[insert name of party to whom acceptance is addressed]**

The **[insert name of party who made the offer being accepted]**
accepts your offer to settle dated **[insert date of offer being accepted]**.

Dated **[Insert date signed]**

[Insert name (1)]

(1) Underneath the signature line, insert name of person, if that person is acting on his or her own behalf, or Solicitor for the plaintiff/defendant. If there is more than one plaintiff or defendant, insert Solicitor for the plaintiff/defendant, and then the name or names of the plaintiffs or defendants.

Appendix 4: NOTICE OF DISCONTINUANCE

FORM 26 (RULE 36 (1))

[insert style of proceeding]

NOTICE OF DISCONTINUANCE

TAKE NOTICE that **[if notice of trial has been given, add either "with the consent of all parties of record" or "by leave of the court"]** the **[insert name of party discontinuing the action (1)]** discontinues this proceeding against **[insert name of party against whom the action is discontinued (2)]**

[(3)]

Dated **[Insert date signed]**

[Insert your name]

(1) Make it clear who the party discontinuing the action is: e.g., the plaintiff, Joe Smith;

(2) Make it clear against whom the action is discontinued: e.g., the plaintiff, Joe Smith. Prepare separate notices for each person.

(3) If the proceeding is only partially discontinued, modify this form accordingly, indicating which portion of the proceeding is discontinued.

Appendix 5: NOTICE OF WITHDRAWAL

FORM 27 (RULE 36 (3))

[insert style of proceeding]

NOTICE OF WITHDRAWAL

TAKE NOTICE that the defendant **[set out name of defendant(s) withdrawing his or her defence]** withdraws his or her defence in this action.

[(1)]

Dated **[Insert date signed]**

[Insert your name]

(1) If only part of the defence is withdrawn, modify this form accordingly, indicating which part is withdrawn.

Appendix 6: DEFAULT JUDGMENT

FORM 86 (RULES 17, 25, AND 41 (9))

[insert style of proceeding]

DEFAULT JUDGMENT

The **[insert the day, month and year]**

[(1A)] The defendant(s) **[set out name(s) of defendant(s)]** not having filed an appearance to the writ of summons in this action and the time for doing so having expired.

[Or]

[(1B)] The plaintiff(s) having filed and delivered a statement of claim and the defendant(s) **[set out name(s) of defendant(s)]** having failed to file and deliver a statement of defence within the time allowed.

[Or]

[(1C)] Pursuant to an order made by **[insert name of judge making order]** on the **[insert day, month and year]**, that this proceeding continue as if no appearance had been entered or defence filed by the defendant(s).

[(2A)] THIS COURT ORDERS that the defendant(s) **[set out name of defendant(s)]** pay to the plaintiff(s) the sum of \$ **[insert amount of judgment (3)]** in the amount of \$[insert amount of interest] and **[(4)]** \$..... costs, [or, and costs to be assessed.]

[(2B)] THIS COURT ORDERS that the defendant(s) **[insert name of defendant(s)]** pay to the plaintiff(s) damages to be assessed and costs to be assessed.

[(2C)] THIS COURT ORDERS that the defendant(s) **[insert name of defendant(s)]** deliver to the plaintiff(s) the goods detained by the defendant(s) **[insert name of defendant(s) holding the goods detained]**, being **[insert description of goods]** or pay to the plaintiff(s) the value of the goods to be assessed and pay **[(4)]**.

[(2D)] THIS COURT ORDERS that the defendant(s) **[insert name of defendant(s)]** pay to the plaintiff(s) the value to be assessed of the goods detained by the defendant(s) **[insert name of defendant(s) detaining goods]**, being **[insert description of goods detained]**, and \$ **[(4)]**.

Dated _____

Registrar [(5)]

THIS DEFAULT JUDGMENT is prepared by **[insert your name, address, telephone and fax number]**.

(1)A, B, C: Use only one of these three paragraphs as required.

(2)A, B, C, D: Use only one of these four paragraphs. Use 2A if Rule 17(3) or Rule 25(4) applies; 2B if Rule 17(5) or 25(6) applies; 2C if Rule 17(6)(a) or Rule 25(7)(a) applies; and 2D if Rule 17(6)(b) or Rule 25(7)(b) applies.

(3) Also add either: (a) interest as claimed or (b) interest pursuant to the Court Order Interest Act.

(4) Also add either: (a) \$(insert amount) costs or (b) costs to be assessed.

(5) Do not sign here. The court will complete this document.