

Guide to Motions and Clerk's Orders

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About this guide:

The information contained in this guide is simply an overview of the relevant legislation and rules of procedure. It is not intended to be a substitute for the Rules of the Small Claims Court, which should be examined for specific information. Nothing contained, expressed or implied in this guide is intended as, or should be taken or understood as, legal advice. If you have any legal questions, you should see a lawyer.

Where to get more information:

The Ministry of the Attorney General has a series of **guides** to Small Claims Court procedures which are available at court offices and the Ministry of the Attorney General website at www.attorneygeneral.jus.gov.on.ca:

- What is Small Claims Court?
- Guide to Making a Claim
- Guide to Replying to a Claim
- Guide to Serving Documents
- Guide to Motions and Clerk's Orders
- Guide to Getting Ready for Court
- Guide to Fee Schedules
- After Judgment - Guide to Getting Results

Small Claims Court **forms** are available at court offices and at the following website: www.ontariocourtforms.on.ca. You can find tips on completing forms at the end of this guide.

The staff behind the counter at any Small Claims Court office are helpful. They will answer your questions about Small Claims Court procedures, but keep in mind that they cannot give legal advice and they cannot fill out your forms for you.

For more detailed information, you should refer to the **Rules of the Small Claims Court**. It is a regulation made under the authority of the *Courts of Justice Act*. To view the *Rules* on-line, go to www.e-laws.gov.on.ca and follow these steps:

- Choose English or French
- Click on "Current Consolidated Law"
- Click on the letter "C"
- Click on the plus sign to the left of "Courts of Justice Act"
- Click on "Rules of the Small Claims Court"

Ce guide est également disponible en français.

Special thanks to the Province of British Columbia whose Small Claims Court self-help materials served as a model for this series of Guides.

Introduction

A motion is a process for requesting that a judge make an order. Generally a party will make a motion to have a matter addressed before judgment, or in some circumstances after judgment or to support an enforcement process. Usually, a motion is a hearing in court before a judge.

There is one type of motion that can be made “in writing.” It is called a “motion in writing for assessment of damages” which can be made by the plaintiff when all defendants have failed to file a defence and have been noted in default. For a motion in writing, the plaintiff does not have to attend court for a hearing. Instead, the documents filed at the court should provide the court with everything the judge needs to make a decision.

The *Rules of the Small Claims Court* (after this, referred to as the *Rules*), also allow the clerk of the court to grant certain orders on consent of all the parties. This is called a clerk's order.

This three-part guide will try to answer your questions about motions and requests for clerk's orders.

Part One describes what a motion is, how to make a motion, and what you can do to prepare for it.

Part Two describes the process for making a motion in writing for an assessment of damages.

Part Three describes what orders a clerk can make on consent of all the parties and what you need to do to get a clerk's order.

There are also other processes in Small Claims Court where orders may be made, such as at settlement conferences or terms of payment hearings. For more information on other processes in Small Claims Court, please refer to the list of guides at the front of this guide.

Part One: Motions

What is a motion?

A motion is a process that is used to make a request to a judge for an order. You can “make a motion” to ask for an order to:

- resolve an issue in the case;
- get direction on how to proceed in the case; or
- change an order that has already been made.

Motions can be very helpful to the parties in a dispute. However, depending on the stage of the proceeding, motions may also lead to the case taking longer. There is a fee to file a motion. For more information about fees, refer to the “Guide to Fee Schedules.”

What are some examples of motions?

You may need to make a motion for a judge's order before the settlement conference, or after the settlement conference but before trial.

Example 1

You are a roofer. You put a roof on an addition to a customer's house and now the customer is suing you over a leaky roof and water damage to a rug and chair. You go to the court office to file your defence. The clerk tells you that you cannot file it because the plaintiff had you noted in default for failing to file your defence within 20 days after he served you with the claim.

You just received the claim in the mail 3 days ago. You could make a motion to ask the judge to set aside the noting in default and allow you to file your defence. In your affidavit you would explain when you received the claim and that you want to file a defence.

Other times, a party may need to make a motion to get a judge's order after the trial.

Example 2

You were a defendant in a Small Claims Court action. At trial the plaintiff was awarded judgment for \$1,000 against you. You didn't have savings to pay the plaintiff so the plaintiff had your wages garnished.

You have now paid off the \$1,000 and you want to clear your credit record. First, you fill out the paperwork to get a clerk's order stating that "payment has been made in full satisfaction of the order" so that you can send a copy to the credit reporting agencies that have you on file. However, the plaintiff refuses to sign the consent for clerk's order form.

You would then have to make a motion to ask the judge for an order stating that you paid the debt in full.

Other examples of motions that you may wish to make are listed on the **Notice of Motion [Form 15A]**.

Who can make a motion?

Anyone who is a party in the case can make a motion. The person who makes the motion is called the "moving party." The person who responds to the motion is called the "responding party."

In special circumstances, a judge may allow a person who is not a party to the action to make a motion because the person's interests would be affected by the outcome of the case.

How do I make a motion?

To make a motion you must file a **Notice with of Motion [Form 15A]** and supporting **Affidavit [Form 15B]**.

How do I fill out the notice of motion?

In the notice of motion, you tell the court and the other parties to the action:

- who is making the motion; and
- what you (the moving party) are asking the court to decide.

You must specify the date, time and place for the hearing of the motion on the notice of motion form. To get this information, contact the clerk of the court (or the court's scheduling office) by telephone or in person. The telephone number is at the top of the documents you have received. Fill in the information given to you by the clerk to complete your form.

For information about where to get forms, refer to the end of this guide.

How do I fill out a supporting affidavit?

When you file your notice of motion you must also file an **Affidavit [Form 15B]**. It is called a supporting affidavit because it supports your request for an order on motion.

In the affidavit, you will:

1. State the order (or orders) that you are requesting.
2. Give the reasons why you think the court should make the order requested. Usually you would set out your reasons (i.e. statements of fact) in numbered paragraphs. Try to make each statement of fact short and to the point. Often, one sentence is enough.
3. If you need additional pages, attach them to the affidavit. Put a page number on the bottom of each additional page and the total number of additional pages (for example, "Page 1 of 5").
4. Attach a copy of any document you refer to in your affidavit, if it is available. You may wish to refer to the first document you intend to attach to your affidavit as "Exhibit A." If you have more than one document attached to the affidavit you can label them "Exhibit A," "Exhibit B," and so on. On the first page of the "Exhibit" itself, you could print the following information:

"This is Exhibit A referred to in the affidavit of (insert your name) sworn or affirmed on (, 200) by (signature of the commissioner for taking affidavits)."

5. You must swear (or affirm) that the statements in your affidavit are true and sign it in front of a commissioner for taking affidavits. Your affidavit can be sworn before:
 - a Small Claims Court staff member who has been appointed a commissioner for taking affidavits (there is no fee for this service);
 - a lawyer who is entitled to practice law in Ontario;
 - a notary public; or
 - any other person who has been appointed a commissioner for taking affidavits in connection with court documents.

The commissioner for taking affidavits will date and sign the affidavit and each document attached to it.

NOTE: It is a criminal offence to knowingly swear a false affidavit.

I completed my notice of motion and supporting affidavit – now what do I do?

Once you have completed your notice of motion and supporting affidavit, you must serve a copy of it on each party to the action except for any defendant who has been noted in default. The notice of motion and supporting affidavit must be served **at least 7 days** before the motion hearing and filed at the court **at least 3 days** before the motion hearing. If you wish, you can serve the notice of motion and affidavit on the parties before you file the original at the court office.

An **Affidavit of Service [Form 8A]** must be completed for each party served and filed at the court **at least 3 days** before the motion hearing. The affidavit of service is proof that the notice of motion and supporting affidavit (including any attachments) have been served on each party. Each affidavit must be sworn or affirmed by the person who served the documents.

There are very specific rules for serving documents. Refer to the “Guide to Serving Documents” for more information on the rules and procedures relating to service of documents and preparing affidavits of service.

If you are unable to serve all parties 7 days before the motion hearing or file your materials 3 days before the motion hearing, contact the court office and ask how to proceed.

Can a motion be heard without notifying the other parties?

In very limited circumstances, a judge may make an order that it is not necessary to give notice of the motion to the other parties. For example, a plaintiff may make a motion without notice to seek an order for substituted service because he or she has not been able to serve the defendant with the claim by personal service and wants an order allowing another method of service.

You must still file the motion documents with the court even if you are making the motion without notice to the other party.

If you make a motion without notice, the judge will usually first decide whether or not you should be permitted to make the motion without notifying the other side. If the judge decides that notice is required, you will need to obtain a date for the hearing and serve all the documents on the other party as explained in this guide.

Remember, a party who obtains an order on motion without notice must serve a copy of the judge’s order on every affected party, together with a copy of the notice of motion and supporting affidavit used on the motion, within five days after the order is signed. For more information, refer to the “Guide to Serving Documents.”

A party who is affected by an order obtained on motion without notice may make a motion to set aside or change the order within 30 days after being served with the order.

How does a party respond to a motion?

If you have been served with a notice of motion and supporting affidavit and you disagree with what it says, you can respond to it by filing an **Affidavit [Form 15B]**. This is called a “responding affidavit” because you are responding to what the moving party has said in his or her notice of motion and supporting affidavit. For example, in your affidavit you may set out different statements of fact that you want the judge to consider when hearing the motion. If you refer to a document in your affidavit, you should attach a copy if it is available. See “What is a supporting affidavit?” (above) for more information.

Your responding affidavit must be served on every party who has filed a claim or defence. File your responding affidavit at the court, together with one affidavit of service for each party served, at **least 2 days** before the hearing date.

What if I cannot attend on the date set for the motion?

If you are unable to attend on the date set for the motion, you can ask the court to adjourn the motion and reschedule it on another date. Contact the court office for assistance.

If the judge allows the request and makes an order, the clerk will notify the parties of the new motion date.

If the motion is not adjourned before the scheduled date you, or someone on your behalf, must attend the motion to request the adjournment. If a judge allows the request and makes an order adjourning the motion, the clerk will notify the parties of the new motion date.

Can I attend the motion by telephone or video conference?

A motion can be heard or conducted by telephone or video conference if facilities for a telephone or video conference are available at the court. A party can file a **Request for Telephone or Video Conference [Form 1B]**, indicating the reasons for the request. If the judge grants the request, the court will make the necessary arrangements and notify the parties.

When should I make my request to attend by telephone or video conference?

If you are the party making the motion, you should file your request when you file your motion with the court. If you are the responding party, you should file your request as soon as possible after you receive the notice of motion.

What if I think a party is trying to delay the proceeding by making unnecessary motions?

Rule 15.04 of the *Rules* provides that:

“If the court is satisfied that a party has tried to delay the action, add to its costs or otherwise abuse the court’s process by making numerous motions without merit, the court may, on motion, make an order prohibiting the party from making any further motions in the action without leave of the court.”

If you think that a party has made a large number of motions in order to increase costs or delay the progress of the case, you can make a motion under Rule 15.04 of the *Rules* to ask the court to make an order stopping the other party from making more motions unless the party has the court’s permission to do so.

Can a party request costs?

Depending on the circumstances, if you are the successful party at the motion, you can ask the court to order the other party to pay some costs to you. The *Rules* and the *Courts of Justice Act* address costs issues.



Checklist: Making a motion

If you are making a motion:

1. Schedule a hearing date, time and place with the Small Claims Court clerk.
2. Fill out the **Notice Of Motion [Form 15A]** and **Affidavit [Form 15B]**, including the date, time and location of the hearing.
3. At least 7 days before the hearing date, serve the notice of motion and supporting affidavit on the responding party or parties (refer to the “Guide to Serving Documents” for more information).
4. At least 3 days before the hearing date, file with the court the notice of motion and supporting affidavit and an **Affidavit Of Service [Form 8A]** for each party served.
5. Pay the filing fee.

If you are responding to a motion:

1. Fill out an **Affidavit [Form 15B]** to respond to the moving party’s notice of motion and affidavit.
2. At least 2 days before the hearing date, serve your affidavit on every party who has filed a claim or defence and file it with the court together with an **Affidavit of Service [Form 8A]** for each party served.

Remember, an **Affidavit [Form 15B]** must be sworn by the person making the affidavit. An **Affidavit of Service [Form 8A]** must be sworn by the person who served the documents.

Part Two: A motion in writing for an assessment of damages

What is a motion in writing for an assessment of damages?

There is one type of motion that can be made “in writing” under the *Rules*. It is called a “motion in writing for an assessment of damages.”

If all defendants have been noted in default and your claim is an “unliquidated” claim, then you can ask for an order from a judge for an assessment of damages. To get this order, you can either file a motion in writing for an assessment of damages or request an assessment hearing before a judge. Refer to the “Guide to Making a Claim” and the “Guide to Getting Ready for Court” for more information about assessment hearings.

If you choose to make a motion in writing for an assessment of damages, you do not have to attend a hearing before a judge. The documents you file should provide the court with everything you think will be required for a decision to be made.

I have filed a plaintiff's claim with more than one defendant. When can I make a motion in writing for an assessment of damages?

You may make a motion in writing for an assessment of damages where:

- all defendants in the claim have been served with the claim;

- no defendants have filed a defence; and
- all defendants have been noted in default.

If one or more defendants have not been served with the claim, you cannot obtain an assessment of damages against any defendants who have been served, because all defendants must be noted in default. The clerk will not note a defendant in default if he or she has not been served with the claim. For more information, refer to the “Guide to Serving Documents.”

If one or more defendants has filed a defence, you cannot obtain an assessment of damages against the other defendants. You will need to attend a settlement conference and, if necessary, a trial.

How do I make a motion in writing for an assessment of damages?

To make a motion in writing for an assessment of damages, file a **Notice of Motion [Form 15A]** and an **Affidavit [Form 15B]**. There is a fee for this process. Be sure to fill out the part of the notice of motion form that reads:

“This motion in writing for an assessment of damages is made by _____ (insert name) who asks the court for an order assessing damages against _____ (insert name) who have/has been noted in default.”

It is not necessary to serve a defendant who is noted in default with the notice of motion.

In the affidavit, you must set out the reasons why the motion should be granted and attach any relevant documents.

The judge will review the notice of motion and affidavit and may do one of the following:

- grant judgment;
- make an order requesting you to provide another affidavit; or
- make an order requiring you to attend an assessment hearing.

A copy of the order or the endorsement record containing the order will be mailed to you if you have provided the clerk with a stamped self-addressed envelope.

Example 3

Your neighbour accidentally broke your basement window and you had it repaired by ABC Windows for \$700. Your neighbour refuses to pay you, so you filed a claim at Small Claims Court. Your neighbour fails to file a defence and you make a written request to the clerk to note her in default. You need a judge to assess the amount of damages that she owes you, but you don't want to take time off work to attend an assessment hearing.

Instead, you file a notice of motion in which you indicate that it is a motion in writing for an assessment of damages. You set out the reasons why your neighbour owes you money in your supporting affidavit. You attach the invoice from ABC Windows

marked “paid” along with two other higher quotes you got from other window repair shops.

The judge reviews your written materials and grants judgment. The clerk mails the order to you in the stamped self-addressed envelope that you gave to the clerk when you filed your motion.

Example 4

Referring back to Example 3, instead of making the order, the judge reviewing your motion in writing for an assessment of damages notes that \$700 seems to be a lot of money for repairing a basement window. She decides she does not have enough information. She orders you to file another affidavit giving more explanation about the age and type of the window, and the damage done to it by the defendant.

You file another affidavit explaining that you had custom windows installed in your basement just last year. You also explain that your neighbour backed her car into the window when driving out of your mutual driveway causing damage to the window frame in addition to breaking the glass. You attach photographs of the repaired window to show that repairs were also made to the window frame.

The judge reviews your additional affidavit and makes an order. The clerk mails the order to you in the stamped self-addressed envelope that you gave to the clerk when you filed your motion.

If the judge orders you to attend an assessment hearing you should contact the court office to schedule the hearing. Refer to the “Guide to Getting Ready for Court” for information about preparing for an assessment hearing. Preparing for an assessment hearing is very similar to the process for preparing for trial.



Checklist: Motion in writing for assessment of damages

If you are bringing a motion in writing for an assessment of damages:

1. Confirm a hearing date with the Small Claims Court clerk. Your motion must be scheduled before a judge even though you do not need to attend the hearing.
2. Fill out the **Notice Of Motion [Form 15A]** including the date, time and location of the hearing, and an **Affidavit [Form 15B]** in support of the motion with documents referred to in the affidavit attached. These documents do not need to be served on the defendants because they have been noted in default.
3. At least 3 days before the hearing date, file at the court your notice of motion, supporting affidavit and attachments and a stamped self-addressed envelope.
4. Pay the filing fee.

Part Three: Clerk's orders on consent

What is a request for clerk's order?

Small Claims Court clerks can make orders only in the specific circumstances set out in the *Rules*. These orders can only be made if the written consent of all parties has been provided to the clerk. The clerk makes the order based on the **Request for Clerk's Order [Form 11.2A]** and the **Consent for Clerk's Order [Form 11.2B]** filed with the court. No hearing is required.

The consent form must state that no party who would be affected by the order is under legal disability, and that all parties to the action have received a copy of the request for clerk's order and consent for clerk's order forms. For more information on parties under legal disability, refer to the "What is Small Claims Court?" guide.

Note: Provided that the above criteria are met, it may be more cost-effective and efficient for the parties to get a clerk's order than to make a motion for a judge's order.

What kind of orders can the clerk make?

The clerk can make an order only for the following:

- amending a claim or defence (an order is required if the trial is less than 30 days away);
- adding, deleting or substituting a party (an order is required if the trial is less than 30 days away);
- setting aside a noting in default or default judgment against a party, and any specified step to enforce the judgment that has not yet been completed;
- restoring a matter that was dismissed under Rule 11.1 to the list;
- noting payment is made in full satisfaction of a judgment or terms of settlement; or
- dismissing an action.

See Rule 11.2 of the *Rules* for further details.

How does a party request a clerk's order on consent?

To request a clerk's order on consent:

1. Fill out the **Request for Clerk's Order [Form 11.2A]** indicating which of the above listed orders you want.
2. Fill out the **Consent for Clerk's Order [Form 11.2B]** to indicate that all parties consent to the order requested. Ask each party to sign the consent for clerk's order in the presence of his or her witness. If a party is being added or substituted, the signature of that new party is also required. If a party is being deleted, that party must also sign. If all parties do not consent, the clerk cannot make the order requested. If a party has been noted in default, his or her consent is not required.
3. Give each party who has signed the consent for clerk's order a copy of that form and a copy of the request for clerk's order form. The consent form states that each party has received a copy of the request for clerk's order and consent for clerk's order, and that no party who would be affected by the order is under legal disability.
4. File the completed request for clerk's order and the consent for clerk's order at the court together with a stamped self-addressed envelope.

What happens next?

The clerk will review the documents and, if the legal requirements of the *Rules* are met, the clerk will sign the order. The clerk will mail a copy of the order to a party who requested it if a stamped self-addressed envelope was provided.

Example 5

Referring back to Example 1, imagine you are the roofer. You put a roof on an addition to a customer's house and now the customer is suing you over a leaky roof and water damage to a rug and chair. In your defence you stated that Len's Shingles Ltd. is responsible for the damage because the shingles you installed were faulty. You also brought a defendant's claim against Len's Shingles Ltd.

You now realize that the company's name is actually Leonard's Shingles Ltd. You ask Leonard's Shingles Ltd. to agree to be substituted as a party for "Len's Shingles Ltd." on your claim form.

If Leonard's Shingles Ltd. agrees, you can prepare a request for clerk's order and consent for clerk's order for Leonard's Shingles Ltd. and the plaintiff to sign. You would give them a copy of the completed forms and then file the originals at the court together with a stamped self-addressed envelope. The clerk would then review the documents and make the order.

Can the clerk refuse to sign the clerk's order?

The clerk may refuse to make a for clerk's order if:

- the criteria set out in Rule 11.2 (discussed above) are not met;
- the consent of the parties is not filed; or
- the forms are incomplete.

When the clerk refuses to sign an order, the clerk will serve a copy of the request for clerk's order, with reasons for the refusal, on all parties.

Depending on the reasons the clerk gives for refusing to grant the order, the party can either amend the documents and re-submit the request for clerk's order, or make a motion before a judge for an order.

Example 6

In Example 5 above, if Leonard's Shingles Ltd. does not consent to be substituted as a party, the clerk cannot sign the order. In this case, you must make a motion before a judge to make the substitution. Refer to Part One of this guide on how to make a motion.

Checklist: Requesting a clerk's order on consent



1. Fill out the **Request for Clerk's Order [Form 11.2A]**.
2. Ask each party, including any party being added, substituted or deleted, to sign the completed **Consent for Clerk's Order [Form 11.2B]** in the presence of his or her witness.
3. After you get the consent form signed, but before you file it with the court, provide everyone who signed it with a copy and a copy of the request for clerk's order.
4. File both forms at the court together with a stamped self-addressed envelope.

Tips on Completing Forms in Small Claims Court

1. **BE NEAT.** These are court documents. All court forms must be typed, handwritten or printed legibly. It may cause delays if your forms cannot be read.

2. How to **COUNT DAYS FOR TIMELINES** in the *Rules of the Small Claims Court*:

When calculating timelines in the *Rules*, count the days by excluding the first day and including the last day of the period; if the last day of the period of time falls on a holiday, the period ends on the next day that is not a holiday.

Holidays include:

- any Saturday or Sunday
- New Year's Day
- Family Day
- Good Friday
- Easter Monday
- Victoria Day
- Canada Day
- Civic Holiday
- Labour Day
- Thanksgiving Day
- Remembrance Day
- Christmas Day
- Boxing Day
- any special holiday proclaimed by the Governor General or the Lieutenant Governor

NOTE: If New Year's Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday. If Christmas Day falls on a Saturday or Sunday the following Monday and Tuesday are holidays, and if Christmas Day falls on a Friday, the following Monday is a holiday.

The court can order, or the parties can consent to, the shortening or lengthening of the time prescribed by the *Rules*.

3. At the top of the forms, fill in the **NAME AND ADDRESS OF THE COURT** where you are filing the documents.
4. Once court staff provides a **COURT FILE NUMBER**, make sure it is written on the upper right-hand corner of **ALL** your documents.
5. Make enough **COPIES** of your completed forms. The court will stamp and return your copy of the forms so you can make copies for service. Usually you will require one copy for each party who must be served and one copy for your own records. In most cases, the court will keep the original form. There is a fee to have copies made at the court office. Refer to the "Guide to Fee Schedules" for more information.
6. **COURT FEES** must be paid to issue and file specific documents. A listing of Small Claims Court fees can be viewed at the Ministry of the Attorney General website at www.attorneygeneral.jus.gov.on.ca or you can refer to the "Guide to Fee Schedules." Fees are payable in Canadian funds, and can be paid by cash, cheque or money order payable to the Minister of Finance.
7. An **AFFIDAVIT** can be sworn before:
 - a Small Claims Court staff member who has been appointed a commissioner for taking affidavits (there is no fee for this service);
 - a lawyer who is entitled to practice law in Ontario;
 - a notary public; or
 - any other person who has been appointed a commissioner for taking affidavits in connection with court documents.

The affidavit must be signed in the presence of the person before whom it is sworn.

NOTE: It is a criminal offence to knowingly swear a false affidavit.

8. If your **ADDRESS FOR SERVICE** changes, you must serve written notice of the change on the court and all other parties within seven (7) days after the change takes place.

Any Comments?

Your feedback is important. Tell us how we can we help you better by taking a moment to comment on this Guide.

Put your response in the Customer Comment Box at any Small Claims Court location.

Was this Guide helpful to you?

Yes

No

Why?

What can we do to make this Guide better?

Thank you!

*Your feedback is requested to help us improve these guides.
Please do not provide any personal information.*