

DEFAULT PROCEEDINGS

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INTRODUCTION

In some cases, you can obtain a judgment on your claim under the *Rules of Civil Procedure (Rules)* without having to conduct an actual trial. There are a number of these types of judgments that the *Rules* refer to as “dispositions without trial,” including default judgments (Rule 19), summary judgments (Rule 20), the determination of an issue before trial (Rule 21) and special cases (Rule 22).

The main procedural difference between a default judgment and summary judgment is that summary judgment is when the defendant has delivered a Statement of Defence. A default judgment occurs when--in most cases--because a defendant has not delivered a Statement of Defence. For information about the summary judgment process (Rule 20) see the Tip Sheet called *Summary Judgment* on the Law Help Ontario website at www.lawhelpontario.org.

This Tip Sheet is restricted to default proceedings under Rule 19. Default proceedings under Rule 19 have two basic stages: (1) the defendant is first *noted in default*, and (2) obtains a *default judgment*. Default proceedings may also result in motions to set aside the noting in default or the default judgment.

Step #1: Noting a Defendant in Default

WHEN MAY A DEFENDANT BE NOTED IN DEFAULT?

A defendant may be ‘noted in default’ in one of two ways:

- i) ***If they have failed to deliver a Statement of Defence within the time period prescribed by the Rules.***

TIP: To “deliver” means serving a copy of the Statement of Defence and filing it with proof of service with the court.

In this case, in order to have the defendant noted in default, the plaintiff must file with the court proof of service of the Statement of Claim (normally an Affidavit of Service or of deemed service under subrule 16.01(2)), and make a requisition, requesting that the registrar note the defendant in default (see Rule 19.01(1)).

Until such time as a defendant has been formally noted in default, they may still deliver a Statement of Defence, even after the time period prescribed by the *Rules* has expired.

ii) *If a Statement of Defence has been delivered, but is struck out by the court.*

Where a court order has been obtained striking out a Statement of Defence either (a) without *leave* (permission) from the court to deliver another or (b) with leave to deliver another but they have failed to deliver one within the time period allowed, the plaintiff may have the defendant noted in default by filing a copy of the court order striking out the Statement of Defence and a requisition requesting that the registrar note the defendant in default (see Rule 19.01(2)).

TIP: *Leave (permission) from a judge is required to note a defendant in default who is under a legal disability (see Rules 19.01(4) & 7.07).*

WHAT IS THE EFFECT OF BEING NOTED IN DEFAULT?

Once noted in default, the defendant:

- is deemed to admit the truth of all allegations of fact in the Statement of Claim,
- may not file a defence or take any steps in the action except with the leave of the court or consent of the plaintiff (other than a motion to set aside the noting of default or any corresponding judgment), and
- is not entitled to any further notice of the proceedings, with some exceptions (see Rule 19.02 generally and Rule 19.02(3) specifically for the exceptions).

Once the defendant has been noted in default, the plaintiff can try to get a default judgment.

HOW DO I SET ASIDE A NOTING IN DEFAULT?

Where a defendant delivers a Statement of Defence with the consent of the plaintiff under Rule 19.02(1)(b), the noting of default against the defendant is deemed to have been set aside.

Otherwise, the defendant may bring a motion to set aside the noting of default. This motion should be brought promptly by the defendant to convince the court that the noting in default should be set aside. The noting of default may be set aside by the court on “such terms as are just” (see Rule 19.03(1)). Relevant factors that the court may consider on the motion to set aside the noting of default include:

- the behaviour of the parties;
- the length of the defendant's delay;
- the reasons for the delay; and
- the complexity and value of the claim

In short, the court generally requires that the defendant explain his or her failure to file a Statement of Defence on time and demonstrate an intention to defend against the claim.

IF THERE IS A NOTING IN DEFAULT, CAN I AUTOMATICALLY OBTAIN A DEFAULT JUDGMENT?

No. Even though a defendant has been noted in default, this does not necessarily mean that the plaintiff will be entitled to obtain a default judgment.

Step #2: Default Judgment

WHAT IS A DEFAULT JUDGMENT?

A default judgment is a judgment entered against a defendant for failure to comply with the *Rules*, such as for the failure to deliver a Statement of Defence to a claim. The procedure to obtain default judgment is set out in Rule 19.

HOW DO YOU OBTAIN A DEFAULT JUDGMENT?

A default judgment may be obtained by, i) the registrar signing default judgment or ii) on motion to a judge.

(i) By Requisition to the Registrar (Rule 19.04)

- ***Claims for which the Registrar may sign Default Judgment***

A default judgment can be signed by the registrar with interest (prejudgment and post-judgment) and costs where the claim is for:

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

TIP: A ***liquidated*** claim is an amount to which the plaintiff is entitled that is fixed or is capable of being fixed by mathematical calculations agreed upon. An example would be a specific amount of monies loaned but not repaid, resulting in the claim.

- **Documents that must be filed with the Registrar**

The plaintiff must file with the registrar the relevant default judgment form (i.e. Form 19A, 19B or 19C) and a Requisition for Default Judgment (Form 19D). Where default judgment is signed by the Registrar, no attendance before a judge is necessary and no separate affidavit material needs to be filed.

- **Registrar may decline to sign Default Judgment**

The registrar may decline to sign default judgment if he or she is uncertain about whether the claim falls within the categories for which default judgment may be signed by the registrar (as outlined above), or of the amount or rate recoverable for interest (see Rule 19.04 (3)).

If the Registrar declines to sign default judgment, the plaintiff may:

- (1) bring a motion (a court hearing) for default judgment before a judge (see Rule 19.04(3.1)(a)); or
- (2) bring a motion for default judgment to the court (which may be to a master) if the claim properly falls within those for which the registrar may sign default judgment (see Rule 19.04(3.1)(b)).

(ii) By Motion to a Court (Rule 19.05)

Where the plaintiff's claim is not one for which the registrar can sign default judgment, the plaintiff may bring a motion to a judge for judgment in accordance with Rule 19.05. Where the claim is for **unliquidated** damages, the motion must be supported by affidavit evidence.

TIP: An **unliquidated** claim is one in which the amount in dispute is not fixed and the court must determine the amount that the plaintiff is entitled to receive. For more information about preparing affidavits and the procedure on motions, see the other guidebooks in this series called *A Guide to Motions in Civil Actions* and *A Guide to Preparing Your Affidavit*, available on Law Help Ontario's website at www.lawhelpontario.org.

WHAT ORDERS MAY A COURT MAKE ON A MOTION FOR DEFAULT JUDGMENT?

On a motion for default judgment, a court may:

- Grant the motion for default judgment;
- Dismiss the motion for default judgment; or

- Order that the action proceed to trial and that oral evidence be presented.

If a trial is ordered, it will take place in front of a judge, but the defendant noted in default will not defend the claim. A motion for judgment on the Statement of Claim against a defendant noted in default may be made at the trial.

WHAT IS REQUIRED IN ORDER TO OBTAIN A DEFAULT JUDGMENT ON A MOTION FOR DEFAULT JUDGMENT?

Even though a defendant has been noted in default, this does not necessarily mean that the plaintiff will automatically obtain a default judgment on a motion for default judgment.

When a defendant is noted in default, the facts alleged in the Statement of Claim are deemed to be true. However, in order to obtain default judgment, the facts alleged in the statement of claim must entitle the plaintiff to judgment (see Rule 19.06). The example below demonstrates the difference between *facts deemed to be true* and *facts deemed to be true which also entitle the plaintiff to judgment*.

Example 1:

The plaintiff's statement of claim may allege that the plaintiff fell and broke his leg while walking up the defendant's driveway. If this is all that is alleged, there is no basis in law to hold the defendant liable because there is no allegation that the defendant was negligent in any way or caused or contributed to the plaintiff's fall, thereby explaining the basis for the defendant's liability to pay damages.

HOW DO I SET ASIDE A DEFAULT JUDGMENT?

The procedure for setting aside a default judgment is set out in Rule 19.08. The defendant against whom default judgment has been obtained may bring a motion to have it set it aside or have it varied.

There are two kinds of motions that can set aside default judgment. The motion you bring depends on what type of default judgment has been obtained:

- (i) If the default judgment was signed by the registrar or granted by the court on motion under Rule 19.04, the motion to set aside default judgment may be made to the *court*, (i.e., to a judge or a case management master).
- (ii) If the default judgment was obtained on a motion for judgment to a judge under rule 19.05(1) or obtained after a trial is ordered under Rule 19.05 (4), the motion to set aside default judgment must be made to a *judge*.

On either motion the court may set aside or vary the default judgment on such terms as are just. On the setting aside of either type of default judgment noted above the court may also set aside the noting in default under Rule 19.03.

HOW DOES THE COURT DECIDE WHETHER TO SET ASIDE A DEFAULT JUDGMENT?

Whether or not to grant a motion to set aside a default judgment requires the court to exercise its discretion. The court will instead consider all of the relevant circumstances. This means that no single factor will decide the motion one way or another.

Ultimately, the court must determine whether the interests of justice favour an order setting aside the default judgment. In doing so, the court may consider factors such as:

- the reasons for the failure to file a Statement of Defence on time;
- any demonstrated intention to defend and/or bring the motion to set aside promptly;
- whether or not there is a defence on the merits of the action (i.e., an arguable case);
- any potential prejudice to the parties; and
- the effect of any order on the integrity of the administration of justice.

IF THE MOTION TO SET ASIDE A DEFAULT JUDGMENT IS UNSUCCESSFUL, WHAT HAPPENS NEXT?

An order dismissing a motion to set aside a default judgment is a final order of a judge of the Superior Court of Justice. An appeal from that decision may be made to either the Divisional Court or the Ontario Court of Appeal, depending on the monetary value of the claim.

A right of appeal lies with the Divisional Court where the final order dismissing the motion to set aside default judgment is one of the following:

- a) for a single payment of not more than \$50,000 (exclusive of costs);
- b) for periodic payments that amount to not more than \$50,000 (exclusive of costs), in the 12 months commencing on the date the first payment is due under the order;
- c) dismissing a claim for an amount that is not more than the amount set out in (a) or (b); or
- d) dismissing a claim for an amount that is more than the amount set out in (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in (a) or (b).

If the final order dismissing the motion for default judgment does not fall into one of the above four categories, then the appeal must be made to the Ontario Court of Appeal. This appeal is as of right, meaning that you do not have to get leave from the Court of Appeal in order to serve and file the appeal.

TIP: *The Courts of Justice Act sets out the jurisdiction of the Ontario Court of Appeal (section 6) and the Divisional Court (section 19). Deciding what court you should appeal to can be complicated and the amount of time you have to appeal is usually not very long. You should get legal advice if you are thinking about appealing a decision dismissing a motion to set aside a default judgment.*

WHERE CAN I GET MORE INFORMATION?

The Ministry of the Attorney General has a series of guides that are available at court offices and at the Ministry of the Attorney General website. The site also has general information on civil cases: www.attorneygeneral.jus.gov.on.ca

Choose your preferred language, click on "Court Services" at the left side of the page, and scroll down to "Civil Cases."

Legal research resources are accessible to the public through CanLII available at: <http://www.canlii.ca>

To obtain forms under the *Rules of Civil Procedure*, visit the Ontario Court Forms website at: <http://www.ontariocourtforms.on.ca>. Choose your preferred language and click on "Rules of Civil Procedure Forms".

The "Guide to Ontario Courts" is available through: <http://www.ontariocourts.on.ca/>

The *Rules of Civil Procedure* are available through the e-laws website. Go to www.e-laws.gov.on.ca and follow these steps:

1. Choose your preferred language
2. Click on "Search or Browse Current Consolidated Law"
3. Under "Browse Current Consolidated Law," click on "C"
4. Scroll down to "Courts of Justice Act"
5. Click on the "plus" sign to the left of "Courts of Justice Act"
6. Click on "Rules of Civil Procedure"