Default in civil proceedings

The act of noting default (or of default, if one is a defendant) may quickly bring proceedings to a close. This procedure is useful when a defendant, who has been properly served, fails to file a defence within a prescribed timeline. In such circumstances, the defendant may be noted in default, thus absolving the plaintiff of establishing the cause of action.

Default is governed by rule 19.

A party noted in default loses many of the procedural rights afforded to it by the *Rules of Civil Procedure*. In short, the defaulting party is deemed to admit all of the alleged facts in the statement of claim. A deeming provision, such as rule 19.02 in this case, is a powerful one, for it creates a legal fiction that binds counsel and the courts.

The defaulting party loses the right to take any step in the proceeding other than moving to set aside noting in default. The defaulting party also loses the right to notice in the proceeding.

Circumstances giving rise to noting default

Rule 19.01 allows default to be noted in the following circumstances:

1. the defendant fails to deliver a defence within thirty (30) days; or
2. the defence is struck out on a pleadings motion and the defendant has not obtained leave to file another or has not filed a defence within the required timeline.

A co-defendant may note a fellow defendant in default if the plaintiff fails to undertake this procedure (sub-rule 19.01[3]).

Party under disability

A party under disability (see rule 7) cannot be noted in default without leave of a judge. Leave must be obtained by motion.

Caveat--rule 19.03

Noting default is not a procedure taken lightly. It is not a wrote procedure that ignores the other parties' disposition toward the action. The Court may set aside a default pursuant to rule 19.03 on terms that it considers just.

Avoid sharp practice

Counsel is required to avoid sharp practice, and noting default may be construed as sharp practice if not done correctly. Opposing counsel must have the opportunity to cure its default. If plaintiff's counsel does not provide such an opportunity, plaintiff's counsel must have a cogent and compelling

explanation for proceeding.

The Court has applied the *Rules of Professional Conduct* to interpret counsel's obligations one toward another. In *Bank of Montreal v D'Angelo*, the Court looked unfavourably upon counsel noting default and obtaining judgment when it knew that opposing counsel intended to provide a defence and did not inquire or warn opposing counsel of his intention to note default (

paras. 18-21

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A defendant or a defendant's solicitor who becomes aware of a claim, yet takes no overt steps to respond or indicate an intention to respond, may be noted in default without further notice (*Canadian Automation & Tool International Inc. v. 381922 Ontario Ltd.*,

paras. 25-6

).

The test for setting aside default

The test for setting aside default is extrapolated from rule 19.03. The test is based on judicial appreciation of each case: context matters quite a bit. The Court of Appeal laid down five criteria:

1. whether the motion was brought promptly after the defendant learned of the default judgment;
2. whether the defendant has a plausible excuse or explanation for the default;
3. whether the defendant has an arguable defence on the merits;
4. the potential prejudice to the defendant should the motion be dismissed, and the potential prejudice to the plaintiff should the motion be allowed; and
5. the effect of any order the court might make on the overall integrity of the administration of justice. (2015 ONCA 205, para. 14)

These are not rigid rules; the Court will generally assess

> “the context and factual situation” of the case: Bardmore, at p. 284 O.R. It should particularly consider such factors as the behaviour of the plaintiff and the defendant; the length of the defendant's delay; the reasons for the delay; and the complexity and value of the claim. These factors are not exhaustive. See Nobosoft Corp. v. No Borders Inc., [2007] O.J. No. 2378, 2007 ONCA 444, 225 O.A.C. 36, at para. 3; Flintoff v. von Anhalt, [2010] O.J. No. 4963, 2010 ONCA 786, at para. 7. Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it: see, e.g., Enbridge Gas Distribution Inc. v. 135 Marlee Holdings Inc., [2005] O.J. No. 4327, [2005] O.T.C. 891 (S.C.J.), at para. 8. Only in extreme circumstances, however, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits: Bardmore, at p. 285 O.R. (2015 ONCA 205, para. 13)

The Court will consider additional criteria that preserve the administration of justice, which, in cases of default, relate to parties' right to have their claims heard and adjudicated based on their merits. The Court balances the respective prejudice to the plaintiff and the defendant if the action is allowed to proceed.

If a defendant submits a defence that has merit, the Court will often set aside default (2014 ONCA

194, para. 51.

If, however, a defendant consciously chooses to ignore the process, thus running the risk of being noted in default, the Court will not consider a defence for its merits (2013 ONCA 151, para. 1).

Firm policy

The firm's policy is that timelines matter, especially when a client's interest in litigation is concerned. We will go out of our way to notify opposing counsel or a self-represented defendant of any circumstances that would required us to note default. We will provide opportunities to cure defaults.

This policy, however, does not apply to a defendant who decides not to participate or flat out ignores the legal process. A defendant who does not participate will be noted in default at the earliest opportunity.

Similarly, if all efforts to cure a default fail, we will note default.

When opposing counsel has taken an inordinate amount of time to file a defence, we will send a letter to counsel indicating that default is immanent (i.e., within twenty-four or forty-eight hours).

Procedure

–> The template requisition for noting default is found on the templates page.

1. Calculate timeline for service of defence (and any extensions granted); constate technical failure to serve and file defence.
2. Review service of originating process to ensure proper service.
3. **IF** defendant has not appointed counsel AND has not responded, prepare requisition for default.
4. **ELSE** prepare and send letter to opposing counsel or defendant explaining default and requiring a defence within twenty-four to forty-eight hours.
5. If no defence forthcoming, file *requisition for default* with court.
6. **IF** claim is for liquidated damages, prepare and file paperwork to request registrar sign judgment.
7. **ELSE** prepare and file motion record for judgment *per* rule 19.05: affidavit, factum; obtain court date.

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