

## **DISPOSITION WITHOUT TRIAL**

### **RULE 19**

#### **DEFAULT PROCEEDINGS**

##### **NOTING DEFAULT**

###### **Where no Defence Delivered**

- 19.01** (1) Where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or of deemed service under subrule 16.01(2), require the registrar to note the defendant in default. (Form 19A)

###### **Where Defence Struck Out**

- (2) Where the statement of defence of a defendant has been struck out,
- (a) without leave to deliver another; or
  - (b) with leave to deliver another, and the defendant has failed to deliver another within the time allowed,
- the plaintiff may, on filing a copy of the order striking out the statement of defence, require the registrar to note the defendant in default.

###### **Noting of Default by Co-defendant**

- (3) Where a plaintiff has failed to require the registrar to note a defendant in default, the court on motion of any other defendant who has delivered a statement of defence, on notice to the plaintiff, may order the registrar to note the other defendant in default.

###### **Party under Disability**

- (4) A defendant under disability may not be noted in default without leave of a judge obtained on motion under Rule 7.07.

###### **Late Delivery of Defence**

- (5) A defendant may deliver a statement of defence at any time before he or she has been noted in default under this rule.

##### **CONSEQUENCES OF NOTING DEFAULT**

- 19.02** (1) A defendant who has been noted in default,
- (a) is deemed to admit the truth of all allegations of fact made in the statement of claim; and
  - (b) shall not deliver a statement of defence or take any other step in the action, other than a motion to set aside the noting of default or any judgment obtained by reason of the default, except with leave of the court or the consent of the plaintiff.
- (2) Notwithstanding the provisions of any other rule, where a defendant has been noted in default, any step in the action that requires the consent of a defendant may be taken without the consent of the defendant in default.
- (3) Notwithstanding the provisions of any other rule, a defendant who has

been noted in default is not entitled to notice of any step in the action and need not be served with any document in the action, except where the court orders otherwise or where party requires the personal attendance of the defendant, and except as provided in,

- (a) subrule 26.04(3) (amended pleading);
- (b) subrule 27.04(3) (counterclaim);
- (c) subrule 28.04(2) (crossclaim);
- (d) subrule 29.11(2) (fourth or subsequent party claim);
- (e) subrule 54.08(1) (motion for confirmation of report on reference);
- (f) subrule 54.09(1) (report on reference);
- (g) subrule 54.09(3) (motion to oppose confirmation of report on reference);
- (h) subrule 55.02(2) (notice of hearing for directions on reference);
- (i) clause 64.03(8)(a) (notice of taking of account in foreclosure action);
- (j) subrule 64.03(24) (notice of reference in action converted from foreclosure to sale);
- (k) subrule 64.04(7) (notice of taking of account in sale action);
- (l) subrule 64.06(8) (notice of reference in mortgage action);
- (m) subrule 64.06(17) (report on reference in mortgage action);
- (n) subrule 64.06(21) (notice of change of account);
- (o) subrule 70.10(3) (counterpetition);
- (p) subrule 70.16(5) (notice of director of child welfare's intention to investigate and report); and
- (q) subrule 70.16(9) (director of child welfare's report).

### **SETTING ASIDE THE NOTING OF DEFAULT**

- 19.03** (1) The noting of default may be set aside by the court on such terms as are just.
- (2) Where a defendant delivers a statement of defence with the consent of the plaintiff under clause 19.02(1)(b), the noting of default against the defendant shall be deemed to have been set aside.

### **BY SIGNING DEFAULT JUDGMENT**

#### **Where Available**

- 19.04** (1) Where a defendant has been noted in default, the plaintiff may require the Registrar to sign judgment against the defendant in respect of a claim for,
- (a) a debt or liquidated demand in money, including interest if claimed in the statement of claim (Form 19B);
  - (b) the recovery of possession of land (Form 19C);

- (c) the recovery of chattels (Form 19D); or
- (d) foreclosure, sale or redemption of a mortgage (Forms 64B to 64D, 64G to 64K and 64M).

#### **Requisition for Default Judgment**

- (2) Before the signing of default judgment, the plaintiff shall file with the Registrar a requisition for default judgment (Form 19E),
  - (a) stating that the claim comes within the class of cases for which default judgment may properly be signed;
  - (b) stating whether there has been any partial payment of the claim and setting out the date and amount of any partial payment;
  - (c) where the plaintiff has claimed prejudgment interest in the statement of claim, setting out how the interest is calculated;
  - (d) where the plaintiff has claimed postjudgment interest in the statement of claim at a rate other than as provided in section 51 of the *Supreme Court Act*, setting out the rate; and
  - (e) stating whether the plaintiff wishes costs to be fixed by the Prothonotary or assessed.

#### **Registrar may Decline to Sign Default Judgment**

- (3) The Registrar may decline to sign default judgments if uncertain,
  - (a) whether the claim comes within the class of cases for which default judgment may properly be signed; or
  - (b) of the amount or rate that is properly recoverable for prejudgment or postjudgment interest.
- (3.1) If the Registrar declines to sign default judgment, the plaintiff may,
  - (a) move before a judge for judgment under Rule 19.05; or
  - (b) in the case of a claim referred to in subrule (1), make a motion to the court for default judgment.

#### **Where Claim Partially Satisfied**

- (4) Where the claim has been partially satisfied, the default judgment shall be confined to the remainder of the claim.

#### **Postjudgment Interest**

- (5) Revoked 1991.

#### **Costs**

- (6) On signing a default judgment, the Registrar shall fix the costs under Tariff A to which the plaintiff is entitled against the defendant in default and shall include the costs in the judgment unless,
  - (a) the judgment directs a reference; or
  - (b) the plaintiff states in the requisition that he or she wishes to have the costs assessed,in which case the judgment shall include costs to be determined on the reference or on assessment.

### **BY MOTION FOR JUDGMENT**

- 19.05** (1) Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed.
- (2) A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages, a divorce or a declaration of the invalidity of a marriage.
- (3) On a motion for judgment under subrule (1), the judge may grant judgment, dismiss the action or order that the action proceed to trial and that oral evidence be presented.
- (4) Where an action proceeds to trial, a motion for judgment on the statement of claim against a defendant noted in default may be made at the trial.

### **FACTS MUST ENTITLE PLAINTIFF TO JUDGMENT**

**19.06** A plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

### **EFFECT OF DEFAULT JUDGMENT**

**19.07** A judgment obtained against a defendant who has been noted in default does not prevent the plaintiff from proceeding against the same defendant for any other relief.

### **SETTING ASIDE DEFAULT JUDGMENT**

- 19.08** (1) A judgment against a defendant who has been noted in default that is signed by the Registrar or granted by the court on motion under Rule 19.04 may be set aside or varied by the court on such terms as are just.
- (2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just.
- (3) On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under Rule 19.03.

### **APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS**

**19.09** Rules 19.01 to 19.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims, subject to Rules 28.07 (default of defence to crossclaim) and 29.07 (default of defence to third party claim).

*Jorand Holdings & Ors. v. Pecoskie & Ors.* 2007 PESCTD 17.

The court granted a motion by one of the defendants to have the default judgment entered against him set aside. In seeking such relief, it is not necessary for the applicant to establish all three elements of the test for granting relief.

*Dockendorff v. Bank of Montreal* 2003 PESCTD 19; (2003), 224 Nfld. & P.E.I.R. 4

The court allowed the defendant's motion to set aside a default judgment. The court found the motion had been made as soon as possible after the defendant became aware of the judgment; the defendant had a plausible explanation for the default; and the defendant had an arguable defence on the merits. The court held that the guiding principle in motions under this Rule is to lean in favor of an affirmative answer to the questions which comprise the test because a party should not suffer judgment without a full hearing on the merits.

*Roberts v. S-G Transport Ltd.* (1998), 160 Nfld. & P.E.I.R. 128 (P.E.I.S.C.-T.D.)

The defendant had been noted in default on a number of actions commenced by the plaintiff in the Small Claims Division and it applied to set the various notices aside. The court reconsidered the test applied in *Campbell v. Allen* (1992), 97 Nfld. & P.E.I.R. 191 (P.E.I.S.C.-T.D.), and concluded that to set aside a notice in default it was not necessary to show a valid defence on the merits; however, it was necessary to show; (1) a continued intention to defend; (2) no great delay and; (3) that the failure to defend was due to inadvertence. The test for setting aside a default judgment is more onerous than the test for setting aside a notice in default

*Bank of Nova Scotia v. MacKinnon* (1996), 146 Nfld. & P.E.I.R. 53 (P.E.I.S.C.-A.D.)

The test in this province for setting aside a default judgment on the ground the defendant has a defence to the claim of the plaintiff is not the same as the test for entering summary judgment against a defendant pursuant to Rule 20. The test is whether the defendant can show an arguable case on the merits.

*Huynh v. Mills*, [1994] 1 P.E.I.R. 334 (P.E.I.S.C.-T.D.)

Although a defendant, upon being noted in default, is deemed to have admitted the truth of the allegations made in the statement of claim, a plaintiff is not automatically entitled to a default judgment in the amount of the claim unless the facts entitle the plaintiff to judgment. Rule 19.06 contemplates that additional affidavit or oral evidence may be presented on a motion for judgment after default.

*Campbell v. Allen* (1992), 97 Nfld. & P.E.I.R. 191 (P.E.I.S.C.-T.D.)

The defendant had been noted in default but default judgment had not been entered. The Court applied the same test for setting aside a default judgment and set aside the notice in default having been satisfied that; (1) the defendant moved quickly to set aside the notice; (2) the defendant had an explanation for the default; and (3) the defendant had a good defence, on the merits, to the claim.

*Irving Oil Ltd. v. Nichols and Jars Distributors Ltd.* (1992), 101 Nfld. & P.E.I.R. 249 (P.E.I.S.C.-T.D.)

Prothonotary has jurisdiction to sign judgment against a defendant but a Registrar does not.

*Huynh v. Mills* (1991), 96 Nfld. & P.E.I.R. 295 (P.E.I.S.C.-T.D.)

The Court found that while the defendant did not have a satisfactory explanation for his failure to file a statement of defence and while the defendant failed to show he had a good defence on the merits, Rule 19.05(1) clearly envisaged that a motion for default judgment is to be made to a judge and not the prothonotary as an uncontested matter under Rule 37.02(2). As the default judgment had been entered against the defendant by order of the prothonotary, it was set aside and it was ordered that the motion for default judgment be brought before a judge.

*P.D. Construction Ltd. v. Bearsto (J.R.) Sales (1978) Ltd.* (1992), 100 Nfld. & P.E.I.R. 266 (P.E.I.S.C.-T.D.)

There are three requirements that an applicant must meet before a judgment against him should be set aside; (1) the motion to set aside the judgment should be made as soon as

possible after the applicant becomes aware of the existence of the judgment; (2) the applicant's affidavit should set out the circumstances under which the default arose and give a plausible explanation for the default; (3) the applicant must have at least an arguable case to present on the merits. Mere delay will not bar the application unless an irreparable injury will be done to the plaintiff or the delay has been wilful. The application should be supported by an affidavit setting out the circumstances under which the default arose and disclosing a defence on the merits.