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## Part 3 - Default and Discontinuance

### Rule 8 - Default Judgment

#### Educational Notes

##### *How This Rule Works*

This Rule replaces the previous Rule 12 - Default of Defence for actions. Default judgment remains available from the prothonotary (R.8.02) or a judge (R.8.03), depending on the circumstances. In both cases, it may be granted on the basis that all pleadings in support of the claim have been admitted (R.8.05).

It is possible to get partial default judgment under R.8.04. A party can obtain default judgment on an undefended claim and proceed to trial on another claim defended by the same party.

Rule 8.02 clearly sets out what is required to obtain default judgment from the prothonotary -

- a. proof of proper notice;
- b. the time for filing has expired;
- c. no defence has been filed; and
- d. the judgment is for damages only.

Rules 8.06 and 8.07 detail the method by which damages are calculated for the prothonotary. Even if a demand for notice has been filed, the motion may still be made to the prothonotary (R.8.02(2)(b)).

If damages need to be assessed, or another remedy is sought, default judgment is obtained on motion to a judge (R.8.03 and 8.08) with the judge assessing damages under Rule 70 - Assessment of Damages or by reference and report under Rule 11 - Reference. Generally, assessments of damages will be conducted using a motion by appointment (R.25), which may be made *ex parte*, as the other party is disentitled to notice (R.22.03(1)(c)).

Rule 8.10 expressly sets out that it is an abuse of process to obtain a default judgment without reasonable warning if the opposing party has (a) advised in writing that they intend to defend the claim; (b) made or defended another claim in the same proceeding; or (c) retained counsel to deal with the claim and provided contact information for counsel. Judgments so obtained may be set aside under Rule 88 - Abuse of Process.

##### *Highlights of Changes*

*Scope of Rule 8* - One key change to this area is that while the previous R.12 applied broadly to any "originating notice," Rule 8 applies only to actions, not applications. Summary disposal of applications is dealt with in R.5.14.

*Mortgages* – the provisions relating to default in actions on mortgages are now found in R.72 - Mortgages.

*Filing Deadlines Changed* - The deadlines for filing a defence have changed slightly for actions filed after January 1, 2009. For service in Nova Scotia, the 15 day deadline

## Rule 8 - Default Judgment

amounts to three full weeks, 30 days to six weeks, and 45 days to 9 full weeks, not including holidays. For actions filed before January 1, 2009, the previous Rules continue to govern the notice period for giving notice of an action to a person, and motions for default judgment (R.92.05).

Location where Defendant is Served	Old Rule 11.02	New Rule 31.12 Note - All days are clear business days
Service in Nova Scotia	20 days	15 days
Service elsewhere in Canada	40 days	30 days
Service in the USA	40 days	45 days
Service in any other country	60 days	45 days

To illustrate the differing time periods for filing a defence, assume a notice of action and statement of claim are served on a defendant in Nova Scotia on October 1, 2008. Under the current Rules, 20 days for filing a defence would expire on October 21. Under the new Rules, 15 days would make the last day to file a defence October 24 (15 clear business days, plus the Thanksgiving Holiday Monday.)

Rule 31.03 governing notice is titled “person to whom personal service must be made” and goes on to specify methods of service for all types of bodies. Section 7(1)(s) of the *Interpretation Act*, R.S.N.S. 1989, c. defines “person” to include a corporation and a person’s heirs, executors, administrators or other legal representatives. Rule 94.08 specifies that “person” includes a non-party.

*Prejudgment Interest* – Allowable pre-judgment interest has been reduced from 6% to 5%.

### *Practice Tip*

Defence counsel should continue to follow the practice of writing to the plaintiff or plaintiff’s counsel immediately after being retained, as this will prevent the plaintiff from obtaining default judgment without a reasonable warning.

### **8.01 - Scope of Rule 8**

- (1) A party who makes a claim against another party in an action may make a motion for default judgment, in accordance with this Rule.
- (2) This Rule does not apply to an application, and an applicant may make a motion for summary disposal of an application in accordance with Rule 5.14, of Rule 5 - Application.

### **8.02 - Default judgment by prothonotary**

- (1) The prothonotary may grant default judgment, if all of the following apply:

## Rule 8 - Default Judgment

- (a) the party against whom judgment is sought is notified of the claim in accordance with Rule 31 - Notice;
  - (b) the time for filing a defence is expired under Rule 31 - Notice;
  - (c) no defence is filed;
  - (d) the judgment is for damages only.
- (2) A motion for a default judgment must be made in one of the following ways:
- (a) if no demand for notice was filed by the party against whom judgment is sought, by filing a draft order for judgment, a bill of costs, and proof of notification, as provided in Rule 31 - Notice;
  - (b) if a demand for notice was filed or the party seeking default judgment chooses to do so on notice, by making a motion to the prothonotary on notice in accordance with Rule 30 - Motion to Prothonotary.

### **8.03 - Default judgment by judge**

A judge may grant default judgment in any action on any claim, if the party against whom judgment is sought is notified in accordance with Rule 31 - Notice, the time for filing a defence is expired, and no defence is filed.

### **8.04 - Judgment on one claim only**

A party may have default judgment on an undefended claim against another party, and proceed to trial on another claim defended by that same party.

### **8.05 - How terms of default judgment are determined**

The terms of a default judgment may be determined on the basis that all pleadings in support of the claim have been admitted.

### **8.06 - When amount is determined by prothonotary**

A prothonotary must refer the assessment of the amount of a default judgment to a judge, unless the judgment is sought in an action brought by notice of action for debt, or the pleadings of the party who makes a motion for default judgment provide both of the following:

- (a) a claim in the same amount as in the default judgment or a claim for an amount to be calculated in accordance with a formula that leads to the same amount as in the proposed default judgment;
- (b) pleaded facts that, taken as admitted, clearly show that the amount is due, such as a liquidated demand pleaded in sufficient detail.

**8.07 - How amount is determined by prothonotary**

- (1) The prothonotary must assess the amount for judgment in an action brought by notice of action for debt, in accordance with the following formula:
  - (a) the amount claimed for principal;
  - (b) the dollar amount claimed for interest, if there is an express agreement for payment of interest;
  - (c) calculated interest from the day stated in the notice of action for debt, if there is an express agreement for payment of interest;
  - (d) if there is no claim for agreed interest but prejudgment interest is claimed, interest at five percent a year calculated simply from the day the debt came due according to the pleadings;
  - (e) necessary and reasonable disbursements approved by the prothonotary, including the cost of giving notice and filing documents; plus
  - (f) costs under Tariff D referred to in Rule 77 - Costs; less
  - (g) any credits to which the judgment debtor is entitled.
- (2) The prothonotary must allow disbursements, costs, and credits in an action the same as in an action brought by notice of action for debt, and must assess damages in accordance with the following formula:
  - (a) the specific amount pleaded or specifically calculated; plus
  - (b) prejudgment interest, if it is claimed, at five percent a year calculated simply from the day the claim arose according to the pleadings; less
  - (c) any credits to which the judgment debtor is entitled.

**8.08 - Assessment or other remedy by judge**

- (1) A judge may assess damages, or grant any other remedy, on a default judgment.
- (2) The judge may defer the assessment of damages, or granting another remedy, in either of the following situations:
  - (a) a claim on which damages are to be assessed is defended by another party and the amount is in issue;
  - (b) the judgment debtor is defending another claim of the judgment creditor in the same action, and facts to be found on assessment of damages, or for granting another remedy, are in issue in the defended claim.
- (3) Rule 70 - Assessment of Damages, including Rules 70.03 and 70.04 about notice, applies to a motion for an assessment or other remedy by a judge under this Rule.

**8.09 - Setting aside default judgment**

A judge may set aside a default judgment issued by the prothonotary or made on an *ex parte* motion by a judge.

**8.10 - Judgment by sharp practice**

- (1) It is an abuse of process to obtain a default judgment without giving reasonable warning to a party who does any of the following:
  - (a) in writing, advises the party making the claim that the party intends to defend it;
  - (b) to the knowledge of the party making the claim, makes or defends another claim in the same action;
  - (c) in writing, advises that counsel has been retained in respect of the claim and gives information by which counsel may be contacted.
- (2) An abusively obtained default judgment may be set aside under Rule 88 - Abuse of Process.

## Rule 9 - Discontinuance

### Educational Notes

This Rule deals with discontinuation of entire proceedings as well as withdrawing claims or defences in a proceeding. "Proceeding" is the umbrella term used to include actions, applications, judicial reviews and appeals (R.94.10). It includes special provisions for dealing with discontinuation of an action for debt (R.9.04).

The deadline for discontinuing an action, or withdrawing a claim or defence as of right has changed. Under the previous R.40.01 this could be done up to the time the matter is "entered for trial." Under R.9, a party may discontinue an action as of right before the day of the trial readiness conference (which is held at least 40 days before the trial date.) Similarly, a claim or defence in an action may be withdrawn at any time before the trial readiness conference.

An application, judicial review proceeding, or appeal may be discontinued as of right at any time before the day of the hearing. A ground in an application, notice of contest, judicial review, appeal, or contention may also be withdrawn as of right before the day of the hearing. After these deadlines, they may be only discontinued or withdrawn with permission of a judge (R.9.02(2)).

Discontinuance automatically discontinues any counterclaims, crossclaims or third party claims ten days after delivery of the notice of discontinuance, unless the party making the claim files a notice continuing it (R.9.03).

Rule 9 includes more judicial flexibility on costs than the previous R.40.03. Rule 40.03 required payment of costs "to the date of giving notice." Under R.9.06(2), this is eliminated in favour of making the stage of the proceeding a relevant factor to consider when assessing costs.

As under the previous R.40.04, discontinuance of a proceeding or withdrawal of a cause of action does not give rise to a defence of *res judicata*, but under R.9.07, a judge may impose terms concerning a subsequent proceeding. A subsequent proceeding that amounts to an abuse of process may be controlled under Rule 88 - Abuse of Process.

### 9.01 - Scope of Rule 9

A party who starts a proceeding may discontinue the proceeding, and a party advancing a claim or defence in a proceeding may withdraw the claim or defence, in accordance with this Rule.

### 9.02 - Discontinuing a proceeding

- (1) A party who starts an action may discontinue the proceeding before the day of the trial readiness conference and a party who starts an application, a proceeding for judicial review, or an appeal, may discontinue the proceeding before the day of the hearing.
- (2) A party may discontinue a proceeding at any time with the permission of a judge.
- (3) A party may discontinue a proceeding by filing a notice of discontinuance.

## Rule 9 - Discontinuance

- (4) The notice of discontinuance must contain the standard heading, be entitled "Notice of Discontinuance", be dated and signed, and include a statement that the party discontinues the proceeding.
- (5) If the proceeding is an action, the notice of discontinuance must also include a statement that a counterclaim, crossclaim, or third party claim in the discontinued proceeding is also discontinued unless the party who made the claim files a notice continuing the proceeding for the purpose of the counterclaim, crossclaim, or third party claim.
- (6) The notice of discontinuance may be in Form 9.02.

### Forms

Notice of Discontinuance(9.02).

### **9.03 - Affect on counterclaim, crossclaim, third party claim**

A counterclaim, crossclaim, or third party claim is discontinued ten days after the day the plaintiff delivers the notice of discontinuance to the party making the counterclaim, crossclaim, or third party claim, unless that party files a notice continuing the counterclaim, crossclaim, or third party claim.

### **9.04 - Mandatory discontinuance of action for debt**

- (1) A plaintiff in an action brought by notice of action for debt must deliver a receipt to the defendant when the defendant pays the amount, other than disbursements that are to be taxed, stated in the notice.
- (2) The receipt must contain the standard heading, be entitled "Receipt", be dated and signed, and include both of the following:
  - (a) an acknowledgement of the amount paid;
  - (b) a statement of whether disbursements remain to be taxed and, if so, the amount claimed.
- (3) The action is discontinued when the receipt is filed, unless the receipt states that disbursements remain to be taxed.
- (4) An action in which a party files a receipt stating that disbursements remain to be taxed is discontinued when a party files an affidavit showing that the disbursements have been settled, or taxed and paid.
- (5) A receipt may be in Form 9.04.

### Forms

Receipt(9.04).

### **9.05 - Withdrawal**

- (1) A party may wholly withdraw a counterclaim, crossclaim, or third party claim with the permission of a judge.
- (2) A party may withdraw a claim or defence in an action before a trial readiness conference.

## Rule 9 - Discontinuance

- (3) A party may withdraw a ground in an application, notice of contest, judicial review, appeal, or contention before the day of the hearing.
- (4) A party may withdraw a claim, defence, ground, counterclaim, crossclaim, or third party claim at any time with the permission of a judge.
- (5) The withdrawing party may file one of the following documents:
  - (a) a notice of withdrawal stating the party withdraws a counterclaim, crossclaim, or third party claim;
  - (b) a notice of withdrawal stating which of the party's claims, defences, or grounds are withdrawn;
  - (c) a consent to judgment stating the party withdraws all defences to a claim or all grounds contesting an application.
- (6) The notice of withdrawal, or the consent to judgment, must contain the standard heading, be entitled "Notice of Withdrawal" or "Consent to Judgment" as is applicable, be dated and signed, and include both of the following statements:
  - (a) whether disbursements remain to be taxed and, if so, the amount claimed;
  - (b) whether the party waives further notice the party is entitled to under Rule 31 - Notice.
- (7) A notice of withdrawal may be in form 9.05A, and a consent to judgment may be in form 9.05B.

### Forms

Notice of Withdrawal(9.05A), Consent to Judgment(9.05B).

## 9.06 - Costs

- (1) A party who files a notice of discontinuance, consent to judgment, or notice of withdrawal must, unless a judge orders otherwise, pay costs of the opposing party in an amount to be fixed under Rule 77 - Costs.
- (2) A judge or adjudicator who assesses costs must consider the stage of the proceedings at which the notice or consent was filed, among the other factors under Rule 77 - Costs.

*N.S. Gaz. Pt. 1, [12/16/2009](#)*

## 9.07 - Cause of action remains

- (1) Discontinuance of a proceeding or withdrawal of a cause of action does not give rise to a defence in subsequent proceedings for the same, or substantially the same, cause.
- (2) A judge who allows a proceeding to be discontinued or a claim to be withdrawn may impose terms concerning a subsequent proceeding for the same cause against the same parties.
- (3) A subsequent proceeding that amounts to an abuse of process may be controlled under Rule 88 - Abuse of Process.