

## SUMMARY JUDGMENT

*Prepared by Law Help Ontario, a project of Pro Bono Law Ontario*

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### INTRODUCTION

One method to dispose of an action without the necessity of a trial is by way of a “*Motion for Summary Judgment*” governed by **Rule 20** of the *Rules of Civil Procedure* (“*Rules*”). Summary judgment serves to “avoid expensive litigation where it is possible to safely predict the result without a trial.”

On a motion for summary judgment, the moving party (the party bringing the motion) attempts to persuade the court, through affidavit and other written evidence, that there is no genuine issue requiring a trial and that judgment should be granted on a summary basis.

### WHAT IS THE PROCEDURE TO OBTAIN SUMMARY JUDGMENT?

In order to obtain a summary judgment, a motion must be brought before the Court. Either a plaintiff or defendant can bring a motion for summary judgment. A plaintiff may bring the motion for summary judgment after the defendant has delivered a statement of defence or served a notice of motion (**Rule 20.01(1)**). A defendant may bring the motion for summary judgment after delivering a statement of defence (**Rule 20.01(3)**).

The plaintiff’s motion will be for judgment against the defendant on all or part of the claim in the statement of claim. A summary judgment motion brought by a defendant would seek the dismissal of all or part of the plaintiff’s claim (see **Rule 20.01**).

**TIP:** A “motion” is a process used to make a request to the court for an order, often in some preliminary issue of the main proceeding. There are many types of motions under the *Rules*. Motions are heard by both Judges and Masters. Both are judicial officers of the court and both sit on the Ontario Superior Court of Justice. For more information about motions, see the guidebooks: “*A Guide to Motions*”, “*A Guide to Preparing Your Affidavit*”, and “*Costs at the Superior Court of Justice*” available online at [www.lawhelpontario.org/civil](http://www.lawhelpontario.org/civil). You may also find the Law Society’s “How To Briefs” useful for preparing motions materials; visit <http://rc.lsuc.on.ca/jsp/ht/civil.jsp>

## WHO DO I APPEAR BEFORE – A MASTER OR A JUDGE?

A summary judgment motion can be brought before either a master or a judge. However, there are several reasons why it may be preferable to the moving party to bring the motion before a judge.

First, where the only genuine issue requiring a trial on the motion is a *question of law*, a master cannot decide the motion. Where the motion for summary judgment is brought before a master and it requires a determination of a question of law, it must be adjourned to be heard by a judge (see Rule 20.04(4)). Where there are no factual issues in dispute, the judge may decide the question of law that is raised on the motion for summary judgment and decide whether or not to grant summary judgment.

Second, where the motion is brought before a judge, the judge may weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence in reaching a decision whether to allow the motion (see Rule 20.04(2.1)). A Master does not have the same ability to consider and weigh the evidence.

Third, a judge may also, for the purpose of exercising his or her powers under Rule 20.04(2.1) order that oral evidence be presented by one or more of the parties. In other words, if a summary judgment motion is brought before a judge, the judge may order a mini-trial. A Master does not have the ability to do so on a motion for Summary Judgment.

The additional powers of a judge on a summary judgment motion would assist the party bringing the motion to demonstrate that there is no genuine issue requiring a trial.

**TIP:** It is not always easy to determine what constitutes a question of law. One example of a question of law is whether certain conduct is in breach of a statute. In one case, the plaintiffs raised elk at a farm with the intention of allowing customers to purchase individual elk and shoot that elk in a fenced "harvesting preserve".

The Ministry of Natural Resources took the position that this activity was illegal pursuant to s. 41 of the Fish and Wildlife Conservation Act, 1997. The plaintiffs brought an action for damages. The Ministry's motion for summary judgment was granted. The judge held that the case turned on whether the activity in question constituted "hunting" which was a question of law that could be determined before trial.

The activity required the customer to "lie in wait for, search for or otherwise pursue or chase the animal", thus falling within the definition of "hunting" in s. 1(1)(a) of the Act. The activity in question was illegal under the Act. Accordingly, the action could not succeed (see *In Universal Game Farm Inc. v. Ontario* (2007), 86 O.R. (3d) 752 (S.C.J.)).

## WHAT EVIDENCE DO I NEED TO PUT BEFORE THE COURT?

On a motion for summary judgment, the moving party must support the motion by affidavit material or other evidence (see Rule 20.01). The affidavits used on a motion for summary judgment may be made on information and belief rather than actual firsthand knowledge.

**TIP:** Evidence in an affidavit made on “information and belief” is called hearsay evidence. Hearsay evidence is evidence based on what someone else has told the witness. It is “second-hand” evidence and is not considered as reliable as firsthand evidence. Hearsay evidence is often not admissible in court. For more information about using evidence on motions, see the guidebook called “Gathering and Using Evidence in Motions and Applications” available on the Law Help Ontario website at [www.lawhelpontario.org](http://www.lawhelpontario.org)

However, the court can draw an adverse inference from the fact that the moving party has not provided evidence of persons having personal knowledge of the facts in issue (Rule 20.02). In this context, an adverse inference means discounting evidence, if controversial, or ignoring it if countered with direct evidence. When contemplating bringing a summary judgment motion, a party should always give serious consideration to providing direct evidence of persons having personal knowledge of contested facts.

The court has also held that, in accordance with Rule 20.04, a responding party has an obligation to “put his best foot forward” and not simply rest on the mere denial of all of the moving party’s allegations (see *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen Div.)) The responding party must set out specific facts in their responding material to show that there is a genuine issue requiring a trial (Rule 20.02(2)).

## CAN I CROSS EXAMINE THE OTHER PARTY’S AFFIDAVITS?

Yes. Each party is entitled to cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion, but must deliver his or her own affidavits that the party intends to rely on before doing so. This means that you may cross-examine a party who has an interest that is opposed to your interest (see Rule 39.02).

## DO I NEED TO PREPARE A FACTUM FOR THIS TYPE OF MOTION?

Yes. Factums are mandatory on motions for summary judgment (see Rule 20.03).

The moving party must serve the factum at least four (4) days before the hearing and the responding party must serve it at least two (2) days before the hearing. Each party is also required to file their factum, with proof of service, at least two (2) days before the hearing of the motion.

**TIP:** A *factum* is your written argument that states the facts and law relied upon. Factums are not easy to write and require a fair amount of work, including research of previously decided cases. If you are able to afford it, this is an area where you might seek the assistance of a lawyer.

## WHAT IS A “GENUINE ISSUE REQUIRING A TRIAL”?

The courts have held that on a motion for summary judgment, they are obliged to “take a hard look at the merits of the action”. Rule 20.04(2)(a) requires the court to grant summary judgment if it is satisfied that there is no genuine issue for trial with respect to a claim or defence.

It is not always a simple exercise to determine whether there is a “genuine issue for trial”. There are many cases that have been decided in this area of law. The Ontario Court of Appeal has held that there is no difference between the test of no genuine issue for trial and “no chance of success” or “plain and obvious that the action cannot succeed” (see *Prete v. Ontario (Attorney General)* (1993), 16 O.R. (3d) 161 (C.A.)).

## WHAT TYPES OF ORDERS CAN THE COURT MAKE?

### **1. The court can grant summary judgment**

The wording of the test on a motion for summary judgment is mandatory. Where the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence the court shall grant summary judgment (see Rule 20.04(2)(a)).

In some cases, the parties may agree to have all or part of the claim determined by summary judgment. The court will grant summary judgement in such a case if it satisfied that it is appropriate to do so (see Rule 20.04(2)(b))

If the court decides that the only genuine issue requiring a trial is the amount of money to which a moving party is entitled, the court can order a trial limited to that issue or, alternatively, grant judgment to the moving party and direct a reference (see Rule 54) to determine the exact amount owing (see Rule 20.04(3)).

If the court is satisfied that the only genuine issue requiring a trial is a question of law, the court may determine the question and grant judgment accordingly (see Rule 20.04(4)).

If the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts (see Rule 20.04(5)).

### **2. The court may make an order that does not grant summary judgment**

If the court determines that granting summary judgment is not appropriate or that it should only be granted in part, the court can make an order specifying what material facts are not in dispute and defining the issues to be tried to narrow the scope of the trial (see Rule 20.05(1)).

The court may also give directions or impose terms with respect to the conduct of the trial (see Rule 20.05(2)).

## WHAT IF THERE ARE MULTIPLE CLAIMS IN THE ACTION?

Where there are multiple claims in an action (such as a proceeding involving a claim and a counterclaim), the court, in a proper case, can grant summary judgment pending the determination of another issue in the action, such as the counterclaim.

This way, the plaintiff will not be required to prove his or her case at trial as he or she already has judgment. Nonetheless, the plaintiff will not be able to enforce the judgment until the counterclaim has proceeded to trial (see Rules 20.08 and 20.09)

## ARE THERE ANY RISKS TO BRINGING A MOTION FOR SUMMARY JUDGMENT?

Yes. While a motion for summary judgment can be very effective in the litigation process and can cut short what might ordinarily be years of complex or expensive litigation, the process is sometimes used improperly. For example, some motions for summary judgment may be brought for tactical purposes and not because the motion has any merit or chance of succeeding.

The court may order costs at a higher rate than ordinarily for improper use of the rule if a party has acted unreasonably by making or responding to the motion for summary judgment or if a party has brought the motion in bad faith for the purpose of stalling the overall proceedings (see Rule 20.06).

## WHAT IF I LOSE A MOTION FOR SUMMARY JUDGMENT?

Losing a motion for summary judgment means that you will likely have to pay the legal costs of the successful party. For information about how costs are determined in the Superior Court of Justice see the guidebook called *Costs in the Superior Court of Justice* available on the Law Help Ontario website at [www.lawhelpontario.org](http://www.lawhelpontario.org).

If you think that the decision of the court is wrong, you can file an appeal to the Ontario Court of Appeal. For information about appeals to the Court of Appeal see the *Court of Appeal Handbook* also available on the Law Help Ontario website at [www.lawhelpontario.org](http://www.lawhelpontario.org). You may also wish to review the self-help packages available on the Court of Appeal's website at [www.ontariocourts.on.ca/coa](http://www.ontariocourts.on.ca/coa).

## WHERE CAN I GET FURTHER ASSISTANCE?

**In Person:** Visit Law Help Ontario (if you cannot afford a lawyer)

Law Help Ontario is a project of Pro Bono Law Ontario that provides pro bono legal services to people who cannot afford to hire a lawyer and are unrepresented in a legal matter. The project is currently piloting two self-help centres in courthouses in the Toronto area. In the future, centres may be launched

in other locations across Ontario. The Law Help Ontario web site provides online resources relating to pro bono legal services.

If you live in the Toronto area, have a civil matter and are unrepresented because you cannot afford a lawyer, visit us at our centre in Superior Court or Small Claims Court. You may be eligible for free (pro bono) legal advice.

We **CANNOT** help you at the centre with: **family law matters, criminal cases, human rights, landlord and tenant matters etc.** Please refer to our online resources for information that might be available in these areas.

If you are located in other areas of the province or need help in another area of the law, check out our online resources at [lawhelpontario.org](http://lawhelpontario.org).

### **Recommended Online Resources:**

[www.lawhelpontario.org/civil](http://www.lawhelpontario.org/civil) (Civil Litigation Tip Sheets, Guidebooks & Court Forms)

<http://www.attorneygeneral.jus.gov.on.ca/english/courts/>

[www.canlii.org](http://www.canlii.org) (Legal Research Website)

<http://rc.lsuc.on.ca/jsp/ht/civil.jsp> (The Law Society's "How To Briefs")

**"The Rules of Civil Procedure"** are available through the e-laws website.

Go to [www.e-laws.gov.on.ca](http://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"

**Lawyer Referral Service:** If you wish to explore the option of hiring a lawyer to represent you, and you simply need help finding a lawyer, you can contact the **Lawyer Referral Service** at **1-900-565-4577**; a **\$6.00** charge will be added to your phone bill. This service is offered by the Law Society of Upper Canada.

**Important Note:** There are certain rigid time restrictions that must be met in pursuing a case or your rights might be forever lost. Therefore, if you intend to pursue your case, it's imperative that you not delay in moving the case forward, on your own.