Avoiding Trial

Avoiding Trial Basics

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Avoiding Trial Basics

There are procedures that can be used in certain cases to avoid a full trial.

Specifically:

1. **Discontinue a Claim:** Whether the matter has been settled out of court or the claimant no longer wants to continue, the case can be ended
2. **Striking Pleadings:** Striking pleadings is an option to have the Court partially or completely disallow a notice of civil claim, response, or other pleading if the pleading is scandalous, frivolous, or vexatious (see **Rule 9-5**)
3. **Summary Judgement:** Summary judgment is another way to resolve a lawsuit before trial. Such an application is brought where the plaintiff can prove that there is no reasonable defence to the claim, or the defendant can prove that the plaintiff has no reasonable claim against them
4. **Summary Trial:** Summary trials are based on written evidence (e.g., affidavits, interrogatories, expert reports, and written argument) rather than hearing the evidence of witnesses in court. You can have your case heard by a judge much sooner than a regular trial, but summary trials are complicated in other ways
5. **Default Judgement**: Default judgment may be taken against the defendant where the defendant fails to file a response to the notice of civil claim, does not comply with the rules, or withdraws a response to a civil claim

It is always a good idea to talk to a lawyer about the best way to resolve your case before trial.

Comparing Striking Pleadings, Summary Judgment and Summary Trials

Striking pleadings, applications for summary judgment, and applications for summary trials, are similar in some ways. However, they have important differences:

	Striking Pleadings	**Summary Judgment**	**Summary Trial**
Governing Rule	**9-5**	**9-6**	**9-7**
Power of the Court	Strike a claim or defence entirely	Grant judgment on all or part of a claim	Grant judgment on all or part of a claim
Applicable Test	"Plain and Obvious" that the claim cannot succeed, even if all the facts are true	There is "no genuine issue for trial" on all or part of the claim	Whether it is appropriate to determine the matter without a full trial
Evidence?	No, the case is decided by looking at the pleadings alone	Yes, affidavit evidence showing that there is or is not a "genuine issue for trial" is appropriate. The evidence must be based on firsthand knowledge. Evidence based on hearsay (information and	Yes, affidavit evidence, interrogatories, expert reports, answers from examinations from discovery all may be admissible. The evidence must be based on firsthand knowledge. Evidence

		belief) is not admissible.	based on hearsay (information and belief) is not admissible.
Likelihood the Court will grant an application	Least likely. Very few cases	Rare. Must be a clear case.	Common, if the case is less complicated.
Does the application lead to a final decision on the case?	Not always. Claims may be struck with "leave to amend", after which the case might still go forward to a full trial.	Not always. If the Court refuses to grant summary judgment, the matter goes for a full trial.	Yes, as long as the case is found to be appropriate for summary trial. If so, the Court will decide which side wins and grant judgment.

Read the Rules

Rule 9-5 Striking pleadings, **Rule9-6** Summary of Judgment, **Rule 9-7** Summary Trial

Discontinuance and Withdrawal

After you start a proceeding, you may decide that you no longer wish to continue the action against one or more of the other parties. This is called discontinuance. Similarly, if you have been sued, and you filed the appropriate documents to defend the proceeding, you may decide to withdraw your response. This is called withdrawal.

Discontinuances and withdrawals apply to both proceedings started by notice of civil claim and to proceedings started by a petition. They also apply to counterclaims and third-party proceedings.

Read the Rules

Rule 9-8 Discontinuance and withdrawal

Discontinuance or withdrawal may:

- End the need for trial or hearing
- Shorten the time required for, or the complexity of, a trial
- Reduce the number of defendants through discontinuance by the plaintiff or withdrawal of the defence by one or more defendants or
- Allow the plaintiff to take default judgment against a defendant who withdraws a response

There are cost consequences associated with discontinuance and withdrawal. If you discontinue or withdraw a claim against a party, **Rule 9-8(4)** requires you to pay the costs of that party. However, you may be able to negotiate an agreement with the other party so that costs do not have to be paid. For more information on cost awards, see **Costs.**

Read the Rules

Rule 9-8(4) Costs and default procedure on discontinuance or withdrawal

Discontinuance by the Plaintiff

If you are the plaintiff, you can shorten a trial by discontinuing an action against a defendant. You can discontinue for any reason, but often plaintiffs discontinue when the defendant:

- Is not capable of paying a judgment – that is, they might be bankrupt or live elsewhere, and it would be too expensive to try to collect on your judgment
- Is unnecessarily named in the action or
- Has agreed to a settlement

Fewer defendants means that you have fewer documents to review and fewer witnesses at trial and your argument is likely to be less complicated. Petitioners may also discontinue proceedings against petition respondents

When You Can Discontinue

A plaintiff can discontinue the case against any defendant and remove that defendant from the action any time before the notice of trial has been filed.

After the notice of trial has been filed, a plaintiff can discontinue the case against a specific defendant but must have either the consent of all other parties or an order from the court to allow the discontinuance.

To discontinue a claim, prepare a document called a notice of discontinuance (**Form 36**). The same procedure applies to petitioners who decide to withdraw a petition.

Find the Form

Form 36 Notice of discontinuance

Withdrawal by the Defendant

The defendant can withdraw:

- All of their response against all of the plaintiffs
- All of their response against one or more plaintiffs, leaving the response intact against the rest of the plaintiffs or
- Only part of their response against any or all of the plaintiffs, leaving the balance of the response intact

If the defendant withdraws in part, the trial will be less complicated as there will be fewer issues that need to be resolved. If there is only one defendant, and he or she completely withdraws his or her response against the plaintiff, the plaintiff can then proceed to get a default judgment.

To withdraw a response, or part of it, the defendant prepares a notice of withdrawal (**Form 37**). The same procedure applies to a petition respondent who decides to withdraw from a proceeding commenced by petition.

Find the Form

Form 37 Notice of withdrawal

Striking Pleadings

An application to strike pleadings (**Rule 9-5**) asks the Court to strike all or part of a notice of civil claim or a response to civil claim.

Read the Rules

Rule 9-5 - Striking pleadings

Court may strike a pleading if:

1. It discloses no reasonable claim or defence
2. Is unnecessary, scandalous, frivolous, or vexatious
3. It may prejudice, embarrass, or delay the fair trial or hearing of the proceeding or
4. It is otherwise an abuse of the process of the Court

This is a high bar to clear. Successful applications to strike are rare. They will only be granted where it is "plain and obvious" the pleading cannot stand. In essence, the Court has to be satisfied that the claim is so fundamentally flawed that it cannot be left.

An application strike is a "chambers proceedings". For more information on bringing an application to chambers, see **Chambers Applications.**

In an application to strike, the Court assumes that all the facts in the pleading are true. You cannot therefore succeed on an application to strike merely because you

know one of the facts alleged to be untrue.The Court can strike pleadings completely, or with "leave to amend".

Key Terms

Striking "**with leave to amend**" means that the Court will give the party whose pleadings were struck some period of time to fix the problem. This is often done when self-represented litigants have their pleadings struck.

If you are facing an application to strike your pleadings, it may be very wise to seek legal help. The consequences of losing an application to strike are serious. Further, a lawyer may be able to help you fix any problem with your claim or defence so you can get past the strike out application. For more information on finding a lawyer, see **Get Help.**

If you are facing an application to strike your pleadings, you might consider if you can amend your pleading to make it more clear. Make sure that all of the facts which are important to your case are clearly set out. Read **Starting a Claim** and **Responding to a Claim,** and consider if you can improve on your pleading. If you are facing an application to strike, you will want to be able to explain to the Court how you might fix any problems. If the Court agrees that your claim or defence could be fixed, they may give you leave to amend your pleadings rather than striking it entirely.

Summary Judgment

Summary judgment applications (**Rule 9-6**) are intended to weed out those claims and responses that have no merit and will fail at trial. If you can show that the defendant has no real defence, you may be able to obtain summary judgment against them, without having to go through a trial. Similarly, if you can show that the plaintiff has no claim, you may be able to get the Court to dismiss the matter without trial. An application strike is a "chambers proceedings". For more information on bringing an application to chambers, see **Chambers Applications.**

Read the Rules

Rule 9-6 Summary Judgment

The main question that the Court considers on these applications is whether there is any genuine issue between the parties that requires a trial to resolve. Either a master or a judge can hear summary judgment applications. Summary judgment allows you to resolve the issues early on, saving you time and money.

Typically, a summary judgment application is made only after a response has been filed and the defendant is defending the proceeding. However, in some situations, a summary judgment application can be made where the defendant has not filed a response. See **Default Judgment**.

If a summary judgment application is unsuccessful, that will simply mean that the matter will go to a full trial. If you bring a summary judgment application and lose, this does not mean that you lose the entire case – just that you were not successful in obtaining summary judgment.

When You Can Seek Summary Judgment

If you are the plaintiff, you may apply for summary judgment under **Rule 9-6** on the grounds that:

- The defendant does not have a defence against all or part of your claim or
- The defendant does not have a defence against your claim except about the amount

In this case, you must be able to prove the amount you are owed. If you are the defendant, you can apply for summary judgment on the ground that there is no merit to all or part of the claim that the plaintiff is making against you.

What Evidence Do You Need?

Witnesses are not permitted in a summary judgment application. All evidence is set out in affidavits. This means that the information in your affidavit must be very clear and accurate.

Unlike an application to strike under **Rule 9-5**, the Court does not assume that the facts pleaded are true. You need to put forward evidence supporting the facts that your application is based on.

The person who swears any affidavit supporting your application must have direct knowledge of the facts contained in the affidavit. In other words, the person swearing the affidavit should not give evidence about facts that someone else told them. Keep in mind that if there is any genuine dispute about the facts of the case, summary judgment is probably not appropriate. Summary judgment is most appropriate when one side is entitled to judgement as a matter of law. For more guidance see **Affidavits.**

If you are the plaintiff, your affidavits must set out:

- The facts that prove the claim you are seeking judgment on and
- Confirmation that the person swearing the affidavit knows of no facts constituting a defence to the claim you are seeking judgment on, except possibly as to the amount of the claim

If you are the defendant, your affidavits must set out:

- The facts that prove that there is no merit in the plaintiff's claim and
- Confirmation that the person swearing the affidavit knows of no facts that support the claim

You may want to consult a lawyer when you prepare your affidavits to make sure that you have included everything necessary and that they do not contain information that should not be included. The affidavits determine the success or failure of your summary judgment application. For more information on finding a lawyer, see **Get Help.**

Summary Trials

Summary trial applications (**Rule 9-7**) are a useful tool. They allow cases that do not need a full trial with witnesses to be heard and decided by a judge in a simpler manner. Most notably, time is saved because evidence is presented by affidavits. This can save a huge amount of time as compared to a traditional trial.

Read the Rules

Rule 9-7 Summary Trial

Summary trials are appropriate in cases where the Court is able to determine the facts of the case through written documents only and there is no need to fully present evidence through the testimony and cross-examination of witnesses. An application strike is a "chambers proceedings". For more information on bringing an application to chambers, see **Chambers Applications** and **Affidavits.**

In a summary trial application, the judge must first determine that the case is appropriate for summary trial. If the case is suitable for a summary trial, evidence is given by affidavit rather than in person and the trial is dramatically shortened.

Like a summary judgment, a summary trial is based on affidavit evidence. However, in a summary trial, you may also present other written evidence to the Court. This evidence could include:

- Answers to interrogatories
- Selected questions and answers from examinations for discovery
- Admissions made in response to a notice to admit and
- Expert reports

Because this evidence is so important to your case, you may want to consult a lawyer about how much and what type of evidence you should use at the summary trial. A lawyer will be able to advise you about whether you need an expert report or opinion, whether you should include interrogatories or examination for discovery questions and answers, and the form in which they should be presented. For information on finding legal help, see **Get Help.**

A summary trial can result in a judgment even if there is a dispute between the parties about the facts behind the claim or the defence to the claim. This is different than a summary judgment, which is only given if there is no outstanding issue that needs to be resolved.

You can apply for a summary trial after the response to the claim that is the subject of the summary trial application has been filed.

If you bring a summary trial application and the Court agrees the matter is appropriate to be heard in that way, it is just like an ordinary trial in that you could win or lose. This is different from a summary judgment application, where if you

are unsuccessful, you simply go back to moving towards a full trial. Bringing a summary trial application could mean that the Court will find against you and grant judgment.

Summary trials are heard by a judge and although they are meant to be short, they generally require more than 2 hours. This means that the date and time of the hearing must be fixed by the Scheduling. For more information see **Chambers Applications.**

Masters cannot hear summary trials. If you already have a trial date, note that a summary trial application must be heard by the Court at least **42 days** before the scheduled trial date (see Rule **9- 7(3)**). You will have to take this into account in scheduling a date to have the application heard.

Evidence in a Summary Trial Application

Summary trials rely on written evidence, so make sure that your written evidence is complete and accurate. It is crucial to your case. The Court takes your evidence – affidavits, interrogatory answers, expert reports or opinions, and examination for discovery questions and answers – and uses it to make a final judgment on the issues.

In a summary trial you are asking the Court to make a final order. For that reason, the person who swears any affidavit supporting your application must have direct knowledge of the facts contained in the affidavit. In other words, the person swearing the affidavit should not give evidence about facts that someone else told them.

Make sure your affidavits:

- Are organized in a way that makes sense
- Are easy to read and grammatically correct
- Are concise and to the point, but contain all the facts required and
- Set out the facts in chronological order

For more information on preparing affidavits, see **Affidavits.**

You can also provide to the Court relevant interrogatory answers and examination for discovery questions and answers. Do not include entire transcripts, but make sure that the information:

- Is well organized
- Includes everything needed to prove your position
- Does not include anything that is not needed
- Puts the questions and answers together and numbers them and
- Is easy to read

For more information on interrogatories and examinations for discovery, see **Discovery.**

Bring the original discovery transcript with you in case the Court requests it. You can also provide expert reports or opinions to the Court. For further information about expert reports see the **Expert Witnesses**.

What You Need for Your Application

In general, you will need the following documents to apply for summary trial:

- A notice of application (**Form 32**)
- Supporting affidavits and
- An application record (see **Rule 8-1(15)**)

See **Chambers Applications** for further helpful information about how to prepare for a chambers application.

Find the Form

Form 32 Notice of Application

Read the Rules

Rule 8-1(15) Application record

What Can the Court Order?

At the summary trial, the Court may:

- Grant judgment in favour of any party, on either part of the claim or all of the claim
- Impose terms about enforcement of the judgment (such as when it must be paid) or
- Award costs (see **Costs**).

If the judge is not able to grant judgment, the judge may order that a full trial be held or:

- Order that the parties attend a case planning conference (see **Case Planning Conference**)
- Make any order that could be made in a case planning conference or
- Make any other order that furthers the object of the Rules

Default Judgment

Default judgments are ordered when one party has failed to file and serve a response to the claim within the time allowed by the rules (**Rule 3-8**). A plaintiff can also apply for a default judgment if the defendant has withdrawn the response to civil claim.

Read the Rules

Rule 3-8 Default Judgment

If you are the plaintiff, the default judgment process will depend on the type of claim you have:

1. **You have a claim for a specific amount of money**. For example, if you are claiming damages because the defendant did not pay the full amount for the purchase of equipment, you can say the exact amount of money still owed. In this case, you would file a default judgment seeking the amount you are owed, plus any interest payable under the ***Court Order Interest Act***, plus

your costs under Appendix B to the rules. You can find websites through an online search that may help you calculate the interest you are owed under the *Court Order Interest Act*

2. **You have a claim for money damages, but the exact amount has to be determined by the Court**. For example, if you claim an amount for pain and suffering arising from an injury, the Court will need to consider evidence to determine the nature of the injury and what amount you are owed as a result of the injury. In this case, the Court will grant a judgment that indicates the amount of the damages is "to be assessed". The plaintiff will then have to schedule a further application to the Court to have a decision made on the amount of damages
3. **You have a claim for detention of goods by the defendant.** For example, the defendant has failed to return a painting to you at the end of an exhibit. In such a case you can either ask the Court to enter judgment ordering the defendant to deliver the painting, or you can ask the Court for judgment in your favour for the value of the painting, with the amount to be assessed at a later hearing

If your claim does not fall within one of these three categories and the defendant has not filed a response, you will have to proceed under the summary judgment rules (discussed below).

What to include in your application:

- **Notice was served:** Proof that the notice of civil claim was served on the defendant. You do this by filing an affidavit of service. For more information on affidavits of service see **Serving Documents**.
- **No response:** Proof that the defendant has not responded as required under the rules. If the defendant has not filed a response, you can obtain this proof by filing a document called a requisition (**Form 17**) that asks the registry to search the file for a response from the defendant. If there is no response, then the requisition will be returned with the word "nil" printed on it. This can then be filed as part of your application for default judgment. If the defendant has not served a response, then you can file an affidavit that states that you have not received a response. For more information on requisitions, see **Requisitions**

- **Requisition**: A requisition that asks the Court for a judgment on the basis that the defendant is in default. The search for a response can be requested on the same requisition used to file the application for default judgment
- **Draft judgment:** A draft default judgment, prepared using **Form 8**
- **Bill of costs:** In cases where you are seeking final judgment, also prepare a bill of costs that sets out the costs you claim you are entitled to under Appendix B of the rules. See **Costs**
- **Interest**: If you are claiming interest, you must include an interest calculation with your application

If you are applying for a default judgment against a party who is under a legal disability (for example, someone who has been declared to be incapable of handling his or her affairs by the Court), you must appear before the Court to apply for an order to allow you to file a default judgment (**Rule 20-2 (14)**).