

Procedural History

- [5] The pleadings in this action closed on July 26, 2018. Thereafter, the plaintiff took the following steps to prosecute the action:
- a. In July 2018, the plaintiff served its affidavit of documents.
 - b. In February 2019, the plaintiff proposed a discovery plan. There is no evidence in the motion record about the defendants' response, if any.
 - c. In March 2021, the defendant served its affidavit of documents. There is no evidence in the motion record of attempts by the plaintiff to compel the delivery of Monsanto's affidavit sooner.
 - d. In January 2023, plaintiff's counsel wrote to the defendants proposing a new discovery plan. The parties agreed to examinations for discovery of all parties in June 2023.
 - e. The plaintiff was examined by the defendants, then Monsanto and Sun Parlour, on June 13, 2023.¹ Sun Parlour was examined by the plaintiff and Monsanto on June 19, 2023. On June 17, 2023, however, Monsanto's counsel cancelled his client's examination scheduled for June 22, 2023, because both counsel and the representative were no longer available. Further, counsel advised that, pursuant to r. 31.06(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, he was not obligated to produce Monsanto's representative until the plaintiff served the expert report that the plaintiff's representative had referred to during his examination.
 - f. The plaintiff refused to produce the expert report and served a notice of examination to examine Monsanto's representative on August 23, 2023. Again, Monsanto's counsel advised that he would not produce his client at the examination until either the expert's conclusions were disclosed, or the plaintiff gave an undertaking not to call the expert at trial.
 - g. The plaintiff took no further steps to schedule the examination. Plaintiff's counsel concedes this was due to inadvertence.
 - h. In April 2024, plaintiff's counsel sent the expert report requested by Monsanto to defence counsel. Plaintiff's counsel failed to follow up with scheduling the examination.
 - i. Pursuant to r. 48.14(1), the Registrar ordered the action dismissed for delay on March 12, 2025.

¹ In April 2025, the plaintiff agreed to discontinue the action as against Sun Parlour Grower Supply Ltd.

- j. The plaintiff brought the within motion returnable on April 22, 2025, but it was adjourned twice at the request of Monsanto.

Law

- [6] Under r. 48.14(1), the registrar shall dismiss an action for delay when the action has not been set down for trial by the fifth anniversary of its commencement. Rule 48.14(10) provides that a plaintiff may move to set aside the dismissal pursuant to r. 37.14(1).
- [7] Judges' decisions on whether to set aside administrative dismissal for delay are discretionary. The test for setting aside a r. 48.14(1) order is well established. The court is to consider the following four factors, commonly referred to as the *Reid* factors:
- a. Has the plaintiff provided a satisfactory explanation for the litigation delay?
 - b. Has the plaintiff led satisfactory evidence to explain that they always intended to prosecute the action within the applicable time limits but failed to do so through inadvertence?
 - c. Did the plaintiff move forthwith to set aside the dismissal order?
 - d. Has the plaintiff convinced the court that the defendant has not demonstrated any significant prejudice in presenting their case as a result of the plaintiffs' delay?

See *Piedrahita v. Costin*, 2023 ONCA 404, at para. 8.

- [8] The plaintiff is not required to satisfy each of the *Reid* factors. Rather, the court is to take a contextual approach and consider all relevant factors to determine an order that is just: *Scaini v. Prochnicki*, 2007 ONCA 63, 85 O.R. (3d) 179, at paras. 23-24.
- [9] The overriding objective is to achieve a result that balances the interests of the parties and takes account of the public's interest in the timely resolution of disputes: *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887, 104 O.R. (3d) 689, at para. 23. The court's preference is for matters to be decided on their merits: *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173, 386 D.L.R. (4th) 262, at para. 27.

Analysis

- [10] Counsel focused their submissions at the hearing on three *Reid* factors: satisfactory explanation for the delay; satisfactory evidence of intention to prosecute the action, and; the prejudice to the defendant resulting from the delay.

Factor (a): Satisfactory Explanation for the Delay

- [11] The delay must be considered from the issuance of the claim to the date of the registrar's dismissal: *Chekhovtsova v. Mutschler et al.*, 2025 ONSC 4077, at para. 42.

- [12] In the plaintiff's factum, Mr. Shulgan submits that the delay from the commencement of the action to August 2023 is shared with the defendant. He also conceded at the hearing that "[plaintiff's] counsel was not diligent." The plaintiff's motion record describes in some detail that the delay from August 2023 to March 2025 was due to prior counsel's inadvertence.
- [13] The defendant submits that it has no obligation to prosecute the action. The defendant additionally submits the plaintiff has not explained why there was a delay in advancing the action between August 2019 (several months after the plaintiff proposed its initial discovery plan) and January 2023 (when the plaintiff proposed a new discovery plan).
- [14] The defendant is correct that the focus of the inquiry on a r. 48.14 motion is the conduct of the plaintiff. It is the plaintiff who bears primary responsibility for the progress of the action: *1196158 Ontario Inc. v. 6274013 Canada Ltd*, 2012 ONCA 544, 112 O.R. (3d) 67, at paras. 28-29; *Barbiero v. Pollack*, 2024 ONCA 904, 504 D.L.R. (4th) 652, at para. 6. However, the conduct of a defendant is still relevant, particularly if they resisted attempts by the plaintiff to move things along: *1196158 Ontario Inc.*, at paras. 29-30.
- [15] I do not agree with the plaintiff that the defendant's position regarding the expert report was improper and that the defendant, therefore, shares responsibility for the failure to complete examinations for discovery in June 2023. Monsanto's counsel provided the plaintiff with the legal authorities supporting its position, and many months later, the plaintiff delivered the expert report to Monsanto.
- [16] Nevertheless, I cannot ignore Monsanto's passivity in the action. Monsanto did not serve its affidavit of documents until March 2021, more than three years after the action was initiated. It took no action – in the form of emails or other correspondence – to reschedule the examination of its representative after cancelling the second appointment and later receiving the requested expert report. Although it is incumbent upon a plaintiff to conduct its action in a proactive manner, it is unfair to ignore a defendant's passivity: *Fuller*, at para. 42.
- [17] The delay in this matter is not as lengthy as in other cases, including authorities cited by the defendant. For example, in *Reid v. Town of Bracebridge and Tatham*, 2025 ONSC 2535, the plaintiff did not serve an affidavit of documents for six years after commencing the action and made almost no efforts to move the action forward for ten years.
- [18] Still, a delay of over seven years is significant. The progress of this action has not been ideal. There have been material periods of inactivity which are mainly, but not solely, attributable to the plaintiff.

Factor (b): Satisfactory Evidence of Intention to Prosecute the Action

- [19] According to an affidavit sworn by a junior lawyer at Mr. Shulgan's firm, their client always intended to proceed with the litigation. There is no evidence of the plaintiff's intention beyond this statement. For example, there is no evidence that the plaintiff's

principal corresponded with his lawyer between 2019 and 2025, as was the case in *Chekhovtsova*, at para. 52(b).

- [20] I agree with the defendant that the plaintiff has not led satisfactory evidence to explain that they always intended to prosecute the action within the time limits set out in the *Rules* but failed to do so through inadvertence. At best, the plaintiff's evidence explains that the delay between June 2023 and March 2025 was purely inadvertent due to miscommunication in the plaintiff's lawyers' firm.
- [21] However, I see no evidence of any intentional delay by the plaintiff, either. There is nothing in the record that suggests the plaintiff's failure to move the action forward was deliberate, as opposed to inadvertent.

Factor (d): Prejudice

- [22] There is an automatic presumption of prejudice in actions that are found to have an inordinate delay, that is, a delay of five years or more: *Barbiero*, at paras. 15 and 22.
- [23] There is no onus on the defendant to demonstrate actual prejudice. Rather, the onus is on the plaintiff to show the defendant has not demonstrated prejudice: *Reid*, at paras. 74, 77 and 79.
- [24] Monsanto states that one of its key employees who met with the plaintiff's principal when the dispute over the crop failure arose cannot be located. The Monsanto employee retired in 2020 and attempts to reach him prior to the hearing were unsuccessful.
- [25] The plaintiff submits that this employee is not a key witness at all because his involvement in the dispute arose after the crop failed. Another employee, who met with the plaintiff before the seed was sold and who made representations about it, is more central to the action and is still available. Moreover, the plaintiff argues that not all efforts have been exhausted to locate and summon the retired employee.
- [26] If indeed the retired employee is a key witness, as Monsanto suggests, it is expected that steps were taken to obtain evidence and statements from him before he retired in 2020: *Martellacci v. Pitney Bowes of Canada Ltd.*, 2024 ONSC 320 at paras. 18-19. Given the timing of his retirement relatively early in the litigation, any associated prejudice would have occurred regardless of the plaintiff's delay.
- [27] That Monsanto took no proactive steps in progressing the litigation is also a relevant factor. While the plaintiff bears primary responsibility for moving the action along, the defendant's "lack of display of any sense of urgency undercuts the claim of actual prejudice": *Aguas v. Rivard Estate*, 2011 ONCA 494, 107 O.R. (3d) 142, at para. 19.
- [28] Based on the evidence before me, I find that the plaintiff has met its burden to show the defendant has not demonstrated actual prejudice. There is no evidence that material documents have been lost. The 'missing' employee was still alive and in contact with other

employees as recently as last year. In any event, he did not make any of the alleged misrepresentations to the plaintiff about the seeds.

[29] The parties have exchanged affidavits of documents, examinations for discovery have been partially completed, and once undertakings have been answered and a mediation held, the matter can be set down for trial. This is not case like *Chekhovtsova*, where no steps had taken place prior to the Registrar's dismissal.

Disposition of Motion

[30] Having considered and weighed all the relevant factors discussed above, I conclude that the most just outcome is for the order dismissing the action to be set aside. This is a close call. The plaintiff is primarily responsible for significant delay in this action, but in the absence of prejudice, an order setting aside the Registrar's dismissal dated March 12, 2025, properly balances the parties' interests and is consistent with the court's preference that matters be tried on their merits.

[31] I order the following timetable for the remaining steps in the litigation, as proposed by the plaintiff:

- a. Examinations of Monsanto representative to be completed by October 15, 2025.
- b. Undertakings/refusals motions to be filed by November 30, 2025.
- c. Mediation completed by December 31, 2025.
- d. The action set down for trial by January 30, 2026.

[32] The plaintiff does not seek costs of this motion. At the conclusion of the hearing, counsel for Monsanto requested costs of \$6,500 on a partial indemnity basis whatever the disposition of the motion. In light of the plaintiff's conduct that led to the administrative dismissal, Monsanto is entitled to its costs. Costs of the motion in the amount of \$6,500 inclusive of fees, disbursements, and HST are to be paid by the plaintiff to Monsanto within 30 days of this order.

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Jasminka Kalajdzic
Justice

Released: August 8, 2025

CITATION: M.O.S. Enterprises Ltd. v. Monsanto Canada Inc. et al., 2025 ONSC 4613
COURT FILE NO.: CV-18-00025945

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

M.O.S. ENTERPRISES LTD.

and

MONSANTO CANADA INC. and SUN PARLOUR
GROWER SUPPLY LTD.

MOTION TO SET ASIDE
ADMINISTRATIVE DISMISSAL

Kalajdzic J.

Released: August 8, 2025