CITATION: 2027707 Ontario Ltd. v. Richard Burnside & Associates Ltd., 2025 ONSC 7039
COURT FILE NO.: CV-13-489058
MOTIONS HEARD: 20250430
SUPPLEMENTARY WRITTEN SUBMISSIONS FILED: 20250829
REASONS RELEASED: 20251216

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

2027707 ONTARIO LTD. and JOHN KRANER

Plaintiffs

- and-

RICHARD BURNSIDE & ASSOCIATES LTD., JOHN SCHNURR, 7887035 CANADA INC. c.o.b. as CEDAR CREEK REMEDIATION and JOHN ALLEN WILFORD

Defendants

BEFORE: ASSOCIATE JUSTICE McGRAW

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REASONS RELEASED: December 16, 2025

Reasons for Endorsement

I. Background

[1] There are 3 motions before me. The Defendant John Allen Wilford ("Wilford") brings a motion to dismiss this action for delay pursuant to Rule 24.01(1) and the Plaintiff John Kraner ("Kraner") brings motions under Rule 48.14 for a status hearing and Rule 31.10 for leave to examine the non-party Richard Burnside ("Burnside").

[2] Kraner is the sole shareholder of the former co-Plaintiff 2027707 Ontario Ltd. ("202") which owned a motel called the Tobermory Lodge (the "Lodge"). Kraner and his former spouse operated the Lodge. During family law proceedings, Kramer's former spouse alleged that he was dissipating assets. On May 16, 2012 she obtained the Order of Corbett J. appointing the former Defendant Richard Burnside & Associates Ltd. ("RBA") as receiver and manager of the property

and assets used in the operation of the Lodge. Wilford was counsel for Kraner's former spouse.

[3] The Lodge was sold in the receivership proceedings on Febraury 25, 2013. Kraner alleged that kitchen equipment and other fixtures were improperly removed from the Lodge prior to closing. Accordingly, 202 commenced this action by Statement of Claim issued in September 2013 claiming damages for conversion of property in the amount of $316,245.17 plus punitive damages.

[4] By Order dated January 25, 2016, Pollak J. stayed this action as against RBA. By Reasons For Decision dated February 19, 2016, Master Dash (as he then was) granted leave to add Kraner as a Plaintiff and Wilford as a Defendant permitting some of the proposed claims against Wilford including conversion. On July 17, 2017, Master Sugunasiri (as she then was) granted leave to further amend the Amended Statement of Claim to add claims for devaluation of the Lodge, inducing breach of fiduciary duty and trespass.

[5] By Reasons For Decision dated October 22, 2018, Master Sugunasiri ordered 202 to post security for costs of $12,500. 202 elected to discontinue its action as against all Defendants rather than post security leaving Kraner as the only Plaintiff.

[6] Wilford served his affidavit of documents in December 2019. In March 2020, Wilford brought a motion to dismiss this action for delay under Rule 24.01(1). The motion came before Master Graham (as he then was) on August 24, 2020. Wilford requested a timetable and Kraner requested an adjournment. Master Graham ordered a timetable which, among other things, required this action to be set down for trial by January 28, 2022 (the "Timetable").

[7] The examination for discovery of the Defendant John Schnurr took place on April 29, 2021. Mr. Schnurr had serious health issues and his examination proceeded with a view to preserving his evidence. He passed away later in 2021. Wilford was examined on June 28, 2021 and Kraner was examined on June 30, 2021. The parties attended mediation on January 13, 2022.

[8] By Reasons For Decision dated August 25, 2021 of Master Frank (as he then was), the Third Party Claim of the Defendants 7887035 Canada Inc. c.o.b. Cedar Creek Remediation and Schnurr against RBA was stayed.

[9] Kraner served a trial record on January 31, 2022 but did not file it. Wilford brought this motion to dismiss for delay on September 27, 2023. On October 20, 2023, Kraner brought the Rule 31.10 motion to examine Mr. Burnside and the motion for a status hearing.

[10] These 3 motions first came before me on October 9, 2024. Kraner had not filed any evidence in support of the Rule 48.14 motion or responding to the Rule 24.01 motion and neither party had filed any legal submissions on the Rule 48.14 motion. I adjourned the motion to March 5, 2025 for 4 hours before me and ordered a timetable for the filing of additional materials.

[11] The motions were subsequently re-scheduled to April 30, 2025 due to court availability. Counsel made full submissions and I reserved my decision. After the motion, Kraner discontinued his action as agasint Schnurr. On June 15, 2025, Kraner then filed a trial record.

[12] Counsel scheduled a telephone case conference with me which proceeded on July 25, 2025. Kraner's counsel requested another return date so that the parties could make supplementary submissions with respect to the potential effect of the discontinuance and the filing of the trial record. Wilford objected and after hearing from counsel and discussing these issues, I concluded that it was reasonable and efficient for the parties to file written submissions. The parties did not oppose, I ordered a timetable and the parties filed supplementary written submissions (the "Supplementary Submissions").

II. The Law and Analysis

[13] For the reasons that follow, I conclude that it is just and appropriate in the circumstances to dismiss this action.

[14] Rule 24.01(1) provides that a defendant who is not in default under the Rules or an order of the court may move to have an action dismissed for delay where, among other grounds, the plaintiff has failed to set the action down for trial within six months after the close of pleadings.

[15] Dismissing an action for delay is a severe remedy which denies a plaintiff the adjudication of their claim on the merits, however, sometimes it is the only order that can adequately protect the integrity of the civil justice process and prevent an adjudication on the merits that is unfair to the defendant (*Langenecker v. Sauve*, 2011 ONCA 803 at para. 3). Therefore, a dismissal motion requires a careful balancing between efficiency and deciding disputes on their merits:

> "....On the one hand, the *Rules of Civil Procedure* need to be enforced in a way that ensures timely and efficient justice, in the interests of plaintiffs, defendants, and society in general. On the other hand, society in general, and the parties, have an interest in the resolution of disputes on their merits and in the availability of flexibility to avoid potentially draconian results, by providing the opportunity for parties to offer a reasonable explanation for delay when it takes them beyond established timelines." (*Kara v. Arnold*, 2014 ONCA 871 at para. 9).

[16] The Court of Appeal has established the preference that matters be resolved on their merits:

> "Expeditious justice must be balanced with the public interest in having disputes determined on their merits. Where, despite the delay, the defendant would not be unfairly prejudiced should the matter proceed for resolution on the merits, according the plaintiff an indulgence is generally favoured." (*D'Alimentation Denis Theriault Ltee* v. *Giant Tiger Stores Ltd.,* 2007 ONCA 695 at para. 34)

[17] An order dismissing an action for delay will be justified where the delay is inordinate, inexcusable, and prejudicial to the defendants in that it gives rise to a substantial risk that a fair trial of the issues will not be possible (*Ticchiarelli* v. *Ticchiarelli,* 2017 ONCA 1 at para. 15; *Langenecker v. Sauvé*, 2011 ONCA 803 at paras 4-7).

[18] Master Graham (as he then was) summarized the relevant considerations on a Rule 24.01 motion in *Szpakowsky* v. *Tenenbaum*, 2017 ONSC 18:

> (1) To dismiss an action for delay, the court must be satisfied that the plaintiff's default has been intentional and contumelious, or that there has been inordinate and inexcusable delay for which the plaintiff or his lawyers are responsible resulting in a substantial risk that a fair trial will not be possible. (*Armstrong v. McCall*, [2006] O.J. No. 2055 (C.A.), *Langenecker v. Sauve*, [2011] O.J. No. 5777 (C.A.), *Francis v. Peel (Regional Municipality) Police*, [2015] O.J. No. 5001 (SCJ))
>
> (2) A dismissal on the basis of intentional and contumelious delay would be warranted in cases "in which the delay is caused by the intentional conduct of the plaintiff or his counsel that demonstrates a disdain or disrespect for the court process." (*Langenecker, supra*, para. 6)
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> (3) The plaintiff is responsible for moving the action along. (*Wallace v. Crate's Marine Sales Ltd.*, [2014] O.J. No. 4606 (C.A.) at para. 18)
>
> (4) Any delay in the prosecution of an action requires an explanation. The onus rests with the plaintiff to show that the delay was not intentional. In the absence of an explanation from the plaintiff for the delay, it is to be presumed that the delay was intentional. (*Berg v. Robbins*, [2009] O.J. No. 6169 (Div. Ct.) at para. 13)
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> The onus is on the plaintiff to rebut the presumption of prejudice arising from the unexplained delay by showing that documents have been preserved, and that the issues in dispute do not require the recollection of witnesses, or that necessary witnesses are available with detailed recollection of events. (*Berg*, para. 14)
>
> (5) The requirement that the delay be "inexcusable" requires a determination of the reasons for the delay and an assessment of whether those reasons afford an adequate explanation for the delay. . . [E]xplanations that are "reasonable and cogent" or "sensible and persuasive" will excuse the delay at least to the extent that an order dismissing the action would be inappropriate.
>
> In assessing the explanations offered, the court will consider not only the credibility of those explanations and the explanations offered for individual parts of the delay, but also the overall delay and the effect of the explanations considered as a whole. (*Langenecker, supra* at paragraphs 9 and 10)
>
> (6) An inordinate delay after the cause of action arose or after the passage of a limitation period gives rise to a presumption of prejudice in which case the defendant need not lead actual evidence of prejudice and the action will be dismissed for delay unless the plaintiff rebuts the presumption. The plaintiff's onus is to persuade the

> court with convincing evidence that there is no substantial risk that a fair trial is not possible. (*Armstrong, supra* and *Woodheath Developments Ltd. v. Goldman*, [2003] O.J. No. 3440)
>
> (7) Courts may dismiss actions for delay even when the relevant rules do not mandate it. A court has inherent jurisdiction to control its own process, which includes the discretionary power to dismiss an action for delay. The power of a superior court to dismiss an action for delay is not limited to that conferred by any specific Rules of Civil Procedure, but also flows from the inherent power of the court to prevent an abuse of its own process. (*Marché D'Alimentation Denis Thériault v. Giant Tiger Stores Ltd.*, 2007 ONCA 695 at paragraph 24, *Wallace, supra* at para. 21)
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> As stated in *Wallace* at para. 22 "There comes a time, in short, when enough is enough, and the civil justice system will no longer tolerate inordinate and inexplicable delay. A court may then eject the action as an exercise of its inherent jurisdiction, whether or not the relevant rules expressly mandate it." (*Szpakowsky* at para. 19)

[19] I cannot conclude that the delay has been intentional. However, I am satisfied that there has been inordinate and inexcusable delay for which Kraner is responsible (*Zaatar* v. *Aviva,* 2018 ONSC 2871 at para. 19; *Ticchiarelli* at para. 15; *Langenecker* at para. 7).

[20] The inordinance of the delay is measured by reference to the length of time from the commencement of the proceeding to the motion to dismiss (*Langenecker* at para. 8; *Ticchiarelli* at para. 15). Taking into account the 6-month suspension of time periods during the pandemic, approximately 9 years and 6 months passed from the issuance of the Statement of Claim to the commencement of the dismissal motion. While there has been some intermittent, albeit very slow progress, this is an inordinate and significant period of time which includes over 3 years since the Timetable was granted. Wilford has been a Defendant for over 9 years.

[21] Determining whether the delay is inexcusable requires an examination of the reasons for it and whether an adequate explanation which is "reasonable and cogent" or "sensible and persuasive" has been provided (*Langenecker* at paras. 9-10; *Ticchiarelli* at para. 16). In determining whether the delay has been unreasonable, the court should consider the issues raised by the case, the complexity of the issues, the explanation for the delay and all relevant surrounding circumstances (*Alexander* v. *Rosedale United Church,* 2010 ONSC 4224 at para. 57). The court will consider explanations offered for both individual parts of the delay and the overall delay and the effect of the explanations considered as a whole to determine if the delay can be excused, at least to the extent that an order dismissing the action would be inappropriate (*Langenecker* at paras. 9-10; *Ticchiarelli* at para. 16).

[22] I am not satisfied that an adequate explanation for the delay has been provided. There are material deficiencies in the record including the absence of any direct evidence from Kraner himself and the lack of an actual explanation of the reasons offered for the delay. The entirety of Kraner's evidence and explanations are set out in the affidavits of his lawyer Peter Cozzi sworn

April 29, 2025 (the "Cozzi Affidavit") and a law clerk, Pavan Gautam sworn January 30, 2025 (the "Gautam Affidavit").

[23] In the Cozzi Affidavit, Mr. Cozzi states that, among other things, he spoke to Kraner who agreed that counsel should bring the Rule 48.14 motion. Mr. Cozzi prepared an affidavit for Kraner to swear in support of the Rule 48.14 motion, however, he has been unable to contact him ever since. As Mr. Cozzi argued these motions, the parties agreed that the Cozzi Affidavit would be allowed for the sole purpose of establishing that Kraner agreed to bring the Rule 48.14 motion.

[24] The Gautam Affidavit states that it has always been Kraner's intention to proceed with his claim against the Defendants and to proceed with his action to trial. Similarly, the Gautam Affidavit also states that Kraner undertakes to forthwith set this action down for trial after the examination of Burnside is completed. However, Mr. Gautam did not speak to Kraner and as with all of the evidence in the Gautam Affidavit, this statement and the undertaking are not made based on advice given by Kraner. An affidavit from a law clerk does not establish that Kraner always intended to pursue his claims to trial or that he intends to do so if successful on these motions. Further, Kraner's agreement to bring the Rule 48.14 motion is not sufficient, without more, to establish this intention. Therefore, based on the record before me, there is no evidence that Kraner always intended to pursue his claim or that he would move a timely manner if he is successful on these motions. I also cannot infer or conclude this from the overall conduct of this action including the failure to meet the extended set down date in the Timetable.

[25] Even accepting the explanations which have been provided at full weight, they are inadequate and insufficient. The two main reasons given for the delay are the need to examine Burnside and obtain an order to continue with respect to Schnurr. The Gautam Affidavit states that Wilford was unable to recall certain information at his discovery and advised that it should be obtained from Burnside. Kraner has attempted to do so but Burnside has been unresponsive and the first available return date was over one year away when he scheduled the Rule 31.10 motion. However, no explanation is provided for why Kraner's counsel did not attempt to contact Burnside until August 15, 2022, over 1 year and 1 month after Wilford's examination and over 7 months after the set down date in the Timetable had passed. There is also no explanation for why Kraner's counsel did not bring the Rule 31.10 motion until October 20, 2023, over 1 year after he last attempted to contact Burnside. I also reject the suggestion that any of this delay can be attributed to Wilford being unable to answer certain questions on discovery. This is common and reasonable particularly with respect to events which happened over 8 years prior to the discovery. The responsibility lies with Kraner who seeks the examination and as the Plaintiff bears responsibility for advancing his claim. Similarly, there is no explanation for why Kraner did not take any steps to obtain an order to continue after his counsel learned of Schnurr's passing in late 2021. The deficiencies in these explanations are more pronounced given Kraner's failure to take the necessary steps notwithstanding the extension granted by the court on consent in August 2020.

[26] In considering the motions, I have fully considered the Supplementary Submissions and they do not alter my conclusions. Kraner filed a trial record approximately 6 weeks after I heard the motion. The courts have been critical of parties who file trial records after status hearing

motions have been brought and/or on the eve of status hearings, purportedly setting actions down for trial which are not ready in an attempt to avoid a status hearing. Even when a trial records are filed before the motion, courts have held that it does not eliminate the need for a status hearing (*Shabbir Khan* v. *Sun Life,* 2011 ONSC 455; aff'd 2011 ONCA 650; *Integrated Business Concepts Inc.* v. *Akagi,* 2022 ONSC 3889 at paras. 20-21). One of Kraner's primary submissions on these motions is that he could not set this action down for trial without first examining Burnside. Passing a trial record is contrary to this position that the action is not ready to be set down. Therefore, filing a trial record, particularly after the motion was already argued, does not obviate the need for a status hearing, prevent the dismissal motion from being decided or affect the submissions on either motion. Similarly, Kraner's discontinuance of his action as against Schnurr after the motion is of no effect. While it means that an order to continue would no longer be required, the delay associated with Kraner's unexplained failure to take steps to obtain one has already contributed to the delay.

[27] I also conclude that the significant delay gives rise to a substantial risk that a fair trial will not be possible. Inordinate delay generates a presumption of prejudice which is inherent in long delays as memories fade, witnesses become unavailable and documents are lost such that the longer the delay the stronger the inference of prejudice (*Langenecker* at para. 11; *Ticchiarelli* v. at para. 28). The plaintiff bears the onus of rebutting the presumption of prejudice (*Cardillo* v. *Willowdale Int'l Contracting Ltd.,* 2020 ONSC 2193 at para. 38). It is also open to a defendant to lead evidence of actual prejudice which may also form the basis for dismissal (*Ticchiarelli* at para. 29; *Cardillo* at para. 38). Actual prejudice is any prejudice which would impair the Defendants' ability to defend the action resulting from the Plaintiffs' delay, not due to the sheer passage of time (*Carioca's* at para. 57; *H.B. Fuller Company et al.* v. *Rogers (Rogers Law Office),* 2015 ONCA 173 at para. 37). Determining whether there is a substantial risk that a fair trial is no longer possible considers the potential prejudice caused by the delay to the defendant's ability to put its case forward for adjudication on the merits (*Langenecker* at para. 11).

[28] The unavailability or death of key witnesses, the loss of material documents and the loss of opportunities to conduct a proper investigation may constitute actual prejudice (*1196158 Ontario Inc.* v. *6274013 Canada Ltd.*, 2012 ONCA 544, at paras. 31, 41-43). Prejudice is inherent in long delays as memories fade and fail, witnesses become unavailable, and documents and other potential exhibits are lost giving rise to a presumption of prejudice due to concerns of trial unfairness (*Langenecker* at para. 11; *DK Manufacturing Group Ltd.* v. *MDF Mechanical Limited,* 2019 ONSC 6853 at para. 28; *1196158 Ontario Inc.* at para. 42).

[29] Given the significant period of over 12 years since the material events occurred, 11 years since the action was commenced including over 9 years from the commencement of the action to the dismissal motion, I am satisfied that a strong presumption of prejudice arises (*Langenecker* at para. 11). I also conclude that Kraner has not rebutted this presumption of prejudice. Examinations for discovery have been completed, Schnurr's evidence was preserved and it appears the only remaining steps are the Rule 31.10 motion and, if successful, examination of Burnside. However, Kraner has not provided any evidence regarding prejudice. In particular, there is no evidence regarding the preservation of documents or the availability of witnesses. In light of the long delay and the strong presumption of prejudice in the present case, more is required and the absence of this evidence is material (*Unlimited Motors Inc.* v. *Automobili*

Lamborghini Spa, 2019 ONSC 142 at paras. 20-26; *DK Manufacturing* at para. 43-44). It is insufficient in these circumstances to expect the court to infer from the record and status of the proceedings that the presumption of prejudice has been rebutted particularly given the overall delay and the more recent delays to take the necessary steps to move this action forward to trial.

[30] In my view, the balancing of Kraner's right to have his action tried on the merits and Wilford's right to timely justice and to not have a significant claim looming for an extended period of time favours dismissal in the circumstances. This action has lingered for over 11 years without making it to trial. Kraner has made serious, personal allegations of misconduct against Wilford which have been pending for over 9 years. Notwithstanding the indulgence given by the court and Wilford in 2020 through the Timetable, Kraner did not take sufficient or reasonable steps to advance his action to trial when given the opportunity to do so. In considering this balance, Sharpe J.A.'s comments in *1196158 Ontario Inc.* are applicable:

> "44. Another harm that flows from delay, properly relied on by the status hearing judge, is that it leaves the litigant with the claim hanging over its head in a kind of perpetual limbo. Fairness requires allowing parties to plan their lives on the assumption that, barring exceptional or unusual circumstances, litigation timelines will be enforced. "Litigants are entitled to have their disputes resolved quickly so that they can get on with their lives" and "[d]elay multiplies costs and breeds frustration and unfairness": Marché, at para. 25; see, also, Hamilton, at para. 21."

[31] With respect to the Rule 48.14 motion, there is significant overlap with the factors and considerations on the dismissal motion. A party seeking an extension of the deadline to set an action down for trial must demonstrate that there is an acceptable explanation for the delay and that allowing the action to proceed would not cause the defendants to suffer non-compensable prejudice (*Kara v. Arnold*, 2014 ONCA 871 at para. 80). Based on the analysis and considerations set out above, I conclude that Kraner has not met this test to show cause why he should be granted an extension to set this action down for trial.

[32] Given my disposition on the dismissal and status hearing motions, I have not considered Kraner's Rule 31.10 motion. I note that Burnside has not responded and Wilford did not oppose this motion if this action was not dismissed.

III. Disposition and Costs

[33] Order to go dismissing this action. If the parties are unable to agree on the costs of this motion, they may file written costs submissions with me (not to exceed 5 pages, excluding Costs Outlines) on a timetable to be agreed upon by counsel.

Released: December 16, 2025

Associate Justice McGraw