

ONTARIO  
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Charney, Nakatsuru, and O'Brien JJ.

**BETWEEN:** )  
)  
LABORERS' INTERNATIONAL UNION ) *Youssef Kodsy*, Counsel for the Appellants  
OF NORTH AMERICA AND LIUNA )  
LOCAL 183 )  
Appellants )  
- and - )  
)  
SYLVESTER DENNIS ) *Patrick Di Monte*, Counsel for the  
Respondent ) Respondent  
)  
)  
) **HEARD in Toronto on December 17, 2025**

2026 ONSC 70 (CanLII)

**REASONS FOR DECISION**

**O'BRIEN J.**

**Overview**

[1] The appellants seek to quash the decision of the motion judge, which allowed the respondent an extension of time to file an amended statement of claim. They submit the order was granted in a procedurally unfair manner because the motion judge relied on a rule not cited by the respondent, Mr. Dennis, in his materials. Specifically, while Mr. Dennis brought a motion to vary a previous order under r. 59.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the motion judge instead granted an extension of time to amend the statement of claim under r. 3.02. The appellants submit that, because they were not given notice that r. 3.02 would be relied upon, they did not file evidence of the prejudice they had suffered by the passage of time.

[2] The only issue on the appeal is whether granting the order for an extension of time breached the appellants' right to procedural fairness. For the following reasons, I find it did.

**Background**

[3] Mr. Dennis' dispute with the appellants arose because he contributed union fees to two locals of the Laborers' International Union of North America (LIUNA) over many years. He does

not complain about contributing twice. His issue as alleged in his statement of claim is that he received a letter from LIUNA in 1992 stating that he was allowed to continue holding memberships in both local unions. In 2019, LIUNA wrote to him stating he could not continue to be a member of both local unions. In his statement of claim, Mr. Dennis seeks a declaration that he holds memberships in both locals and damages of \$75,000 for “harassment, discrimination and emotional abuse.”

[4] It took over five years from the time Mr. Dennis issued his statement of claim until the order at issue, which allowed him an extension of time to amend that claim. Mr. Dennis’ statement of claim was issued in November 2019. Counsel for the appellants wrote to him at that time advising that the defendants were not properly named because trade unions cannot be sued in their own names. Since Mr. Dennis did not provide them with an amended claim nor take any other steps to advance the action, the appellants ultimately scheduled a motion to strike the claim, which was heard on June 17, 2021. Mr. Dennis did not appear at the motion. The motion judge, Trimble J., noted that “there is a recurring theme that [Mr. Dennis] is not in the country, cannot or will not appear in a Virtual courtroom, and insists that the matter be heard live.”

[5] The motion judge found the claim was properly served. He ordered that it be struck because the appellants had no legal capacity to be sued and because the claim did not properly plead a cause of action and the facts supporting it. The motion judge gave Mr. Dennis thirty days to file an amended statement of claim.

[6] On December 5, 2024, Mr. Dennis brought a motion to set aside or vary the order of June 17, 2021 on the ground that he was not properly served and was out of the country when the motion was heard. He also asked the court to establish a timetable to proceed with the action, including the filing of a statement of defence and discoveries.

[7] In the alternative, he sought an order extending the time for delivery of an amended statement of claim, although he did not include a draft amended statement of claim in his motion record.

[8] Despite being aware of the June 17, 2021 order as of August 2021, Mr. Dennis did not serve his motion record for the motion to set aside the order until December 2024, approximately three and a half years after the order was made. That motion was heard by Trimble J. on March 13, 2025. In his motion materials, Mr. Dennis relied only on r. 59.06.

[9] In his order, Trimble J. allowed the motion under r. 3.02(1), which permits the court to extend the time prescribed by an order. He gave Mr. Dennis 30 days to file an amended statement of claim. He reasoned that the court prefers to allow matters to be dealt with on their merits. He also stated: “The key consideration is prejudice to the respondent...Where the respondent cannot demonstrate prejudice in its ability to defend the claim, the indulgence should be granted.”

### **Was there a breach of procedural fairness?**

[10] Deciding a motion on a basis not pleaded by the parties may amount to a breach of procedural fairness. Civil proceedings generally should be decided within the boundaries pleaded by the parties so that the parties know the case they have to meet: *Colautti Construction Ltd. v.*

*Ashcroft Development Inc.*, 2011 ONCA 359, at para. 42; *Rodaro v. Royal Bank of Canada*, 2002 CanLII 41834 (ON CA), at paras. 60-63; *A-C-H International Inc. v. Royal Bank of Canada*, 2005 CanLII 17769 (ON CA), at paras. 13-21; *2183164 Ontario Inc. v. Gillani*, 2013 ONSC 1456, at paras. 24-25. It is well established that deciding a case on a basis never pleaded or raised amounts to a denial of procedural fairness: *Nicholls v. Zsiga*, 2021 ONSC 6890, at para. 7.

[11] Pursuant to r. 37.06, a party's notice of motion is required to state the precise relief sought and state the grounds to be argued, including any rule to be relied upon.

[12] This does not mean a motion judge can never decide a motion on a basis other than set out in the pleadings. A decision can be made that does not perfectly accord with the pleadings as long as no party was surprised or prejudiced: *Nicholls*, at para. 9, citing *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28.

[13] Indeed, parties (particularly self-represented parties) frequently cite the wrong rule of civil procedure, and, as long as there is no surprise or prejudice, the court will endeavour to apply the correct rule "to secure the just, most expeditious and least expensive determination" of the proceeding (Rule 1.04(1)).

[14] In this case, there was a breach of procedural fairness because Mr. Dennis brought his motion only on the basis of r. 59.06, and the appellants were denied the opportunity to provide the evidence of prejudice that the motions judge considered key to the analysis.

[15] As indicated above, Mr. Dennis' main focus was for "an Order setting aside or varying the Order of the Honourable Justice Jamie Trimble dated June 17, 2021." He sought an order for a timetable for the action, and requested orders for specific steps in the action, such as discoveries, a pre-trial, and setting the matter down for trial.

[16] In their responding materials, the appellants filed two affidavits providing the history of communications between the parties. The argument in their factum was focused entirely on the test under r. 59.06. At the argument of the motion, counsel for Mr. Dennis relied only on r. 59.06. The appellants submitted the test under r. 59.06 was not met because there were no fraud or new facts discovered after the initial motion decision.

[17] It was only the motion judge who raised the possibility of an order under r. 3.02. In oral argument, counsel for the appellants responded that he had not addressed that rule because it was not pleaded. When the motion judge asked counsel what evidence his clients had of prejudice caused by the delay, counsel responded that he did not file any evidence of prejudice because that was not an issue under r. 59.06. Moreover, counsel for the appellant noted that Mr. Dennis had not included a draft amended statement of claim in his motion record, and the defendants could not provide evidence of prejudice without knowing what would be in the draft amended statement of claim.

[18] The motion judge then decided the motion based exclusively on r. 3.02(1). He briefly addressed the elements of the test for an extension of time and relied on the principle that, where a respondent cannot demonstrate prejudice, an extension of time should be granted. He stated:

“The delay is the main problem for the Plaintiff although not a large one given the lack of prejudice for the Respondent.”

[19] The breach of procedural fairness arose because the appellants were not on notice that prejudice was in issue. It is not sufficient that Mr. Dennis requested an extension of time to file an amended statement of claim as the final alternative relief in his notice of motion. Mr. Dennis did not offer a draft amended statement of claim, did not cite r 3.02 in his motion materials, and did not address the test for an extension of time. Although the motion judge raised r. 3.02 at the hearing, it was too late by then for the appellants to file evidence of prejudice, particularly in the absence of a draft amended statement of claim. Overall, the appellants did not have advance notice that they would be required to demonstrate specific evidence of prejudice caused by the passage of time. In my view, it was therefore unfair to decide the motion on that basis.

**Disposition**

[20] The appeal is allowed. The motion is remitted to a different motion judge for determination. Mr. Dennis must include a draft amended statement of claim in his motion record and the appellants may include evidence of prejudice in their motion record.

[21] The appellants are entitled to (a) \$2500 in costs, as fixed on the motion for leave to appeal; and (b) as agreed by the parties, \$5,000 in costs for the appeal. Mr. Dennis therefore shall pay the appellants costs of \$7,500.

\_\_\_\_\_  
O'Brien J.

I agree: \_\_\_\_\_  
Charney J.

I agree: \_\_\_\_\_  
Nakatsuru J.

**Released:** January 13, 2026

**CITATION:** LIUNA v. Dennis, 2026 ONSC 70  
**DIVISIONAL COURT FILE NO.:** 237/25  
**DATE:** 20260113

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**BETWEEN:**

LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA AND LIUNA LOCAL 183

Appellants

- and -

SYLVESTER DENNIS

Respondent

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**REASONS FOR DECISION**

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**O'BRIEN, J**

**Released:** January 13, 2026