

**CITATION:** Niagara Radio Group et al. v. Rankin Construction Inc., 2026 ONSC 1857  
**COURT FILE NO.:** CV-16-00011367-0000  
**DATE:** March 30, 2026

**SUPERIOR COURT OF JUSTICE**

**RE:** Niagara Radio Group Inc & 1736106 Ontario Inc. (Plaintiffs/Moving Party) v. Rankin Construction Inc. (Defendant/Respondent)

**BEFORE:** Latimer, J.

**COUNSEL:** Luigi De Lisio, for the Plaintiffs/Moving Party

Peter Mahoney & Robert Kim (student-at-law), for the Defendant/Respondent

**HEARD:** March 24, 2026

**ENDORSEMENT**

[1] This was originally a motion seeking to set aside an administrative order for dismissal. On the day of the hearing, it morphed into a motion seeking a finding that the dismissal order was a nullity, given an earlier stay related to one Plaintiff transferring their interest to another corporate entity, a non-party. Both approaches, however, sought the same practical outcome. The Moving Party wished to revive their Actions on a court-approved timetable and replace one corporate Plaintiff with another.

[2] The Defendant’s position was originally that the motion to set aside should fail. Given the shift in the Plaintiffs’ position noted above, the Defendant shifted in kind and submitted that only one Plaintiff, Niagara Radio Group Inc. (“Niagara Radio”) had their action stayed, with the other action, related to 1736106 Ontario Inc. (“1736106”), was properly administratively dismissed. The Defendant requested that the dismissal order remain while, pursuant to Rule 11.03 of the *Rules of Civil Procedure*, the stayed matter should be dismissed now on account of the substantial delay.

[3] For the reasons that follow, I agree with the Defendant.

**Background**

[4] Over a decade ago, construction was completed on a portion of Highway 406, widening it to four divided lanes between Fonthill and Welland. Some of the fill used to complete this project came from the Plaintiffs’ lands, having been removed by the Defendant pursuant to contractual agreement.

[5] The contract in question is from 2011. It provided that the Defendant, a construction company, could remove fill from two Parcels of land under certain circumstances. The Plaintiffs allege in their Statement of Claim that, while fill was removed, the terms of the contract were violated.

[6] The fill was removed from locations referred to by the parties as Parcels 1 and 2. Parcel 1 was owned by Niagara Radio, Parcel 2 by 1736106. Andrew Ferri is a directing mind of both companies, as well as 448332 Ontario Ltd. (“448332”), a company that subsequently purchased Parcel 1 from Niagara Radio in 2019. I will address this detail more fully in a moment.

[7] Returning to the chronology, the Statement of Claim was filed in 2016 on behalf of both Plaintiffs, Niagara Radio and 1736106.

[8] Both Plaintiffs’ Actions were administratively dismissed in 2025. A detailed chronology is set out in the affidavit found in the Respondent Motion Record (B-1-779 on Case Center). I accept that chronology as accurate. Plaintiffs’ then-counsel, Kris Hutton, engaged intermittently with Defendant’s counsel, Mr. Mahoney, for several years on case management-related steps. During these steps, the five-year period to set the matter down for trial approached. The parties agreed to a Timetable Order setting out future steps that, if followed, would have had the matter set down for trial by December 31, 2022.

[9] In 2022, after having expressly inquired, Defendant’s counsel was advised that Niagara Radio had transferred its interest in Parcel 1 to 448332 three years earlier. Defendant’s counsel reminded Plaintiffs’ counsel that this transfer resulted in an automatic stay pursuant to Rule 11.01 of the *Rules of Civil Procedure*, and that an order to continue would be required. No order was ever sought by either Niagara Radio, Mr. Ferri, or 448332.

[10] Plaintiffs’ then-counsel requested to be removed from the record in July 2022. Mr. Ferri subsequently sought to represent the Plaintiffs in court and, additionally, sought to add 448332 to the litigation. After significant delays, those motions were heard on August 4, 2023. Justice Gambacorta dismissed both motions orally and included the following reminder in her Endorsement:

Pursuant to Rule 11.01, the proceedings/action is stayed due to the effect of a transfer of interest from the Plaintiff to a non-party. (Plaintiff needs to obtain an Order to Continue the action).

[11] In August 2023, Luigi De Lisio was retained as counsel for the Plaintiffs. No progress occurred on the file, however, until notification of the Registrar’s “Order Dismissing Action for Delay”, which occurred on March 3, 2025. Mr. De Lisio thereafter moved promptly to set aside the dismissal order, resulting in the current motion.

[12] I have received quality submissions from both sides and reviewed their helpful material. I have come to the following conclusions:

- 1) The *Niagara Radio* Action was automatically stayed in 2019, following the transfer of interest to 448332 that occurred on November 19, 2019, pursuant to Rule 11.01 of the *Rules*. Justice Gambacorta’s *obiter* reference to this fact in her August 4, 2023 Endorsement did not purport to, or have the effect of, enlarging that stay to include the *1736106* Action. *1736106* still owned Parcel 2 and therefore still had an interest in the litigation.
- 2) The *1736106* Action was lawfully dismissed pursuant to the March 3, 2025 Dismissal Order. For the purposes of this endorsement, however, I find that the *Niagara Radio* Action was not lawfully dismissed, as a stayed action cannot be the subject of a dismissal order: see *625041 Ontario Inc. v Ford Motor Company of Canada*, 2012 ONSC 2931, at paras. 27-31. I adopt Justice Goodman’s ruling as a correct statement of the law on this point and will treat the dismissal order *vis a vis* the *Niagara Radio* Action as a nullity.<sup>1</sup>

[13] There are two additional questions for resolution on this motion. First, should the *1736106* Action be revived by setting aside the dismissal order? This question is addressed by an application of the *Reid* factors: *Reid v Dow Corning Corp*, [2001] OJ No 2364, 11 CPC (5<sup>th</sup>) 80 (Ont. Master), at para. 41, rev’d on other grounds, [2002] OJ 3414, 48 CPC (5<sup>th</sup>) 93 (Ont. Div. Ct.).

[14] The second question is how to proceed in relation to the stayed *Niagara Radio* Action. I will address these two questions next.

### **The *1736106* Action: should the dismissal order be set aside?**

[15] This analysis focuses on four questions:

- 1) Has there been a satisfactory explanation for the delay?
- 2) Was the delay caused by inadvertence?

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<sup>1</sup> I appreciate there is other related authority: see, for example, *401 Weston Centre Ltd. v. 1734252 Ontario Inc.*, 2021 ONSC 443, at paras. 47-52; *George Karr v Allstate Insurance Company*, 2014 ONSC 2771, at paras. 5-13; *CWH Distribution Services Inc. v. Imperial Chilled Juice Inc.*, 2020 ONSC 7006, at paras. 52-58. This issue arose the morning of the motion. Counsel made *extempore* submissions but did not have the benefit of reflection and further research. Defendant’s counsel subsequently provided the *401 Weston Centre* decision after the hearing. I have not sought nor have the benefit of written submissions on the issue. In these circumstances, I am inclined to the view that the dismissal order was a nullity, and apply that view to this determination, as it is the approach most beneficial to the Plaintiffs/Moving Party. As will be clear from the remainder of these reasons, however, resolution of the “nullity” issue is inconsequential to the overall result.

- 3) Has the Plaintiff moved promptly to set aside the dismissal order?
- 4) Has there been prejudice to the Defendant?

[16] This is a contextual analysis; the Plaintiff, who bears the onus, need not satisfy every step. These questions are the lens through which I assess what result is ultimately in the interests of justice: *Scaini v Prochnicki* (2007), 85 OR (3d) 179 (CA), at paras. 23-24.

[17] In an attempt to satisfactorily explain why a 2026 court is considering a 2016 action, the Plaintiff points to significant events that have occurred during the past ten years. First, the COVID pandemic slowed the court system. Next, his earlier counsel, Mr. Hutton, apparently had personal issues that led to regulatory intervention by the Law Society of Ontario. Finally, no procedural steps were taken following Mr. De Lisio's retainer in 2023.

[18] The difficulty with each of these submissions is the lack of any evidentiary linkage between the occurrence of these events and a concrete impact on the Plaintiffs' pace of litigation. Beginning with COVID, while filing and courthouse-related restrictions were in place for a time, that did not prevent this case from moving forward in the background. There is evidence in this record of the parties corresponding and sharing information during between 2020 and 2022. It has not been established that the COVID restrictions delayed this proceeding in any way. In considering this time period, I bear in mind as well that an earlier extension of the five-year dismissal timeline already took place, in 2021.

[19] Regarding Mr. Hutton, there is no specific allegation of ineffective assistance made against him. While I pay close attention to his LSO difficulties, I cannot find as a fact that it had any impact on legal services he provided to Mr. Ferri and his companies. It has not been established that Mr. Hutton's actions as counsel delayed this proceeding in any way.

[20] I do, however, find that Mr. Ferri, as agent for the Plaintiffs and an active participant in their representation, particularly after Mr. Hutton was removed, failed to pursue the Plaintiffs' claims with diligence. For example, he transferred an interest in Parcel 1 in 2019 and never told anyone, including the court, for years. The *Niagara Radio* Action has been stayed for more than five years, with over half of that time occurring without anyone (the Court, the Defendant) being made aware. While not legally trained, Mr. Ferri's email correspondence betrays an understanding of the legal process. He also considerably delayed his eventual 2023 motion to represent himself and add 448332 as a Plaintiff. I am not satisfied the Plaintiff has satisfactorily explained the significant delay in this proceeding.

[21] Further, the only portion of delay that may have been caused by inadvertence is August 2023 to March 2025, the period where Mr. De Lisio was retained counsel. His reputation and his overall

competence as counsel make me inclined to conclude that a dismissal order under his watch may have been inadvertent, although Mr. Mahoney properly reminds me that these questions should be resolved on evidence, not reputation, and I have no specific evidence explaining what did (or did not) occur after Mr. De Lisio was retained.

[22] On reflection, I conclude that I do not have to come to a firm conclusion regarding this time period, given the ample delay that preceded Mr. De Lisio's retainer. It has not been established that the 2023-2025 delay was caused by inadvertence, although I put almost no weight on this time period in my ultimate determination.

[23] I find that the Plaintiff has moved promptly to set aside the dismissal order.

[24] I also find that the Defendant has been prejudiced by the delay. First, it has caused additional motions to be argued (and paid for). Second, I am satisfied there is what might be called evidentiary prejudice from the significant passage of time since the contested events underlying this litigation. While I accept that this is a case where written documents are important, I am also satisfied that witnesses will be asked to test their memory on conversations and events that surrounded those contracts. For example, the Plaintiffs' wish to discover Mr. Rankin, the President of the Defendant company (see April 8, 2022 email at B-1-848 on Case Center). A case that is reliant on the memory of witnesses on dated matters impacts not just the parties but the entire fact-finding process: *Jadid v Toronto Transit Commission and John Doe Driver*, 2016 ONCA 936, at para. 16.

[25] Having conducted this assessment, I now consider the overarching question of what result is in the interests of justice. The Plaintiff has not convinced me that setting aside the dismissal order is just in the circumstances of this case. They have not satisfactorily explained considerable delay, much of which they actively caused. They have not transparently engaged with the court (*e.g.* not advising of the 2019 transfer of interest for Parcel 1), and their actions have caused prejudice to the Defendant and the court process. Their recent actions to promptly address the dismissal order do not outweigh his prior dilatory conduct and my findings on the other *Reid* factors. Overall, the Plaintiff has not met their onus to demonstrate that the administrative dismissal should be overturned. That aspect of this motion is dismissed.

### **The Niagara Radio Action: Should the stay remain?**

[26] The next question is what should occur with the stayed action. In my view, a practical application of Rule 11 is appropriate and in the interests of justice. I reproduce that Rule in its entirety below:

## RULE 11: TRANSFER OR TRANSMISSION OF INTEREST

### Effect of Transfer or Transmission

**11.01** Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the proceeding shall be stayed with respect to the party whose interest or liability has been transferred or transmitted until an order to continue the proceeding by or against the other person has been obtained.

### Order to Continue

**11.02** (1) Where a transfer or transmission of the interest or liability of a party takes place while a proceeding is pending, any interested person may, on filing an affidavit verifying the transfer or transmission of interest or liability, obtain on requisition from the registrar an order to continue (Form 11A), without notice to any other party.

(2) An order to continue shall be served forthwith on every other party.

### Failure to Obtain Order to Continue Action

**11.03** Where a transfer or transmission of the interest of a plaintiff takes place while an action is pending and no order to continue is obtained within a reasonable time, a defendant may move to have the action dismissed for delay, and rules 24.02 to 24.05 apply, with necessary modifications.

[27] Pursuant to R. 11.01, the *Niagara Radio* Action was stayed at the time of the transfer of interest of Parcel 1 in November 2019. Despite this stay, an easy administrative solution resided in R. 11.02. Mr. Ferri, or his counsel, could have readily obtained an order to continue by filing a Form 11A (available online) with the registrar. No court date or notice to the Defendant was required: *Outfront Media Canada LP v. Clarity Media Inc.*, 2017 ONSC 2136 (Div. Ct), at paras. 73-77. I find as a fact that this process would have been straightforward and required minimal effort. The Plaintiff's failure to do so, despite Mr. Mahoney's repeated encouragement to do so (once he learned about the transfer), is inexplicable. Given Mr. Ferri's familiarity with the legal process, I can only conclude that his failure to do so was intentional and advertent. Indeed, his affidavit on this motion makes this point plain.

[28] Overall, the Plaintiff failed to take reasonable steps to pursue his litigation. He did not seek an order to continue within a reasonable time. Even when expressly told by Mr. Mahoney, in March 2022, that an order was necessary, none was obtained. Instead, it was actively resisted (see May 27, 2022 email exchange at B-1-858 on Case Center). Somewhat ironically, had the *Niagara Radio* Action not been stayed at the time of the dismissal order, it would cease to be before the courts, given my above ruling in the *1736106* Action. It would not be just to allow unreasonable Rule 11 delay to operate in a manner that rewards the dilatory party: *401 Weston Centre*, at paras. 56-57.

[29] It is in this context that I address whether to apply Rule 11.03 to the present circumstances. The Rule requires the Defendant to “move to have the action dismissed for delay”. To “move” is to bring a motion. In this case, a specific R. 11.03 motion has not been brought in writing.

[30] In the unique circumstances of this proceeding, I conclude it is nevertheless in the interests of justice that I consider R. 11.03 within the currency of the Plaintiffs’ current motion. I come to this conclusion for the following reasons:

- 1) The conduct engaging R. 11.03 is squarely before me already.
- 2) The Plaintiffs’ have received fair notice, arising from the fact of the dismissal order and the Defendant’s responding factum, that a dismissal for delay, or a continuation of a previous dismissal order, is a potential result.
- 3) The R. 11.03 remedy – dismissal for delay – logically arises from the present factual circumstances.
- 4) Plaintiff’s counsel is the party who first raised the applicability of Rule 11 during his “nullity” argument. This issue was not raised in the Plaintiffs’ factum, as Mr. De Lisio advised he only recently came across Goodman J’s endorsement in *625041 Ontario Inc.* He professionally disclosed the decision to opposing counsel and made quality submissions on the point that assisted his client and the court. Indeed, I have applied that decision in these reasons. Having relied upon a R. 11.01 argument, however, it is fair that the Defendant be permitted to make a R. 11.03 argument in response.
- 5) Requiring the Defendant to bring a specific R. 11.03 motion would be expensive, unnecessary and, as the relevant issues are already before the court, could be described as sacrificing substance on the altar of form.

[31] For these reasons, I apply Rule 1.04 and Rule 2.03 of the *Rules* to dispense with specific compliance regarding a formal R. 11.03 motion in this proceeding. The facts and argument are already before the court; adjudicating this issue within the currency of the present motion is just and appropriate.

### **Disposition**

[32] Ten years ago, a Statement of Claim was filed arising out of a contractual dispute related to the construction of a prominent new stretch of highway. Ten years later, that same highway is well-worn,

displaying cracks, potholes and other signs of age.<sup>2</sup> And yet, this Statement of Claim is still before the courts, closer to the beginning of the civil litigation process than the end.

[33] The Defendant has had to concern itself with this outstanding litigation for ten years. The Supreme Court of Canada in *Hryniak v Mauldin*<sup>3</sup> spoke of the need for a “culture shift” to create timely and affordable access to justice. There is nothing timely about the pace of the present litigation, and the responsibility for this excessive passage of time falls squarely at the feet of the Plaintiffs.

[34] The motion as it relates to the *1736106* Action, to set aside the dismissal order, is dismissed.

[35] I accept the Plaintiff’s argument that the dismissal order *vis a vis* the *Niagara Radio* Action was a nullity, pursuant to R. 11.01, as the Action had previously been stayed. However, I order, pursuant to R. 11.03, that the stayed *Niagara Radio* Action now be dismissed for delay.

[36] Regarding costs, the Defendant is the successful party and entitled to costs. My jurisdiction to order costs resides in section 131(1) of the *Courts of Justice Act*. I have reviewed Rule 57.01 of the *Rules* and drawn guidance from Justice Perell’s decision in *394 Lakeshore Oakville Holdings Inc. v Misek*, 2010 ONSC 7238, at paras. 11-17.

[37] The Defendant seeks \$8381.59 in costs. A factum and book of authorities was filed, along with a responding motion record. I am satisfied that amount is reasonable, given the fact that the Plaintiffs’ Bill of Costs is very similar. This long motion was set for two hours. Both lawyers provided excellent oral advocacy on behalf of their clients, and the court benefited from both of their submissions. The Plaintiffs lost on the merits. I am satisfied a costs order in the amount of \$7500 is appropriate. That amount is ordered, payable forthwith.

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Latimer J

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<sup>2</sup> I drive it every time I attend Welland Courthouse.

<sup>3</sup> [2014] 1 SCR 87, at para. 1.

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SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Niagara Radio Group Inc. & 1736106 Ontario Inc.

Plaintiffs/Moving Party

**- and -**

Rankin Construction Inc.

Defendant/Respondent

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**ENDORSEMENT**

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LATIMER J

**Released:** March 30, 2026