Cogent evidence required to avoid automatic dismissal for delay

March 30, 2026

On March 10, 2026, the Ontario Court of Appeal released its decision in *Bellefeuille v Tamarack Developments Corporation (Tamarack Homes)*, 2026 ONCA 170. The decision confirms that moving promptly to set aside the dismissal is not necessarily sufficient to save the action. The plaintiff must put forward cogent evidence to explain the delay. The decision also confirms that the primary responsibility for an action's progress lies with the plaintiff.

Background

The action arose out of a dispute over alleged deficiencies in the plaintiffs' new home. They made warranty claims to Tarion as early as November 2016. In October 2018, they commenced an action against the builder/vendor and the City of Ottawa. It was not until January 2020 that the plaintiffs instructed their counsel to add Tarion as a defendant and adjourned the examinations for discovery that had been scheduled for February of the same year. Tarion was not added as a defendant until August 2022. Examinations for discovery were rescheduled for January 2024, but the plaintiffs cancelled them, alleging deficiencies in the builder/vendor's affidavit of documents.

The action was administratively dismissed for delay under Rule 48.14(1) because it was not set down for trial within five years of its commencement. The plaintiffs brought a motion to set aside the dismissal.

The motion decision

The motion judge dismissed the plaintiffs' motion to set aside the dismissal, finding that they did not adduce sufficient evidence to explain the delay and that the delay led to inferred prejudice against the respondents. Although the plaintiffs brought the motion to set aside the dismissal promptly, the motion judge found that there was not enough evidence that the respondents caused some of the delay to "tilt the…factors" in the plaintiffs' favour. Furthermore, while the plaintiffs provided an affidavit sworn by their counsel purporting to provide reasons for the delay, the motion judge found that the affidavit contained "bald assertions" that did not adequately explain the delay in adding Tarion to the action.

The appellate decision

The Court of Appeal upheld the administrative dismissal of the plaintiffs' action for delay. The Court agreed with the motion judge that although the plaintiffs moved promptly to set aside the dismissal, they failed to provide sufficient evidence explaining years of inactivity, including a long gap in adding Tarion as a defendant. Applying the factors from *Reid v Dow Corning Corp.* contextually, the Court held that the plaintiffs failed to identify a palpable and overriding error in the motion judge's reasoning.

The Court of Appeal also accepted the motion judge's finding of inferred prejudice arising from the prolonged delay. The Court found that this case was unlike those in which courts have set aside dismissals because the defendants' conduct contributed meaningfully to inactivity or the matter was otherwise ready for trial. To the contrary, the plaintiffs in *Bellefeuille* did not adduce sufficient evidence to demonstrate that the defendants contributed to the delay, the plaintiffs' explanations for the delay were largely unsupported by evidence, and the action had not yet even reached the discovery phase. As a result, the motion judge was entitled to reject the plaintiffs' arguments. The appeal was dismissed, with costs awarded to all three respondents.

Commentary

This decision highlights that Rule 48.14 can be strictly enforced. If an action is not set down for trial within 5-years, the delay can be considered presumptively "inordinate". The plaintiffs then bear the burden of overturning the presumption by adducing evidence to explain the delay. In determining whether the plaintiffs have met their burden, courts will apply the *Reid* factors contextually and therefore defendants will want to carefully consider the evidence in taking a technical position to oppose a motion to set aside an automatic dismissal under Rule 48.14.

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