

CITATION: *Mi5 Print & Digital v. Larmer*, 2026 ONSC 3070
COURT FILE NO.: CV-17-00570437-0000
DATE: 20260612

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: *Mi5 Print & Digital Communications Inc. et al. v. Craig Larmer et al*

BEFORE: Associate Justice Rappos

COUNSEL: *Peter Carey*, for the Plaintiffs

Jared Brown, for Defendants Ronald Morgan and Barrie Williams

Mark Laschuk, for Defendants Craig Larmer, Lesley Ann Sharpe, and Lesley Ann Sharpe cob as LCS Imaging

HEARD: September 11, 2024, August 14, 2025, September 22, 2025, and October 15, 2025

REASONS FOR DECISION

Overview

[1] In this action the Plaintiffs, Mi5 Print & Digital Communications Inc. and 2214264 Ontario Inc., allege that, among other things, the Defendant Craig Larmer, a former employee of Mi5 Print, breached his fiduciary duties by sharing Mi5 Print’s confidential information with the other Defendants, misappropriating Mi5 Print’s business opportunities, and soliciting Mi5 Print’s clients to send work to the other Defendants. The Plaintiffs seek damages for breach of fiduciary duty, breach of contract, inducing breach of contract, and intentional and unlawful interference with economic relations.

[2] The Plaintiffs brought a motion for a status hearing so that the action would not be administratively dismissed for delay. The Plaintiffs ask that the Court grant an Order setting a deadline for the completion of the remaining steps necessary to have this action set down for trial.

[3] To date, the parties have not exchanged affidavits of documents, conducted examinations for discovery, participated in mediation, or set the matter down for trial

[4] As set out in my Reasons for Decision reported as *Mi5 Print & Digital v. Larmer*, 2025 ONSC 729, one of the arguments made by the Plaintiffs in support of their motion was that their former counsel, David Rubin (“**Former Counsel**”), failed to advance the claim on a timely basis. I refrained from rendering a decision on the motion at that time, since the Plaintiffs had failed to serve their materials on Former Counsel. Following the release of my decision, Former Counsel filed an affidavit and was subject to cross-examination.

[5] The parties appeared before me at two case conferences, and timetables were established for the parties to file additional written submissions and make additional oral submissions in response to Former Counsel's evidence.

[6] The Plaintiffs continue to argue that their action should not be dismissed and that the Court should set deadlines for the completion of the remaining steps necessary to have the action set down for trial. The Plaintiffs' position is that they have always intended to prosecute the action, the action has a high probability of success, that Former Counsel failed to advance the claim on a timely basis, and that they have attempted to move the matter forward and the Defendants have prevented the matter from progressing further. The Plaintiffs also argue that the Defendants will not suffer any non-compensable prejudice if the action proceeds.

[7] The remaining Defendants¹ argue that the action should be dismissed for delay because the Plaintiffs have failed to provide an acceptable explanation for the delay, and that they would be prejudiced if they are required to continue to defend this action.

[8] For the reasons that follow, the Plaintiffs' motion is dismissed, and the action is dismissed for delay.

Legal Principles

[9] The primary responsibility for the progress of an action lies with the plaintiff. There is no burden on the defendant to explain the delay or to move the action to trial.²

[10] Where a plaintiff has failed to take initiative to advance an action, a defendant is not required to spend time and money to prepare for a case that, from all appearances, was dead on the vine. To do so would impose an unnecessary and unreasonable burden on a defendant.³

[11] Subrule 48.14(1) of the *Rules of Civil Procedure* provides that an action shall be administratively dismissed for delay where it has not been set down by the fifth (5th) anniversary of the commencement of the action.

[12] The presumptive time period for listing a civil action for trial reminds plaintiffs of their obligation to move their actions forward expeditiously to their resolution or final determination on the merits and cautions that they bear the consequences of conducting their actions in a dilatory manner.⁴

¹ The Defendants Pyxalis Inc. and Marvin Foy Marketing Incorporated each filed an assignment in bankruptcy in 2018.

² *Prescott v. Barbon*, 2018 ONCA 504, para. 30 [citations omitted].

³ *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544 [“**1196158 Ontario**”], para. 30.

⁴ *Southwestern Sales Corporation Limited v. Spurr Bros. Ltd.*, 2016 ONCA 590, para. 11, citing *Faris v. Eftimovski*, 2013 ONCA 360, para. 33.

[13] There is a strong public interest in promoting timely resolution of disputes. Excusing significant delay risks undermining public confidence in the administration of justice. The timelines the *Rules* impose are relatively generous and there is a heavy price to be paid when they are not respected.⁵

[14] Subrule 48.14(7) provides that a plaintiff shall show cause why the action should not be dismissed for delay. At a status hearing, the Court may dismiss the action for delay, or, if it is satisfied that the action should proceed, the Court may, among other things, set deadlines for the completion of the remaining steps necessary to have the action set down for trial.

[15] A decision to dismiss an action for delay at a status hearing is a discretionary decision.⁶

[16] The legal test on a status hearing motion is well settled. The plaintiff is required to establish that there is an “acceptable explanation” for the delay, and demonstrate that the defendant will not suffer any non-compensable prejudice if the action is allowed to proceed.⁷

[17] The test is conjunctive. Even if a plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if there would be prejudice to the defendant. If the plaintiff is not able to provide a satisfactory explanation, it is still open to the court to dismiss the action, even if there is no proof of actual prejudice to the defendant.⁸

[18] In applying the test, the court must carefully balance two fundamental principles: (a) a civil action should, if possible, be decided on the merits and procedural rules should be interpreted accordingly, and (b) procedural rules that aim to resolve disputes in a timely and efficient manner can only achieve their goals if they are respected and enforced.⁹

[19] Timelines prescribed by the *Rules* should be complied with, and the failure to enforce the *Rules* undermines public confidence in the capacity of the justice system to process disputes fairly and sufficiently. However, the court must allow some latitude for unexpected and unusual contingencies that make it difficult or impossible to comply, and should avoid a purely mechanical application of timelines that would penalize parties for technical non-compliance and frustrate the fundamental goal of resolving disputes on their merits.¹⁰

[20] The challenge posed on status hearing motions is to find the right balance between the need to ensure that the rules are enforced to ensure timely and efficient justice, and the need to ensure

⁵ 1196158 *Ontario Inc.*, para. 39 [citations omitted].

⁶ *Ibid.*, para. 16.

⁷ *Beshay v. Labib*, 2024 ONCA 186, para. 11.

⁸ 1196158 *Ontario*, para. 32.

⁹ *Ibid.*, para. 18.

¹⁰ *Ibid.*, para. 19.

sufficient flexibility to allow parties able to provide a reasonable explanation for failing to comply with the rules and to have their disputes decided on the merits.¹¹

[21] With respect to the first part of the test, what constitutes an “acceptable explanation” depends on the circumstances of each case. The explanation does not have to be “perfect” or “good”. An “adequate” or “passable” explanation will suffice as being acceptable.¹²

[22] In considering the reason for the delay, the court should take into account whether the plaintiff demonstrated an intention to prosecute the action since its commencement.¹³

[23] The court is primarily concerned with the rights of the litigants, as opposed to the conduct of their counsel. An action should not ordinarily be dismissed because of the inadvertence of counsel, or an error committed by counsel. An innocent client should not suffer the irrevocable loss of the right to proceed because of such actions.¹⁴

[24] However, the court has dismissed a case where the delay was caused by a combination of neglect, disinterest or lack of diligence by the plaintiffs and their counsel.¹⁵

[25] It is insufficient for the plaintiff to only adduce evidence that a matter has fallen through the cracks. The plaintiff must provide evidence showing how or why the matter appears to have fallen through the cracks.¹⁶

[26] If a plaintiff fails to show cause for its delay, the action must be dismissed for delay even if it could theoretically be set back on track with little or no non-compensable prejudice to the defendant.¹⁷

[27] With respect to the second part of the test, the conduct of the defendant is also a factor to be considered, especially where a plaintiff encounters some resistance when trying to move the action along.¹⁸ This analysis requires some apportionment of responsibility for the delay.¹⁹

[28] The prejudice at issue is to the defendant’s ability to defend the action because of the plaintiff’s delay, not because of the sheer passage of time.²⁰

¹¹ *Ibid.*, para. 20.

¹² *Martellacci v. Pitney Bowes of Canada Ltd.*, 2024 ONSC 320, para. 16.

¹³ *Beshay v Labib*, 2023 ONSC 2874, para. 21.

¹⁴ *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173 [“**H.B. Fuller**”], para. 27.

¹⁵ *Candoo Excavating Services Ltd. et al v. Ipex Inc. et al*, 2023 ONSC 4828, para. 70.

¹⁶ *Saini v. Sun Life Assurance Co.*, 2013 ONSC 4463, para. 12.

¹⁷ *Ibid.*, para. 9.

¹⁸ *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592, para. 53.

¹⁹ *Ibid.*, para. 57.

²⁰ *Ibid.*

[29] The presumption of prejudice can be rebutted by evidence that all documentary evidence has been preserved and the issues in the lawsuit do not depend on the recollection of witnesses or that all necessary witnesses are available with detailed recollection of the events.²¹

[30] In determining prejudice, the Court must consider all of the circumstances, including the conduct of the defendant.²² The conduct of a defendant may be relevant where a plaintiff who tries to move an action along is faced with “some resistance” from the defendant.²³

[31] A defendant’s lack of display of any urgency may undercut any claim of actual prejudice.²⁴

[32] Prejudice to the defence that exists regardless of the plaintiff’s delay is not relevant. The defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done, such as interviewing witnesses, conducting surveillance, or otherwise preserving relevant evidence.²⁵

Analysis

Disclosure by the Plaintiffs

[33] As a preliminary matter, it is necessary to consider how this motion has proceeded before the Court, and the disclosure provided by the Plaintiffs.

[34] The Plaintiffs framed their motion as one involving them having issues with Former Counsel and his representation of them in this action. In the notice of motion, the Plaintiffs state that they: (a) “became concerned about the failure of its then counsel to advance its claim on a timely basis”; (b) constantly contacted its then counsel between January 2020 and December 2020 to move the matter along; and (c) “[f]or reasons known only to himself, that counsel did not transfer the file until March 2022”.

[35] In their factum, the Plaintiffs say that they were unable to obtain the file from Former Counsel until March 2022, and that the acceptable reason for the delay in this action from May 2018 to July 2020 was due to the failure of Former Counsel to advance the claim on a timely basis.

[36] Nowhere in the Plaintiffs’ written materials do they detail any explanation that they may have received from Former Counsel concerning how the action had progressed while he was their

²¹ *Canadian National Railway Company v. Kitchener (City)*, 2015 ONCA 131, para. 12, citing *Armstrong v. McCall*, 2006 CanLII 17248 (ON CA), para. 11

²² *MDM Plastics Limited v. Vincor International Inc.*, 2015 ONCA 28, para. 32.

²³ *1196158 Ontario*, para. 29.

²⁴ *H.B. Fuller*, para. 42, citing *Aguas v. Rivard Estate*, 2011 ONCA 494, para. 19.

²⁵ *Labelle v. Canada (Border Services Agency)*, 2016 ONCA 187, para. 23, citing *Chiarelli v. Weins*, 2000 CanLII 3904 (ON CA), paras. 15-16.

lawyer, other than to say that Former Counsel advised on one occasion that “due to personal circumstances he would be unable to deliver the file within the following week”.

[37] During his cross-examination, Derek McGeachie, the president of the Plaintiffs, said that Former Counsel gave him “every excuse you could possibly imagine...like the cat ate my lunch or ate my report or whatever, but he said his computer had had a massive malfunction and he lost all his records...”

[38] In his affidavit filed for the motion, Mr. McGeachie set out his concern about taction and of the action and attached a number of e-mails as exhibits to his affidavit. The e-mails produced by Mr. McGeachie covered the period starting on December 6, 2019 and ending on December 3, 2021. The e-mails were heavily redacted. The only e-mails produced that were from Former Counsel were dated July 20, 2020 and November 16, 2020. Certain of the e-mails had subject lines that included the phrase “account reconciliation”. Mr. McGeachie made no reference to any issue regarding Former Counsel’s accounts in his affidavit.

[39] During cross-examination, the Plaintiffs’ current counsel, Peter Carey (“**Current Counsel**”), took the position that the redactions were done because they contained irrelevant materials or privileged solicitor/client communications.

[40] With respect to the reference to account reconciliation, Mr. McGeachie said that Former Counsel “wouldn’t bill for a year and then he would send us a bill and it was always disjointed, so, he’s had, his computers had failed him somehow, and he was having trouble getting his bills out”. Mr. McGeachie said that Former Counsel would “have a quiver of excuses and then it feels to me this, this particular dart of excuse was, ‘You’ve got to settle up your bills’. Okay. Let’s settle them up.” Mr. McGeachie also said that Former Counsel used his unpaid account as an excuse for why he hadn’t moved the file forward. Mr. McGeachie noted that Former Counsel said he wouldn’t release the file until he was paid.

[41] Mr. McGeachie provided answers to undertakings that explained the redactions and provided unredacted copies of some of the e-mails. In a now unredacted e-mail from Former Counsel sent on January 4, 2021, it shows that the redactions had covered Former Counsel’s reference to steps that would need to be completed to transfer the file, which included “payment of our final account and the outstanding account on this file”. Another redaction covered Former Counsel’s offer to speak with Current Counsel to provide “a quick synopsis of the file... to bring him up to speed.” An unredacted portion of an e-mail sent by Former Counsel on November 25, 2020 referenced requiring “all outstanding accounts on the file are paid”.

[42] The redactions also covered statements made by Former Counsel about being unable to get to his office due to the Covid-19 pandemic, and the health of his wife. Additionally, the redactions had covered a response by Former Counsel to Mr. McGeachie’s statement in an e-mail that Former Counsel didn’t “have the bandwidth for this case”, where Former Counsel stated that “bandwidth is very much a two-way issue.”

[43] Lastly, in unredacted versions of e-mails sent in January 2021, it is apparent that Mr. McGeachie and Former Counsel had exchanged e-mails about payment of outstanding accounts, which included comments from Former Counsel that he had informed the Plaintiffs that he “could not do more work until the account was paid”.

[44] As I noted in my earlier decision, the Plaintiffs did not serve their motion materials on Former Counsel. During Mr. McGeachie’s cross-examination, Current Counsel indicated that his office had advised Former Counsel of the upcoming motion.

[45] In his affidavit, Former Counsel details events in his personal life, including his wife being diagnosed with leukemia and issues with her hips, and how they, along with the Covid-19 pandemic, impacted his legal practice. Former Counsel noted that he experienced issues with the Plaintiffs regarding payment of their accounts, but that payment of the accounts did not cause substantial delay in moving the litigation forward.

[46] Having had the opportunity to review the unredacted e-mails as well as Former Counsel’s evidence, it is clear that the Plaintiffs failed to make full and frank disclosure in their motion materials. The Plaintiffs redacted portions of e-mails from Former Counsel that were directly relevant to the issues on this motion. The Plaintiffs failed to make any reference to account reconciliation and payment issues raised by Former Counsel as reasons for why he stopped working on the litigation. Their materials, which they did not serve on Former Counsel, were silent on matters that should have been proactively raised by them, instead of having to be raised only due to questions received on cross-examination.

[47] The failure to provide full and frank disclosure on a status hearing motion where the Plaintiffs are required to provide an adequate explanation for delay is concerning and must be taken into account when the Court is exercising its discretion on this motion.

Progress of the Action and Adequate Explanation for Delay

[48] As set out above, the Plaintiffs are required to show cause why the action should not be dismissed for delay. The first part of the applicable legal test requires the Plaintiffs to establish that there is an “acceptable explanation” for the delay.

[49] The Plaintiffs’ argument about how this action progressed and their alleged adequate explanation for the delay can be broken down into a number of phases. I have reviewed each of those phases and the evidence tendered by the parties, and have ruled on whether there was an adequate explanation provided for any delay during each phase of the litigation.

First Phase: February 27, 2017 to May 31, 2018

[50] The Plaintiffs’ commenced this action by way of statement of claim issued on February 27, 2017. The Plaintiffs’ lawyer of record on the claim was Former Counsel.

[51] The Defendants Craig Larmer, Lesley Ann Sharpe, and Lesley Ann Sharpe cob as LCS Imagining (collectively, the “**Larmer Defendants**”) delivered a statement of defence and counterclaim for Mr. Larmer on April 4, 2017.²⁶

[52] The Defendants Pyxalis Inc., Ronald Morgan, Barrie Williams, and Marvin Foy Marketing Incorporated (“**MF**”) delivered a statement of defence and counterclaim for Pyxalis on April 11, 2017.

[53] Under the *Rules*, the Plaintiffs had 20 days after the service of the statements of defence and counterclaims to deliver a reply and defence to counterclaim.

[54] The Plaintiffs sought an interlocutory injunction restraining the Defendants from soliciting or having further contact with specific clients. On May 23, 2017, Justice Lederman granted an interlocutory injunction for a period of one year or further order of the court. Justice Lederman held that there was a strong *prima facie* case against Mr. Larmer, and against LCS Imaging and the Pyxalis defendants for providing knowing assistance to Mr. Larmer in breaching his fiduciary duty.²⁷

[55] On July 11, 2017, Justice Lederman ordered costs of \$65,000 against the Defendants on a joint and several basis.

[56] On November 20, 2017, the Plaintiffs obtained a hearing date of February 5, 2018 for a motion for an order striking the statements of defence and counterclaims on the basis that the Defendants had failed to pay the costs award. The Plaintiffs prepared and served a notice of motion for this motion.

[57] On December 18, 2017, counsel to Messrs. Morgan and Williams asked Former Counsel whether the Plaintiffs intended to file a defence to the Pyxalis counterclaim.

[58] On January 19, 2018, the Defendants satisfied the costs award. The motion to strike was subsequently vacated.

[59] On January 31, 2018, Former Counsel sent an e-mail to opposing counsel that said “with this side issue out of the way, I will now be able to serve a Reply and Defence to Counterclaim – which I had been prevented up to now on the basis that this would or might have been a ‘fresh step’ that would have had an impact on our ability to proceed with the motion – now withdrawn. I will have those out shortly.”

²⁶ These Defendants delivered a revised statement of defence and counterclaim dated April 12, 2017 that clarified that the defence was delivered only on behalf of Craig Larmer, Lesley Ann Sharpe, and Lesley Ann Sharpe cob as LCS Imagining.

²⁷ *Mi5 Print & Digital Communications Inc. v. Larmer*, 2017 ONSC 3112, paras. 30 and 34.

[60] On April 20, 2028, counsel to Messrs. Morgan and Williams asked Former Counsel for a defence forthwith and updated financial statements to assess the Plaintiffs' continuing financial viability and the impact that may have on the undertaking as to damages and costs issues generally.

[61] The interim injunction expired on May 27, 2018. The Plaintiffs served a reply to the statement of defence of Pyxalis, Mr. Morgan, Mr. Williams, and MFM, and defence to the counterclaim of Pyxalis, on May 30, 2018.

[62] The Plaintiffs did not serve a reply and statement of defence with respect to the Larmer Defendants.

[63] Mr. McGeachie does not explain the delay in the Plaintiffs serving their reply and statement of defence.

[64] In his affidavit, Former Counsel says he had not completed the defence to counterclaim because he was waiting for the Plaintiffs to send him a commission analysis. Former Counsel said that the document was completed without the commission analysis and was done within a month of it being requested by the Defendants.

[65] In terms of delay during this initial phase, I believe there is an adequate explanation as to why the Plaintiffs did not serve a reply and statement of defence before January 31, 2018, which was because they were bringing a motion to strike based on the failure of the Defendants to pay the outstanding costs award.

[66] However, I do not believe that an adequate explanation has been provided for the four-month delay (February 1 to May 31, 2018) in the Plaintiffs serving a reply and defence to counterclaim. Former Counsel said it was due to the failure of the Plaintiffs to provide a commission analysis to him. However, he was still able to complete this document without the commission analysis. It took Former Counsel four months after he had informed counsel to the Defendants that he would be sending it out "shortly" to serve the reply.

[67] As a result, I find that there was a four-month delay on the part of the Plaintiffs during this phase of the litigation, for which there is no adequate explanation provided by the Plaintiffs.

Second Phase: June 1, 2018 to December 5, 2019

[68] Following the delivery of the reply, Mr. McGeachie says that the Plaintiffs retained Fuller Landau LLP in July 2018 to provide an expert report with respect to damages suffered by the Plaintiff as a result of the alleged breaches committed by the Defendants.

[69] A draft expert report was delivered to the Plaintiffs and Former Counsel on September 26, 2019. Mr. McGeachie says he provided a response on October 5, 2019, and waited for Former Counsel to provide his comments. Mr. McGeachie said that former counsel did not review the report until November 12, 2019.

[70] There is nothing in Mr. McGeachie's affidavit that explains why it took the expert 14 months to deliver this draft report. There is also nothing explaining why the Plaintiffs did not take any steps to move the litigation forward during this time.

[71] Former Counsel said that the Plaintiffs were making efforts to recover the alleged lost business that had been wrongfully diverted, and that continuation by the Plaintiffs of their claims for damages depended on the success of these efforts. Former Counsel also said that the Plaintiffs determined that they would need to wait out the year provided to them by the injunction in order to assess the impact.

[72] Former Counsel stated that by summer of 2018, the Plaintiffs determined that their efforts to recover the lost business were largely unsuccessful, and that it was decided to hire an expert to quantify damages.

[73] Former Counsel said that his practice was upended due to his wife being diagnosed with leukemia in early November 2018, for which she was hospitalized for almost 8 months. As a result, Former Counsel had limited time for work.

[74] However, Former Counsel said he had little involvement in the process for the expert report, as it was left to the Plaintiffs and the expert to gather the necessary documentation. He says that further discussions and revisions for the report were had in fall 2019 into December 2019. He also said his wife's health inhibited his ability to review and comment on the draft expert report until December 2019.

[75] In an e-mail Former Counsel sent to an employee of the Plaintiffs on January 18, 2021, he said that the Plaintiffs agreed to hire the expert "in order to take off financial pressure from both legal costs and paying [the expert]. I held off billing for work done in the period Aug/2017 – May / 2018 which I am still going to be billing to allow Mi5 to deal with the financial impact of dealing with [the expert] – so that he wouldn't pay for needless legals if it turned out we couldn't support the damages claim with a viable expert opinion."

[76] During cross-examination, Mr. McGeachie said he directly communicated with the expert. Mr. McGeachie said the expert drafted a couple of reports, and that there may have been other drafts during that time period. Mr. McGeachie was asked to provide copies of correspondence showing the exchange of drafts, which was refused by Current Counsel due to the timing of the cross-examination taking place less than a week before the hearing date, and because of his position that no undertakings were to be given on cross-examinations.

[77] Mr. McGeachie also said that the report was lengthy, very intensive, and very expensive. He claimed that communication with the expert went through Former Counsel, which contradicted his earlier statement that he communicated directly with the expert. Mr. McGeachie was asked to provide copies of the correspondence with the expert, which was refused by Current Counsel.

[78] The expert's report was ultimately finalized on January 17, 2020.

[79] Based on the evidence provided by the Plaintiffs, in my view they have failed to provide an adequate explanation for the delay in the litigation from June 1, 2018 to October 5, 2019, being the date that Mr. McGeachie provided comments on the draft expert report. During this 16-month period, no litigation steps were taken by the Plaintiffs to continue prosecuting the action. There is no record of there being any communication with counsel to the Defendants during this period. The Plaintiffs took no steps to satisfy their documentary discovery obligations under the *Rules*. They made a conscious decision to solely focus on obtaining the damages report from the expert so they could decide whether they should proceed with the litigation. No correspondence was produced between the Plaintiffs and the expert that may explain why it took the expert 14 months to produce the draft report referred to in Mr. McGeachie's affidavit.

[80] I am prepared to accept as an adequate explanation that, from October 5, 2019 to December 5, 2019, Former Counsel was unable to take steps to respond in a timely manner with comments on the draft expert report due to the serious health issues his wife was facing at the time.

[81] As a result, I find that there is a 16-month delay during this phase of the litigation and that the Plaintiffs have failed to provide an adequate explanation for this delay.

Third Phase: December 6, 2019 to July 19, 2020

[82] In his affidavit, Mr. McGeachie said that Former Counsel's response to the expert report was concerning, and that he began to worry about the slow speed at which the action was progressing. Mr. McGeachie says he expressed this frustration in an e-mail sent to Former Counsel on December 6, 2019, where he said "please proceed on these two files as quickly as possible. We need to bring them to resolution. They are both taking too long. Mr. McGeachie sent a follow up e-mail on January 10, 2010, saying "what is happening with this and the Larmer case". Redacted copies of these e-mails were initially produced by the Plaintiffs.

[83] Mr. McGeachie also produced redacted e-mails dated February 21, 2020 ("when is this case proceeding to court? We are waiting too long"), February 24, 2020 ("have you sent this trial?"), and February 27, 2020 ("what is happening with this case? I haven't heard from you for quite some time. Are you ok?"), where he asked Former Counsel for updates.

[84] Mr. McGeachie has produced a redacted e-mail dated March 9, 2020 to an unidentified recipient, where he said "Can you chase Rubin up for us? I'm worried that we're spending all this time and money and he isn't pushing this forward. It has gone no where [sic] for many months now and he isn't returning my calls or e-mails".

[85] On April 9, 2020, Mr. McGeachie e-mailed Former Counsel and asked "are these two files proceeding to court?, referring to this action and a different redacted matter.

[86] On April 24, 2020, Mr. McGeachie e-mailed Former Counsel and said "we need these to move forward or I have to switch lawyers. This is upsetting. Why is it taking so long?"

[87] On June 1, 2020, Mr. McGeachie e-mailed Former Counsel and said “just confirming that you’re on track with these two cases. Call or e-mail me if we need to discuss”. On June 16, 2020, Mr. McGeachie asked “what is the status of this case? What are the next steps?”

[88] Mr. McGeachie did not produce any e-mails that he may have received from Former Counsel from December 6, 2019 to July 19, 2020.

[89] Former Counsel’s evidence is that his wife began to have pain in her hip in December 2019, and that she was referred for investigation in January 2020. By late February or early March 2020, it was determined that his wife needed to have both hips replaced.

[90] Former Counsel said that over the remainder of winter 2020 his time was consumed with his wife’s health as well as a two-week trial during the last week of February and first week of March 2020.

[91] Former Counsel said that his practice was upended from mid-March 2020 with the onset of the pandemic and the fact that he could not leave his wife alone as she was immunocompromised. He said his office was temporarily closed and he could only work from home.

[92] During his cross-examination, Mr. McGeachie said that during this period Former Counsel would respond to him with non-answers and delays, and would give him “every excuse you could possibly imagine”.

[93] Based on the evidence before me, I am prepared to accept that the Plaintiffs have an adequate explanation during this 7.5-month period, which is that Former Counsel was preoccupied with other matters and the health of his wife, along with the beginning of the Covid-19 pandemic, and was not responding to the Plaintiffs in a timely manner.

Fourth Phase: July 20, 2020 to November 4, 2020

[94] On July 20, 2020, Former Counsel sent an e-mail to Mr. McGeachie that attached a “draft letter to opposing counsel in the Larmer action”. Portions of this e-mail were redacted. On July 21, 2020, Mr. McGeachie responded by saying “My personal feeling is don’t take any steps that may delay bringing this to trial”. This e-mail was also redacted.

[95] In a letter dated July 21, 2020, Former Counsel wrote to counsel to the Defendants and noted that “it has been some time since we last communicated. I thought I would take this opportunity to re-establish communication lines”. By that time more than two years had passed since counsel had exchanged written correspondence in this action.

[96] The letter noted the completion of the expert report in mid-January 2020, and provided a copy of the report dated January 17, 2020. Former Counsel also noted that he had a two-week trial starting in late February 2020, and that his wife was dealing with health matters. As a result of the onset of the Covid-19 pandemic, Former Counsel said that he was mainly working from home and in isolation because of the immune-compromised situation facing his wife.

[97] The letter also noted that “it is our clients’ intention to proceed on with the action”, and that the delivery of the expert report prior to discoveries “is given to impress upon your clients that MI5 is serious in its further pursuit of this claim.

[98] The letter proposed that the parties consider holding an early mediation, and offered the name of a potential mediator. The letter also noted that if the Defendants had no interest in early mediation, they could prefer to wait until after discoveries were completed. Former Counsel asked the parties to confirm a time to discuss a discovery plan and timetable if they were not interested in early mediation.

[99] Mr. McGeachie says that he reviewed the file for Former Counsel and he had sent a follow-up e-mail on August 18, 2020, at which time then counsel to the Larmer Defendants said he had not heard from his clients in some time.

[100] The Larimer Defendants have produced copies of e-mails exchanged on August 18, 2020 that showed counsel discussed the bankruptcies of MFM and Pyxalis and how they impacted the litigation landscape. Former Counsel confirmed that the Plaintiffs intended to continue the action as against Messrs. Morgan and Williams.

[101] Former Counsel says that he exchanged e-mails with counsel about potential settlement and a discovery plan in August 2020 and early September 2020 and has produced e-mails that detail the discussions.

[102] On October 14, 2020, Mr. McGeachie asked Former Counsel “what is your status on the case? Are you able to move this forward to completion soon?” The e-mail was redacted. Mr. McGeachie says he sent it as he had not heard from Former Counsel for some months.

[103] In an e-mail sent on November 5, 2020, Mr. McGeachie asked Former Counsel to “call me today to discuss the files you’re working on: Larmer”. This e-mail had redactions.

[104] Former Counsel said that he submitted a requisition for a case conference but could not get a response. He did not provide any documentary confirmation that a requisition was sent in.

[105] Based on my review of the evidence, I do not believe there was any unreasonable delay that occurred during this period. There were discussions between counsel regarding next steps in the litigation throughout this period of time.

Fifth Phase: November 6, 2020 to January 5, 2021

[106] In his affidavit, Mr. McGeachie says that he decided it was necessary to retain new counsel given that almost an entire year had passed since he first raised his concerns with Former Counsel. Mr. McGeachie says that he spoke with Current Counsel about him taking over the file.

[107] On November 6, 2020, Mr. McGeachie informed Former Counsel via e-mail to transfer his file for this litigation to Current Counsel as soon as you are able. Current Counsel was copied on the e-mail.

[108] On November 16, 2020, Mr. McGeachie followed up by saying that it “seems that [Former Counsel] don’t have the bandwidth for this case. I have a litigator at Loopstra Nixon who has the capacity to take it on and bring it across the finish line.” A portion of the e-mail was redacted. In a subsequently produced unredacted copy of the e-mail, it shows that Mr. McGeachie also said “[i]f you want to keep it I need to see some significant steps forward in the next 24 hours.”

[109] Former Counsel responded on that day and said the only way to move the litigation forward was to start with a case conference. He also said that the parties need the Court to set a timetable for production of documents, oral examinations, and mediation. Portions of the e-mail were redacted.

[110] In subsequently produced unredacted copy, Former Counsel did note that “bandwidth is very much a two-way issue”. He then went on to discuss scheduling a court attendance to deal with the matter.

[111] In his affidavit, Former Counsel says his bandwidth comment pertained to payment of his accounts. He said he could no longer compromise on payment of accounts given how limited his practice had been for the prior years due to his wife’s health. He goes on to say that “bandwidth” did not refer to the Plaintiff’s cooperation in moving their action, and that he “never had doubts about the plaintiffs’ commitment to the claim”. He says he did not “encounter significant issues with the plaintiffs’ responsiveness or cooperation in providing me with requisite information, documentation or obtaining instructions.”

[112] On November 25, 2020, Mr. McGeachie asked Former Counsel to transfer the file to Current Counsel this week. Current Counsel was copied on the e-mail. Again, portions of the e-mail were redacted.

[113] Mr. McGeachie subsequently produced an unredacted e-mail from Former Counsel dated November 25, 2020, where he said he would not be able to deal with the transfer given health issues and surgery facing his wife. Former Counsel said that he would prepare the file for transfer next week and submit his final account, and that he would be prepared to release the file once all outstanding accounts on the file were paid.

[114] Mr. McGeachie has produced redacted e-mails sent between December 14, 2020 to January 6, 2021, where he made repeated requests of Former Counsel to send his file to Current Counsel.

[115] Following cross-examination, the Plaintiffs produced unredacted versions of certain e-mails. In an e-mail from Former Counsel dated January 4, 2021, he said he would sort out what might be transferred to Current Counsel. He also said that he would have to prepare a final account

to December 31, 2020, and that payment of the final account and the outstanding account on the file would have to be completed before the file would be transferred.

[116] Former Counsel also said he sent copies of the pleadings and Justice Lederman's decision to Current Counsel on January 4, 2020, and that he offered to discuss the file with Current Counsel.

[117] On January 5, 2021, Current Counsel served a notice of change of lawyer and became lawyer of record for the Plaintiffs. As a result, Former Counsel was no longer lawyer of record for the Plaintiffs.

[118] Based on my review of the evidence, I am satisfied that there is an adequate explanation for the delay during this period, which is that the Plaintiffs and Former Counsel were discussing the transfer of the file to Current Counsel and a final account reconciliation.

Sixth Phase: January 6, 2021 to February 28, 2022

[119] Mr. McGeachie subsequently produced unredacted e-mails sent between January 12 and 21, 2021. Former Counsel sent an e-mail to the Plaintiffs on January 12, 2021, which said he was delayed in completing year end billings. He also noted that \$16,943.54 was outstanding from an invoice sent on July 6, 2017.

[120] Mr. McGeachie produced heavily redacted e-mails sent between February 8, 2021 to December 3, 2021 to Former Counsel by him or Current Counsel about the status of the litigation and transfer of file to Current Counsel. A response from Tory Millar at Mi5 Print sent on January 13, 2021 says that the Plaintiffs were surprised by the significant amounts as their records did not show any outstanding invoices.

[121] On January 18, 2021, Former Counsel sent a detailed e-mail to the Plaintiffs regarding invoice payment matters and said that he had previously indicated "I could not do more work" until an account was paid. That same e-mail said that Mr. McGeachie had hired the expert "in order to take off financial pressure from both legal costs and paying" the expert, and that Former Counsel had held off on billing for work done from August 2017 to May 2018 to allow "Mi5 to deal with the financial impact of dealing with [the expert] – so that he wouldn't pay for needless legals if it turned out we couldn't support the damages claim with a viable expert opinion".

[122] Former Counsel also said in that e-mail that he understood that the Plaintiffs did not pay the expert until February or March 2020, and that Former Counsel didn't get to deal with collection and billing, or to push the action ahead, due to the pandemic, his wife's worsening condition, and his reduced work hours.

[123] In his affidavit, Former Counsel said he did experience issues with the Plaintiffs paying for the accounts, but also says that he was flexible and "payment of my accounts did not cause substantial delay in moving the litigation forward during my time as counsel".

[124] On June 29, 2021, Current Counsel sent a letter to Former Counsel noting that he had still not received the file and that he was “concerned that this delay is prejudicing Mi5 in its ability to prosecute the action against Mr. Larmer”. Current Counsel asked that the file be forwarded to him immediately or to advise why the file was not being forwarded.

[125] In a letter dated November 30, 2021, Current Counsel advised Former Counsel that despite numerous requests, the file had not materialized over the course of more than a year, that Former Counsel was prejudicing Mi5 Print’s ability to proceed with the file, and that he may have to report Former Counsel to the Law Society of Ontario.

[126] It is Former Counsel’s evidence that he rarely went to the office in 2021 given the need to care for his wife, the risks of Covid-19 infection and the ongoing lockdowns and workplace restrictions. He says he needed to get to the office to go through the file before it could be transferred and to render a final account. He was unable to attend the office for this purpose until December 2021.

[127] Former Counsel said he completed the review and sent a final account in early January 2022. The Plaintiffs and Former Counsel came to a payment arrangement in early February 2022, and the file was ready to be transferred and available to be picked up by February 28, 2022.

[128] It is difficult to assess whether an adequate explanation has been provided by the Plaintiffs for the delay that was experienced during this almost 14-month period of time. It is clear that there was a dispute between the Plaintiffs and Former Counsel with respect to amounts owed to him for prior work that he completed. Former Counsel has sworn that “late payment did not substantially delay the litigation”.

[129] An entire 12-month period elapsed between the discussions of payment of accounts in January 2021 until a final account was sent in January 2022. Former Counsel has said that he “needed to attend the office to go through the plaintiffs’ file before it could be transferred – and to render a final account. I was unable to attend the office for this purpose until December 2021.”

[130] I accept Former Counsel’s evidence that the delay in transferring the file to Current Counsel in 2021 was because he did not render a final account, which he said was a pre-condition to his transferring files to Current Counsel, and he was unable to render a final account as he was rarely in the office in 2021.

[131] The issue I have is that Current Counsel became lawyer of record on January 5, 2021. Outside of sending a few e-mails to Former Counsel, it does not appear that Current Counsel actively took steps to push the litigation forward on behalf of the Plaintiffs.

[132] Former Counsel’s evidence is that he sent copies of the pleadings and Justice Lederman’s decision to Current Counsel on January 4, 2020, and that he offered to discuss the file with Current Counsel.

[133] There is nothing in the record that details what was in Former Counsel's file, and why, because of the lack of access to such documents, Current Counsel was unable to move the litigation forward during this period of time. The record does not contain any communications sent by Current Counsel to counsel to the Defendants during this time period that asks for access to documents or indicates that the parties should move toward discoveries.

[134] In my view, while the transfer of Former Counsel's file was delayed due to his failure to issue a final account for the entire period of time, the lack of the file does not excuse the Plaintiffs and Current Counsel from taking any steps to progress the litigation during this 14-month period.

[135] I believe that a fair approach to this period is to attribute half of the delay to Former Counsel, and an adequate explanation has been provided for that time period. I do not believe that the Plaintiffs have provided an adequate explanation for the failure to move the matter forward for the remaining seven-month period of time.

Seventh Phase: March 1, 2022 to October 16, 2022

[136] On March 7, 2022, Current Counsel received Former Counsel's file regarding this litigation.

[137] There is nothing in the record that shows that any steps were taken in this litigation until October 17, 2022. No explanation was provided as to why no such steps were taken during this period. Mr. McGeachie did not produce any correspondence that he may have sent to Current Counsel regarding the progress of the action.

[138] As a result, I find that there was a seven-and-a-half-month delay during this phase of the litigation and no adequate explanation has been provided by the Plaintiffs.

Eighth Phase: October 17, 2022 to December 3, 2023

[139] On October 17, 2022, Current Counsel wrote to counsel to the Defendants and indicated that he had "recently been retained" and wished to move the matter forward quickly. He asked counsel to contact him to discuss the conduct of the action, including the exchange of affidavits of documents, among other things.

[140] In response on that same date, counsel to the Larimer Defendants suggested that Current Counsel should circulate a proposed discovery plan.

[141] On October 20, 2022, a colleague of Current Counsel sent a proposed discovery plan for review to the parties. A follow up requesting a response was sent on November 1, 2022 by Current Counsel.

[142] On December 6, 2022, the Larmer Defendants retained new counsel, who served a notice of change of lawyer.

[143] On December 19, 2022, a colleague of Current Counsel sent a follow up and advised that the dates in the discovery plan had been adjusted and asked for input from counsel. A follow up e-mail was sent on December 23, 2022.

[144] On January 17, 2023, new counsel to the Larimer Defendants said they were reviewing the file and needed more time to respond to the draft discovery plan. She also said that she would not be available for examinations prior to March 31, 2023.

[145] Also on January 17, 2023, counsel to Messrs. Morgan and Williams said he would have to re-engage with his clients as he had lost contact with at least one of them. Counsel noted the bankruptcy of Pyxalis and MFM and the prior request for financial statements. Counsel suggested a call to discuss a few outstanding issues.

[146] Counsel to the parties exchanged e-mails about scheduling a call. That call was held on February 16, 2023.

[147] As set out in the affidavit of Maria Belykh, a former associate that assisted Current Counsel, no timetable was achieved during the conference, as counsel to Messrs. Morgan and Williams said he was not prepared to provide his client documents before November 2023 due to the bankruptcy of the two companies.

[148] Between March 3, 2023 and April 18, 2023, Current Counsel exchanged e-mails with the trustee in bankruptcy for the two companies regarding the status of documents and records for the companies.

[149] On May 16, 2023, counsel to the Larmer Defendants said that her clients were having difficulties pulling together materials given the passage of time and scope of the claim, as well as because she was in trial, they required until June 9, 2023 to produce documents.

[150] There were no written communications between counsel from May 16, 2023 to December 4, 2023. The Larmer Defendants failed to produce documents by the June 9, 2023 deadline that they had agreed to, and Messrs. Morgan and Williams failed to produce documents by November 2023 as they had indicated that they were prepared to do.

[151] It is not clear why counsel to the Plaintiffs did not follow up with counsel to the Defendants for over six months. It is also not clear why the Plaintiffs, even in the absence of documents from the Defendants, did not take steps to serve their affidavit of documents. If the Plaintiffs had concerns about the failure of the Defendants to produce documents and agree to a discovery plan, it was open to them to use the procedural tools available to them under the *Rules*. The Plaintiffs could have brought a motion to impose a discovery plan under subrule 29.1.05(2). The Plaintiffs also could have brought a motion under subrule 30.08(2) due to the failure of the Defendants to serve an affidavit of documents. They chose to do neither.

[152] I find that the Plaintiffs acted reasonably in attempting to move this litigation forward during the start of the period, but that they failed to move the action forward during the last six months. The Plaintiffs have failed to provide an adequate explanation for why they did not take any steps to prosecute the action for the six-month period from June 9 to December 3, 2023.

Ninth Phase: December 4, 2023 to April 4, 2024

[153] On December 4 and 6, 2023, Current Counsel wrote to counsel to the Defendants and indicated that an attendance at Civil Practice Court (CPC) was required to establish a timetable for going forward with the matter.

[154] On December 6, 2023, counsel to the Larimer Defendant said she was not available in December to attend CPC and asked that Current Counsel to send a proposed schedule if he had one. On that same day, counsel to Messrs. Morgan and Williams said he had availability during the last two weeks of January 2024.

[155] Counsel agreed to attend CPC on January 16, 2024, provided a proposed timetable was circulated before the end of the year.

[156] On January 5, 2024, counsel to the Larimer Defendants followed up, as they had not received anything from Current Counsel. On that say day, Current Counsel proposed a timetable for completion of discoveries and to set the matter down for trial.

[157] On January 15, 2024, counsel to the Defendants set out their view that a status hearing motion was required for the litigation to continue.

[158] On January 16, 2024, Justice Chalmers, while presiding in CPC, ruled that he was not prepared to establish a timetable for the action. Justice Chalmers noted that a status hearing was the appropriate forum to establish a timetable under rule 48.14.

[159] On February 22, 2024, I issued an Endorsement that directed the parties to schedule a status hearing motion. The Plaintiffs originally scheduled it as a short motion (less than two hours) for June 21, 2024.

[160] On April 4, 2024, the parties appeared before me at a case conference, at which time a long motion was scheduled for September 11, 2024.

[161] Based on the evidence before me, there was no unreasonable delay that occurred during this period of time.

Conclusion

[162] For the reasons set out above, I have found that, from February 27, 2017 to April 4, 2024, which is approximately 85 months of time, the Plaintiffs have failed to provide an adequate

explanation for 38.5 months of this period. That represents approximately 45.3% of the total time at issue.

[163] The deadline in this action was initially set to expire on February 27, 2022. That deadline was extended to August 28, 2022 pursuant to the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, which suspended the running of limitation periods and procedural time periods from March 16, 2020 to September 14, 2020 due to the Covid-19 pandemic.

[164] The Plaintiffs failed to take steps to remedy the expiry of the 5-year period until December 2023, more than 15 months after the relevant time period expired.

[165] With respect to prejudice faced by the Defendants, in his affidavit, Mr. Williams alleged that he and Mr. Morgan are prejudiced because they have not have had access to the business records of Pyxalis and MFM since they filed for bankruptcy in 2018. I do not view the bankruptcies of the two companies as having anything to do with the manner in which the Plaintiffs have prosecuted the action. The bankruptcies were voluntarily entered into by Messrs. Williams and Morgan, and it was open to them to ask the trustee in bankruptcy to make copies of records that they would need to defend themselves in this action, which was started more than 18 months before the bankruptcies.

[166] Mr. Williams also stated that Mr. Morgan had been diagnosed with mild to moderate dementia. Mr. Williams included as an exhibit to his affidavit a letter from Dr. Sanjay Rastogi, dated August 6, 2024 that says that Mr. Morgan “has been diagnosed with mild to moderate dementia and is currently on treatment for it”.

[167] Mr. Williams did not produce an expert affidavit concerning Mr. Morgan’s condition. As well, the letter from Dr. Rastogi does not say that because of Mr. Morgan’s condition, he would be unable to take part in the litigation process.

[168] I find that Messrs. Williams and Morgan have failed to provide satisfactory evidence to establish that they have faced actual prejudice due to the delay in the Plaintiffs’ proceeding with this litigation.

[169] With respect to the Larmer Defendants, the only evidence they delivered was an affidavit from a law clerk. The Larmer Defendants did not argue that there was any actual prejudice in their facts filed for the motion.

[170] As noted by the Court of Appeal in *1196158 Ontario Inc. v. 6274013 Canada Limited*, it is open to the Court to dismiss an action even if there is no proof of actual prejudice to the defendant where the plaintiff is not able to provide a satisfactory explanation for delay.

[171] In my view, a 38.5-month period of time where the Plaintiffs have provided no adequate explanation for the delay is excessive and warrants a dismissal of the action for delay. The Plaintiffs have failed to prosecute their action diligently and in accordance with the *Rules*, notwithstanding their expressed intention to proceed with the action. To excuse such a significant

delay, even if the matter could proceed to trial now without prejudice, would undermine public confidence in the administration of justice. It would be unfair to countenance such a situation where the Defendants had the burden of having this litigation hanging over their heads for such a long period of time where the Plaintiffs failed to take steps to move the litigation forward. In my view, in balancing the interests of the Plaintiffs to having their litigation resolved on its merits, and the interests of the Defendants, the balance tilts in favour of the interests of the Defendants.

Disposition and Costs

[172] For the reasons set out above, the Plaintiffs' request for an order setting a deadline for the completion of the remaining steps necessary to have this action set down for trial is dismissed, and the action is dismissed for delay.

[173] I strongly urge the parties to come to a resolution on costs. If they are unable to do so, they may contact my Assistant Trial Coordinator to receive my directions on the exchange of written cost submissions.

Associate Justice Rappos

DATE: June 12, 2026