

CITATION: Jin & Sun Ltd. v. Barton, 2026 ONSC 5130
COURT FILE NO.: CV-20-00000187-0000
DATE: 09/10/2026

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JIN & SUN LTD.

Plaintiff

Adam Huff, for the plaintiff (defendant by counterclaim)

– and –

SUSAN DEBORAH BARTON and
DAVID BRUCE BARTON

Defendants

Matthew E. Wright, for the defendants
(plaintiffs by counterclaim)

– and –

HIS MAJESTY THE KING IN RIGHT
OF ONTARIO as represented by THE
MINISTER OF THE ENVIRONMENT,
CONSERVATION AND PARKS

Added Third Party

No one appearing, for the added third party

)
) **HEARD in Kingston:** August 21, 2026

FLAHERTY J.

REASONS FOR DECISION

OVERVIEW

[1] This is a motion for an extension of time to set the matter down for trial. The action was commenced on July 3, 2020, and was not set down for trial within five years, as required by r. 48.14(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (“*Rules*”). Taking into account the six-month suspension of court timelines due to the COVID-19 pandemic, the five-year anniversary expired on September 13, 2025.

[2] The action concerns the plaintiff’s purchase of a campground property and business from the defendants in 2018. The plaintiff alleges that the defendants breached certain representations and warranties concerning: (1) the septic and waste disposal system at the property; (2) an option for the plaintiff to purchase an adjoining property; and (3) representations concerning certain tax filings to the Canada Revenue Agency. At this stage, the only remaining issue between the parties concerns the septic system. The issues related to the adjoining property were resolved in January 2023, and the plaintiff abandoned its claim concerning the tax filings in January 2026.

[3] The only issue before me is whether the plaintiff’s action should be permitted to proceed. For the reasons that follow, the action is reinstated, and the time for setting it down for trial is extended by 12 months from the date of this decision.

History of the Litigation

[4] In essence, the remaining dispute concerns alleged representations concerning the septic system and, more specifically, whether the defendants obtained a valid permit. The septic system was installed in 1973, approximately 47 years before this action was commenced.

[5] The statement of claim was issued on July 3, 2020. The defendants delivered a statement of defence and counterclaim on November 23, 2020. The defendants then commenced third-party proceedings concerning certain tax filings against BDO Canada LLP, Mathieu St-Denis, and Stephane Savage on November 2, 2021.

[6] The Ministry of the Environment, Conservation and Parks (“Ministry”) was put on notice of a possible claim. In November 2021, defendants’ counsel suggested placing the matter in abeyance until a response was received from the Ministry. There is no evidence of an agreement to place the matter in abeyance. The defendants commenced a further third-party claim against the Ministry on October 28, 2022.

[7] During 2022 and early 2023, the parties engaged in negotiations. This resulted in the plaintiff purchasing the adjoining property and releasing that aspect of its claim in January 2023. On February 9, 2023, the plaintiff served an amended statement of claim removing the claim related to the adjoining property.

[8] In February 2023, defendants' counsel emailed the plaintiff's then counsel and urged the plaintiff to resolve the tax issue so that the pleadings could close. Defendants' counsel followed up on March 3, 2023, and again on March 30, 2023, when he advised plaintiff's counsel that he would seek to note the plaintiff in default if its reply and defence to counterclaim were not filed within 20 days. The plaintiff served its defence to the counterclaim on April 25, 2023, and the Ministry served its defence to the third-party claim on April 26, 2023.

[9] After April 26, 2023, the action largely stalled. The plaintiff's explanation for the delay from April 2023 to July 2025 is the significant disruption experienced within its law firm, Cunningham Swan. This included health issues affecting original counsel, followed ultimately by his retirement. His files then needed to be transitioned to other lawyers. The problems were exacerbated by staffing shortages within Cunningham Swan and health difficulties experienced by the counsel assigned to take over the matter.

[10] In January 2025, the plaintiff sold its shares in the campground pursuant to a shareholder agreement. The plaintiff assigned its interest in the septic-system lawsuit to the Lees.

[11] Between April 2023 and May 2025, there is no evidence that the defendants took steps to move the matter forward.

[12] In May 2025, plaintiff's counsel served a notice of motion seeking a status hearing, an extension of time to set the action down for trial, and a litigation timetable. In October 2025, when the parties were discussing a possible timetable or status hearing, plaintiff's counsel proposed placing the allegations related to the tax issue in abeyance until the limitation period had passed, at which time the allegations would be abandoned, assuming no tax reassessment had occurred. This proposal was not accepted.

[13] In November 2025, the plaintiff advised that no septic-system remediation had yet occurred and coordinated a site inspection. The defendants and their expert attended and inspected the septic system on December 19, 2025.

[14] In January 2026, the plaintiff decided to abandon the tax claim, leaving only the septic-system claim outstanding.

ANALYSIS

[15] Rule 48.14 deals with the dismissal of an action for delay. Subrule (1) provides that an action is presumptively dismissed by the registrar if it has not been set down for trial by the fifth anniversary of its commencement.

[16] Subrule 48.14(5) allows any party to bring a motion for a status hearing before the expiry of the five-year period. At the status hearing, the plaintiff is required to show cause why the action should not be dismissed for delay.

[17] The onus is on the plaintiff to demonstrate: (a) an acceptable explanation for the delay; and (b) that, if the action is allowed to proceed, the defendants will suffer no non-compensable prejudice: *Henderson v. Kenora-Rainy River Districts Child & Family Services*, 2022 ONCA 387; *Faris v. Eftimovski*, 2013 ONCA 360; and *Kara v. Arnold*, 2014 ONCA 871.

[18] The analysis of these factors calls for a careful balance between two competing values. On the one hand, the *Rules* must be enforced to ensure timely and efficient justice. On the other hand, society generally, and the parties specifically, have an interest in the resolution of disputes on their merits. The weight of authority from the Court of Appeal has favoured deciding cases on their merits, particularly where the delay results from circumstances affecting counsel: *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173; see also *Kara v. Arnold*, 2014 ONCA 871.

Is There an Adequate Explanation for the Delay?

[19] In considering the reasonableness of an explanation for delay, a status-hearing judge must engage in a contextual analysis and weigh all relevant factors to reach a just result. That said, the longer the delay, the more cogent the explanation must be: *Kara v. Arnold*, 2014 ONCA 871, at para. 17.

[20] The conduct of all parties is relevant to determining whether to restore an action to the trial list: *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592, at para. 53. The focus of the delay inquiry is the conduct of the plaintiff, which bears primary responsibility for the progress of the litigation. That said, a defendant's conduct may also be relevant. For example, a defendant is not permitted to obstruct the litigation or to lie in wait in the hope of obtaining a tactical advantage: *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544, at paras. 28-30.

[21] This motion was brought a few months before the set-down deadline. The plaintiff maintains that it remained committed to pursuing the claim and that the delay resulted from counsel-related circumstances rather than inaction by the plaintiff itself. As noted, there was a period of inactivity between late April 2023 and 2025. Until then, the matter had been progressing, albeit slowly. With the exception of defence counsel's emails in February and March 2023, none of the parties expressed dissatisfaction with the pace of the litigation. None of the parties sought to move the litigation forward between April 2023 and 2025.

[22] The defendants do not dispute that there were significant disruptions at Cunningham Swan from 2023 to 2025. However, they submit that those disruptions do not sufficiently explain the delay. Independently of any issues at Cunningham Swan, the defendants submit that the plaintiff was incentivized to delay the litigation because it had not yet suffered any loss and wanted to

exhaust the operational life of the septic system before pursuing its claim for non-compliance. Indeed, there is no evidence of attempts by the plaintiff to contact its solicitor to inquire about the progress of the action or demand that steps be taken.

[23] The defendants also rely on the fact that the plaintiff waited until January 2026 to abandon its tax claim, without explaining why it took six years to do so. The defendants submit that the principal obstacle to moving the matter forward was the close of pleadings, which could not occur until the plaintiff abandoned its tax claim.

[24] In relation to the tax claim, an earlier decision by the plaintiff would have streamlined the litigation. However, I am not persuaded that this was an insurmountable obstacle to moving the litigation forward. BDO could have been required to respond to the third-party claim. The litigation could have proceeded, with possible cost consequences to the plaintiff concerning the tax claim.

[25] The plaintiff did not move the litigation forward at any great pace before 2023, and it may have been incentivized to delay the litigation. However, a motion to restore an action to the trial list is not a blame game in which counsel must justify the conduct of the litigation on a month-by-month basis: *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592, at para. 46. I find that the disruption at Cunningham Swan was an important factor in the delay between 2023 and 2025. The circumstances at the law firm provide an adequate explanation for a substantial portion of the inactivity, even if they do not account for every period of delay. I need not conclude that counsel-related circumstances were the only factor to find that the explanation is adequate. There may have been other contributing factors, but the crisis at the plaintiff's law firm from 2023 to 2025 contributed significantly to the delay, and the plaintiff should not lose the right to proceed because of circumstances affecting its counsel: *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173, at para. 27.

Prejudice

[26] As noted, the plaintiff's claim will be dismissed unless the plaintiff shows that the defendants will suffer no non-compensable prejudice if the matter proceeds to trial. Although the defendants bear no evidential burden to demonstrate actual prejudice, the court may consider their conduct in light of their assertions of prejudice: *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592, at para. 50.

[27] The plaintiff submits that the defendants have already investigated the claim and will have a fair opportunity to defend it. The defendants retained an engineer, pursued freedom-of-information requests with the Ministry, obtained the Ministry file, investigated the history of the septic system, and gathered evidence from witnesses, including former maintenance employee Fraser Cross. The defendants also inspected the septic system in December 2025, before any remediation was undertaken.

[28] The defendants have not identified any evidence that was lost because of the litigation delay. Any records that are unavailable were lost either in a 1999 fire or before the defendants

contacted the Ministry in 2020. There is no evidence that witnesses became unavailable during the period of litigation delay. The plaintiff submits that unavailable documents or witnesses do not constitute prejudice arising from the delay itself.

[29] The defendants submit that the litigation must be considered as a whole. They argue that the delay was highly prejudicial because defending the claim requires evidence concerning events and circumstances dating back more than 50 years. They further submit that the delay has compounded the difficulty of proving or disproving facts relating to events from the 1970s.

[30] I have considered the nature of the case and the fact that the allegations relate to historic events. However, in deciding whether to set aside the dismissal, the relevant prejudice is prejudice to the defendants' ability to defend the action resulting from the plaintiff's delay, not from the sheer passage of time: *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592, at para. 57. I am persuaded that the defendants will suffer no non-compensable prejudice if the matter proceeds to trial. The defendants have investigated the claim and had an opportunity to inspect the septic system before any remedial work began. There is no evidence that documents or witnesses were lost during the period of litigation delay. I am satisfied that the delay in setting the matter down will not impair the fairness of the trial.

[31] Finally, this is not a case in which the defendants obstructed the progress of the litigation. However, in considering prejudice, it is relevant that they made no effort to advance the litigation between April 2023 and May 2025.

The Merits of the Claim Are to Be Assessed at Trial

[32] The defendants submit that the plaintiff's claim is without merit and that this is a further reason to uphold the dismissal. I am not in a position to evaluate the strength of the plaintiff's case. Although certain facts are not in dispute, including the age of the septic system and the fact that the plaintiff has not sustained any damages to date, whether the septic system was compliant remains in dispute and cannot be determined on the record before me.

DISPOSITION

[33] The plaintiff has provided an adequate explanation for the delay. The plaintiff has also persuaded me that a fair trial remains possible and that its delay did not result in non-compensable prejudice to the defendants. The plaintiff's motion is granted, and the dismissal order is set aside. The time for setting the matter down for trial is extended by 12 months.

[34] If the parties cannot agree on a timetable, they may request a case conference.

[35] The parties are encouraged to agree on costs. If they are unable to do so, they may serve brief written submissions not exceeding three pages, exclusive of the costs outline. The plaintiff's submissions are due within 14 days of the date of these reasons. The defendants' submissions are due within 28 days of the date of these reasons. There will be no reply submissions without leave.

Flaherty J.

Released: September 10, 2026

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