

What can I do if my appeal to the Divisional Court is dismissed for delay or dismissed as abandoned?

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About this guide:

The information contained in this guide is simply an overview of the relevant legislation and rules of procedure. It is not intended to be a substitute for the *Rules of Civil Procedure*, which should be examined for specific information. Nothing contained, expressed or implied in this guide is intended as, or should be taken or understood as, legal advice. If you have any legal questions, you should see a lawyer.

Special thanks to the Divisional Court, whose Appeal Information Package provided valuable information for this series of Guides.

Ce guide est également disponible en français.

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Where to get more information:

The Ministry of the Attorney General has a series of **guides** to Divisional Court procedures which are available at court offices and the Ministry of the Attorney General website at www.ontario.ca/attorneygeneral:

What is Divisional Court?

Guide to Appeals in Divisional Court

Guide to Serving Documents in Divisional Court Appeals

What can I do if my appeal to the Divisional Court is dismissed for delay or dismissed as abandoned?

Guide to Fees in Divisional Court Appeals

The guide entitled "What is Divisional Court?" includes a helpful overview of Divisional Court services, as well as a glossary of legal terms you may find helpful when reading the other guides.

Content of forms under the *Rules of Civil Procedure* is available at the following website: www.ontariocourtforms.on.ca. Please note the forms must be formatted in accordance with the *Rules of Civil Procedure*. You can find tips on completing forms at the end of this guide.

The staff behind the counter at any Divisional Court office are helpful. They will answer your questions about Divisional Court procedures, but keep in mind they cannot give legal advice and they cannot fill out your forms for you.

For more detailed information, you should refer to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. It is a regulation made under the authority of the *Courts of Justice Act*. To view the Rules on-line, go to www.e-laws.gov.on.ca and follow these steps:

- Choose English or French
- Click on "Search or Browse Current Consolidated Law"
- Click on the letter "C"
- Click on the plus sign to the left of "Courts of Justice Act"
- Click on "Rules of Civil Procedure"

Part 1: What can I do if my appeal is dismissed for delay by the registrar?

If your appeal is dismissed for delay by order of the **court registrar**, you may make a motion to a judge of the Divisional Court to have the registrar's order varied or set aside under Rule 61.16(5) of the *Rules of Civil Procedure*. The *Rules* require that you commence your motion by serving a Notice of Motion on all of the other parties to your appeal **as soon as possible** after the appeal is dismissed. If you delay, you could lose your right to bring the motion.

If your motion is successful, your appeal may be reinstated. If your motion is not successful, you may have to pay costs to the other party(ies).

The chart below outlines some of the steps involved in making a motion to have the registrar's decision varied or dismissed. When referring to the chart below, please note the following:

- Some steps refer to forms prescribed by the *Rules of Civil Procedure*. Content of forms under the *Rules of Civil Procedure* is available at the following website: www.ontariocourtforms.on.ca. Please note the forms must be formatted in accordance with the *Rules of Civil Procedure*. Refer to the "Tips" page at the end of this guide for information on how to complete forms.
- Some steps refer to service. For more information on service, refer to the **Guide to Serving Documents in Divisional Court Appeals**.
- Some steps refer to court fees. For information about fees in Divisional Court, please refer to the **Guide to Fees in Divisional Court Appeals**.
- If you are bringing your motion in Toronto, you should also consult the Divisional Court Practice Direction Re: Proceedings to be Heard by a Single Judge, available online at www.ontariocourts.ca.
- If you are able to bring your motion on consent or in writing under Rule 37.12.1, different procedures will apply. You should consult the *Rules of Civil Procedure* for more information.

MOTION TO HAVE A REGISTRAR'S DECISION VARIED OR DISMISSED	
NOTE: Steps 1 to 4 must be completed as soon as possible .	
Step 1: Draft a Notice of Motion	You must draft a Notice of Motion (Form 37A). In the Notice of Motion you will need to explain why the order dismissing your appeal should be varied or set aside. You will also need to include an estimate of how long you think your oral argument of the motion will take (Rule 61.16(3.2)).
Step 2: Draft an Affidavit to support your motion	Generally, you will also need to draft an Affidavit (Form 4D) to support your motion. Your Affidavit should set out all of the evidence you might think might be relevant to your argument. For information regarding how to swear or affirm your Affidavit, refer to the back of this guide. For information regarding fees for having your Affidavit sworn/affirmed by a registrar of the court, please consult the Guide to Fees in Divisional Court Appeals .
Step 3: Obtain a hearing date for your motion	Contact the court office where your appeal was dismissed to get a hearing date for your motion. You will need to include this date in your Notice of Motion. The court staff will ask you when you intend to serve your Notice of Motion on the other parties. That is because there must be at least three days between the day you serve the Notice of Motion on the other parties and the hearing date. You will also need to provide an estimate of how long you think the oral argument of the motion will take.
Step 4: Serve a copy of your Notice of Motion on all parties	You must serve a copy of your Notice of Motion on all of the parties to your appeal as soon as possible and at least three days before the hearing date. You must also serve a copy of your Affidavit(s) with your Notice of Motion, along with any other documentary evidence you intend to file. Step 6 below refers to additional material you must serve on the other parties. It may be efficient to serve all of your material at once, if possible.

<p>Step 5: File a copy of your Notice of Motion with the court registrar, along with proof of service</p>	<p>At least three days before the hearing date (in Toronto, by 4:30 p.m. two days before the hearing date), you must go back to the court office where your appeal was dismissed and file a copy of your Notice of Motion with the court. You must also file proof you served your Notice of Motion on all of the other parties. Ordinarily, proof of service is in the form of an Affidavit of Service (Form 16B) indicating when, where and how your documents were served. For more information on proving service, refer to the Guide to Serving Documents in Divisional Court Appeals.</p> <p>You must pay a fee for filing the Notice of Motion. You should keep a copy of all of the materials you file with the court.</p> <p>Step 6 below refers to additional material you must file with the court. It may be efficient to file all of your material at once, if possible.</p>
<p>Step 6: Serve and file your Motion Record, and Factum and transcript if applicable</p>	<p>At least three days before the hearing date, you must serve a Motion Record on all of the other parties, and then file a copy of the Motion Record with the court. In Toronto, your Motion Record must be filed by 4:30 p.m. two days before the hearing date.</p> <p>The Motion Record would include:</p> <ul style="list-style-type: none"> - A table of contents describing each document included in the Motion Record; - A copy of your Notice of Motion; - A copy of your Affidavit(s) and any other material served by any party for use on the motion; - A list of any relevant transcripts from prior court or tribunal proceedings in chronological order, but not necessarily the transcripts themselves (see below for information on when you must file the transcripts themselves); and - A copy of any other material in the court file that is necessary for the hearing of the motion. <p>You should consult Rule 37.10 and Rule 4.07(1) of the <i>Rules of Civil Procedure</i> for more details on how to prepare a motion record.</p> <p>You must also file proof you served your Motion Record on all of the other parties. Ordinarily, proof of service is in the form of an Affidavit of Service (Form 16B) indicating when, where and how your documents were served. For more information on proving service, please refer to the Guide to Serving Documents in Divisional Court Appeals.</p> <p>You may also want to file a Factum to support your motion. A Factum is a bound document containing a concise summary of the facts, the law and the arguments you are making in support of your motion. A judge may decide not to hear a matter if a Factum is not filed. For example, Toronto's practice direction states the presiding judge will generally exercise her/his discretion to decline to hear a matter without a Factum. If you decide to file a Factum, then you must serve it on all of the other parties at least four days before the hearing date. You must also file a copy of your Factum with the court at least two days before the hearing date with proof of service. Check with the court where you intend to file your documents about any local practices you should be aware of.</p> <p>Note: Please refer to the Practice Direction regarding civil and family motions procedures located on the Ontario Court Courts website for additional requirements.</p>
<p>Step 6, cont.</p>	<p>If you intend to refer to a transcript of evidence in your argument, then you must also file a copy of the transcript with the court at least two days before the hearing date. To obtain a transcript of a proceeding, you should contact the court or tribunal at which that proceeding occurred.</p>
<p>Step 7: File your Confirmation of Motion</p>	<p>Not later than 2 p.m. (4:30 p.m. in Toronto) two days before the hearing date, you must file with the court a Confirmation of Motion (Form 37B). A Confirmation of Motion provides the court with additional information regarding the motion, such as how long the motion is estimated to take. In Toronto, you should use the form provided in the practice direction, instead of Form 37B.</p>
<p>Step 8: The hearing</p>	<p>Go to court on the hearing date. You should be prepared to explain to the judge why the order dismissing your appeal should be varied or set aside.</p>

Part 2: What can I do if my appeal is dismissed as abandoned because I did not appear on my hearing date?

If you do not go to court on the date your appeal is heard, then the Divisional Court may dismiss it as abandoned. If this happens, you may have two options available to you. It is strongly recommended you speak to a lawyer about which option, if any, to pursue. Be aware that a judge may award costs against you.

(a) Motion to have a Divisional Court order set aside or varied

One option that may be available to you is to promptly bring a motion in Divisional Court to have the order set aside or varied under Rule 59.06(2) and Rule 37.14(6) of the *Rules of Civil Procedure*. If your motion is successful, your appeal may be reinstated. If your motion is not successful, you may have to pay costs to the other party(ies).

The chart below outlines some of the steps involved in making a motion to have the Divisional Court's decision set aside or varied. When referring to the chart below, please note the following:

- Some steps refer to forms prescribed by the *Rules of Civil Procedure*. Content of forms under the *Rules of Civil Procedure* is available at the following website: www.ontariocourtforms.on.ca. Please note the forms must be formatted in accordance with the *Rules of Civil Procedure*. Refer to the "Tips" page at the end of this guide for information on how to complete forms.
- Some steps refer to service. For more information on service, refer to the **Guide to Serving Documents in Divisional Court Appeals**.
- Some steps refer to court fees. For information about fees in Divisional Court, refer to the **Guide to Fees in Divisional Court Appeals**.
- If you are bringing your motion in Toronto, you should also consult the Divisional Court Practice Direction Re: Proceedings to be Heard by a Single Judge, available online at www.ontariocourts.ca. This will apply only if your motion will be heard by a single judge.
- If you are able to bring your motion on consent or in writing under Rule 37.12.1, different procedures will apply. You should consult the *Rules of Civil Procedure* for more information.

MOTION TO HAVE A DIVISIONAL COURT DECISION SET ASIDE OR VARIED	
Step 1: Draft a Notice of Motion	<p>You must draft a Notice of Motion (Form 37A). In the Notice of Motion you will need to explain why the order dismissing your appeal should be set aside or varied.</p> <p>If your motion will be heard by more than one judge, you will need to state in your Notice of Motion that it will be heard on a date to be fixed by the Registrar. You will also need to include a certificate estimating how long you think your oral argument of the motion will take (Rule 61.16(3.2)).</p>
Step 2: Draft an Affidavit to support your motion	<p>Generally, you will also need to draft an Affidavit (Form 4D) to support your motion. Your Affidavit should set out all of the evidence you think might be relevant to your argument. For information regarding how to swear or affirm your Affidavit, refer to the back of this guide. For information regarding fees for having your Affidavit sworn/affirmed by a registrar of the court, please consult the Guide to Fees in Divisional Court Appeals.</p>
Step 3: Obtain a hearing date for your motion (if your motion will be heard by a single judge)	<p>If your motion will be heard by a single judge, contact the court office where your appeal was dismissed to get a hearing date for your motion. You will need to include this date in your Notice of Motion. The court staff will ask you when you intend to serve your Notice of Motion on the other parties. That is because there must be at least four days between the day you serve the Notice of Motion on the other parties and the hearing date. You will also need to provide an estimate of how long you think the oral argument of the motion will take.</p>
Step 4: Serve a copy of your Notice of Motion on all parties	<p>You must serve a copy of your Notice of Motion on all of the parties to your appeal at least four days before the hearing date. You must also serve a copy of your Affidavit(s) with your Notice of Motion, along with any other documentary evidence you intend to file.</p> <p>Step 6 below refers to additional material you must serve on the other parties. It may be efficient to serve all of your material at once, if possible.</p>

<p>Step 5: File a copy of your Notice of Motion with the court registrar, along with proof of service</p>	<p>At least three days before the hearing date (in Toronto, by 4:30 p.m. two days before the hearing date if your motion is to be heard by a single judge), you must go back to the court office where your appeal was dismissed and file a copy of your Notice of Motion with the court. You must also file proof that you served your Notice of Motion on all of the other parties. Ordinarily, proof of service is in the form of an Affidavit of Service (Form 16B) indicating when, where and how your documents were served. For more information on proving service, please refer to the Guide to Serving Documents in Divisional Court Appeals.</p> <p>You must pay a fee for filing the Notice of Motion. You should keep a copy of all of the materials that you file with the court.</p> <p>Step 6 below refers to additional material you must file with the court. It may be efficient to file all of your material at once, if possible.</p>
<p>Step 6: Serve and file your Motion Record, and Factum and transcript if applicable</p>	<p>At least three days before the hearing date, you must serve a Motion Record on all of the other parties, and then file a copy of the Motion Record with the court. In Toronto, if your motion is to be heard by a single judge, your Motion Record must be filed by 4:30 p.m. two days before the hearing date.</p> <p>Please note if your motion will be heard by more than one judge, you must file three copies of your Motion Record within 30 days after filing your Notice of Motion.</p> <p>The Motion Record would include:</p> <ul style="list-style-type: none"> - A table of contents describing each document included in the Motion Record; - A copy of your Notice of Motion; - A copy of your Affidavit(s) and any other material served by any party for use on the motion; - A list of any relevant transcripts from prior court or tribunal proceedings in chronological order, but not necessarily the transcripts themselves (see below for information on when you must file the transcripts themselves); and - A copy of any other material in the court file that is necessary for the hearing of the motion. <p>You should consult Rule 37.10 and Rule 4.07(1) of the <i>Rules of Civil Procedure</i> for more detail on how to prepare a motion record.</p> <p>You must also file proof that you served your Motion Record on all of the other parties. Ordinarily, proof of service is in the form of an Affidavit of Service (Form 16B) indicating when, where and how your documents were served. For more information on proving service, please refer to the Guide to Serving Documents in Divisional Court Appeals.</p> <p>You may need to prepare a Factum to support your motion. A Factum is a bound document containing a concise summary of the facts, the law and the arguments you are making in support of your appeal or in response to an appeal. If your motion will be heard by more than one judge, you will need a Factum. Even if your motion will be heard by only one judge, it may be prudent to prepare a Factum. A judge may decide not to hear a matter if a Factum is not filed. For example, Toronto's practice direction states that the presiding judge will generally exercise her/his discretion to decline to hear a matter without a Factum. Check with the court where you intend to file your documents about any practice directions.</p> <p>Note: Please refer to the Practice Direction regarding civil and family motions procedures located on the Ontario Court Courts website for additional requirements.</p> <p>The requirements for service and filing of a Factum are as follows:</p> <ul style="list-style-type: none"> - You must serve the Factum on the other parties at least four days before the hearing date. - You must file your Factum with the court, with proof of service (see above), at least two days before the hearing date. - If your motion will be heard by more than one judge, you will have to provide three copies when you file your Factum. In addition, your Factum will have to be filed within 30 days after you file your Notice of Motion. <p>If you intend to refer to a transcript of evidence in your argument, then you must also file a copy of the transcript with the court at least two days before the hearing date. If your motion will be heard by more than one judge, you will need to include any transcripts in your Motion Record. To obtain a transcript of a proceeding, you should contact the court or tribunal at which that proceeding occurred.</p>

Step 7: File your Confirmation of Motion	Not later than 2 p.m. (4:30 p.m. in Toronto if your motion is to be heard by a single judge) two days before the hearing date , you must file with the court a Confirmation of Motion (Form 37B). A Confirmation of Motion provides the court with additional information regarding the motion, such as how long the motion is estimated to take. In Toronto, if your motion is to be heard by a single judge, you should use the form provided in the practice direction , instead of Form 37B.
Step 8: The hearing	Go to court on the hearing date. You should be prepared to explain to the judge why the order dismissing your appeal should be varied or set aside.

(b) Appeal to the Court of Appeal for Ontario

Another option may be to appeal the Divisional Court’s decision to the Court of Appeal for Ontario. To bring an appeal to the Court of Appeal for Ontario, you will first need to bring a motion for leave to appeal and obtain the leave of the court. The *Rules of Civil Procedure* provide that you must commence your motion by serving a Notice of Motion for Leave to Appeal on all of the other parties to your appeal **within 15 days** after your appeal is dismissed, and file it with proof of service within 5 days of service. If you delay, then your motion for leave may be denied.

A self-help package for processing a civil appeal may be obtained from the Ontario Courts website at: www.ontariocourts.ca/court_of_appeal/selfhelp/civil.htm or from the Court of Appeal office, at the following address:

Court of Appeal for Ontario
130 Queen Street West
Toronto, Ontario M5H 2N5

If your appeal is unsuccessful, you may have to pay costs to the other party(ies).

Tips on Completing Forms in Divisional Court

1. **BE NEAT.** These are court documents. All court forms must be typed, handwritten or printed legibly. It may cause delays if your forms cannot be read.
2. Content of forms under the *Rules of Civil Procedure* is available at the following website: www.ontariocourtforms.on.ca. This content is not formatted. It is your responsibility to ensure that the form complies with the *Rules of Civil Procedure* (see for example Rule 4.01 with respect to formatting). Many of the *Rules of Civil Procedure* forms contain the phrase "General heading." General headings are separate forms under the *Rules of Civil Procedure* and must be inserted where this phrase appears, with the proper content.
3. How to **COUNT DAYS FOR TIMELINES** in the *Rules of Civil Procedure*:

When calculating timelines in the *Rules of Civil Procedure*, count the days by excluding the first day and including the last day of the period; where a period of less than seven days is prescribed, holidays (including Saturdays and Sundays) shall not be counted; if the last day of the period of time falls on a holiday, the period ends on the next day that is not a holiday.

Holidays include:

- any Saturday or Sunday
- New Year's Day
- Family Day
- Good Friday
- Easter Monday
- Victoria Day
- Canada Day
- Civic Holiday
- Labour Day
- Thanksgiving Day
- Remembrance Day
- Christmas Day
- Boxing Day
- any special holiday proclaimed by the Governor General or the Lieutenant Governor

NOTE: If New Year's Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday. If Christmas Day falls on a Saturday or Sunday the following Monday and Tuesday are holidays, and if Christmas Day falls on a Friday, the following Monday is a holiday.

4. You can **FILE** your documents by mail or in person. It is best to file documents in person, because if any are incomplete, the clerk may inform you, and you can avoid wasting time mailing the documents back and forth. If you file documents by mail, the date of filing will be the date the documents are stamped upon receipt by the court office. If the court office does not receive the documents, they will be considered not to have been filed, unless the court orders otherwise (see Rule 4.05). **All applicable fees and proof of service must be included with the documents when you mail them.** Documents **cannot** be faxed or e-mailed to the court. Keep a copy of all original documents you forward to the court for your records.
5. Once court staff gives you a **COURT FILE NUMBER**, make sure it is written on the upper right-hand corner of **ALL** your documents.
6. Make enough **COPIES** of your completed forms/documents. Usually you will require one copy for each party who must be served and one copy for your own records. There is a fee to have copies made at the court office. Refer to the **Guide to Fees in Divisional Court Appeals** for more information.
7. **COURT FEES** must be paid to issue and file specific documents. A listing of Superior Court of Justice and Court of Appeal fees can be viewed at the Ministry of the Attorney General website at www.ontario.ca/attorneygeneral or you can refer to the **Guide to Fees in Divisional Court Appeals**. Fees are payable in Canadian funds, and can be paid by cash, cheque or money order payable to the Minister of Finance.
8. An **AFFIDAVIT** can be sworn or affirmed before:
 - a Divisional Court staff member who is a commissioner for taking affidavits (there is a fee for this service);
 - a lawyer who is entitled to practise law in Ontario;
 - a notary public; or
 - a person who has been appointed a commissioner for taking affidavits and who is authorized to commission the affidavit.

The affidavit must be signed in the presence of the commissioner, lawyer or notary public before whom it is sworn or affirmed.

NOTE: It is a criminal offence to knowingly swear or affirm a false affidavit.