

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

Inside this guide:

1. What can I do if my appeal is dismissed for delay by the court registrar?
2. What can I do if my appeal is dismissed as abandoned because I did not appear on my hearing date?

The following is general information about what you can do if your appeal to the Divisional Court is dismissed for delay or dismissed as abandoned. It is not intended to be a substitute for the Rules of Civil Procedure. In case of any conflict between this brochure and the Rules, the Rules govern. The complete Rules of Civil Procedure can be found online at:

http://www.e-laws.gov.on.ca/DBLaws/Regs/English/900194a_e.htm,
or at your local law library.

Nothing contained in this brochure is intended as, or should be taken or understood as, legal advice. If you have legal questions, you should contact a lawyer. If you do not have a lawyer, you may wish to contact the Lawyer Referral Service operated by the Law Society of Upper Canada (LSUC) at 416-947-3330 in Toronto or 1-800-268-8326 in other parts of Ontario. The Lawyer Referral Service will provide a name of a lawyer who practices in the relevant legal area and will provide a half-hour free consultation. Please note that there is a charge of \$6.00 to use this service. The Law Society of Upper Canada also maintains a list of lawyers in Ontario which may be viewed at the LSUC website at www.lsuc.on.ca.

Ce (brochure) est également disponible en français.

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 dismissed 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. These forms are available online at http://www.e-laws.gov.on.ca/DBLaws/Regs/English/900194b_e.htm, or at your local law library.
- Some steps refer to timelines. For more information on how days are counted, refer to [Rule 3](#) of the Rules of Civil Procedure.
- Some steps refer to service. For more information on service, refer to [Rule 16](#) of the Rules of Civil Procedure. Note that you cannot serve documents on Sunday, unless you have the court's permission (see section 124 of the *Courts of Justice Act*).
- Some steps refer to court fees. Court fees are set by regulation under the *Administration of Justice Act*. Superior Court of Justice and Court of Appeal fees may be viewed on the Ministry of the Attorney General website at www.attorneygeneral.jus.gov.on.ca. If you cannot afford to pay court fees, you may wish to request a fee waiver. Fee waiver request forms and a guide to the fee waiver process and financial eligibility criteria are also available on the Ministry's website, or on request at any court or enforcement office.
- 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.on.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 dismissed. You will also need to include an estimate of how long you think your oral argument of the motion will take.
Step 2: Draft an Affidavit to support your motion	Generally, you will also need to draft an Affidavit (Form 4D) to support your motion. An Affidavit is a formal sworn statement of fact, written down by you and then sworn/affirmed and signed by you in the presence of a Commissioner for Taking Affidavits. Your Affidavit should set out all of the evidence you think might be relevant to your argument. You can have your Affidavit sworn/affirmed by a registrar of the court, a lawyer who is entitled to practice law in Ontario, a notary public, or any other person who has been appointed a commissioner for taking affidavits in connection with Superior Court of Justice court documents. For information regarding fees for having your Affidavit sworn/affirmed by a registrar of the court, please consult the Superior Court of Justice and Court of Appeal Fees Regulation .
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 to your motion. 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.

<p>Step 4: Serve a copy of your Notice of Motion on all parties</p>	<p>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.</p> <p>Step 6 below refers to additional material that 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), 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 registrar. 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, you should consult the Rules of Civil Procedure.</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 that 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 (in Toronto, by 4:30 p.m. two 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.</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 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 of the Rules of Civil Procedure for more details 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, you should consult the Rules of Civil Procedure.</p> <p>You may also want to file a Factum to support your motion. A Factum is a concise argument stating the facts and law upon which you intend to rely. A judge may decide not to hear a matter without a Factum. 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. 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.</p> <p>If you intend to refer to a court transcript 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 registrar a Confirmation of Motion (Form 37B). A Confirmation of Motion provides the court with additional information regarding the motion, such as how long it 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 dismissed.</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 don't 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 that you speak to a lawyer about which option, if any, to pursue.

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

One option that may be available to you is to 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. These forms are available online at http://www.e-laws.gov.on.ca/DBLaws/Regs/English/900194b_e.htm, or at your local law library.
- Some steps refer to timelines. For more information on how days are counted, refer to [Rule 3](#) of the Rules of Civil Procedure.
- Some steps refer to service. For more information on service, refer to [Rule 16](#) of the Rules of Civil Procedure. Note that you cannot serve documents on Sunday, unless you have the court's permission (see section 124 of the *Courts of Justice Act*).
- Some steps refer to court fees. Court fees are set by regulation under the *Administration of Justice Act*. Superior Court of Justice and Court of Appeal may be viewed on the Ministry of the Attorney General website at www.attorneygeneral.jus.gov.on.ca. If you cannot afford to pay court fees, you may wish to request a fee waiver. Fee waiver request forms and a guide to the fee waiver process and financial eligibility criteria are also available on the Ministry's website, or on request at any court or enforcement office.
- 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.on.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.</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. An Affidavit is a formal sworn statement of fact, written down by you and then sworn/affirmed and signed by you in the presence of a Commissioner for Taking Affidavits. Your Affidavit should set out all of the evidence you think might be relevant to your argument. You can have your Affidavit sworn/affirmed by a registrar of the court, a lawyer who is entitled to practice law in Ontario, a notary public, or any other person who has been appointed a commissioner for taking affidavits in connection with Superior Court of Justice court documents. For information regarding fees for having your Affidavit sworn/affirmed by a registrar of the court, please consult the Superior Court of Justice and Court of Appeal Fees Regulation.</p>

<p>Step 3: Obtain a hearing date for your motion (if your motion will be heard by a single judge)</p>	<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 to your motion. 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.</p>
<p>Step 4: Serve a copy of your Notice of Motion on all parties</p>	<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 that 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 registrar. 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, you should consult the Rules of Civil Procedure.</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 that 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 (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 serve a Motion Record on all of the other parties, and then file a copy of the Motion Record with the court. Please note that 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 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 of the Rules of Civil Procedure for more details 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, you should consult the Rules of Civil Procedure.</p> <p>You may need to prepare a Factum to support your motion. A Factum is a concise argument stating the facts and law upon which you intend to rely. 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. 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.</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 court transcript 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 registrar a Confirmation of Motion (Form 37B). A Confirmation of Motion provides the court with additional information regarding the motion, such as how long it 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 dismissed.

(b) Appeal to the Ontario Court of Appeal

Another option may be to appeal the Divisional Court's decision to the Ontario Court of Appeal. To bring an appeal to the Ontario Court of Appeal, 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 Notice of Motion on all of the other parties to your appeal **within 15 days** after your appeal is dismissed. 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: http://www.ontariocourts.on.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).