Repairs: LawPRO works with lawyers to correct errors and minimize losses

"Repair" work – steps taken to correct an error or problem to minimize or avoid claims costs – is an important part of LawPRO's claims portfolio. Depending on the nature of the error, LawPRO may take these steps directly, or provide support while the insured conducts a "self-repair". The most commonly-repaired claims are in the civil litigation area, but successful repairs were also undertaken in the context of construction liens, wills, and real estate, among other areas. The following summaries illustrate some of the repairs we achieved in 2012.

Setting aside administrative dismissals

LawPRO is especially active in motions to set aside orders dismissing actions for delay. Rule 48 of the *Rules of Civil Procedure* permits the Registrar or the Court to dismiss actions for delay under specified circumstances. Such dismissals often lead to claims: In 2012, there were over 100 claims based on the administrative dismissal of a proceeding reported to LawPRO. These claims can be costly; where possible, LawPRO seeks to have these orders set aside. Success in these motions often requires the submission of exhaustive material to demonstrate that the criteria for granting relief have been met. Sometimes we are successful, sometimes we are unsuccessful because the facts are too unfavourable. Because the Court's power to dismiss an action for delay or to set aside such a dismissal is discretionary, it is difficult to predict the outcome of these motions in advance.

Our repair of a medical malpractice action[1] in 2012 demonstrates the value of well-prepared materials. The Registrar in this case dismissed the plaintiff's medical malpractice action as abandoned pursuant to Rule 48.15. Master Hawkins set that order aside.

The plaintiff was able to satisfactorily explain the litigation delay. The surgery giving rise to the claim took place in 2005. The plaintiff claimed to have discovered her cause of action only in 2006. There was no convincing evidence to the contrary. The plaintiff's lawyer issued a notice of action in September, 2008, and a statement of claim in October, 2008. These were not served, as the lawyer said he needed to gather medical reports and opinions.

A series of tragedies then struck the lawyer: His son-in-law was diagnosed with cancer in December and died in March. That same month, the lawyer learned that his wife had cancer; she died in August, 2010. The lawyer's evidence was that he was unable to function rationally, or practice law at that time. The plaintiff was aware that the lawyer's wife had cancer, and was reluctant to pressure the lawyer about the claim, though at no time did the plaintiff instruct the lawyer not to prosecute the claim.

In September, 2010, the plaintiff learned that the lawyer's practice was being wound down. She retained new counsel immediately. New counsel received notice from the Court that the action would be dismissed as abandoned under Rule 48.15. Instead of dealing directly with the pending dismissal, new counsel had the notice of action and statement of claim served on the defendant, notwithstanding that the time for service had expired. The defendant did not deliver a defence, and the

[1] *Viney v. Cameron*, 2012 ONSC 4401

Registrar dismissed the action. LawPRO was then notified, and it appointed new counsel who brought a motion to set aside the dismissal order.

Master Hawkins, who heard the motion, was satisfied that the plaintiff provided adequate evidence for the litigation delay. The lawyer's conduct in 2009 and 2010 was not a deliberate attempt to delay this action, and the plaintiff was not at fault, in the circumstances, for not putting pressure on the lawyer nor dismissing him sooner and retaining new counsel. The plaintiff's new lawyers did not deliberately ignore the threat of a registrar's dismissal order; however their response was not sufficient to prevent the registrar from dismissing this action as abandoned.

The motion to set aside the dismissal order was brought reasonably promptly. Repair counsel required substantial time to prepare the extensive motions materials, but these materials were the most thorough that Master Hawkins had ever seen.

Also in 2012, LawPRO argued two administrative dismissal cases before the Ontario Court of Appeal, failing to sway the court in the first, but succeeding in the second.

In the first[2], the Court of Appeal dismissed the plaintiff's appeal of a dismissal order. In so doing, the court reiterated that the burden on a plaintiff at status hearing pursuant to rule 48.14(13) (often called a show-cause hearing) is stringent. Even if the plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if there has been prejudice to the defendant. If the plaintiff is not able to provide a satisfactory explanation for the delay, it is open to the judge to dismiss the action, even if there is no proof of actual prejudice to the defendant. The test, in the court's words "is conjunctive, not disjunctive." While there was little evidence of prejudice to the defendant, the plaintiff could not provide a satisfactory explanation for the delay between 2005 (when the facts giving rise to the claim occurred) and 2011, when the action was dismissed.

The second appeal[3] was from an order of Gorman J., who dismissed the plaintiff's action pursuant to Rule 48.14(13). That dismissal first came before Master Pope, who declined to dismiss the action, but imposed a timetable. The Court of Appeal reinstated the timetable.

The Court of Appeal held that the test for dismissing an action at a status hearing under Rule 48.14(13) is NOT the same as the test for dismissing an action under Rule 24 (also a rule permitting dismissals for delay, but on the defendant's motion). Rule 24 imposes a burden on the defendant to show why the action should be dismissed. Under Rule 48.14, the plaintiff bears the burden of demonstrating that there is an acceptable explanation for litigation delay and that, if the action is allowed to proceed, the defendant will suffer no non-compensable prejudice.

In allowing the appeal from the Master's decision, Justice Gorman had held that the plaintiff failed to satisfy her onus under Rule 48.14 because she failed to file affidavit evidence. Justice Gorman erred in so holding. The usual practice is for the initial status hearing to proceed on the basis of oral submissions. If the judicial officer conducting the status hearing forms the view, on the basis of the oral submissions, that the action is vulnerable dismissal for delay, ordinarily a full hearing will be ordered on affidavit evidence. Furthermore, the 22-month delay in this case was not exclusively attributable to the plaintiff.

It is important that dismissal orders be reported to LawPRO promptly. Depending on the circumstances, LawPRO's in-house counsel may simply give you some guidance and in some instances may agree that you personally handle the motion to set aside the dismissal. On more difficult cases, expert counsel may be called on to assist.

Remember, however, that the courts have become increasingly strict about plaintiffs' obligations to move actions forward. Even when successful, remedial motions are expensive. The Courts require extensive production of material to inform them in the exercise of their discretion. It is far better to carefully comply with the *Rules of Civil Procedure* than to find yourself involved in a "repair" motion.

LawPRO repair leads to unusual "correction" to a will

In *Daradick v. McKeand Estate*[4], Justice Matheson ordered that the will of Ruth McKeand be rectified to include a bequest of McKeand's house to her daughter Virginia Daradick. This order was unusual in that an entire clause was inserted into a will, rather than simply a word or a few words.

[2] *1196158 Ontario Inc. V. 6274013 Canada Limited*, 2012 ONCA 544

[3] *Bolohan v. Hull*, 2012 ONCA 121, allowing appeal from Gorman, J. who allowed the Defendant's appeal from Master Pope 2011 ONSC 2295

[4] 2012 ONSC 5622

Virginia had cared for both her father and her mother before their deaths. Her parents promised that Virginia would have the house. Shortly before her death, Ruth instructed her lawyer to prepare a new will. Through an error in his office, the clause leaving the house to Virginia was omitted from the new will.

After Ruth's death, the error came to light. The executor of Ruth's estate refused to consent to rectification; however, on the rectification application, the executor led no evidence to contradict that of Virginia and the lawyer. Justice Matheson found that the lawyer's error should be corrected. If this were not done, then the only other course of action would be to sue the lawyer or the estate, which could be very costly. He therefore ordered that the will be rectified by adding that the house would be bequeathed to Virginia Daradick. All other terms remained the same.

Arguing for the preservation of a construction lien

Lawyers acting for three "finishing trades" had failed to set their construction lien claims down for trial within the time stipulated by the *Construction Lien Act*. However, LawPRO counsel persuaded the court[5] that under s. 37(1)(2) of the *Construction Lien Act*, these liens were entitled to "shelter" under the lien action commenced and set down for trial by the general contractor in a timely way. Master Macleod declared that the general contractor's lien claim was an action in which the other three liens may be enforced and, because it was set down for trial in time, the "finishing" liens had not expired.

Setting aside a real estate transfer made in error

The Court of Appeal affirmed that a conveyance may be set aside, and the parcel registration rectified, where a transfer was made in error and the transferee was not a bona fide purchaser for value[6].

Through the error of a lawyer in 1994, a conveyance from a vendor to a purchaser omitted one condominium unit, which should have been conveyed along with several other units. The purchaser included the disputed unit in a new transfer to another purchaser in 2008, along with all of the remaining units which the vendor owned. It was the vendor's evidence that he understood that he had conveyed the disputed unit in 1994, and did not authorize its conveyance in 2008. It is likely that the lawyers for the second purchaser erroneously included the unit among the 88 others to be conveyed, since a title search would have shown that the vendor owned the unit and meant to dispose of all remaining units in the condominium to the second purchaser. The first purchaser learned of the conveyance to the second in November, 2011.

Justice Moore ordered that the second conveyance be set aside, and the 1994 conveyance be rectified to include the missing unit. The indefeasibility sections of the *Land Titles Act* only protect *bona fide* purchasers for value without notice. The second purchaser was not a *bona fide* purchaser for value, having paid no consideration for the transfer of the disputed unit, which was not described in the Agreement of Purchase and Sale nor mentioned by the vendor. The Land Registrar was ordered to amend the Registers accordingly.

The Court of Appeal held that Justice Moore's discretionary order granting rectification was well supported by the evidence, and it declined to interfere. ■

Debra Rolph is director of research at LawPRO.

[5] *Deslaurier v. Le Groupe Brigil*, 2012 ONSC 3350, as to costs 2012 ONSC 5490

[6] *719083 Ontario v. 2174112 Ontario*, 2012 ONSC 3815, affirmed 2013 ONCA 11