Administrative dismissal:

Take it seriously and ask for (our) help

It's Friday afternoon, and you are almost ready to begin what promises to be a relaxing weekend. One file remains at the corner of your desk and there is a telephone message from opposing counsel. It has been difficult to obtain instructions from the client and you have a nagging feeling that you have put the matter off for too long. You listen to your telephone message and defence counsel has let you know that the registrar dismissed the action for delay about six months ago and he is closing his file.

When you review the file, you find buried with some client documents the dismissal order which never came to your attention. You are not even sure if you received the status notice advising of the pending dismissal. You don't see it in the file. Your first thought is that a registrar's dismissal order is easy to set aside. Wrong!

Unfortunately, this scenario (or a similar version) is something we at LawPRO see on a weekly basis. Many lawyers are unfamiliar with the case law and think that the registrar's dismissal order is routinely set aside. They do not call LawPRO. Instead, they bring a motion but are not successful in restoring the action. The motion materials are poorly drafted and the affidavit lacks crucial details.

By reporting the matter late, you are not only jeopardizing your coverage, but also endangering hopes of an appeal because this is likely not a case where we would be able to introduce fresh evidence on appeal. Typically, all relevant information was available prior to the motion.

The test that the court is to implement when setting aside the order of the registrar made pursuant to Rules 48.14(3) and 77.08 has been set out by the Court of Appeal in *Scaini v Prochnicki* (2007) 85 O.R. (3d) 179, and *Marche D'Alimentation Denis Theriault Ltee v Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660. The court noted that the four factors set out in *Reid v Dow Corning Corp* (2001), 11 C.P.C (5th) 80, are not to be applied rigidly, but rather contextually, along with all relevant factors, and the court must determine what is just in all of the circumstances of a particular case.

The four *Reid* factors are:

1. an explanation of the litigation delay from the start of the action until the deadline for setting the action down;
2. evidence that the plaintiff always intended to set the action down by the deadline but failed to do so through inadvertence;
3. the motion to set aside was brought promptly after learning of the dismissal; and
4. a lack of significant prejudice to the defendants arising from the delay or as a result of the dismissal.

The court will have no difficulty in dismissing a motion for want of proper evidence being adduced.

As an example, one of our files involved an action for non-payment of a mortgage insurance policy. The affidavit in support of the motion was 11 paragraphs, and basically a procedural chronology, which the court referred to as containing the "barest minimum of information." The affidavit did not address all four criteria in *Reid*. Although the motion to restore the action was brought six months after the dismissal order, there was no explanation for the delay.

Our insured explained that he received little cooperation from the defendant in scheduling discoveries. But he did not explain this in his material even though the defendants contributed to the delay. There was no evidence as to why the action was not set down for trial. There was no evidence as to whether the status notice was received, nor what was or was not done in response to the status notice. There was no explanation as to when the dismissal order came to our insured's attention, and what was done in response thereafter. There was no evidence that the plaintiff intended to proceed with the action, which was important because on the pleadings, there was a real question about the merits of the action. Even though the defendant did not allege prejudice, the court was of the view that there was not enough information to exercise its discretion under Rule 48.

In some cases, the motion will fail because the action simply dragged on for too long. The key is that the lack of prejudice is not the sole criterion. In *Giant Tiger* the court stressed the importance of not countenancing delay. If there has been inordinate delay in advancing the action prior to the dismissal, or in bringing your motion to restore the action, this may trump lack of prejudice.

When you realize that an action has been dismissed for delay, call LawPRO immediately. Don't bring the motion without telling us first, and don't advise us of the situation on the eve of motion. We can help by reviewing your motion material. In some cases, a consent to set aside the order may be available. In some circumstances, we may agree that your firm can proceed on its own with experienced counsel handling the motion. In most cases, it is necessary for us to retain counsel for you to prepare the motion record and argue the motion. We have been successful when we have time to properly respond. We are here to help.

Domenic Bellacicco is claims counsel with LawPRO.

© 2009 Lawyers' Professional Indemnity Company. This article originally appeared in LAWPRO Magazine "Changing Direction," July 2009 (Vol. 8 no. 1). It is available at www.lawpro.ca/magazinearchives