

Rule 48 dismissal FAQs

In the last year we have received inquiries regarding the new Rule 48. Here are the questions we most frequently hear:

1 The main action is administratively dismissed under Rule 48. What happens to related counterclaims, crossclaims and third party claims?

Counterclaims, crossclaims, and third party claims are dealt with under Rule 48.14(9), which refers to Rules 24.03 to 24.05. This requires us to cross-reference Rules 24.03 to 24.05. When the main action is administratively dismissed under Rule 48 (remember to set appropriate tickler dates):

- A defendant's counterclaim to the main action will be dismissed without costs within 30 days absent a notice of election to proceed (Rule 24.03);
- A defendant's (to the main action) crossclaim or third party claim is deemed to be dismissed (Rule 24.04(1)); and
- A defendant to the crossclaim can have the crossclaim deemed to be dismissed by sending a copy of the dismissal order to the crossclaimant (Rule 24.02(1.1)).

2 My case is approaching the Rule 48 dismissal date and I have not set the matter down for trial. I have consent of all parties to a new dismissal date. Can I simply file a new timetable with the registrar or must I bring a motion for a status hearing?

You can file a consent timetable with the registrar, but must do so at least 30 days before the dismissal date. The timetable must identify the steps needed to set the matter down for trial, set the deadlines for each step, AND set a dismissal date no more than two years from the current dismissal date. Remember to attach a draft order. See Rule 48.14(4).

If the conditions above cannot be met, you must bring a motion for a status hearing. If the status hearing will not go on consent, notify LAWPRO as this is now a potential claim.

3 What are the cost consequences when an action is administratively dismissed under Rule 48?

While Rule 48 does not address costs, a Rule 48 administrative dismissal is an action dismissed for delay. Under Rule 24.05.1, if an action is dismissed for delay, any party may, within 30 days of the dismissal, make a motion respecting the costs of the action (Rule 24.05.1). UPDATE: See AvoidAClaim post on Daniels v. Grizzell, 2016 ONSC 7351 endorsement.

4 I have a court order setting a date by which I have to set the matter down for trial. Which dismissal date applies to my case, the 5-year dismissal date under Rule 48, or the date set by the court order?

The date set by the court order (see Rule 48.14(1)).

5 I have settled a case which has not been set down for trial. Should one of the parties bring a motion to dismiss the action, or can we wait for the case to be administratively dismissed under Rule 48.14?

While it is possible to let an action that has settled sit dormant until it is administratively dismissed under Rule 48.14, there is a risk that one of the parties may renege on the settlement and suddenly take steps in the action. This may occur, for example, if one of the parties has "buyer's remorse" or if the settlement is not executed properly or in a timely manner. Typically, when an action is settled, one of the parties brings a motion to dismiss the action to help achieve closure.

(As with any settlement, remember that if it involves a party under disability, the settlement must be approved by a judge under Rule 7.08.)

6 Does Rule 48 apply to a family law action?

Rule 48 of the *Rules of Civil Procedure* applies to civil proceedings in the Court of Appeal and in the Superior Court of Justice. Under Rule 1.02, the *Rules of Civil Procedure*, including Rule 48, do not apply to proceedings governed by Ontario Regulation 114/99 *Family Law Rules*, except as provided. If there is a combined proceeding where both the *Rules of Civil Procedure* and the *Family Law Rules* may apply, the parties may agree, or obtain a court order, that the *Family Law Rules* apply to a part or all of the combined proceeding – in this circumstance parties may consider whether Rule 48 should apply to the combined proceeding or not, and take appropriate steps.

Remember, under the *Family Law Rules*, Rules 39, 40 and 41 provide for the dismissal of actions by the clerk, after service of a notice of approaching dismissal if no case conference or settlement conference is arranged before the 365th day after the date the case was started. ■