



The clock is ticking

Pre-2012 matters not set down will be automatically dismissed January 1, 2017

As we begin the New Year, it's a good time to review your litigation files and make sure they are proceeding as appropriate. The clock is ticking! Remember, under the new Rule 48.14 of the *Rules of Civil Procedure*, matters commenced before January 1, 2012 will be automatically dismissed – without notice to you – on January 1, 2017, if the action is not set down for trial.

Take immediate action to ensure your pre-2012 files will either resolve or be set down for trial by the end of this year. If you anticipate you cannot do so, obtain consent from all parties to file a timetable and a draft order with the court by December 1, 2016 (Rule 48.14(4) requires this happen 30 or more days before the dismissal date). And if you cannot resolve, set down, or file a consent timetable on a pre-2012 file, then you will need to bring a motion for a status hearing before the dismissal deadline. However, before doing so, please contact LAWPRO as you have a potential claim. Early notice will hopefully allow the opportunity to repair potential claims – and avoid the \$10,000 increase in deductible that will apply if a dismissal is not set aside (see next page).

Be proactive and dictate the pace of litigation on your files. Be aware of the three most common reasons files are dismissed for delay – and don't let them happen to you (see next page). Consider using LAWPRO's Rule 48 Transition Toolkit (practicepro.ca/Rule48), which provides advice and tools lawyers and law firms can use to lessen the risk of a claim under the new rule (see Toolkit sidebar).

Rule 48 Transition Toolkit

There are four tools in the toolkit:

- 1 A **Firm Transition Checklist** containing a list of the steps firms should take to update ticklers and other firm systems and processes to ensure Rule 48 requirements are met on all files.
- 2 An **Individual File Checklist** containing a list of the steps to be taken and ticklers to be updated for an individual file.
- 3 A **File Progress Plan** that can be used to help actively manage and monitor the status and progress of work on an individual file.
- 4 A **Rule 48 Transition Training PowerPoint®** to help train lawyers and staff on Rule 48 and file management best practices (available at practicepro.ca/Rule48).



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The top three reasons files are dismissed for delay

Far too often, litigation files are dropped for the same three preventable reasons. Take a look and ensure your files are not at risk.

- 1. The file has languished because damages are minimal and/or there are difficult issues of liability:** This typically results from a poor evaluation of a file at the time of retainer, or because a re-evaluation didn't occur when circumstances changed as the matter progressed. Proper screening at the time of retainer, and as a file proceeds, can help you avoid investing in a file with limited prospects for success.
- 2. A lawyer's personal crisis or unexpected hiatus from legal practice:** When a lawyer stops practising because of illness, family emergency, or substance abuse, all of the lawyer's files may face administrative dismissals. LAWPRO sees multiple claims arise in such circumstances. Don't let this happen to you. Ensure a backup plan is in place. Who will handle your urgent client matters if you are unable to do so? Do you have an agreement with another lawyer to help out or take over files when needed?
- 3. A junior lawyer is overwhelmed:** When a senior lawyer assigns responsibility for files to a junior who is overwhelmed, the junior may be too embarrassed or intimidated to speak up. Senior lawyers may be ultimately responsible for work they delegate to juniors under their supervision. A good "open door" policy means more than just being available – check in on junior lawyers and ensure they are moving their files along.

\$10,000 increase in deductible for certain administrative dismissal claims

In our efforts to control escalating claims costs for administrative dismissals (more than \$10 million in the last four years), LAWPRO has circulated repeated warnings and resources about the risk of having a claim dismissed for delay or by reason of abandonment under Rule 48 of the *Rules of Civil Procedure*. Since 2009, we have written numerous articles in legal publications, educated the bar by giving presentations, speeches, and CPD programming, and released the Rule 48 Transition Toolkit.



Key dates

- New Rule 48.14 was effective **January 1, 2015**
- Actions commenced before **January 1, 2012** will be automatically dismissed, without notice, **January 1, 2017**
- Actions commenced on or after **January 1, 2012** will be automatically dismissed, without notice, 5 years after commencement
- Transition provisions impact whether a status hearing will occur for **pre-January 1, 2015** actions

Nevertheless, these highly preventable claims continue to occur, and are becoming more challenging than ever to defend. Starting with the 2014 policy year, where an administrative dismissal is not set aside through steps taken by or under the direction of LAWPRO, in regard to a resulting claim, the deductible for that claim will be deemed to apply to claim expenses, indemnity payments and/or repair costs and be \$10,000 more than the deductible chosen by the insured and/or listed on the declarations page of the policy. (There is an exception to this, for claims arising out of certain *pro bono* work.)

“ **Matters commenced before January 1, 2012 will be automatically dismissed – without notice to you – on January 1, 2017, if the action is not set down for trial.** ”

Often these types of claims can be repaired if early notice is provided, so we urge lawyers to continue to report actual and potential claims as soon as they are discovered to permit LAWPRO counsel every opportunity to have the proceeding reinstated and to avoid the application of the increased deductible. For this reason the increased deductible will apply only to claims resulting from administrative dismissals that are not set aside. ■

New Small Claims Court Rule 11.1: Actions will be dismissed for delay after two years without notice

On September 1, 2015, The *Rules of the Small Claims Court* were amended to bring administrative dismissals in small claims in line with the spirit of the new Rule 48. With this change the small claims court will no longer provide notice that an action will be dismissed. And note, small claims court actions will be dismissed **two years** after the date the claim was issued (a much

shorter period of time than the five years under Rule 48.14), if it has not been resolved or a date has not been requested for a trial or assessment hearing. The Plaintiff's Claim (Form 7A) now includes wording that reflects the changes (available at ontariocourtforms.on.ca).