Civil procedure update: Rule 48 transition and defended actions; amendments to damage claims after limitation deadline

Thought you knew your *Rules of Civil Procedure*? Not so fast… there's always a new angle. The following (unrelated) case summaries touch on two fussy points with significant consequences: In *Pinevalley Trim*, a defendant tries to force a subrule 48.14 square peg into a 48.15 round hole; and in *Dee Ferraro* a plaintiff succeeds in refining an ungraceful pleading after time is up.

Rule 48.15 transition provisions don't apply to defended actions

In *Pinevalley Trim & Doors Ltd. v. Tibollo & Associates Professional Corporation et al.* (2012 ONSC 1002 (CanLII)), a commercial dispute came before the court for a status hearing. The parties disagreed about whether or not the case had been automatically dismissed on January 1, 2012 by the operation of Rule 48.15(6) of the *Rules*.

Rule 48 deals with the setting down of actions for trial. Subrules 48.14 and 48.15 were introduced to permit the dismissal of delinquent or abandoned actions that do not progress within prescribed timelines.

Rule 48.14 opens with a definition of "defence" and thereafter refers to defended actions. In a nutshell, it provides that if two years pass after the last defence is filed without the action being set down for trial, the Registrar will serve a status notice on the parties. The status notice provides that if the action is not set down for trial (or otherwise terminated, for example, via settlement) within 90 days of the notice, and the parties do not file documents in support of a status hearing, the action will be dismissed by the Registrar.

The process with respect to *undefended* actions is set out in subrule 48.15. That subrule permits the Registrar to dismiss an action as "abandoned" if, following the issuance of the originating process, no defence, notice of intent to defend, or motion (other than a motion challenging jurisdiction) is filed, nor has the plaintiff taken steps to pursue default judgment. Under these circumstances, an action may be dismissed after 45 days' notice.

In the *Pinevalley Trim* case – which involved a defended action – some confusion arose over the interpretation of subrule 48.15(6). Subrule 48.15, having been introduced on January 1, 2010, is considerably newer than subrule 48.14. To address concerns about how the application of the new rule to old actions (those commenced before January 1, 2010), the transition period created by 48.15(6) created an extension for these actions in the form of two-year "window" in which the plaintiff could forestall administrative dismissal by taking "a step" in the action.

While the transitional provision forms part of Rule 48.15 – the rule permitting dismissal of undefended actions – the wording of subrule 48.15(6) does not explicitly restrict its operation to undefended actions.

Having noticed this potential semantic loophole, the defendant in *Pinevalley Trim* sought to argue that subrule 48.15(6) was broad enough to "catch" the defended action – and that, because no step had been taken within the timeframe, operated to trigger a dismissal of the claim effective January 1, 2012.

Instead of arguing the more complicated issue of whether a step had or had not been taken, the parties agreed to allow the court to deal with the narrower legal question of whether subrule 48.15(6) does or does not apply to defended actions.

The court found that the purpose of the subrule's enactment was "a legitimate tool of interpretation to determine the extent of its application". That purpose was to provide a grace period with respect to older stalled actions, to avoid the potential of surprising parties who had filed before the introduction of the new subrule. Since subrule 48.14 was NOT new, there was no need for a grace period with respect to defended actions. The correct interpretation, the court held, was that subrule 48.15(6) applies only to undefended actions.

The court found that the action had not been dismissed by the operation of subrule 48.15(6), and requested that the parties file a timetable to guide the progress of the litigation.

Late amendment to add new remedies not unduly prejudicial

In its recent decision in *Dee Ferraro Ltd. v. Pellizzari* (2012 ONCA 55 (CanLII)), the Ontario Court of Appeal clarified its position on the availability of amendments to pleadings to add remedies after expiry of the limitation period for the underlying claim.

Amendments to pleadings, in Ontario, are governed by Rule 26 of the *Rules*. The general principle underlying the permissibility of amending pleadings is that amendments will be permitted unless "prejudice would result that could not be compensated for by costs or an adjournment" (subrule 26.01).

Amendments are permitted anytime with the consent of all parties. Amendments prior to the close of pleadings, other than those seeking to add a party, do not require permission (or parties' consent). In general, these early amendments simply reflect the parties' developing understanding of the issues as more information becomes available, and it is generally difficult for a party to argue that early amendments lead to non-compensable prejudice.

As time passes, allegations of prejudice become more legitimate. Once the relevant limitation period has come and gone, permitting amendments to a statement of claim is sometimes equivalent, for practical purposes, to lifting the limitations bar. Under these circumstances, if the proposed amendments introduce a new cause of action, they are, as a rule, not permitted. In its 2008 decision in *Frohlick v. Pinkerton Canada Limited* (2008 ONCA 3 (CanLII)), the Ontario Court of Appeal characterized the situation that arises when a party wants to make significant changes after the expiry of a limitation period as a "presumption of prejudice" to the interests of the defendant that "will be determinative" (i.e. will preclude permission to amend pleadings) "unless the party seeking the amendment can show the existence of special circumstances that rebut the presumption."

This presumption, however, has not always been recognized, particularly in cases where the facts supporting the proposed amendment were set out in the originating process. The decision in *Canadian Industries Ltd. v. Canadian National Railway Co.*([1940] O.J. No. 266 (C.A.), affd. 1941 CanLII 16 (SCC), [1941] S.C.R. 591) drew a distinction between amendments that allege new facts and amendments that request new remedies based on facts already set out in the pleadings before time ran out.

The *Canadian Industries* case was a commercial case alleging damages in contract after chemicals were spilled when a train derailed. After finding that there was no contract between the parties, the court allowed the plaintiff to request a remedy in negligence, based on the same derailment facts.

In the years since 1940, the trend in "late amendment" cases has been to permit amendments that add "an alternative theory of liability based upon the same factual nexus" (*Gladstone v. Canadian National Transportation Limited*, 2009 CanLII 38789 (ON SCDC) ; see also, for example, *Fitzpatrick Estate v. Medtronic Inc.*, [1996] O.J. No. 2439 (Ct. J. (Gen. Div.)). This line of cases can be distinguished from *Frohlick v. Pinkerton Canada Limited*, because in the *Frohlick* case (which didn't cite *Canadian Industries*), the amendment requested (to add a constructive dismissal argument) was based on facts that occurred a year earlier than the facts that supported the original (wrongful dismissal) claim.

In denying the *Dee Ferraro* plaintiff's proposed amendment at the trial level, the court relied on *Frohlick*, quoting that case for the principle that "[i]t would be wrong… to view Rule 26.01 as allowing a party to use the existence of an outstanding claim, and nothing more, to defeat the protection of relevant limitation periods."

On appeal, however, the court reversed the decision and permitted the amendment. After reviewing them, Strathy J. found that the majority of the amendments "simply claim additional forms of relief, or clarify the relief sought, based on the same facts as originally pleaded." In permitting the amendments, he reaffirmed

the analysis developed in *Canadian Industries* and the line of cases that built upon that decision, and distinguished *Frohlick* on the basis that the amendments proposed in that case depended upon entirely new allegations.

Just as the *Dee Ferraro* amendments served to clean up an "inelegant" pleading, the Court of Appeal's decision in the case clears up an inconsistency in Ontario law. Defendants opposing an amendment to pleadings after the limitation period has passed should look first to the facts set out in the original pleading: Are all the facts necessary to support the new relief set out? If the answer is yes, a court will be unlikely to find that irremediable prejudice attaches to the proposed amendment.