



The clock is ticking less than three months left...

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

As we move through September, LAWPRO urges lawyers to review their litigation files and make sure they are proceeding as appropriate. The clock is ticking and time is running out! 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. As courts may be busy and it may be difficult to get a court date, you are encouraged to immediately take all steps necessary to deal with matters that face dismissal.

See the Rule 48 Dismissal FAQs on the opposite page for the answers to the most common questions we are hearing from Ontario lawyers.

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, if you anticipate or know that

the status hearing will be contested, 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 page 27).

Remember that as of January 1, 2017, matters will be automatically dismissed five years after they were commenced. Please be proactive and keep your files moving along. 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 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, sets 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)).

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

New Rule 48.14

(Administrative Dismissals) Transition Toolkit

...making a difference for the legal profession.

Effective January 1, 2015, a new Rule 48.14 brought significant changes to the administrative dismissal regime in Ontario. After several hundred claims and almost \$10 million in claims costs to just three and a half years, LawPRO was happy to see old Rules 48.14 and 48.15 revised.

While LawPRO believes the new rule may stem the tide of administrative dismissal-related claims under the old rules, the changed deadlines, processes and transition provisions introduce new claims risks that may trap the unwary lawyer. Remember, under the new rule costs will automatically disburse any action not set down for trial **five years after commencement, without sending notices of any type to parties or their lawyers.** Your tickler systems must remind you of relevant dismissal deadlines.

LawPRO encourages all lawyers to familiarize themselves with the requirements under the new Rule 48.14 and make all necessary changes to internal firm systems and processes. While claims may happen for reasons beyond your control, many of the claims risks under Rule 48.14 can be significantly reduced or eliminated with some proactive claims prevention efforts.

There are four tools in this 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 law firm lawyers and staff on Rule 48 and file management best practices (available at practicepro.ca/Rule48).

An electronic version of the Toolkit and LawPRO's Rule 48 Transition Training PowerPoint are available at practicepro.ca/Rule48.

The worst case scenario: When lawyers drop the ball on all their files

A very dangerous scenario arises when a lawyer takes an unexpected hiatus from legal practice (for example, due to illness, substance abuse or family emergency) or is still in the office but overwhelmed and "not present," which leads to the ball being dropped on several files or even files at their entire practices. This triggers a "tsunami" of administrative dismissals and it is a scenario that LawPRO sees all too frequently, even at law firms that should have systems to prevent this from happening. When we see these clusters it appears that the departed lawyer's active files were not being monitored by a staff person or transferred to a colleague.

Lawyers and law firms should be prepared for unexpected work interruptions. Consider the possibility that an illness, injury or other contingency could cause someone to struggle with keeping up, or even leave practice for a significant amount of time. Ask yourself: *Does your firm have systems that will require you or the person(s) to handle these situations? Who will be the agent? Client matters in these circumstances? Will the lawyer taking over a file be able to review files to identify matters requiring prompt action? Consider how you would improve your firm's systems to address these situations.*

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. ■

\$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 and a half 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.

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.)

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.