# casebook

Know how administrative dismissal claims happen, and

# take 8 steps to immunize yourself against them



Over the last two years LAWPRO has seen a major spike in Rule 48 administrative dismissal claims.

Rule 48 claims arise when it is alleged that the dismissal of a claim was due to the lawyer's negligence with respect to either a defended (Rule 48.14) or an undefended (48.15) action. Many of these claims have been very costly for LAWPRO. While certain Rule 48 claims can be repaired by speaking with opposing counsel or court staff, in larger centres (Toronto especially), repairs require a motion to set aside the dismissal and reinstate the action. Not only do these repair efforts consume significant defence costs, but success is not guaranteed. Both the courts and LAWPRO are losing patience with what is almost always an easily preventable error.

LawPRO urges lawyers to take every possible precaution against claims based on the administrative dismissal of an action.

Avoiding these claims means, first, understanding how these claims happen; and second, taking practical, active steps to protect against them.

#### How Rule 48 claims happen

Actions are dismissed when plaintiffs, for whatever reason, lose sight of litigation deadlines on a matter and then don't receive or fail to act on a status notice sent by the court. Here at LAWPRO we are uniquely placed to observe how these errors happen.

In a few cases, the reason for the oversight is administrative or clerical. The tickler system doesn't function properly and the timelines for the matter are missed and/or the resulting status notice is missed, misinterpreted, or is lost in the mail. Better management of office procedures and systems (for example, the use of the "inactivity" reports or warnings from account software) and better staff training can help with this cause.

Good office management also means careful supervision of juniors: On some claims, a senior lawyer who is ultimately responsible for a file delegates it to a junior who is overwhelmed with workload and is too embarrassed or intimidated to speak up. When the junior lawyer misses deadlines, the senior lawyer is not supervising him or her closely enough to notice.

On other claims, the limitation period goes by while the plaintiff is waiting for a medical prognosis, discoveries are proceeding, or there are active settlement discussions occurring.

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A very dangerous scenario arises when a lawyer's unexpected hiatus from legal practice (for example, due to an illness or family emergency) leads to the ball being dropped on several files triggering a "cluster" of administrative dismissals. When we see these clusters it appears that the departed lawyer's active files are not being monitored by a staff person or transferred to a colleague.

Finally, sometimes the result of a status hearing is the imposition of a timetable for progress on the plaintiff's lawyer. We see claims, in some instances, where the matter is dismissed when the lawyer did not or could not meet the timetable.

# Eight practical precautions to avoid Rule 48 claims

Administrative dismissal claims are almost universally preventable. Take these eight steps for your best chance at avoiding a claim:

- 1. Ensure that your tickler system is effective, is being populated properly, and that staff has been well-trained in the use of the system.
- 2. Consider using your tickler system or the "inactivity reports" or warnings that many law office accounting or practice management programs have to identify files in which nothing has happened for a specified period of time.
- 3. Don't assume that you can wait to take prescribed procedural steps in an action while awaiting completion of medical reports, discoveries, or settlement negotiations. Instead of relying on an opponent's informal or implied waiver, either meet litigation deadlines or obtain a written and signed "tolling" or "standstill" agreement confirming the parties' mutual agreement to extend time.
- 4. Train staff to recognize status notices, and to bring them to the attention of counsel without delay.
- 5. Supervise junior lawyers appropriately; ensure that they understand the operation of Rule 48, and pay attention to signs that suggest they are overwhelmed and at risk of missing deadlines.

- 6. Be prepared for unexpected work interruptions. Consider the possibility that an illness, injury or other contingency could cause your practice to be suddenly interrupted for a significant amount of time. Who would handle urgent client matters in those circumstances? Would that person be able, when reviewing your files, to identify matters requiring prompt action?
- 7. When time is passing and you can't get instructions from the client or a replenished retainer, you can't just let the file sit in abeyance. The court will be monitoring even if your client and the
- other side are content to let the matter slide. If you don't consider the file from this angle and the matter is eventually administratively dismissed, all of a sudden the client may show great interest in his or her cause of action, and effectively pursue it through an action against you. Knowing when to get off the record is one key to practising safely.
- 8. As there is the potential for a malpractice claim, contact LAWPRO promptly for advice if you are required to attend at a show cause hearing.

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## Some helpful resources

Litigation to keep a delayed action alive is complicated by jurisprudence that establishes FOUR separate tests, depending on the particular rules triggered. The chart on page 34 provides a handy guide to understanding which test will apply, and identifies the key precedents.

For a more detailed analysis of these tests and their application, and the case law in this area, read Debra Rolph's article "Plaintiff counsel beware – it is now easier to dismiss an action for delay." practicepro.ca/now-easier-to-dismiss-for-delay.pdf

# **LAWPRO KEY REMINDER DATES** MARK YOUR CALENDAR NOW!

#### On or about October I, 2013

LAWPRO online filing of Professional Liability Insurance renewal applications for 2014 begins. If you wish to file a paper application instead, please note that paper renewal applications will not be automatically mailed out, but you can download a 2014 pre-populated paper renewal application from our website on or about October 1, 2013.

#### November I, 2013

E-filing deadline: Renewal applications filed online by November 1 qualify for a \$25 per lawyer e-filing discount applied to the 2014 insurance premium.

#### November 8, 2013

Application filing deadline: 2014 LAWPRO renewal insurance applications filed after this date will be subject to a surcharge equal to 30 per cent of the base premium.

If you have any questions regarding the renewal of your insurance coverage, contact LAWPRO Customer Service Department at 416-598-5899 or 1-800-410-1013; by fax at 416-599-8341 or 1-800-286-7639; by e-mail at service@lawpro.ca



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# **Dismissal Motions: What is the Test?**

MOTION TYPE & RULE(S)

TEST(S)

AUTHORITIES

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# Dismissal of Action for Delay - Rule 24

Available to defendant where plaintiff fails:

- to serve statement of claim on all defendants within prescribed time;
- to note in default any defendant who has failed to deliver a defence, within 30 days after the default;
- to set an action down for trial within six months after close of pleadings;
- to move for leave to action to trial list, within 30 days after the action was struck off.

An action should not be dismissed unless:

- (a) the delay is intentional and contumelious; or
- (b) the plaintiff or his or her lawyers are responsible for the inexcusable delay that gives rise to a substantial risk that a fair trial might not now be possible.

Woodheath Developments Ltd. v. Goldman 2001 CanLII 28019 (ONSC), (2001), 56 O.R. (3d) 658 (Master), aff'd. 2003 CanLII 46735 (ON SCDC), (2003) 66 O.R. (3d) 731 (Div. Ct.), leave to appeal refused (2004) 44 C.P.C. (5th) 101 (C.A.). Approved and adopted in Armstrong v. McCall 2006 CanLII 17248 (ONCA), at para. 11

## Setting Aside a Registrar's order Dismissing Action - Rule 37.14 and Rule 48.14(4) and (5); Rule 48.15

Available where a Registrar dismisses an action under Rules 48.14(4) or (5), or Rule 48.15:

#### Rule 48.14(4)

The registrar shall dismiss the action for delay... 90 days after service of the status notice, unless:

- the action has been set down for trial or restored to a trial list;
- the action has been terminated by any means;
- documents have been filed in accordance with subrule (10)
  [timetable and draft order establishing timetable];
- the judge or case management master presiding at a status hearing has ordered otherwise.

#### Rule 48.14(5)

If an action is not set down for trial, restored to a trial list or terminated by any means within the time specified in an order made at a status hearing, the registrar shall dismiss the action for delay, with costs.

#### Rule 48.15

The registrar shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:

- more than 180 days have passed since the date the originating process was issued;
- none of the following has been filed:
  - i. A statement of defence
  - ii. A notice of intent to defend
  - iii. A notice of motion in response to an action, other than a motion challenging the court's jurisdiction
- the action has not been disposed of by final order or judgment;
- the action has not been set down for trial; or
- the registrar has given 45 days notice in Form 48E that the action will be dismissed as abandoned.

The plaintiff must satisfy at least some of the four criteria set out in *Reid v. Dow Corning Corp.* (2001), 11 C.P.C. (5<sup>th</sup>) 80 (affirmed as to the four-pronged test, (2002) 48 C.P.C. (5<sup>th</sup>) 93 (Ont. Div. Ct.)),

- (1) explanation of the litigation delay;
- (2) inadvertence in missing the deadline;
- (3) the motion is brought promptly; and,
- (4) no prejudice to the defendant.

See: *Scaini v. Prochnicki*, 2007 ONCA 63 (CanLII), 85 OR (3d) 179 (CA)

And also: Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited (C.A.) (2007) 87 O.R. (3d) 66, (C.A.), 2007 ONCA 695, allowing appeal From [2006] O.J. No. 2898; Wellwood v. Ontario Provincial Police, 2009 CanLII 1476 (Ont.Div.Ct.); [2009] O.J. No. 235; Finlay v. Paassen, 2010 ONCA 204; Viola v. Tortorelli, 2010 CarswellOnt 9219, 2010 ONSC 6148; reversing 2010 ONSC 711, 2010 CarswellOnt 633; Machacek v. Ontario Cycling Association, 2011 ONCA 410, dismissing appeal from 2010 ONSC 7065; Municipality Of Greenstone v. Marshall Macklin Monaghan Limited, 2013 ONSC 933; as to costs 2013 ONSC 2030

# **Showing Cause at a Status Hearing – Rule 48.14(13)**

A defendant may require a plaintiff to show cause at a status hearing, as to why its action should not be dismissed for delay:

#### Rule 48.14(13)

- at the status hearing, the plaintiff shall show cause why the action should not be dismissed for delay;
- if the presiding judge or case management master is not satisfied that the action should proceed, the judge or case management master may dismiss the action for delay.

A plaintiff bears the burden of demonstrating that there is an acceptable explanation for the delay in the litigation AND that, if the action was allowed to proceed, the defendant would suffer no non-compensable prejudice 1196158 Ontario Inc. v . 6274013 Canada Ltd. 2012 ONCA 544, 112 O.R. (3d) 67 at para. 32; Faris v. Eftimovski, 2013 ONCA 360, dismissing appeal from 2012 ONSC 1126 and 2012 ONSC 2227; see also 1667207 Ontario Inc. v. Botnick, 2013 ONSC 153

#### Restoring Action to Trial List - Rule 48.11

Available to a defendant where a plaintiff seeks to restore an action to the trial list:

#### Rule 48.11

Where an action is struck off a trial list, it shall not thereafter be placed on any trial list except,

- (a) in the case of an action struck off the list by a judge, with leave of a judge; or
- (b) in any other case, with leave of the court.

The plaintiff bears the burden of demonstrating that there is an acceptable explanation for the delay in the litigation AND that, if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice

Nissar v. Toronto Transit Commission, 2013 ONCA 361

This chart was prepared by Debra Rolph, director of research at LAWPRO.