

Administrative Dismissals Part 2

You have just settled a very complicated case on the eve of trial. The preparation leading to trial has left little time to work on other files, but fortunately the two weeks previously blocked off have now opened up. Time to catch up and start returning all those old phone calls and responding to those never ending emails.

You start reading an email from defence counsel on one of your personal injury files who has let you know that the Registrar dismissed your client's action for delay about six months ago and he is closing his file.

He reminds you that you did not answer his previous letters asking you to move the action along and deliver the pre-accident clinical notes and records of your client's treating doctors. When you review the file, you find underneath a copy of the police report, a status notice from the court warning of the pending dismissal, but you do not recall ever seeing it before.

Your first reaction is panic, but you then remember that this did happen to you before, and you recall having read an article in the July 2009 *LAWPRO Magazine* on this very issue. That article stressed that these dismissal orders need to be taken seriously and you should call LAWPRO immediately and ask for help.

You recall that the claims counsel at LAWPRO helped you write the appropriate letter to your client, and vetted your draft motion materials, which were later served on opposing counsel. Fortunately, the action was restored on consent, but you knew that LAWPRO would retain counsel on your behalf should the matter proceed to cross examinations and then be argued on a contested basis.

When you first read the article and spoke with claims counsel, you were quite surprised to learn that a Registrar's dismissal order is not routinely set aside, and the case law is quite extensive.

You recall being advised that your materials were poorly drafted, and your affidavit lacked crucial details. You were stunned to find out that if you proceeded with the motion without contacting LAWPRO, you would likely have lost the motion and jeopardized your coverage. Any appeal was doomed to fail because all of the relevant material was available before the motion and there would be little hope of introducing fresh evidence.

Without delay, you begin writing your Claims Notice Report to LAWPRO.

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Unfortunately, LAWPRO claims counsel deal with actions dismissed for delay by the Registrar every week. Many lawyers have busy practices, and mistakes are made because they fail to implement a procedure in which files are diarized for review and all staff are involved in bringing a Status Notice front and centre to the lawyer's attention. To avoid problems, the deadline dates should be recorded in the firm's tickler system.

You want to avoid dealing with a Registrar's dismissal in the first place by ensuring you have a good system in place. However, if you have to bring a motion to restore an action, the key is ensuring that the motion materials are done right.

Case law on dismissal orders

The law regarding setting aside dismissal orders pursuant to Rule 48.14 is now well settled. The involvement of LAWPRO counsel has been instrumental in developing the law and four key Court of Appeal decisions were argued by our counsel.

In *Scaini v. Prochnicki* (2007), 85 O.R. (3d) 179, the Court of Appeal stated that although there are a series of factors that should generally be considered in these motions, the court should not be restricted to a rigid application of a test involving only the four factors set out in *Reid v. Dow Corning Corp* (2001), 11 C.P.C. (5th) 80. Rather a contextual approach is to be used, which involves a review of all relevant factors with the ultimate goal of balancing the respective interests of the parties.

The four *Reid* factors remain the starting point for these motions, and need to be addressed in the affidavit material. Those factors are:

1. an explanation of the litigation delay from the start of the action until the deadline for setting the action down;
2. evidence that the plaintiff always intended to set the action down by the deadline but failed to do so through inadvertence;
3. promptness in bringing the motion to set aside the dismissal; and
4. a lack of significant prejudice to the defendants arising from the delay or as a result of the dismissal.

The plaintiff need not satisfy all four factors as such an approach would undermine the court's discretion to consider all relevant factors and attempt to balance the interests of the parties.

In *Marche D'Alimentation Denis Theriault Ltee v. Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660, the Court of Appeal confirmed the need to consider all of the contextual factors to make a "just" order in the circumstances. But it also pointed out that significant delay in moving an action forward undermines the public interest in promoting timely resolution of disputes and should not be condoned.

The *Giant Tiger* decision established that the principle of finality was an important consideration even in the absence of prejudice. In my view, the lower courts focused on the finality principle and often ignored that the court was also aware that justice favours the "goal of having disputes resolved on the merits."

Moreover, it was often forgotten that the court made a finding that the plaintiff's lawyer was unaware of the dismissal order because he had put his file in abeyance and "there was a deliberate intention not to advance the litigation toward trial."

Fortunately, our counsel was successful before the Court of Appeal in *Finlay v. Paassen* 2010 ONCA 204 in which the Court of Appeal stressed that the issue of prejudice "invariably is a key consideration on a motion to set aside a dismissal order." The Court of Appeal also stressed that courts should not be too quick to dismiss these motions on the basis that a plaintiff will then have a remedy against his own lawyer. A lawyer's potential negligence should not be a factor at all.

In *Finlay*, the motion's judge focused on the two-year delay by the plaintiff's lawyer in moving to set aside the Registrar's Order. On

appeal, Laskin J.A. stressed that this delay had to be "assessed in the context of the time frame preceding it — a timeframe in which the lawsuit proceeded reasonably promptly."

The court took notice that the action was moving reasonably well before service of the Status Notice, and contrary to what occurred in *Giant Tiger*, the lawyer in *Finlay* did not make a deliberate decision not to move the action forward.

After reviewing all relevant factors, the court stated that "cumulatively, these considerations outweigh the two-year delay in bringing the motion and justify setting aside the registrar's order."

The Court of Appeal in *Wellwood v. Ontario provincial police* 2010 ONCA 386, upheld the Master's finding that there was delay in advancing the action, in bringing the motion that was not adequately explained and that this delay was intentional. The majority also upheld the initial finding of a presumption of prejudice due to the expiry of the limitation period. As such, if the plaintiff rebuts the presumption, the onus shifts to the defendant to establish actual prejudice.

The *Wellwood* decision is commonly relied on by defence counsel opposing motions to restore the action, but the key is to provide a very detailed affidavit to explain any delays as to avoid a finding of intentional delay.

LAWPRO counsel who argued both appeals maintains that the decision of Laskin J.A. in *Finlay* remains unaffected. The majority in *Wellwood* distinguishes *Finlay* on the basis that the delay in *Finlay* was not deliberate. The majority decision in *Wellwood*, like in *Giant Tiger*, can be explained by their finding that on the evidence that the delay in proceeding with the action and in moving to set aside the dismissal order was inordinate, unexplained and intentional.

The court will have no difficulty in dismissing a motion for want of proper evidence being adduced.

As an example, one of our files involved a tort claim for damages as a result of a motor vehicle accident.

The insured lawyer argued the motion without contacting us and lost. The Master found that the evidence addressing the *Reid* factors to be “woefully inadequate.” The lawyer simply indicated he missed the deadline to set the action down due to inadvertence, but provided no further explanation.

The Master wanted to know if someone had failed to record a key date, or if there were any problems with the firm’s tickler system. The lawyer waited one year to bring the motion to restore the action, and again there was simply a “blanket referral to inadvertence,” and this is not enough. The lawyer had to be more specific about what happened after the dismissal order came to his attention. There was simply no evidence to rebut the presumption of prejudice.

Even if he was incorrect regarding prejudice, the Master went further and criticized the plaintiff himself for making a deliberate decision not to advance the litigation because he left the jurisdiction for a considerable period of time without communicating with his lawyers. Relying on *Giant Tiger* and *Wellwood*, the Master found that the intentional delay was fatal to restoring the action.

Based on the lack of proper evidence at first instance and the Master’s finding of intention delay on the evidence presented, there was no way to succeed on appeal. The costs of the action and motion were fixed at \$15,000.

Call LAWPRO – immediately

When you realize that an action has been dismissed for delay, call LAWPRO immediately. Don’t bring the motion without telling us first, and don’t advise us of the situation on the eve of the motion.

By involving LAWPRO early, you can ensure that the motion materials are properly prepared, and there is a good chance that the motion will go on consent or unopposed. Alternatively, we can retain counsel for you to prepare and argue the motion. We have

been successful when we have time to respond. We are here to help. ■

Domenic Bellacicco is new claims unit director and counsel at LAWPRO.

Take a fresh step... before it’s too late

In January, 2012, litigators may see a tsunami of “deemed dismissals” of stale actions. Note especially Rule 48.15(6)2:

Rule 48.15(6)

In the case of an action commenced before January 1, 2010, other than an action governed by Rule 76 or 77, the following rules apply, unless the court orders otherwise:

1. If a step is taken in the action on or after January 1, 2010, and before January 1, 2012, subrule (1) applies as if the action started on the date on which the step was taken.
2. If no step is taken in the action on or after January 1, 2010, and before January 1, 2012, the action is deemed on January 1, 2012, to be dismissed as abandoned on that date, unless the plaintiff is under a disability.
3. An action deemed to be dismissed under paragraph 2 may be set aside under rule 37.14 and, for the purpose, the deemed dismissal shall be treated as if it were an order of the registrar. O. Reg. 394/09, s. 21(2).

The “leading” cases on setting aside dismissals by the registrar are *Scaini v. Prochnicki* (2007) 85 O.R. (3d) 179 (C.A.); *Finlay v. Paassen*, 2010 ONCA 204, and *Welland v. Ontario Provincial Police*, 2010 ONCA 386. These are discussed at length in Domenic Bellacicco’s article “Administrative Dismissals.”

If you have a file that has gone nowhere in the past one and one half years, it is surely better to “take a fresh step” before the end of 2011, rather than to be forced to bring a motion in 2012, hoping that you can satisfy the Court of Appeal’s criteria for setting aside the dismissal of your client’s action.

Debra Rolph is director of research at LAWPRO.

Update on dismissal orders

The recent Court of Appeal decision in *Machacek v. Ontario Cycling Association*, 2011 ONCA 410 underlines the importance of reporting a dismissal order promptly to LAWPRO. The plaintiffs' lawyer waited almost two years to report the matter to LAWPRO. The Court stressed motion delay and finality as opposed to litigation delay and lack of prejudice. The finding of the lack of prejudice had to be "balanced by a consideration of the finality principle." Motion delay coupled with the fact that the plaintiffs' lawyer was not communicating with his clients after discovery, led the court to conclude that the delay and the conduct of the lawyer "tip the balance" toward the finality principle.