Plaintiff counsel beware - It is now easier to dismiss an action for delay

Three recent judgments of the Court of Appeal show that plaintiffs face two serious dangers, should they fail to prosecute their actions expeditiously. First, the Court of Appeal has held that on rule 48.14(13) "show cause" hearings, an action may be dismissed, even where no prejudice to the defendant is shown, if the delay in prosecuting the action is severe enough. Second, plaintiffs may be caught by surprise by the stringency of the new test for restoring actions to a trial list under Rule 48.11.

See below for a discussion of these two dangers, an overview of the three distinct tests that now govern dismissing actions for delay, and advice on how to prepare for both show cause hearings, and for motions to restore actions to the trial list.

A. "Showing Cause" at a Status Hearing – Rule 48.14(13) – Action may be dismissed, even where there is no prejudice to the defendant

The judgments of the Ontario Court of Appeal in *1196158 Ontario v. 6274013 Canada*[1] and *Faris v. Eftimovski*,[2] clearly demonstrate that rule 48.14(13) is a powerful weapon in defendants' hands to obtain the dismissal of an action at a status hearing. Rule 48.14(13) is more dangerous than is rule 24. This is true because under rule 24, the burden is on the defendant to show that the delay is inexcusable, and that there is a danger that a fair trial is no longer possible. Under rule 48.14(13), the plaintiff has the burden of showing why the action should not be dismissed. The plaintiff must explain any periods of delay. The plaintiff must demonstrate that the defendant will suffer no prejudice if the action is allowed to proceed. A plaintiff's action can be dismissed, even where no actual prejudice to the defendant is shown.

In *1667207 Ontario Inc. v. Botnick*[3], Master Short observed: "Not surprisingly, with the addition of the new status hearing provisions, defendants seem to be holding their fire until a status notice is issued, to take advantage of the shift in onus to the plaintiff. Having regard to the goal of access to justice and resolution on the merits, one is left to ponder the rationale for differing tests and onuses under the two rules. Does this constitute "equal benefit of the Law without discrimination"?

Tulloch, J.A. proposed an answer to Master Short's question in his judgment in *Faris.* He noted that the timelines under rule 24 are very short. The plaintiff must be delinquent by having failed to: serve the statement of claim on all defendants within the prescribed time; note in default any defendant who has failed to deliver a statement of defence within thirty days after the default; set the action down for trial within six months after the close of pleadings; or move for leave to restore an action to the trial list within thirty days after the action was struck off. Accordingly, a high threshold has been established to dismiss an action for delay under rule 24.01.

In the case of a status hearing, however, an opportunity for the court to consider dismissing an action for delay will not arise for a considerable period of time after the proceedings have been initiated. Rules 48.14(1) and 48.14(2), which trigger the requirement that the registrar issue a status notice, contemplate delinquency by plaintiffs which exceeds that under rule 24.01.

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[1]2012 ONCA 544, 112 O.R. (3d) 66 (C.A.)
[2] 2013 ONCA 330
[3] 2013 ONSC 153 at para. 75

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Tulloch, J.A. concluded that the onus placed on the plaintiff under rule 48.14(13) is mandated not only by the plain wording of the rule but also by the greater severity of the plaintiff's delinquency in pursuing its claim.

It is true that on its face, rule 24 allows a defendant to move to dismiss for want of prosecution within a much shorter time period than does rule 48.14. But realistically, to meet the test set out in the "leading cases" of *Woodheath Developments Ltd. v. Goldman* [4] and *Armstrong v. McCall* [5], the defendant needs to wait a very considerable period of time before it can successfully move under rule 24.

In *Woodheath* itself, the abortive closing took place in 1989. The action was commenced in 1995. A statement of defence was demanded in September, 1996. That same month, the plaintiff rejected a settlement offer. No further action was taken until 2001, at which point, the defendant successfully moved under rule 24. By then, twelve years had elapsed since the events giving rise to the claim, and six years had passed since the action was commenced. Surely, the delay was severe in that case.

In a second "leading case", *Armstrong v. McCall*, the Court of Appeal set aside the order of Swinton, J. dismissing the plaintiff's action under rule 24. The defendants brought a series of motions under rule 24 to dismiss for delay. The defendants eventually succeeded before Swinton, J. The medical services in question were rendered in 1997. While the action was set down for trial in 2005, no trial date was likely until 2006 -- in short, nine years after the events giving rise to the claim. Even so, the Court of Appeal refused to dismiss the action. Mr. Justice Borins tartly wrote: ". . . I cannot leave this issue without observing that in my view it would been better had counsel for the physicians been less obsessed with the bringing of motions seeking to dismiss the action for delay, and more co-operative in such matters as providing dates when she was available for trial." [6]

All of this is merely to suggest that a defendant may be well advised to "hold fire" until a status notice is issued, in order to take advantage of the shifting onus. The defendant's "waiting time" under rule 48.14(13) is not necessarily longer than what has traditionally been required to obtain a dismissal under rule 24. In *1196158 Ontario Inc. v. 6274013 Canada Ltd.*,[7] the action was dismissed under rule 48.14(13) in 2011, even though the events giving rise to the claim occurred in 2005. Contrast that with the delay times discussed in *Woodheath* and *Armstrong.*

Some counsel believe that the burden on the plaintiff under rule 48.14(13) is tougher than the burden that must be satisfied to set aside a registrar's dismissal order. This is because in order to set aside a Registrar's dismissal order, a plaintiff need not satisfy ALL of the criteria set out in *Reid v. Dow Corning*,[8] See *Scaini v. Prochnicki*[9].

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[4] 2001 CanLII 28019 (ON SC), (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.)
[5] 2006 CanLII 17248 (ON CA)
[6] 2006 CanLII 17248 (ONCA) at para. 26
[7] 2012 ONCA 544, 112 O.R. (3d) 66 (C.A.)
[8][2001] O.J. No. 2365, reversed on other grounds [2002] O.J. No. 3414 (Div.Ct.)
[9] (2007) 85 O.R. (3d) 179 (C.A.), allowing appeal from [2006] O.J. No. 1185

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While the Court of Appeal recently refused to set aside a registrar's dismissal order even where no actual prejudice to the defendant was demonstrated, the Court of Appeal did say that lack of prejudice was an important factor. But, on the facts before it, the delay and the plaintiff's lawyer's conduct "tipped the balance" in favour of the finality principle.[10] In *Marché D'Alimentation Denis Thériault Ltée V. Giant Tiger Stores Limited* [11]the Court of Appeal held that a Registrar's dismissal order made previously should not be set aside, even though there was a finding that the defendant would not be prejudiced. However, the facts in *Marche* were extreme. The dismissal order was made five years previously, and the plaintiff's lawyer had effectively abandoned the file.

Therefore, while it is possible that a Court will refuse to set aside a registrar's dismissal order solely on the basis of delay, prejudice or lack of prejudice remains an important factor. Under the *1196158* and *Faris* cases, if the delay is aggravated enough, the Court need not even consider lack of prejudice to the defendant.

B. Restoring actions to trial lists -- Rule 48.11 has a tough new test

While the Court of Appeal's judgments in *1196158* and *Faris* came as no surprise in view of its previous decisions in *Khan v. Sun Life Assurance*[12] and *Riggitano v. Standard Life Assurance* [13], its approach to restoring actions to the trial list under rule 48.11 is ground breaking.

The Court of Appeal held in *Nissar v. Toronto Transit Commission*[14] that the same test which a plaintiff must meet at a "show cause" hearing under rule 48.14(13) is also applicable where a plaintiff wishes to restore an action to the trial list under rule 48.11. This is true notwithstanding that rule 48.11 sets out no particular test which must be met in order to restore an action to the trial list.

For many years, there was little jurisprudence on what is required to restore an action to the trial list. At least some lawyers thought that all that was necessary was to demonstrate that the action was ready for trial. If the defendant wished to bring a cross-motion under rule 24, it was free to do so. In any event, for many years, there were few if any cases reported to LAWPRO involving restoring actions to the trial list.

Things began to change in 2011. In *Portelance v. Williams*[15], Kennedy, J. suggested a test easy for a plaintiff to meet – whether the plaintiff was now ready for trial, unless the defendant proved actual prejudice.

In *Ruggiero v. FN Corp.*[16], Master Graham took a different approach, and applied a test based on an analogy with *Armstrong v. McCall* [17], a rule 24 case.

The test was:

(1) Is the delay intentional or contumelious?

(2) If not, is there inordinate and inexcusable delay for which the plaintiff or his lawyers are responsible such as to give rise to a presumption of prejudice?

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[10] *Machacek V. Ontario Cycling Association,* 2011 ONCA 410, dismissing appeal from 2010 ONSC 7065.
[11] (2007) 87 O.R. (3d) 66, (C.A.),
[12] 2011 ONCA 650
[13] 2010 ONCA 70, affirming 2009 CanLII 2389
[14] 2013 ONCA 331
[15] [2011] O.J. No. 6221
[16] 2011 ONSC 3212
[17] 2006 CanLII 17248 (ONCA)

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(3) If so has the plaintiff provided evidence to rebut the presumption of prejudice arising from the delay?

(4) If so, have the defendants provided evidence of actual prejudice?

Ruggiero was followed in *1351428 Ontario v. 1037598 Ontario*[18] and *Williams v. Doe.*[19]

In *Nissar*, the Court of Appeal held that the test for restoring an action to the trial list under Rule 48.11, should be the same as the test under rule 48.14(13), which the plaintiff must meet when it is required to show cause at a status hearing, why its action should not be dismissed for delay. This approach, Tulloch, J.A. wrote, is more consistent with rule 48 as a whole, than is the approach taken in *Ruggiero.* As already discussed, the test under *1196158, Faris,* and *Nissar* is onerous.

Note that rule 24.01(1)(e) remains in force, and allows a defendant to move to dismiss for want of prosecution, if the plaintiff fails to move to have the action restored to the trial list , within 30 days of the action being struck off. As already discussed, under rule 24, the defendant bears the burden of establishing intentional or contumelious delay, or in the alternative, inordinate and inexcusable delay such as to give rise to a presumption of prejudice. The plaintiff must then rebut the presumption of prejudice. If the plaintiff is successful in doing so, the defendant must lead convincing evidence of actual prejudice. It is clearly more difficult for a defendant to succeed under rule 24, than under the *Nissar* test.

Finally, see rule 48.14(2). There is a respectable argument that if a motion is brought to restore the action to the trial list within 180 days after it is struck from the list or within 90 days after service of the status notice, the only requirement is that the plaintiff establish that he or she is ready for trial. Only if the status hearing actually takes place or the action is subsequently dismissed by the Registrar, does the *Nissar* test apply. This proposition seems logical, in view of the fact that the "delinquency" is of relatively short duration, and is cured before the status hearing takes place. However, this argument has not yet been tested in the Courts.

C. Three tests for four dismissal applications

We now have three different tests to govern four different delay applications, in descending order of stringency from the plaintiff's perspective. They are:

1. For show cause status hearings and motions to restore cases to the trial list :
"[T]he onus is on the plaintiff to show why the action should not be dismissed for delay at the status hearing.
…
the plaintiff must explain the delay so as to satisfy the court that the action should proceed; and the plaintiff must satisfy the court that there would be no prejudice to the defendants."[20]

2. For motions to set aside Registrar's dismissal orders - the four criteria set out in *Scaini v. Prochnicki*.[21] These are (1) explanation of the litigation delay, (2) inadvertence in missing the deadline, (3) the motion was brought promptly, and (4) no prejudice to the defendant. It is not necessary to satisfy all four of them

[18] 2011 ONSC 4767. [2011] O.J. 3597
[19] 2012 ONSC 2514

[20] *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; *Nissar v. TTC* , 2013 ONCA 36
[21] (2007) 85 O.R. (3d) 179 (C.A.), allowing appeal from [2006] O.J. No. 1185

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3. Defendants' motions to dismiss for want of prosecution under Rule 24 --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. [22]

D. Preparing for rule 48.14(13) and rule 48.11 motions

A motion to restore an action to a trial list is a "big deal", as is a motion to compel the plaintiff to "show cause" at a status hearing under rule 48.14(13). The tests are the same. Thorough preparation is absolutely necessary.

- If a plaintiff has been less than 100 per cent diligent in prosecuting the action, he or she had better be in a position to explain why. All "gaps" in the litigation history should be documented and explained.
- Thought should be given to demonstrating how the delay was due to factors beyond the control of plaintiff and plaintiff's counsel.
- Thought should be given to what actions, if any, of the defendant(s) caused or contributed to the delay.
- Ideally, the plaintiff should be prepared to affirmatively demonstrate:
    - that all discovery evidence has been transcribed and ordered,
    - that all documentary evidence has been preserved,
    - that all parties are alive and able to testify, and all witnesses are available to testify, and
    - the existence of any other factors that refute the presumption that the defendant has been prejudiced by delay.

The very best advice is for plaintiff's counsel is never to get into a position where he or she is involved in a rule 48.14(13) or rule 48.11 motion. The courts have recently become far more proactive in compelling plaintiffs to "move their actions along." Even where the plaintiff is successful, these motions are extremely time-consuming and therefore very expensive. Because the decision to dismiss or not to dismiss an action is discretionary, outcomes are hard to predict.

Never hesitate to contact LawPRO. LawPRO counsel have vast experience in this area, and can provide invaluable guidance.

Debra Rolph is director of research at LAWPRO.

[22] *Woodheath Developments Ltd. v. Goldman*, (2001), 56 O.R. (3d) 658 (Master), aff'd. (2003) 66 O.R. (3d) 731 (Div. Ct.), leave to appeal refused (2004) 44 C.P.C. (5th) 101 (C.A.)

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