LawPRO repairs in 2015

Resuscitating dismissed actions

In the past few years, LawPRO's claims repair program has been increasingly occupied with the work of attempting to restore actions to the trial list. Rule 48, which permits the administrative dismissal of actions for delay, has been responsible for over $10 million in claims costs over the past three years. LawPRO in-house and defence counsel have expended a great deal of effort to limit those costs by arguing for the restoration of dismissed actions.

The provisions that have governed that work include:

1) Rule 48.14(1) (since January 1, 2015, Rule 48.14(1)) – Registrars' orders dismissing actions for delay;
2) Rule 48.15 (revoked on January 1, 2015, and not replaced) – Registrars' orders dismissing actions as abandoned.
3) Rule 48.14(13) – (since January 1, 2015 – Rule 48.14(7)) – Dismissal for delay at status hearings.
4) Rule 48.11 – (unchanged by rule amendments) – Restoring actions to trial lists.

While the cases discussed below were decided under the "old" rules in force prior to January 1, 2015, this "old" case law may be considered relevant to motions under the "new" rules. Rule 48.11 remains unchanged in any event. For further discussion, see "Applying old case law to the new Rule 48.14."[1]

Setting aside registrars' dismissal orders

Until it was repealed on January 1, 2015, the "old" Rule 48.14(1) provided that if an action was not placed on a trial list within two years after the first defence was filed, the action would be dismissed by the registrar 90 days after a status notice was served on all parties.

The "new" Rule 48.14(1), which came into force that same day, provides that an action will be dismissed by the registrar for delay if the action has not been set down for trial by the later of the fifth anniversary of the commencement of the action, and January 1, 2017. Therefore, no actions were administratively dismissed in 2015.

Applications to set aside administrative dismissal decided in 2015 were governed by the "old" Rule 48.14(1), because the dismissals predated the rule amendment. However, in several cases, LawPRO counsel persuaded the courts to take the five-year "no administrative dismissal" provision in the "new" Rule 48.14(1) into account, when applying the contextual approach developed under the case law governing the setting aside of registrars' dismissals predating January 1,

[1] *LawPRO Magazine*, January, 2016, vol. 15.1, p. 26

2015. That is, the courts recognized that if the "new" Rule 48.14(1) had applied to the cases they were considering, the case would not have been dismissed in the first place, since five years had not passed since the action was commenced.

In one such case, the Ontario Superior Court of Justice overturned the dismissal of an action by plaintiff investors against their financial advisors.[2] The court adopted a contextual approach in deciding to set aside the dismissal, considered the five year period provided by the "new" Rule 48.14(1), as well as the undesirability of the plaintiff being required to commence another action against his solicitor, where the defendant was not prejudiced by restoring the action.

In another decision,[3] the Court of Appeal decided that the registrar's dismissal should be set aside. It held:

- The court's bias is in favour of deciding matters on their merits rather than terminating rights on procedural grounds.
- The court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel.
- The court must consider not only the plaintiff's right to have its action decided on its merits, but also whether the defendant has suffered non-compensable prejudice as a result of the delay, whether or not a fair trial is still possible, and even if it is, whether it is just that the principle of finality should nonetheless prevail.
- The prejudice that the court must consider is to the defendant's ability to defend the action that would arise from steps taken following dismissal, or which would result from restoration of the action following the registrar's dismissal.

Rule 48.15 – Action dismissed as abandoned

In deciding whether to reinstate actions dismissed as abandoned pursuant to the "old" Rule 48.15, two courts referred to the fact that Rule 48.15 was abolished as of January 15, 2015, and analogous situations folded into the "new" Rule 48.14(1). If the "new" Rule 48.14(1) had applied, the five-year period running from the dates of the commencement of both actions would not have expired, and the actions would not have been dismissed. After considering this and all other relevant facts, and applying the contextual approach, one court set aside the registrar's dismissal order , while a second court declined to do so.

In a case in which a S.A.B. claim was pursued promptly post-accident but a tort action against the same insurer was somehow forgotten,[4] the Master set aside the dismissal order. Clients should not suffer for their counsel's inadvertence. The Court of Appeal's judgments in *MDM Plastics Limited v Vincor*,[5] and *H.B. Fuller Company v. Rogers*[6] evidence a swing of the pendulum in favour of reinstating actions. The plaintiff never intended to abandon her action, and her motion to reinstate was brought promptly. Restoring the action would not prejudice the defendant. Finally, under the new Rule 48.14(1), the action would only have been dismissed in July, 2016, five years after the issuance of the statement of claim.

In another accident case,[7] the Divisional Court declined to give any weight to the amendments to Rule 48.14, in view of: 1) the two year delay in moving to set aside the registrar's order; 2) the plaintiff's solicitor's egregious non-system for handling dismissal notices and orders; and 3) prejudice to the defendant's ability to defend the damage claim caused by the delay.

Rule 48.11 – Actions struck off trial list

The "old" Rule 48.11 was carried forward unchanged into the amended Rule 48. Therefore, the Court of Appeal's judgment in *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*,[8] will continue to apply.

In *Carioca*, the Court of Appeal followed the test it developed in *Nissar v. Toronto Transit Commission*,[9] but gave it a more liberal spin. The *Nissar* test is to be applied where refusing to restore an action to the trial list would result in its dismissal, for instance, a registrar's dismissal under Rule 48.14. Otherwise, the test is whether the action is ready for trial.

The plaintiff is not required to account for delay on a month-to-month basis. Rather, the issue is whether the plaintiff presented an "acceptable explanation" for the delay. Actions should be tried on their merits when an "acceptable explanation" is presented. The context of the action and any other relevant factors must be considered. These will include the overall progress of the action before it was listed for trial, the circumstances of how the action

2 2015 ONSC 1650 (Div.Ct.)
3 2015 ONCA 173, paras 26, 27, 28, 37
4 2015 ONSC 6028
5 2015 ONCA 28
6 *Supra*, n. 3
7 2015 ONSC 4626 (Div.Ct.)
8 2015 ONCA 592, 128 O.R. (3d) 143
9 2013 ONCA 361, 115 O.R. (3d) 713

came to be struck from the trial list, and the conduct of all parties. The mere passage of time cannot be an insurmountable hurdle in determining prejudice. The defendant is not required to offer evidence of actual prejudice; however, the court is entitled to consider the defendant's conduct in light of its assertion of prejudice.

Status notices and hearings

Status notices ceased to be issued as of January 1, 2015. Status notices received by parties prior to January 1, 2015 under the "old" Rule 48.14(13) ceased to have effect on that date, unless a status hearing had already been scheduled or the action had already been dismissed.

In a case about alleged damage to a residential pool by a company hired to clean it,[10] Swinton J., applied the contextual approach mandated by *Carioca*, and set aside the Master's order dismissing this action for delay.

Justice Swinton allowed the appeal for the following reasons:

- The Master failed to consider all of the evidence which demonstrated that the litigation delay was adequately explained from the date the defence was served until the status notice was issued by the court;
- The Master erroneously calculated the period of litigation delay. The correct period of assessment for litigation delay starts from the time the action is defended until the status notice is generated;[11]
- The Master required "cogent," "compelling" and "convincing" evidence to explain the litigation delay when the settled case law simply requires an "adequate" or "passable" explanation;[12] and
- The Master ignored undisputed evidence that the defendant sustained no prejudice from the litigation delay. The Master erroneously relied upon the mere passage of time and bald assertions that defence witnesses might not be available without any evidentiary foundation.

Conclusion

The Rule 48 set aside motions decided in 2015 were generally favourable to plaintiffs. Some courts were willing to consider the five year dismissal window in the amended rules, even where the new rule was not strictly applicable. A bias towards determination on the merits was emphasized. Solicitors' errors should not be visited on their clients, if the defendant is not prejudiced. A contextual approach was applied, not only in setting aside registrars' dismissals, but also dismissals at status hearings, and motions to restore actions to the trial list.

While LawPRO had some success in arguing these motions in 2015, we are concerned that the January 1, 2017 deadline prescribed under the new rules will trigger a wave of administrative dismissals of actions commenced before January 1, 2012. These dismissals will occur without notice to the parties, and given the newly-extended timeframe for bringing actions to trial, there is a risk judges may be less amenable to arguments about the reasonableness of delays. We highly recommend that lawyers begin reviewing the status of their files well before the January 1 deadline. For tips about how to protect your files from unexpected dismissal, see our Rule 48 Toolkit at practicepro.ca/rule48 ■

Critical dates under the new Rule 48.14:

- New Rule 48.14 is effective January 1, 2015
- Actions commenced on or after January 1, 2012 automatically dismissed without notice 5 years after commencement
- Actions commenced before January 1, 2012 automatically dismissed January 1, 2017
- Dismissals will occur without notice to parties or their counsel

Debra Rolph is Director of Research at LawPRO.

[10] 2015 ONSC 7348 (Div.Ct), See also *Fant v. Caterpillar Tunneling Canada Corp*, 2015 ONSC 6889

[11] *Kara v. Arnold*, 2014 ONCA 871

[12] *Carioca's, supra*, n. 8