Changes To Rules Extend The Period Before An Action Is Administratively Dismissed For Delay

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Amendments to the Ontario *Rules of Civil Procedure* taking effect January 1, 2015 will significantly extend the period of time before an action will be administratively dismissed for delay. The former 2-year rule will become a 5-year rule — and plaintiffs will no longer receive notice of an impending dismissal.

Present Rules until December 31, 2014

The current Rule 48.14 provides for the administrative dismissal of an action for delay (1) if an action is not placed on the trial list two years after the first defence* is filed, or (2) if an action that was placed on the trial list is struck off, and is not restored to the trial list within 180 days of being struck off. The registrar is required first to serve a status notice providing 90 days' notice of dismissal. The plaintiff may then requisition a status hearing and seek an order from the Court setting a timetable to complete the remaining steps in the action, or file a consent timetable. The timetable must require that the action be set down for trial no more than 12 months after the date of the status hearing.

The current Rule 48.15 provides for the administrative dismissal of an action as abandoned if more than 180 days have passed since an originating process was issued; no defence* has been filed; and the action has not been disposed of by final order or judgment, or set down for trial. The registrar is required first to serve a notice providing 45 days' notice of dismissal under this Rule.

New Rules Effective January 1, 2015

As of January 1, 2015, Rule 48.15 is being repealed entirely. There will now be no dismissal for abandonment purely because no defence has been filed.

Rule 48.14 is receiving a significant overhaul: (1) Instead of a two-year deadline for dismissal for delay, actions will be dismissed for delay five years after the commencement of the action if they have not been set down for trial or otherwise terminated. (2) Actions struck from the trial list after January 1, 2015 and not restored to

the trial list or otherwise terminated will be administratively dismissed on the second anniversary of being struck off. Status hearings may still be convened, and consent timetables may still be filed. Timetables must require that actions be set down for trial no more than two years after the dismissal date.

Significantly, the new Rule does not provide for any notice from the Registrar before an action is administratively dismissed.

The new standard form Statement of Claim (Form 14A) effective January 1, 2015 will contain the following language:

"TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court."

Under the transition provisions, status notices and notices of abandonment made under the old Rules before January 1, 2015 will cease to have effect on that date unless the action has already been dismissed or a status hearing has already been scheduled.

The new Rule does not provide for any retroactive changes to timetables ordered at status hearings prior to January, 1, 2015.

Impact of the New Rules

Although the amendments will not take effect until January 1, 2015, they are already being acknowledged by the Courts. In *Elkhouli v. Senathirajah*, 2014 ONSC 6140, a motion to set aside an order dismissing an action as abandoned under the present Rule 48.15 that was heard on October 16, 2014, the Court took into account the facts that Rule 48.15 was being repealed, and that the deadline for dismissal for delay significantly extended, as factors in exercising its discretion to set aside the dismissal order.

While the Court was sympathetic to a plaintiff whose action had been dismissed in the waning days of the old Rule 48.14, time will tell whether the courts will be as lenient to plaintiffs who miss a 5-year deadline under the new Rule 48.14 as opposed to the old 2-year deadline. For the immediate future, there are likely to be far fewer cases on administrative dismissal for delay until 2017 when the first dismissals will begin under the new Rule, and a new body of caselaw will emerge.

One effect of the repeal of Rule 48.15 and the extension of time under Rule 48.14 is that there are now fewer procedural safeguards to ensure that a defendant is served promptly with an originating process. Although Rule 14.08 still requires service of an originating process in an action within 6 months, that time can be extended with leave of the Court, and no notice will issue under Rule 48.15 after 180 days to alert a defendant to the fact that a claim exists but has not yet been served. As a practical matter, it will be easier for a plaintiff to delay in serving defendants who may not even know that a claim exists.

A defendant seeking to have a claim dismissed prior to the new 5-year deadline for dismissal for delay will have to take active steps to do so. A defendant may bring a

motion for summary judgment or a motion to dismiss for delay under Rule 24.01. However, both of these motions place a high onus on the defendant. As a result, actions that are not prosecuted diligently by plaintiffs are likely to remain active for significantly longer under the amendments to the Rules.

*"Defence" is defined to include notice of intent to defend, statement of defence, or notice of motion in response to an action other than a motion challenging the court's jurisdiction.

By

Matthew Furrow

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BLG Offices

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Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

Vancouver
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V7X 1T2
T 604.687.5744
F 604.687.1415

Montréal
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Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749

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