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Commercial Litigation Insights: They're ba-ack! Everything you need to know about administrative dismissals in Ontario

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By Lia Boritz

Administrative dismissals of civil actions have resumed in Ontario, after being suspended since the COVID-19 pandemic. Starting May 13, 2024, any actions not set down for trial that were commenced before November 12, 2018 will be subject to administrative dismissal.[1]

In accordance with Rule 48.14(1), administrative dismissals occur when:

(a) The action has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action; or

(b) The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of being struck off.

How to Avoid an Administrative Dismissal

There are two primary ways to avoid an administrative dismissal:

1. The parties to the proceeding consent to a timetable and draft Order establishing a timetable and file the order at least 30 days prior to the administrative dismissal deadline; or
2. A party can bring a motion or status hearing prior to the expiry of the administrative dismissal deadline.

Actions on the Commercial List in Toronto and actions under the *Class Proceedings Act* are not subject to Rule 48.14(1).

Applicable Legal Test at a Status Hearing

Recently in *Beshay v Labib*, the Court of Appeal reviewed the applicable legal test to avoid having an action dismissed for delay at a status hearing:

1. The plaintiff must establish that there is "an acceptable explanation" for the delay; and
2. The plaintiff must demonstrate that the defendant will not suffer any non-compensable prejudice if the action is allowed to proceed.[2]

The plaintiff needs to satisfy **both branches** of the legal test to succeed in showing that the action should not be dismissed for delay.

The explanation does not need to be perfect, but needs to be backed up with evidence.

An "acceptable explanation" need only be "adequate" or "passable" and does not necessarily have to be "good" or "perfect".[3] However, where a party asks the court to find that their explanations for delay are reasonable, that party has to put their best foot forward and present cogent evidence to support the explanations. Bald assertions are insufficient to discharge that onus.[4]

A defendant's passivity in the face of inaction by the plaintiff may be a relevant factor in the court's analysis of whether it is just to dismiss an action for delay. However, once a judge rejects the plaintiff's proffered explanations for the delay, the defendant's inaction is unlikely to tip the scales the other way.[5] After all, "a party who commences the proceeding bears primary responsibility for its progress."[6]

Prejudice may be presumed

The relevant prejudice considered by the courts is the prejudice to the defendant's ability to defend the action: "The more time that passes, the more difficult it is to defend the case. Memories fade and even if documents are not lost, their significance becomes shrouded."[7]

The onus is not on the defendant to demonstrate "significant and actual" prejudice, but on the plaintiff to rebut the inference of prejudice.[8] A presumption of prejudice can arise from the passage of time, but a plaintiff will not necessarily fail to rebut the presumption because they do not adduce affirmative evidence. Rather, in evaluating prejudice, the judge must consider all of the circumstances, including the defendant's conduct in the litigation.[9]

However, even where a judge finds that there is no prejudice to the defendant from the delay, because the legal test is conjunctive, a judge will still be obliged to dismiss the action if the plaintiff fails to provide a credible and acceptable explanation for the delay.[10]

Rule 24.01 and Rule 48.14 are Not the Same

The tests to be applied under rules 24.01 and 48.14 are distinct from one another.[11] Rule 24.01 enables a *defendant* to bring a motion to have an action dismissed for delay, while Rule 48.14 enables the *court* to control the pace of litigation and ensure that disputes are resolved in a time-effective manner.[12]

The threshold for dismissing an action for delay under Rule 24.01 is relatively high. In a rule 24.01 motion, an action should not be dismissed unless the defendant can establish that: (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.[13]

At a status hearing, the onus is on the plaintiff to show cause why the action should not be dismissed for delay.[14]

What Happens if an Action is Administratively Dismissed?

If an action is administratively dismissed, a motion can be brought under Rule 37.14 to set aside the administrative dismissal. The legal test to be met on a motion to set aside an administrative dismissal is:

- has the plaintiff provided a satisfactory explanation for the litigation delay;

- has the plaintiff led satisfactory evidence to explain that they always intended to prosecute this action within the time limit set out in the rules or a court order but failed to do so through inadvertence;
- has the plaintiff demonstrated that they moved forthwith to set aside the dismissal order as soon as the order came to their attention; and
- has the plaintiff convinced the court that the defendant has not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action?[15]

This is not a rigid test – a contextual approach is required. The overriding objective is to achieve a result that balances the interests of the parties and takes account of the public's interest in the timely resolution of disputes.[16]

What about Costs?

Rule 48.14 makes no mention of costs. Rule 48.14 also makes no prohibition of a costs award upon an administrative dismissal of an action. There have been some conflicting decisions as to the ability to recover costs after an administrative dismissal; however, ultimately, the courts have held that silence as to costs in Rule 48.14 does not prevent the court from exercising its cost jurisdiction under section 131 of the *Courts of Justice Act*. Accordingly, if an action is administratively dismissed, it is open to a defendant to bring a motion for costs; however it should be noted that a defendant is not presumptively entitled to costs where an action has been dismissed or abandoned.[17]

Final Warnings and Key Takeaways

Administrative dismissals are back.

- At a status hearing, plaintiffs need to provide a credible and acceptable explanation for the delay, which is backed up by cogent evidence.
- Unlike a motion under Rule 24.01 where the onus is on the defendant to prove why an action should be dismissed, at a status hearing under Rule 48.14, the onus is on the plaintiff to establish why an action should not be.
- Actual prejudice is not required. A presumption of prejudice can arise from the passage of time. The plaintiff bears the onus of rebutting the presumption of prejudice.
- A defendant's inaction is unlikely to be a relevant factor in the court's analysis where the plaintiff has a significant and unexplained or inadequately explained delay. However, a defendant's passivity may undercut a claim of actual prejudice.
- Where a plaintiff has a credible and acceptable explanation for the delay, a status hearing provides a real opportunity to get the action back on track and avoid having it dismissed for delay.
- A defendant is not presumptively entitled to costs after an administrative dismissal, but a motion for costs can be brought to the court's jurisdiction under section 131 of the *Courts of Justice Act.*

[1] This already factors in the COVID-19 related suspension of timelines from March 16, 2020 to September 13, 2020.

[2] *Beshay v Labib,* 2024 ONCA 186 at para 11, citing *1196158 Ontario Inc. v. 6274013 Canada Limited,* 2012 ONCA 544 at paras 32-33

[3] *Windebank v. Toronto East General Hospital*, 2022 ONSC 6913 at para 13; *Yang v. The Christian World Korea Inc.*, 2019 ONSC 6131 at para 35

[4] *Beshay v Labib*, 2024 ONCA 186 at para 20

[5] *Beshay v Labib*, 2024 ONCA 186 at para 24

[6] *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544 at paras 28-29

[7] *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544 at para 43

[8] *Chrisjohn v. Riley*, 2015 ONCA 713 at para 40

[9] H.*B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173 at para 38

[10] *Beshay v. Labib*, 2024 ONCA 186 at para 28

[11] *Faris v. Eftimovski*, 2013 ONCA 360 at para 25

[12] *Faris v. Eftimovski*, 2013 ONCA 360 at paras 28-33

[13] *Faris v. Eftimovski*, 2013 ONCA 360 at para 37

[14] Rule 48.14(7)

[15] *Prescott v. Barbon*, 2018 ONCA 504 at para 14

[16] *Prescott v. Barbon*, 2018 ONCA 504 at para 15

[17] *Katz v Hindrea*, 2021 ONSC 2532 at paras 23-29

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