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STATUS HEARINGS UNDER RULE 48.14

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Although entirely replaced in the 2010 amendments, unlike the transition provision under Rule 48.15,[1] status hearings under Rule 48.14 are not new. The rule behind status hearings has actually existed since 1984. However, there have been changes to the effectiveness and implementation of the rule which has resulted in a number of interesting decisions in recent years. [2]

In 2010, the newest amendments to the Rules of Civil Procedure came into effect, part of which provided (adopting the former Rule 78) that status hearings under Rule 48.14 should ordinarily proceed in writing. The rule appears to imply that, upon filing the required documents on the consent of all parties, the order and timetable will be approved by the court as a matter of course.[3] However, where the parties cannot agree on a timetable, the plaintiff does bear a real onus of showing cause as to why the action should not be dismissed for delay.

While the early cases considering Rule 48.14 may have been reluctant to dismiss a case at the first status hearing, there has been a shift in the court's approach. If not prepared, a plaintiff may see its action dismissed, even at the first status hearing.[4]

Practical Considerations

Master Macleod summarized the common courses of action in response to an approaching Rule 48.14 deadline[5]:

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[1] Rule 48.15 caused some concern to the bar prior to January 1, 2012 because subrule (6) provides that in the case of an action commenced before January 1, 2010, if no "step" was taken between January 1, 2010 and January 1, 2012, the action is deemed to be dismissed as abandoned. The rule did not expressly limit its application to undefended actions. In a recent case, *Pinevalley Trim & Doors Ltd. v. Tibollo & Associates Professional Corporation,* 2012 ONSC 1002, Justice Ricchetti clarified that 48.15(6) applied only to actions where no defence had been filed, and did not apply to defended actions.

[2] See *Amirrahmani v. Wal-Mart Canada Inc.*, 2011 ONSC 6608 (Master) for a summary of the history of Rule 48.14

[3] *Amirrahmani, supra* at para. 29

[4] *Koepcke v. Webster*, 2012 ONSC 357 (Master) at para. 21

[5] *Amirrahmani, supra* at para. 36

a. A plaintiff could bring a motion seeking to extend the time under Rule 48.14 rather than waiting for a status notice. The plaintiff, as the moving party, would have to demonstrate that more time was legitimately required and that the defendant would not be prejudiced.

b. A plaintiff served with a status notice can bring a motion to set aside the status notice and to extend the time to a new deadline. In that instance there will be a new status notice when the new deadline expires. Frequently such motions are made in writing and on consent.

c. If a plaintiff does not act on a status notice or does not receive the notice and there is an automatic dismissal, the plaintiff may move to set aside the registrar's dismissal order. The test for setting aside a registrar's order centres around the "Reid factors":

    i. explanation of the litigation delay which led to the dismissal notice and order in the first place;
    ii. inadvertence in missing the deadline set out in the notice;
    iii. promptly moving to set aside the order once it comes to the attention of the moving party; and,
    iv. prejudice or lack of prejudice to the defendant.

d. A plaintiff in receipt of a status notice may move to extend the 90 days for requesting a status hearing. Presumably this might be done due to inability to obtain instructions or because there is an upcoming discovery or mediation date or the potential for a motion.

e. A plaintiff served with a status notice may request a status hearing, attempt to negotiate a timetable and then find the defendant will require the plaintiff to actually show cause and will be seeking dismissal of the action.

It is the type of situation described in paragraph "e" that has lead to a number of decisions worth reviewing. It is usual practice that when a status hearing is contested, the hearing may be adjourned to permit the parties to file affidavit evidence. However, nothing prevents the parties from filing affidavit evidence at the initial return of the status hearing if it is known in advance that the hearing will be contested.[6]

It is also worth noting that in a few cases, plaintiffs (or their counsel) have attempted to "technically" comply at the last minute as a means of avoiding a status hearing. Rule 48.14 provides that the registrar shall dismiss the action for delay after the service of the status notice, unless the action has been set down for trial. If an action is set down for trial as a means of avoiding the status hearing, a defendant can still insist on a status hearing.[7]

The Test on a Status Hearing

At a status hearing, the plaintiff bears the burden of demonstrating that:

1. there is an acceptable explanation for the delay; and

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[6] For example in *Koepcke v. Webster*, *supra* at para. 13, it is clear in Master Dash's reasons that the affidavits were filed in advance of the status hearing, alleviating the need to adjourn the hearing to permit the filing of evidence. See also in *Pouget v. Hynes*, 2012 ONSC 829 (Master) at para. 1.

[7] *Davenport v. Sun Life Assurance Co. of Canada,* 2011 ONSC 252 at para. 2, 5-6; *Khan v. Sun Life Assurance Co. of Canada,* 2011 ONSC 455 (Master) at para. 3-4 affirmed by 2011 ONCA 650

2. if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice.[8]

The test is conjunctive and the plaintiff must satisfy both parts.

However, the presiding judge or master maintains discretion to permit an action to proceed even if the plaintiff does not satisfy both aspects of the test. Master Dash, in a recent decision, writes that the court should consider the prongs of the test, along with other relevant factors, on a contextual basis.[9]

Explanation for the Delay

The focus of the first part of the test is to justify the continuance of the action. To do this, the court is required to make a determination as to the plaintiff's intentions with respect to prosecuting the action throughout the period since commencement of the action.

The plaintiff must provide a "credible"[10], "plausible"[11], "satisfactory",[12] "acceptable"[13], or "justifiable"[14] explanation for the delay. In *Koepcke v Webster*, where the plaintiff explained that the action against the lawyer was "precautionary" and that the plaintiff was awaiting a determination on the underlying action before prosecuting the action against the lawyer for negligence, the court found that the decision to wait for the underlying action to be determined was reasonable. However, it was not reasonable to make that decision unilaterally without the participation of the defendant and do nothing for those years while waiting.[15]

There should be a clearly articulated plan by the plaintiff for moving the case forward.[16] In *Pouget v. Hynes*, the Master rejected the plaintiff's "plan" as being insufficient, which provided for a motion to consider the validity of that Affidavit of Documents, as well as the venue of the discovery of the Defendant and proposed a revised timetable "if necessary," a discovery plan and that all steps, including the motion, be completed within 12 months from the date of the status hearing.[17]

The first part of the test cannot be easily met with counsel's oral submissions setting out the history of the action. The plaintiff should provide an explanation for the delay by affidavit evidence. Although, it is common for this affidavit to be from a person employed in the lawyer's office (a clerk, legal assistance, junior associate), because the court is required to make a

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[8] *Khan v. Sun Life Assurance Co. of Canada,* 2011 ONCA 650 at para. 1

[9] *Koepcke v. Webster, supra* at para. 18

[10] *Donskoy v. Toronto Transit Commission,* 2008 CanLII 47020 (ON SCDC) at para. 16

[11] *Khan, supra* (CA) at para. 2

[12] *Khan, supra* (Master) at para. 18

[13] *Khan*, *supra* (CA) at para. 1

[14] *Oberding v. Sun Life Financial Assurance Co. of Canada,* 2010 ONSC 3303 (ON SCDC) at para. 15

[15] *Koepcke v. Webster, supra* at para. 26

[16] *Donskoy v. TTC, supra* at para. 16

[17] *Pouget v. Hynes, supra* at para. 26

determination as to the plaintiff's intention to prosecute the action, it would be prudent to consider having the plaintiff provide affidavit evidence.[18]

The following cases were held by the court as failing the first part of the test:

1. *Canadian Champion Auto v. Petro-Canada*;[19]
2. *Khan v. Sun Life Assurance Co. of Canada;*[20]
3. *Koepcke v. Webster*;[21]
4. *Malik v 1645156 Ontario Ltd.*;[22]
5. *Pouget v. Hynes*;[23]
6. *Riggitano v. Standard Life Assurance Co.*;[24]
7. *Samborski v. Pristine Capital Inc.*;[25]
8. *Savundranayagam v. Sun Life Assurance Co. of Canada*;[26]

In these cases, there is an emphasis on the evidence, or lack thereof, with respect to the explanation for delay and the plaintiff's intention to prosecute the action. As such, as a defendant it may be appropriate to file affidavit evidence, irrespective of whether the plaintiff files affidavit evidence. In a "borderline" case, such evidence may be sufficient to tip the scales.

Non-Compensable Prejudice

The cases have firmly established that the plaintiff bears the onus of showing that the defendant will not suffer non-compensable prejudice.[27] The defendant is not required to lead any evidence in this regard. There is an underlying presumption of prejudice that stems from the delay (fading memories).[28]

The cases however do not appear to go so far as to find that a plaintiff's failure to lead evidence rebutting prejudice automatically results in a finding of prejudice.[29] Thus, if possible, a defendant should always consider putting in evidence to establish prejudice.

To disprove prejudice, a plaintiff can present evidence regarding the preservation of documents and the continued availability and reliability of witnesses.[30] In addition, if there is some prejudice

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[18] *Khan, supra* (Master) at para. 13 citing *Sepehr Industrial Mineral Exports Co. v. Alternative Marketing Bridge Enterprises Inc.*, [2007] CanLII 23175 (ONSC) at para. 22

[19] 2011 ONSC 6794

[20] *Khan, supra*

[21] *Koepcke v. Webster, supra*

[22] 2012 ONSC 2887 (ON SCDC) affirming 2011 ONSC 4495 (Master)

[23] *Pouget v. Hynes, supra*

[24] 2009 CarswellOnt 2685, 177 A.C.W.S. (3d) 364 (ON SC)

[25] 2011 ONSC 3383 (Master)

[26] 2008 CarswellOnt 6255, 2008 C.E.B. & P.G.R. 8316, 67 C.C.L.I. (4th) 241, 73 C.P.C. (6th) 379 (ON SCDC)

[27] *Malik*, *supra* at para. 9; *Koepcke v. Webster, supra* at para. 31; *Pouget v. Hynes, supra* at para. 31; *Rigattano, supra* at para. 34

[28] *Canadian Champion, supra* at para. 95

[29] See for example *Koepcke v. Webster, supra* at para. 38-39

[30] *Koepcke v. Webster, supra* at para. 31

to the defendants but the defendants were complicit in creating this prejudice, then that may be a factor in favour of the plaintiff.[31]

Discretion – The Principles of the Rule

At a status hearing, the exercise of discretion must occur in the context of two competing principles of our civil justice system:

1. the public interest in discouraging delay; and
2. permitting actions to be determined on their merits.[32]

Master McLeod summarizes the interplay of these two principles as follows [citations omitted][33]:

> 16 The tension between the principles of resolution on the merits and dismissal for delay has been the subject of comment by the Court of Appeal. This tension is not a contradiction if one accepts that delay is the enemy of justice and that expedition and cost effectiveness are also important principles. In fact it is enshrined in the general interpretive rule that the rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits". Numerous studies have demonstrated that the longer it takes to bring a matter to resolution the more expensive it is for the individual litigants and the less likely it is that a fair trial can be held and a cost effective result obtained. Accordingly the rules provide that a plaintiff that fails to prosecute an action may ultimately be deprived of the right to do so. Whether that point has been reached in a particular case will depend on the particular facts. The overriding objective always is to achieve a just result.

It is in this part of the analysis – the exercise of discretion – that other factors can persuade the court to permit the action to proceed despite a technical failure to meet the test under 48.14. These are factors such as the contribution of the defendant to the delay, whether outstanding orders exist, whether it is the first status hearing, whether the defendant idly sat and waited for the status notice, etc.

That said, a number of cases have found it appropriate to dismiss an action at the first status hearing:

1. In *Canadian Champion*[34] where the delay spanned 38 months from the first defence to the status hearing. In that time, the defendant made two inquiries as to the plaintiff's intentions to prosecute the action, whereas the plaintiff had not taken any steps except in response to the status notice. Prejudice was presumed in the absence of evidence from the plaintiff rebutting the presumption.

2. In *Khan*[35] where a 2008 action alleging disability occurring on August 8, 2006 came on for a status hearing in October 2010. The plaintiff served its trial record when the

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[31] *Amirrahmani, supra* at para. 47

[32] *Koepcke v. Webster*, *supra* at para. 23 citing *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887 at para. 20-21

[33] *Amirrahmani, supra* at para. 16

[34] *Canadian Champion, supra*

[35] *Khan*, *supra*

defendant refused to consent to a litigation timetable and insisted the plaintiff show cause. The defendant had made two offers to settle and followed up the offer on a number of occasions from June 2008 through to March 2010. During that time, the plaintiff's counsel did nothing and in most cases, did not respond to the defendant's correspondence. The plaintiff did not submit evidence rebutting the presumption of prejudice. The defendant filed affidavit evidence with respect to prejudice. The prejudice concerned the effect on the defendant-insurer's coverage defence to a disability claim due to a lack of any meaningful productions from the plaintiff throughout the delay regarding his employment and his income from employment.

3. In *Malik*[36] where there was a delay of 2 ¾ years prior to the status hearing and the action had not progressed past the pleadings stage. The explanation was found to be "wholly lacking in substance". The Master found prejudice in the fading memories of witnesses in a case that depended largely on viva voce evidence, and the expiry of a limitation period.

4. In *Savundranayagam*[37] where the time between the defence and the status notice was 36 months. The Master found an acceptable explanation for the first 22 months of the delay, but no acceptable explanation for the balance of the delay. The evidence tendered to explain the delay was deficient – there was no affidavit from plaintiff and the evidence from the new lawyer for the plaintiff showed no direct knowledge of the matters deposed to. Prejudice was found in this long-term disability claim because the plaintiff had not submitted an application for disability and did not disclose whether medical records continued to exist. As such, the defendant-insurer had no opportunity to investigate the plaintiff's claim.

These cases demonstrate that it is no longer (if it ever was) appropriate to consider status hearings as an administrative exercise to get an action back on track. An unprepared plaintiff may see his or her action dismissed in the appropriate case.

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[36] *Malik, supra*

[37] *Savundranayagam, supra*