Rules of Court Committee

Request for Comments 2012-1

"Drop Dead" Rule 4.33

Under the transitional provisions in the new Rules, the new two year drop dead rule will come into effect November 1, 2012. As a result of concerns expressed about the new provisions, primarily by the personal injury bar, the Rules of Court Committee has recommended to the Minister of Justice that the implementation date be delayed until November 1, 2013. This will allow time for the Rules of Court Committee to collect further input on the Rule from all stakeholders. The new drop dead rule will remain 2 years for now, but if the Minister accepts the Committee's recommendation, implementation will be deferred one year.

The Rules of Court Committee is now requesting comments from the Bar on the drop dead rule. Submissions are requested by September 30, 2012, and should be sent to: RCC@albertacourts.ca, **or** Barb Turner, Q.C., Secretary, Rules of Court Committee, 9833 109 Street, Edmonton, AB T5K 2E8. The Bar is invited to comment on any aspect of the Rule, although the following discussion document is intended to highlight some of the issues identified to date.

1. Background

1.1 Under the previous rule (R. 244.1) if a litigant did not do something to materially advance the action for 5 years, the action had to be dismissed for want of prosecution.

1.2 Under the new R. 4.33, the time within which something must be done to significantly advance the action has been reduced to 2 years, but four exceptions have been provided that will preclude dismissal of the action:

(a) the parties expressly agreed to the delay,
(b) the delay is accounted for in an order, or in a litigation plan,
(c) a written proposal is sent suggesting a period of inactivity for more than 2 years, and no response is received from the opposing side, or
(d) the opposing side has acquiesced in fresh steps after 2 years of inactivity, which the Court concludes warrants the action continuing.

1.3 The new drop dead rule is therefore designed to work in harmony with other provisions, such as R. 4.5 (complex case litigation plans), Rule 4.4(2) (proposal for the pace and timing of an action), R. 4.10 (court assistance in procedural issues) and R. 4.12 (case management).

2. Abolish the Drop Dead Concept

2.1 It is suggested by some that: The drop dead rule distorts the natural flow of litigation by creating artificial deadlines; the consequences of the rule are disproportionate to the evil of delay it is designed to prevent; the rule erodes civility; it inhibits access to justice.

Preliminary Observations of the Rules of Court Committee:

(a) The experience under the old Rules, and the extensive consultation done by the Alberta Law Reform Institute which led up to the new Rules, confirm the need for some sort of ultimate time limit on the prosecution of actions.

(i) It is suggested that the consequences of delay be placed in the discretion of the judge. It was the failure of such a discretionary regime that led to the drop dead rule in the first place.

(ii) Another suggestion was that the defendant who takes the position that nothing has been done should be required to give three months notice before the two years is up. This would effectively change the rule into a "three months from notice" rule, and would likely lead to a myriad of "three month notices". The practicality of this approach is questionable. If, say, nothing was done for four years, would the defendant then have to give three months notice? What if the three-month notice was given, followed by two years of delay? Is a further notice required?

3. Defining What Significantly Advances an Action

3.1 One concern expressed about the drop dead rule is the uncertainty created by the absence of a definition of what "significantly advances" an action. It is noted that a "significant advance" is what starts the two year clock running. In order to maintain an effective limitation diary system, it is necessary to have a starting point, which in turn requires an identification of the last significant advance.

Discussion Points:

(a) It is sometimes suggested that there should be a definition or list of "things" that are deemed to significantly advance the action.

(i) This approach is not focused on the functional objective of the Rule, which is that the action must be "significantly advanced". The word "thing" in the rule is a type of pronoun, like "something" or "anything". The Rule is not aimed at requiring litigants to take formalistic steps every two years, without truly advancing the action: ***Phillips v. Sowan***, 2007 ABCA 101 at para. 5, 40 C.P.C. (6th) 378.

(ii) There may be no effective way to define what significantly advances an action. Not every step will do so. Any attempt to create a list will just generate all sorts of artificial steps to start the time running, without in any way advancing the action, thereby undermining the efficacy of the rule.

4. Delay under the Control of the Defendant

4.1 It is argued that the Rule is "one-sided", and that it places an unfair burden on the plaintiff. There is, on the other hand, no corresponding duty on the defendant to cooperate in moving the action along, and indeed an opportunity for unscrupulous defendants to deliberately manipulate the action to try and cause the 2 year period to run out. While R. 1.2 directs both parties to move the action along in an efficient way, the practical fact is that it is the plaintiff's action, and it is said that the "drop dead" risk falls only on the plaintiff.

Discussion Points:

(a) While R. 4.33(1)(c) provides that time does not run if the defendant does not respond to a written proposal for delay, there is no deadline within which a reply must be sent. Some defendants allegedly ignore such proposals. The suggested solution is that a time limit (say, one month, or two months) be inserted into this sub-rule.

(b) At some point often the next thing that needs to be done is something that needs to be done by the defence. With some steps there is no way to make the defence act, or even decide whether or not they want to do it. Specifically mentioned were trying to get the defence to commit to questioning on undertakings, or to ordering and booking independent medical examinations. The problem is compounded when the defence schedules one of these steps, then cancels or adjourns. In the meantime, the clock is ticking on the drop dead rule. What is the solution?

(i) Some have suggested that the rule be made even-handed by providing for the striking of a defence if the defendant fails to take some step it is required to take within 2 years. The problem is that there are very few steps that the defendant is "required to take". They do not have to question, question on undertakings, do IME's, etc. Where there is something that the defendant must do, there is generally already a time limit, e.g. filing a defence, or affidavit of records.

(ii) Should discrete exceptions for some matters be created? For example, it is suggested that the time spent waiting for a defence IME not be

counted. As noted above, this may unduly complicate the rule. Defining the starting and ending points under this concept could be tricky?

(iii) Is it possible and practical to create a system modeled on the proposal for pace and timing of litigation? Once the plaintiff believes reasonably that undertakings are substantially answered, it could provide a proposal to the defence as to when examinations on undertakings would occur. Until the defence either waives the examination, or completes the examination, time could be suspended. A similar kind of rule could be put in place to force the defence to commit to an IME. Does this add anything to the existing R. 4.4(2) on proposals for pace and timing?

5. Absence of Effective Remedies

5.1 While the new R. 4.33 contains 4 exceptions, as noted above, some argue that there are no effective remedies. It is suggested that while R. 4.33(1)(a) contemplates agreements about delay, a significant proportion of defence counsel simply will not agree, and either ignore or provide unreasonable responses to requests for delay. Seeking an order or directions under R. 4.33(1)(b) involves some expense.

5.2 The Rules of Court Committee would be interested in receiving ideas about improved remedies in the Rules, but observes that those who commented on this issue fell into three categories:

(a) Those who simply take "no", even an unreasonable "no", (or complete silence in the face of request) as being final and something about which they can do nothing.
(b) Those who seem to realize that there are tools available, but who find it inconvenient or too much work to use them.
(c) Those who have actually tried to use the tools presently provided, and report that defence counsel routinely capitulate in the face of a motion before the court.

The Rules of Court Committee's preliminary view is that it is not self-evident that the existing remedies are inadequate, but is interested in input from stakeholders on the adequacy of existing remedies in the Rules.

6. Length of Permissible Delay

6.1 The drop dead period in the rule has been changed from 5 years, to 2 years with four exceptions. There has been some suggestion that 2 years is too short, and that some alternative time is more appropriate. Comments are invited.

(a) It has been suggested that the present rule, with the 2 year period, is distorting the normal flow of civil litigation. Counsel report that they "hold back" steps until they near the end of the 2 year period, and then take that step to start the

clock running again. The rule was designed to prune out those cases that were completely dormant, or where only token and nominal things were being done to advance it along. It was not intended to catch litigants who are diligently prosecuting their files in the face of inherent time constraints. It was not designed as a primary tool to keep litigation going at an even pace. The drop dead rule is too blunt an instrument to be an effective way to case manage litigation.

(b) It has been suggested that a slightly longer period (for example, 3 years) would alleviate the uncertainty encountered in some actions of identifiying a material advance in the action. Where a longer period is allowed, more steps would typically be taken which, together, would offer more certainty for parties and their lawyers that the necessary progress was made.

(c) It has been suggested that the existing 2 year limit does not reasonably accommodate many of the common (and sometimes lengthy) delays in an action such as arranging further questioning or a medical examination.

(d) It has been suggested that the rule does not contemplate the situation where the next thing that needs to be done, cannot be done for more than two years (or a very lengthy period of time). The situations where this might happen may be rare. Even if some steps take a long time, and even if the timing is outside the control of counsel, it would be rare that two years would go by without anything being done to advance the action. Are the exceptions in R. 4.33 sufficient to deal with this situation?

(e) Some have observed that it takes more than two years to complete many actions, such as a complex personal injury action. But the drop dead rule does not require that the entire action be resolved in two years.

(f) It is argued that some steps are beyond counsel's control, for example, getting independent medical appointments, receiving the resulting independent medical reports, and booking court dates. It is said to be unfair to make the plaintiff responsible for such delays.

    (i) It is obviously correct to say that some things are beyond the control of counsel. On the other hand, the Rules of Court and the conduct of the litigation are within the control of counsel. The new Rules contain many tools that allow counsel to deal with problems of this type (see items 1 and 5, *supra*).

    (ii) It was specifically noted that sometimes “clients disappear”, or simply refuse to provide answers to undertakings. If the client is not sufficiently interested in the claim to stay in contact with and cooperate with counsel, that does not reflect any shortcoming with the Rule. This is arguably one of the reasons for a drop dead rule.

The problem with booking JDR dates is discussed next.

7. Inability to Get JDR Dates

7.1 One particular problem mentioned is the time it requires to get a JDR date from the Court of Queen's Bench, now that R. 8.4(3)(a) requires some form of dispute resolution before the matter is set down for trial. The preliminary view of the Rules of Court Committee is that this is more a problem with the JDR system, than with the drop dead rule.

(a) Traditionally, most files were settled by counsel without the intervention of any mediator or other third-party. Very few actions went to trial. The increased resort to ADR before a file is settled appears to reflect a shift in the practice. The Rules of Court Committee would be interested in any observations of the Bar as to if and why fewer actions are now being settled without the intervention of a third party.

(b) It was never intended that JDR be the only, or even the primary, method of dispute resolution. Rule 4.16 contemplates many different types of ADR. Delays caused by mandatory ADR appear to be resulting from a particular reliance on JDR.

(i) It has been suggested that some counsel simply will not agree to private ADR, perhaps because of expense, and perhaps because the participation of a judge changes the dynamics of ADR. One possible solution is to add a power to R. 4.16 for the court to order the use of private ADR when appropriate, and make collateral orders about the costs, etc.

(ii) Another possible solution is to charge a fee for JDR, to remove the disincentive to private ADR. This could be a new fee, or an acceleration of the existing trial fee.

(iii) At present the Court of Queen's Bench allows counsel to select a JDR judge, which complicates the scheduling because JDRs cannot be scheduled until the judges are assigned. Another possible solution would be to allocate JDR judges at random, like trial judges are assigned.

(iv) Are there other ways to better allocate, limit, or ration the available JDR dates? Should actions that are otherwise totally ready for trial have priority? Should JDR only be available to those who have exchanged written offers of settlement, to avoid the booking of JDRs when no efforts have been made to resolve the file? Should there be a fee charged to those who cancel a JDR too late to allow re-booking, as apparently a number of JDR slots are lost through this practice?

8. Discrete Exceptions

8.1 There have been suggestions that certain exceptions should be made to the drop dead rule.

(a) It has been suggested that the drop dead rule is not appropriate for personal injury actions. The preliminary view of the Rules of Court Committee is that this sort of exception is undesirable, and that delay is as much a problem in personal injury actions as in any other.

(b) Alternatively, it is suggested that exceptions for some steps should be identified. For example, it is suggested that the time spent waiting for a defence IME not be counted. Likewise the time waiting to get on the JDR list. Or the time when the plaintiff is under active medical treatment. This approach might reduce the rule to a morose of detail. Defining and identifying the appropriate list may be impractical.

May 17, 2012