Rules of Court Committee
Results of Consultation
"Drop Dead" Rule 4.33

In May, 2012 the Rules of Court Committee requested comments from the Bar on the drop dead rule. Submissions were received from a number of individuals and groups, and the Committee proposes to recommend amendments to the Rules.

1. The Context

1.1. The Rules contain numerous provisions designed to promote the timely and cost effective resolution of litigation. There are two rules that specifically address the issue of delay:

(a) Rule 4.31 provides that the court can dismiss an action for delay at any time where significant prejudice is shown. It is a discretionary, prejudice based provision.

(b) Rule 4.33 provides that if an action has not been significantly advanced for two years, it must be dismissed. This rule is not discretionary, and is accurately described as a "drop dead" provision; noncompliance leads to automatic dismissal of the entire action.

These two rules are designed to work together, and they complement other rules designed to achieve the timely resolution of litigation, 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), R. 4.12 (case management), and the numerous rules that provide deadlines for the completion of particular steps.

1.2. It was suggested by some that the drop dead rule be repealed. Experience has shown that a purely discretionary delay regime fails to adequately deal with cases that have become dormant. The Rules of Court Committee believes there is still a need for a properly crafted drop dead provision.

1.3. Some commentators suggested that R. 4.33 be made discretionary. The Rules of Court Committee believes that would blur the distinction between it and R. 4.31, which is the discretionary delay rule. The two rules are designed to serve different purposes.

1.4. It was also suggested that some types of litigation (such as personal injury litigation) be excepted from the operation of R. 4.33. The Rules of Court are designed to be of universal application, and as a general principle should apply to all litigation. For the same reason, the Rules should accommodate the legitimate requirements of all litigation. While there are some rules for specialized litigation (e.g. foreclosures), excepting out particular types of litigation from particular rules is undesirable. Since inordinate delay can occur in any type of litigation, the

Committee is of the view that the drop dead rule should be drafted and applied so that it can accommodate all types of litigation.

2. The Triggering Period

2.1. The present rule provides that an action must be dismissed if it is not significantly advanced for two years. The two year triggering period is significantly shorter than the previous five year trigger. A number of commentators suggested that the two year period is too short, providing detailed examples taken from actual files. The Rules of Court Committee has concluded that these observations have merit, and that the triggering period should be lengthened to three years.

2.2. Selecting the appropriate triggering period is somewhat arbitrary. Arguments could be made for any number of triggering periods, including a return to the original five year period.

2.3. The discretionary, prejudice based R. 4.31 is designed to operate as a case management tool, at any time in the litigation. It specifically provides that if the action is not dismissed for delay, the court may make procedural orders to advance the action. While R. 4.31 is designed as a case management rule, R. 4.33, the drop dead rule, is designed to serve a different purpose. It is designed to prune out those actions that have become so dormant and moribund that the system should essentially deem them to have been abandoned.

2.4. Examples were provided to indicate that there might be, or appear to be, two year gaps in the prosecution of litigation that has not in fact been abandoned, and has not been so neglected that outright dismissal is warranted. As well, there are indications that the two year period is so short that defendants are sometimes tempted to wait out the two years, rather than respond to the claim on the merits. Consideration of the examples provided suggest that a three year period, while only one year (50%) longer, would likely address the vast majority of the examples given.

2.5. There were also indications that the shortness of the two year period was distorting the normal flow of litigation. Plaintiffs are rationing or delaying steps in order to reserve an opportunity to advance the action on the eve of the expiration of the two year period. The drop dead rule was never intended to be a case management tool, so that it would measure or pace the advance of the litigation; it was designed to prune out those cases that have truly "dropped dead". It was not intended to catch litigants who are diligently prosecuting their files in the face of inherent time constraints.

2.6. The Rules of Court Committee, having reflected on all of these factors, concluded that a three year drop dead triggering period would strike the appropriate balance.

3. Creating Exceptions to the Passage of Time

3.1. Some commentators suggested (in addition to, or as a substitute for lengthening the trigger period) that further exceptions be created for the drop dead rule. Rule 4.33 presently contains the following exceptions:

(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.

3.2. Some further suggested exceptions were the time spent waiting for independent medical appointments, receiving the resulting independent medical reports, and booking dispute resolution sessions. Another suggestion was the time that elapses as a result of the cancellation by the defendant of any scheduled step. The Rules of Court Committee has concluded that adding further exceptions would complicate the operation of the rule, and make the calculation of the drop dead period more difficult, which is not an appropriate response. The increased length of the triggering period to three years should accommodate the concerns expressed.

3.3. One exception that would be easy to calculate, and would be a fair balance of the obligations of the litigants to advance the litigation, would be to except out of the triggering period the time between the service of statement of claim, and the service of that defendant's statement of defence, to a maximum of one year. This one year (the "adjuster's year") would deal with the common situation where the defendant seeks additional time to defend. The Committee proposes to recommend that amendment.

3.4. It was noted that there is a flaw in the drafting of R. 4.33(c), in that it does not provide any time limit within which a response must be given. The Committee intends to recommend amending the rule so that it requires a "substantive response within two months".

4. Defining What Significantly Advances an Action

4.1. One concern expressed about the drop dead rule is the uncertainty created by the absence of a definition of what constitutes a "thing". It is argued that 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.

4.2. The Rules of Court Committee recognizes that maintaining a diary system is a normal and responsible tool used in the practice of law. The efficacy of diary systems is important. However, the Committee remains of the view that it is impossible to compile a list of "things" that significantly advance an action. Even steps that are mandatory under the rules can be merely formalistic, and will not advance anything. Any attempt to create a list will just generate all sorts of artificial steps to start the time running.

4.3. The Committee believes that the focus should be on the functional aspect 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.

4.4. Increasing the triggering period to three years should respond in part to this concern. No active file should be diarized for longer than a fixed period (say six months, or 12 months). Files should be diarized and reviewed on a regular basis to ensure that they are being significantly advanced.

4.5. The reference in the present rule to "things" is perhaps just a feature of the drafting, and was likely in part an attempt to distance the new rule from the old concept of a "step", which had generated a lot of arcane case law. The word "thing" has unfortunately become a distraction for users of the rule, and the Committee proposes to recommend amendments that will eliminate its use.

5. Delay under the Control of the Defendant

5.1. It is argued that the Rule is "one-sided", and that it places an unfair burden on the plaintiff. It is suggested there is 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 drop dead period to run out. It was suggested that the rule be amended such that if a defendant does not take a step within the specified time, the defence would be struck out.

5.2. The Rules of Court Committee obviously agrees that the rules should be even handed. However, the practical fact is that it is the plaintiff's action, and to some extent the "drop dead" risk will always fall on the plaintiff.

5.3. The Committee does not agree with the premise that there is no obligation on the defendant to cooperate in moving the action along. The assumption underlying the Rules is that actions will be resolved on their merits, not based on tactical maneuvering, procedural stratagems and stonewalling. Rules 4.1 and 4.2 make

that clear. For example, R. 4.2(b) requires all parties to "respond in a substantive way and within a reasonable time to any proposal for the conduct of an action".

5.4. The problem with the proposed remedy 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.

5.5. As noted in item 3.3 above, the Committee proposes to except from the drop dead period the time between service of the statement of claim, and filing of the statement of defence, to a maximum of one year.

5.6. The Committee has not been persuaded that the remedies presently available under the Rules are inadequate for dealing with uncooperative defendants.

(a) The suggestion that some defendants either ignore, or provide unreasonable responses to requests for steps to advance the action would be a concern if there were no available remedies, but it seems that some counsel are either unaware that there are remedies, or are unwilling to use them. Amending the Rules of Court will not assist parties who are unable to make effective use of the rules.

(b) As previously noted, R. 4.2(b) requires all parties to "respond in a substantive way and within a reasonable time to any proposal for the conduct of an action". If such conduct occurs, the plaintiff should seek a procedural order, which would presumably be accompanied by an appropriate costs award.

(c) It was suggested that defendants will never agree to a standstill agreement under R. 4.33(a). But there is no indication that the Court is failing to deal with those situations in a satisfactory way, when the circumstances are brought to its attention. That some plaintiffs are prepared to acquiesce in unreasonable behavior does not reflect a weakness in the Rules.

(d) To illustrate, it is suggested that the filing of a defence is often deferred in personal injury actions, in order to leave the file in the hands of the adjusters. The personal injury Bar suggests that this is often to the mutual advantage of both sides. It is also said that the insurance companies will never acknowledge a "standstill" in the formal advance of the action as a result. Good arguments were made to suggest that this approach by the insurance companies is unreasonable. However, the plaintiff is not without a remedy. It can either simply insist on a defence be being filed immediately, or it can seek a

procedural order. Again, acquiescence in unreasonable positions cannot be cured by any amendments to the Rules.

6. Undertakings

6.1. Giving undertakings during questioning to provide information has long been a feature of Alberta civil procedure, but for the first time the practice has been recognized in R. 5.30. Particular concerns were raised about the interaction of the drop dead rule with the answering of undertakings:

(a) It was suggested that some questioners refuse to say whether or not they are satisfied with an answer to an undertaking. (This is not to say that the questioner is happy with the answer, only whether the answer is responsive to the question.)

(b) Some questioners refuse to examine on undertakings until every last undertaking has been answered, or decline to say whether they will examine or not. This problem is compounded when the questioner refuses to even acknowledge if undertakings are responsive to the question.

(c) The situation is sometimes compounded when the witness holds back the responses until he or she has answers to every single undertaking.

6.2. Several commentators indicated that inconsistent practices surrounding the answering of undertakings contribute to delay in litigation, and can therefore create the risk that the drop dead rule will be violated.

6.3. The Committee considered amending R. 5.30 to indicate how and when undertakings must be answered, and to outline the corresponding responsibilities of the questioner. The Committee concluded, however, that an attempt to micromanage the answering of undertakings might well be counterproductive. As an initial response, the Committee proposes to exercise its authority under R. 1.6(2) to insert an Information Note after R. 5.30 along the following lines:

> Information Note: Undertakings should be answered in a reasonable time, and the witness should generally not delay responding until every undertaking can be answered. The questioner is expected to indicate within a reasonable time whether the undertaking is responsive to the question, and whether the questioner intends to question further on the undertaking. Further questioning should proceed when the undertakings are substantially answered, even if some undertakings remain outstanding, and even if questioning is not completed.

7. Presumption of Prejudice

7.1. Former R. 244(4) provided for a presumption of prejudice if there was inordinate delay. This provision was not expressly carried forward into R. 4.31, the new discretionary delay rule. The Rules of Court Committee is of the view that the rule would be strengthened by the addition of a new sub-rule providing that inordinate, unexplained delay in an action is *prima facie* evidence of prejudice.

8. Inability to Get JDR Dates

8.1. One particular problem mentioned is the time it requires to get a JDR date from the Court of Queen's Bench, given that R. 8.4(3)(a) requires some form of dispute resolution before the matter is set down for trial. The unanticipated demands for JDR have now outstripped the resources available.

8.2. This problem has prompted the Chief Justice to suspend the mandatory requirement for ADR until such time as further resources are available to the Court of Queen's Bench.

8.3. Parties now have the option of proceeding directly to trial, without resorting to ADR. Those files that still require the intervention of a third party before settlement is possible can have resort to private ADR, or wait for a JDR appointment. If the plaintiff is concerned about the passage of the drop dead period, a standstill agreement can be reached with the defendant, or an order can be applied for under R. 4.33(1)(b).

9. Summary

The numerous responses received from the Bar to the request from the Committee for comments on the drop dead rule were very helpful. It is anticipated that the proposed amendments will alleviate many of the concerns of the Bar. The Rules generally, and the drop dead rule in particular, will continue to be monitored with a view to amendment and improvement.

February 8, 2013

Schedule A
Proposed Drop Dead Rule

Dismissal for long delay

4.33(1) If 3 or more years has passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless

(a) the parties to the application expressly agreed to the delay,

(b) the action has been stayed or adjourned by order, an order has extended the time for advancing the action, or the delay is provided for in a litigation plan,

(c) the applicant did not give a substantive response within 2 months to a written proposal by the respondent not to advance the action until more than 3 years after the previous significant advance in the action, or

(d) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

(2) If the Court refuses an application to dismiss an action for delay, the Court may still make whatever procedural order it considers appropriate.

(3) The time that elapses between

(a) the service of the statement of claim on the applicant, and the service of the applicant's statement of defence, to a maximum of one year, and

(b) the time between the respondent's written proposal under subrule (1)(c) and the applicant's substantive response, to a maximum of one year

shall not be counted in computing the time under this rule.

(4) Rule 13.5 [*Variation of time periods*] does not apply to this rule.

Compare version showing proposed changes from the existing rule.

4.33(1) If ~~2~~3 or more years has passed ~~after the last thing done that~~without a significant~~ly~~ advance~~d~~ in an action, the Court, on application, must dismiss the action as against the applicant, unless

(a) the parties to the application expressly agreed to the delay,
(b) the action has been stayed or adjourned by order, an order has extended the time for ~~doing the next thing in~~advancing the action, or the delay is provided for in a litigation plan,
(c) the applicant did not ~~respond~~give a substantive response within 2 months to a written proposal by the respondent ~~that the next thing in~~not to advance the action ~~not occur~~ until more than 3 years after the ~~last thing done that~~previous significant~~ly~~ advance~~d~~ in the action, or
(d) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

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shall not be counted in computing the time under this rule.

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