

## **RULE 24**

### **DISMISSAL OF ACTION FOR DELAY**

#### **WHERE AVAILABLE**

**24.01** A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed,

- (a) to serve the statement of claim on all the defendants within the prescribed time;
- (b) to have noted in default any defendant who has failed to deliver a statement of defence, within thirty days after the default;
- (c) to set the action down for trial within six months after the close of pleadings;
- (d) to move for leave to restore to a trial list an action that has been struck off the trial list, within thirty days after the action was struck off.

#### **NOTICE WHERE PLAINTIFF UNDER DISABILITY**

**24.02** Where the plaintiff is under disability, notice of a motion to dismiss the action for delay shall be served on,

- (a) the litigation guardian or committee of the estate of the plaintiff; and
- (b) on the Official Guardian, unless
  - (i) the Public Trustee is committee of the estate or litigation guardian of the plaintiff, or
  - (ii) a judge orders otherwise.

#### **NOTICE OF ORDER**

**24.02.1** If the defendant is successful on the motion to dismiss an action for delay, the defendant shall serve a copy of the order dismissing the action on every defendant to the action who has crossclaimed against him or her.

#### **EFFECT OF DISMISSAL ON COUNTERCLAIM**

**24.03** Where an action against a defendant who has counterclaimed is dismissed for delay, the defendant may within thirty days after the dismissal deliver a notice of election to proceed with the counterclaim (Form 23B), and if the defendant fails to do so, the counterclaim shall

be deemed to be discontinued without costs.

**EFFECT OF DISMISSAL ON CROSSCLAIM OR THIRD PARTY CLAIM**

- 24.04** (1) Unless the court orders otherwise, where an action against a defendant who has crossclaimed or made a third party claim is dismissed for delay,
- (a) the crossclaim or third party claim shall be deemed to be dismissed with costs; and
  - (b) the defendant may recover those costs and his or her own costs of the crossclaim or third party claim from the plaintiff.

**EFFECT OF DEEMED DISMISSAL ON SUBSEQUENT ACTION**

- (2) A deemed dismissal under this Rule is not a defence to a subsequent action unless the order dismissing the action provides otherwise.

**EFFECT ON SUBSEQUENT ACTION**

- 24.05** (1) The dismissal of an action for delay is not a defence to a subsequent action unless the order dismissing the action provides otherwise.
- (2) Where a plaintiff's action has been dismissed for delay with costs, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest before payment of the costs of the dismissed action, the court may order a stay of the subsequent action until the costs of the dismissed action have been paid.

**APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS**

- 24.06** Rules 24.01 to 24.05 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

*Diversified Metal v. Trivett* 2014 PESC 25

The Court refused to dismiss the action for delay finding there was a plausible explanation for the delay, and there had not been prejudice to the defendant in the legal sense such that a fair trial may not still be had.

*Johnston v. Stewart McKelvey Stirling Scales* 2014 PECA 8

Rule 24.01(c) Delay: The Court of Appeal agreed with the trial judge's conclusion that the claim should be dismissed for delay. The Court confirmed the trial judge's finding to stay the action for abuse of the court's processes considering the length of time since the events which give rise to the claim, the length of time since the action was commenced and the length of time since expiration of the limitation period.

*PEI Protestant Children's Trust and Province of PEI and S. Marshall* 2014 PESC 6

The Court struck the plaintiff's statement of claim for delay. The pleadings were closed on May 11, 2005. The plaintiff did not demonstrate a willingness to prosecute her claim by either documentary disclosure or discovery.

*Johnson v. Stewart McKelvey Stirling Scales* 2012 PESC 29

The court dismissed the plaintiff's action because of delay. In considering a motion to dismiss an action for delay, the court must determine whether the plaintiff's delay in setting the action down for trial has been such that it gives rise to a substantial risk the defendants will be denied a fair trial.

The court also exercised its inherent jurisdiction to control its own processes and pursuant to s. 19 of the *Judicature Act*, Stats P.E.I. 2009, Cap. J-2.1, dismissed the action of the plaintiff on the grounds that it was an abuse of process.

*Connick v. Ramsay* 2008 PESCTD 42; [2008] P.E.I.J. No. 50; (2008), 282 Nfld. & P.E.I.R. 93

The defendants made a motion pursuant to Rule 24.01(c) for dismissal of the action because of delay. To establish that the action be dismissed because of delay the defendant had to show the delay was: (i) unreasonable in that it was inordinate and inexcusable; and (ii) there is a substantial risk a fair trial would not be possible, if the action is allowed to continue. The motion was dismissed.