

# Case Law Update: Aguas v Rivard Estate

September 21, 2011

2011 ONCA 494 (Released July 6, 2011)

## Civil procedure Dismissal order Test to set aside

The appellant commenced an action on October 6, 2003, against Curtis Rivard following a motor vehicle accident. On August 15, 2007, the Registrar dismissed the action because the appellant had neither set the matter down for trial within two years of the filing of the statement of defence nor obtained an order from a judge presiding at a status hearing in accordance with Rule 48.14. The order dismissing the action was mistakenly sent to the appellant's former counsel, but not to current counsel. Counsel for the appellant did not discover that the action had been dismissed until September 2009. On October 7, 2009, the appellants filed a notice of motion to set aside the dismissal.

This decision is an appeal from the order of Seppi J. dismissing the appellant's motion to set aside the dismissal order.

The majority of the Court of Appeal allowed the appeal, holding that while the motion judge identified and applied the proper test, she made three palpable and overriding errors.

First, the court held that the motion judge made an error in finding that there was no explanation for the litigation delay. In the court's opinion, although the action was not proceeding with "lightning speed", steps were being taken. Additionally, the litigation was complicated and directly affected by a second accident in which the appellant was involved, which led to a second action commenced by the appellant. In the court's decision, it was an error to say that the appellant did not give "any reason whatsoever" for the litigation delay. Moreover, once counsel for the appellant discovered the dismissal, she moved almost immediately to set it aside.

Second, the court held that the motion judge made an error in finding that prejudice to the respondents favoured dismissing the motion. The court found that the motion judge placed unreasonable emphasis on prejudice, and concluded that there was no prejudice suffered by the respondents.

Third, the court held that the motion judge erred in holding that the respondents were entitled to rely on the principle of finality. It held that the respondents did not proceed as if they were acting on the principle of finality, and continued to participate in the litigation, most obviously by attending the discoveries in the second accident.

Upon considering the facts of the case in context, the Court of Appeal determined that the dismissal order should have been set aside.

Juriansz J.A. dissented from the majority's opinion. He stated that the motion judge's decision to uphold the dismissal order involved an exercise of discretion, which should be given "significant deference from this court". An appellate court reviews a decision, not with the aim of replacing it with the decision it would have made itself, but with a view to determining whether the motion judge erred in arriving at his/her decision. He stated: "Interfering with her considered exercise of discretion will have the effect of rendering the

jurisprudence of this court so uncertain that trial judges will have difficulty understanding and applying it. Uncertainty in the jurisprudence will have the result that a Court of Appeal decision will be required to determine the final status of a case administratively dismissed under Rule 48.14, which is intended to remove cases from the court's docket without any judicial involvement". Juriansz J.A. concluded that the result reached by the motion judge in this case was reasonable.

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