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As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

The Dismissal of Civil Actions at Status Hearings

THE COURT OF APPEAL FOR ONTARIO HAS AFFIRMED THAT AN ACTION WILL BE DISMISSED FOR DELAY AT A STATUS HEARING ABSENT COMPELLING FACTORS FAVORING THE CONTINUANCE OF THE ACTION.

In *Kara v. Arnold*, 2014 ONCA 871, the Court affirmed a ruling by the motions judge at a status hearing dismissing an action where there had been an eleven-year delay between the delivery of the defendant's statement of defence and the date of the status hearing.

Since the Court's decision in *Kara*, significant changes have been made to Rule 48.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules"), effective January 1, 2015¹.

The *Kara* decision was made under the former Rule 48.14. Nonetheless, the principles in *Kara* governing when an action will be dismissed for delay by the Courts would appear to apply under the new Rule 48.14. Counsel should consult the new Rule 48.14 to be made aware of the new procedures, transition rules, and deadlines now in effect.

The former Rule 48.14 provided that where an action was not set down

for trial or terminated by other means within two years after the first defence was filed, the registrar was required to serve a status hearing notice advising that the action will be dismissed for delay if not set down for trial or otherwise terminated within ninety days.

Under the former Rule 48.14, a party who received a status hearing notice could make a request to arrange a hearing, where the hearing judge had the power to dismiss the action.

Both under the former and new Rule 48.14, the onus rests on the plaintiff to show why the action should not be dismissed for delay.

In *Kara*, the plaintiffs had brought an action for medical malpractice against the defendant physician and others. At the time of the status hearing, the action was more than fourteen years old and the principal facts giving rise to the cause of action had taken place more than

sixteen years before the hearing. In particular, the plaintiffs started their action in February, 2000. The action was then dismissed against all of the defendants, except the remaining defendant physician. The defendant physician served his defence in April, 2002 and his affidavit of documents in June, 2003.

The delay in the action's progress was caused by both parties. That is, the plaintiffs had not sworn their affidavit of documents until August, 2006, though it was delivered almost two years earlier. The defendant physician did not provide a transcription of his notes until June, 2006. One of the plaintiff's treating physicians, who was a potential witness, died in 2007. Discoveries, which had been scheduled and re-scheduled, started in December, 2006 and were done in December, 2010. The plaintiffs took no steps to discover the defendant physician and did not intend to do so. The last contact between the physician's counsel and plaintiff's counsel before the status hearing took place was in December, 2010. The plaintiffs took more than three years to obtain expert reports. They also took no steps to set the action down for trial between the date they received the status hearing notice and the hearing date.

In view of these facts, the motions judge dismissed the action for delay at the status hearing. In upholding this ruling, the Court of Appeal made several important findings about

the nature of status hearings and when actions should be dismissed for delay:

- 1. The test for dismissing an action under Rule 48.14 is conjunctive.** There is a two-fold test under Rule 48.14. The plaintiff bears the onus of showing: (i) that there was an "acceptable explanation" for the delay; and (ii) if the action were allowed to proceed, the defendant would suffer no "non-compensable prejudice".
- 2. There are important policy reasons for enforcing timely justice.** The Court noted that in deciding whether to dismiss a case under Rule 48.14, the motions judge must balance two competing values: (i) the *Rules of Civil Procedure* should be enforced to achieve timely and efficient justice; and (ii) parties to a proceeding should be able to offer a reasonable explanation for delay when it takes them beyond the timelines set out in the *Rules*. While the Court noted that the motions judge should not take an overly formalistic or mechanical approach to timelines under the *Rules*, the Court held that Rule 48.14 had to be given "some teeth" in order to discourage delay.
- 3. The motions judge must weigh all relevant factors at a status hearing.** In considering the reasonableness of any explanation for the delay in question, the motions judge will "almost invariably engage in a weighing of all relevant factors in order to reach a just result". The Court was not fussed with identifying this approach as a "contextual" one. Rather, the Court held that in this case, the motion judge considered all relevant factors, which included: (i) the inordinate length of the delay; (ii) the explanations offered by the plaintiffs for the delay; (iii) the contribution by the defendant to the delay; (iv) the plaintiff's delay in obtaining expert reports and the lack of explanation for the delay; and (v) the issue of prejudice. Moreover, the Court held that the motions judge properly set the date of the delivery of the physician's statement of defence as the starting point for the delay in question.
- 4. The longer the delay, the more cogent an explanation required.** The motions judge held that the "longer the delay, the more cogent the explanation must be". The Court of Appeal upheld this finding as a "common sense observation".
- 5. The time and expense devoted to the case to date should be considered.** The Court held that the motions judge was alive to the time and expense the parties devoted to the case to date when he dismissed it. It was self-evident that the case involved

considerable time and expense. Moreover, if the action were actually ready to be set down for trial, the plaintiffs would have taken steps to set it down in the year between the time they received the status notice and the date of the hearing.

While the decision in *Kara* does not at first glance appear to be a radical change in the law governing when actions will be dismissed for delay, it is an important case. First, it illustrates that status hearing judges will dismiss actions in the face of inordinate and unexplained delay.

Moreover, the case shows that when deciding whether or not to dismiss an action at a status hearing, the Court will take a holistic approach, one that will almost always engage a balancing of all relevant factors.

¹ For example, under the new Rule 48.14, which is effective January 1, 2015, unless the Court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances: (i) the action has not been set down for trial or terminated by any means by the later of the fifth anniversary of the commencement of the action and January 1, 2017; (ii) the action was struck off a trial list and has not been resorted to a trial list or otherwise terminated by any means by the later of the 2nd anniversary of being struck off and January 1, 2017. A dismissal can be avoided under the new Rule 48.14 by filing a timetable and draft order 30 days prior to the dismissal deadline. Where the parties do not consent to a timetable, a party can bring a motion for a status hearing. This is not a comprehensive list of all the changes that have been made to Rules 48.14 and 48.15. Counsel should consult both the new Rules for further information.