Cassels

“Class (Action) Dismissed!”: Recent Interpretations of Section 29.1 of the Class Proceedings Act, 1992

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On October 1, 2020, Ontario adopted amendments and additions to the *Class Proceedings Act, 1992* (CPA), including s.29.1, which allows the defendants to move for the early dismissal of a class proceeding for delay should the representative plaintiff fail to take certain steps by the first anniversary of the day on which the proceeding was commenced.

The Ontario Superior Court of Justice has issued a small handful of decisions interpreting and analyzing s.29.1 since its adoption. While the earliest decisions suggested that the section is clear on its face and should be read literally with no discretion available to the Court, subsequent decisions have carved out some discretion in specific circumstances.

Given the importance to defendants of s.29.1 and its ability to derail class proceedings, this legislative change will likely be litigated significantly in the coming years and greater clarity will emerge as to how this section can be used as a tool to ensure that class proceedings do not languish once the claims are brought.

Background: Section 29.1

On October 1, 2020, the Ontario government proclaimed the amendments to the CPA in force. One of these amendments was the enaction of s.29.1:

Mandatory Dismissal for Delay

29.1 (1) The court shall, on motion, dismiss for delay a proceeding commenced under section 2 unless, by the first anniversary of the day on which the proceeding was commenced,

(a) the representative plaintiff has filed a final and complete motion record in the motion for certification;

(b) the parties have agreed in writing to a timetable for service of the representative plaintiff’s motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding, and have filed the timetable with the court;

(c) the court has established a timetable for service of the representative plaintiff’s motion record in the

motion for certification or for completion of one or more other steps required to advance the proceeding; or

(d) any other steps, occurrences or circumstances specified by the regulations have taken place.

Pursuant to s.39(2) of the CPA, if a class proceeding was commenced before the provision came into force, it will be deemed to have been commenced on the day the new provisions came into force (i.e., October 1, 2020). In other words, for class proceedings issued prior to October 1, 2020, the one-year timeline under s.29.1 expired on October 1, 2021.

Analysis: Bourque, Lamarche, LeBlanc, Lubus, and D'Haene

In the first reported decision interpreting s.29.1 – *Bourque v Insight Productions*[1] – Justice Belobaba held that while s.29.1 "means what it says." In other words, dismissal is mandatory if the deadline is not met. Justice Belobaba noted the intended purpose of the amendment – to help advance class proceedings that otherwise tend to move at "glacial speed." However, the Court noted that the dismissal was not an onerous consequence as class counsel can nevertheless refile an identical statement of claim against the same defendant(s), but with a different representative plaintiff.[2] This may understate the inconvenience suffered by class counsel as obtaining a plaintiff to serve as a class representative is often an obstacle to proceeding with a class proceeding, particularly given the possible financial consequences to such a plaintiff.

In *Lamarche v Pacific Telescope Corp,*[3] Justice Gomery agreed with Justice Belobaba that s.29.1 meant what it said. The plaintiff argued that the motion should be dismissed because the parties agreed to seek a case conference once a foreign defendant was served, and this constituted the "timetable […] for completion of one or more other steps required to advance the proceeding" required by section 29.1(1)(b).[4] Justice Gomery disagreed that this met the timetable requirement, since, on its face, the subsection required "that [the timetable] be filed with the court".[5] Even if the alleged agreement constituted a "timetable" – which Her Honour held it did not[6] – the failure to file said alleged timetable meant that the test was not met.[7]

Class counsel also contended that, analogous to Alberta case law addressing mandatory dismissal provisions, "the court retains discretion to refuse to grant a dismissal on a motion like this". In response, Justice Gomery stated that "*Bourque* suggests otherwise" – suggesting, once again, that the section means what it says insofar as the section addresses "mandatory" dismissal for delay and states that a Court "shall" grant the motion if none of the criteria are met.[8]

Last, in response to class counsel's argument that "dismissing the action is pointless, because he will simply find another class representative and start another class action against the same defendant", Justice Gomery noted that Justice Belobaba's statement was *obiter* and had no precedential value.[9] Consequently, a decision on this issue was left to another day.

These issues were subsequently addressed in *LeBlanc v Attorney General (Canada)*.[10] In this case, class counsel did not oppose the motion, but requested that the dismissal be delayed for a period of 60-90 days "to give plaintiffs' counsel or agent the opportunity to identify and contact […] claimants and their families to give them an opportunity to participate in a fresh action which the plaintiffs intend to bring [and which] will require new representative plaintiffs."[11]

Rather than engage with the implicit question of whether class counsel is permitted to issue a new identical class proceeding in the first place, Justice Akbarali agreed with Justice Belobaba that s.29.1 should be applied "as written," and that as such, he did not have discretion to delay the effective date of the dismissal of the proceeding.[12]

This rigidity in interpreting s.29.1 has faded to some degree in two recent decisions. In *Lubus v Wayland Group Corp*,[13] Justice Morgan denied the motion to dismiss the proceeding, despite the fact that, on its face, the criteria in s.29.1 were not met. While Justice Morgan agreed with the previous decisions interpreting the criteria literally – notably including a holding that steps taken to advance a parallel proceeding do not meet the test, which requires steps to advance *the class proceeding*[14] – he was "prepared to be the fifth dentist on sugarless gum" concerning the issue of discretion.[15] In particular, he held that "the wording of the section is strict,"[16] but that the other judgments should not "be seen to pronounce blanket statements covering all circumstances."[17]

The context of the case was deeply important in Justice Morgan's decision. In this case, the parties attended a case conference before Justice Morgan to schedule the steps leading to the certification, at which point he declined to schedule any steps but directed the parties to resolve various other issues first.[18] In that context, Justice Morgan held that the Court had "established a form of timetable by directing the next steps to be taken", though he "did not specify an outside date." Counsel understood that those steps should be taken "as soon as practicable," and in so doing, adhered to the timetable set; consequently, the Court refused to dismiss the action.[19] Notably, in those circumstances and "given the newness" of s.29.1, Justice Morgan ordered that there would be no costs of the motion for or against either party.[20]

Most recently, Justice Perell of the Ontario Superior Court of Justice addressed s.29.1 in *D'Haene v BMW Canada Inc*,[21] a class action against multiple automotive manufacturer defendants in respect of exploding airbags. In that case, two defendants, Mercedes and Mitsubishi, successfully brought a motion to dismiss the action under s.29.1. However, the dismissal was conditional on the controversial term that the order would be set aside if the plaintiffs filed a complete certification motion record within 30 days.

In *D'Haene*, the Court held that s.29.1 compels a mandatory non-discretionary dismissal if the conditions of s.29.1 are not met (which echoes the comments of Justice Belobaba in *Bourque*). Further, the Court held that even where there are multiple defendants, s.29.1 does not require a motion by all of the defendants.

However, despite the above, Justice Perell imposed what he called a "Phoenix Order" that had the potential

to revive or resurrect the action. Relying on his powers under s.12 of the CPA (which empowers him to manage the procedure of a class action), s.35 of the CPA (which directs that the *Rules of Civil Procedure* apply to class proceedings, including Rule 1.04(1) which permits the liberal interpretation of rules to secure the just, most expeditious, and least expensive determination of every civil proceeding), and the general principle that courts often revive terminated actions by way of setting aside default judgments and administrative dismissals, Justice Perell held that a Phoenix Order would be proportional, efficient, pragmatic, fair, just, and in the interests of justice. The Court noted that the administrative dismissal took place in the context of "procedural gamesmanship and opportunism and very little actual procedural prejudice." Accordingly, the dismissal was made with the "escape clause" of the plaintiff filing the certification record. It will be interesting to see if there will be appellate commentary on the reasoning in this decision, which appears to undermine the straightforward legislative language of s.29.1.

Key Takeaway Principles

The first handful of cases interpreting s.29.1 of the CPA make certain points clear. In particular:

- Section 29.1 should be read literally;
- The section is mandatory and leaves a judge with little discretion to refuse to grant the motion if none of the criteria are met.
- However, per *Lubus,* the Court may retain some discretion in interpreting what constitutes a timetable for the purpose of section 29.1 and per *D'Haene*, the Court retains a residual discretion to craft an order that potentially revives the action; and
- Agreements between counsel as to the next steps do not constitute a "timetable" for the purposes of s.29.1.

Ontario courts continue to grapple with the interpretation of this provision and, given the stakes, the Ontario Court of Appeal will likely be called upon to clarify the limitations of the legislation and the scope of judicial discretion in light of the CPA's express language on dismissal

Cassels will provide updates on developments in this area as the jurisprudence develops.

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[1] 2022 ONSC 174.

[2] *Bourque v Insight Productions*, 2022 ONSC 174 at paras 2-3 and 19 (*Bourque*).

[3] 2022 ONSC 2553.

[4] *Lamarche v Pacific Telescope Corp*, 2022 ONSC 2553 at para 12.

[5] *Lamarche v Pacific Telescope Corp*, 2022 ONSC 2553 at para 13.

[6] *Lamarche v Pacific Telescope Corp*, 2022 ONSC 2553 at paras 14-17.

[7] *Lamarche v Pacific Telescope Corp*, 2022 ONSC 2553 at para 13.

[8] *Lamarche v Pacific Telescope Corp*, 2022 ONSC 2553 at paras 19-20.

[9] *Lamarche v Pacific Telescope Corp*, 2022 ONSC 2553 at para 26.

[10] 2022 ONSC 3257.

[11] *LeBlanc v Attorney General (Canada)*, 2022 ONSC 3257 at paras 7 and 9.

[12] *LeBlanc v Attorney General (Canada)*, 2022 ONSC 3257 at paras 13-15.

[13] 2022 ONSC 4999.

[14] *Lubus v Wayland Group Corp*, 2022 ONSC 4999 at paras 26-29.

[15] *Lubus v Wayland Group Corp*, 2022 ONSC 4999 at para 40.

[16] *Lubus v Wayland Group Corp*, 2022 ONSC 4999 at para 39.

[17] *Lubus v Wayland Group Corp*, 2022 ONSC 4999 at para 40.

[18] *Lubus v Wayland Group Corp*, 2022 ONSC 4999 at paras 33-35.

[19] *Lubus v Wayland Group Corp*, 2022 ONSC 4999 at para 46.

[20] *Lubus v Wayland Group Corp*, 2022 ONSC 4999 at para 48.

[21] *D'Haene v BMW Canada Inc*, 2022 ONSC 5973 (*D'Haene*).
