Where are we with the Languishing Class Action Cases?

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Defendants embroiled in class proceedings are often times presented with the issue of properly managing cases that languish for years for want of prosecution. Yet, even when plaintiffs fail to properly prosecute such cases, whether due to their complexity, lack of merit, or other reasons, defendants are faced with the predicament of incurring costs, beyond just legal fees, to handle these languishing cases. This issue is propagated when these cases continue on for years raising issues, to name a few, of prejudice, evidence preservation, and ongoing disclosure in financial reports. In these circumstances, defendants often must decide between poking the bear or letting sleeping dogs lie, notwithstanding the costs associated with either approach.

Not surprisingly, a large number of interested parties who have provided submissions to the Law Commission of Ontario ("LCO"), as part of its comprehensive review of class actions in the province, have commented on this issue with many stakeholders advancing the view that automatic dismissal mechanisms ought to be introduced to the *Class Proceedings Act* to address these dormant cases. Some interested parties have suggested that either a two-year or a five-year automatic dismissal amendment be introduced in cases where no certification motion has been filed, parties have not agreed to a timetable, and where there is no court order permitting the case to continue.1

Notably, the LCO has not yet issued its report, but it would not be surprising, given the submissions received, if an automatic dismissal mechanism were not recommended to address languishing class actions. Without such a mechanism, parties will be left looking to procedures provided under the *Rules of Civil Procedure* as grounds for motions to dismiss class actions for delay2. In considering a motion to dismiss for delay in a class action where the representative plaintiff took 17 years to advance the action to certification, Justice Gordon of the Ontario Superior Court used the test for delay under Rule 24.01 (1) and highlighted that even in the class action context a direct correlation exists between the delay associated in moving the action forward and an inference being made that the plaintiff's intention to "hav[e] the matter determined on the merits is disingenuous"3. The longer the delay, the stronger the inference that would face plaintiffs that fail to prosecute such actions.

As demonstrated by that case, a successful dismissal for delay does not remove the possibility that the moving party may face a subsequent class proceeding by another

representative plaintiff, subject of course to the expiry of any applicable limitation periods, which will resume running once the previous action is dismissed for delay. To protect the rights of such representative plaintiffs, it has been raised by at least some stakeholders that automatic dismissal amendments could provide a requirement for class counsel to give notice of the administrative dismissal within a certain time period following the dismissal4. Certainly, Justice Gordon found it appropriate that putative class members known to class counsel be specifically advised of the dismissal of the action, the date of the dismissal, and the resumption of applicable limitation periods as of the date of the dismissal. It remains to be seen what LCO's suggested approach will be in this regard.

For the time being and absent the existence of an appropriate automatic dismissal mechanisms under the *Class Proceedings Act*, defendants electing to challenge the plaintiffs on a motion for delay should at least ensure that they are not a reason for the delay by their actions or inaction.

1 See submissions by Ontario Bar Association, Innovative Medicines Canada and MEDEC, Ad Hoc Defence Counsel Group, and the International Association of Defence Counsel: https://www.lco-cdo.org/en/our-current-projects/class-actions.

2 Although dismissal for delay is contemplated by section 29(4) of the *Class Proceedings Act*, the legislation does not set out a procedure dealing with dismissal for delay. However, the *Rules of Civil Procedure* are incorporated by reference pursuant to s.35 of the legislation.

3 *Smith v Armstrong et al*2018 ONSC 2435 at para 14.

4 Submission by Innovative Medicines Canada and MEDEC, see: https://innovativemedicines.ca/wp-content/uploads/2018/06/20180531_IMC_MEDEC_Submission_LCO_Class-Actions_Final.pdf.

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