First class action dismissed for delay under new Ontario Class Proceedings Act

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In *Bourque v. Insight Productions* ("*Bourque*"), the Ontario Superior Court dismissed a proposed class action for delay because the plaintiff had not scheduled the certification motion or delivered her certification materials within one year after Oct. 1, 2020. This is the first reported decision to consider the new mandatory dismissal for delay provision introduced as section 29.1 of the *Class Proceedings Act*, and suggests that the court will interpret this provision literally.

What you need to know

- On Oct. 5, 2021, the defendant brought a motion to dismiss the action for delay under the new section 29.1 of the Ontario *Class Proceedings Act*. The section came into force on Oct. 1, 2020, and sets a timeline for the plaintiff to schedule the certification motion, deliver certification materials, or take certain other prescribed steps. For actions commenced before Oc. 1, 2020, the plaintiff was required to complete at least one of these steps by no later than Oc. 1, 2021, and for actions commenced after Oct. 1, 2021, the plaintiff is required to take these steps within one year of commencing the action.
- In *Bourque*, commenced before Oct. 1, 2020, the plaintiff failed to complete any of the steps prior to Oct. 1, 2021, so the defendant moved to dismiss the action for delay on Oct. 5, 2021. The plaintiff delivered her certification materials the next day, on Oct. 6, 2021.
- In the first reported decision to interpret section 29.1, Justice Belobaba dismissed the action for delay, finding that the newly enacted section is mandatory and does not give the court any discretion not to dismiss an action for delay if the plaintiff has not completed any of the prescribed steps in time.
- In *obiter*, Justice Belobaba suggested that following dismissal, class counsel could simply re-file the “identical” proposed class action against the same defendants, but with a different representative plaintiff. It remains to be seen whether class counsel will do this. More significantly, it is questionable whether Justice Belobaba’s *obiter* comment, which would appear to be at odds with the legislature’s stated intent in enacting section 29.1, is consistent with a proper interpretation of section 29.1 when read in the context of the *Class Proceedings Act* as a whole.

Background

On Oct. 1, 2020, s. 29.1 of the *Class Proceedings Act* came into force. With a view to addressing the glacial pace at which class actions have generally progressed and the associated expense and reputational risk they pose for defendants, this new provision allows a defendant to move for mandatory dismissal for delay of an action commenced after Oct. 1, 2020 unless, by the first anniversary of the day on which the action was commenced,

a. the plaintiff has filed a motion record for certification;
b. the parties have agreed in writing to a timetable, and have filed the timetable with the court;
c. the court has established a timetable; or
d. any other steps prescribed in a regulation have taken place.

As no regulations have specified additional steps under 29.1(d), on a s. 29.1 motion, the defendant must demonstrate that none of the steps contemplated by s. 29.1(a), (b), or (c) have occurred.

For actions commenced prior to Oct. 1, 2020, the plaintiff was required to take any of these steps prior to Oct. 1, 2021.

The motion to dismiss in *Bourque*

The plaintiff commenced the action in *Bourque* on February 5, 2020. The action alleges that television production companies misclassified employees for pay and benefits purposes.

The plaintiff did not take any of the actions provided in s. 29.1 (a), (b), or (c) before Oct. 1, 2021. On Oct. 5, 2021, the defendants moved under s. 29.1 for mandatory dismissal for delay. On Oct. 6, 2021, the plaintiff delivered her certification materials.

In response to the motion, the plaintiff argued that a timetable had been established at a case conference in May 2020. Justice Belobaba rejected this argument, finding that the court at the case conference had not set a specific time for service of the motion record. Instead, the court had decided to await service of the certification motion record before establishing a timetable. He held that allowing a plaintiff to serve its motion record at its leisure is the antithesis of a timetable and would undermine s. 29.1's statutory objective of advancing the proposed class proceeding towards certification with dispatch.

Importantly, Justice Belobaba found that s. 29.1 does not include any language granting the court discretion in respect of a dismissal for delay, such as "unless the court orders or directs otherwise" or "unless there is a good reason not to dismiss for delay." He therefore held that the legislature did not intend to give the court any discretion in applying s. 29.1.

Although Justice Belobaba agreed with the plaintiff's assertion that the *Class Proceedings Act* is to be given a generous, broad, liberal, and purposive interpretation, he held that the purpose of s. 29.1 was explicit, and that interpreting the provision as demanding mandatory dismissal is purposive, in that it aligns with the goal of timely

advancement of class action litigation. He held that the clear language of s. 29.1 trumped the court's broad case management powers conferred by s. 12 of the *Class Proceedings Act*.

The court's interpretation of s. 29.1 in *Bourque* is that mandatory dismissal benefits not only the defendant(s), but also the putative class. In Justice Belobaba's view, s. 29.1 both protects defendants to proposed class actions from unnecessarily lengthy proceedings and aids members of the putative class by eschewing representative plaintiffs who are not advancing the action. Justice Belobaba speculated that, after dismissal, it would be open to class counsel to re-file this same action against the same defendants with a different representative plaintiff. However, this comment was not necessary to the decision, and allowing the same class action to simply be re-filed appears inconsistent with shortening defendants' exposure to a class proceeding, since a newly re-filed "identical" class action only prolongs the class action process. It remains to be seen how defendants and the court would react to such a tactic, and there do not appear to be any reported decisions in which an Ontario court has analyzed the propriety of a newly re-filed class action following its mandatory dismissal for delay under s. 29.1.

If you have any questions regarding this decision or how the new provision of the *Class Proceedings Act* may impact your business, contact your BLG lawyer or any of the key contacts listed below.

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