Mandatory dismissal provision in Ontario's Class Proceedings Act gets new judicial gloss

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On April 26, 2022, two decisions interpreting the new mandatory dismissal for delay provision in section 29.1 of Ontario's *Class Proceedings Act, 1992* were released. These are the second and third reported decisions on this recently-introduced provision, the first being the January 14, 2022 decision of Justice Belobaba in *Bourque v. Insight Productions*, 2022 ONSC 174.

Section 29.1 requires mandatory dismissal of a proposed class action if, by the one-year anniversary of the commencement of the action (or, for actions that had already been commenced by October 1, 2020, by no later than October 1, 2021):

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.

The two new decisions—*Lamarche v. Pacific Telescope Corp.*, 2022 ONSC 2553 and *St. Louis v. Canadian National Railway Company*, 2022 ONSC 2556—provide additional insight into how courts are interpreting section 29.1. In *Lamarche*, the plaintiff unsuccessfully attempted to avoid dismissal of his proposed class action by asserting, among other things, that the parties had agreed to a written timetable (section 29.1(1)(b)). In *St. Louis*, however, the plaintiffs avoided dismissal on the basis of the court having established a timetable for completion of "one or more steps required to advance the proceeding" (section 29.1(1)(c)). Both decisions cite *Bourque*.

In *Bourque*, Justice Belobaba interpreted section 29.1 of the Ontario *Class Proceedings Act* narrowly, writing that the section "means what it says"; namely, that "if none of the requirements set out in s. 29.1 are satisfied by the one-year anniversary date, the

proposed class action "shall" be dismissed for delay." In *Lamarche*, Justice Sally Gomery agreed, writing that "class counsel must live with the section as enacted [and t]his may involve modifying past practices." In *St. Louis*, Justice Robbie Gordon remarked that if none of the section 29.1 criteria were satisfied, "the court retains no residual discretion to order anything but dismissal."

Despite Justices Gomery and Gordon agreeing with Justice Belobaba that section 29.1 should be interpreted and applied as written, the *Lamarche* action was dismissed for delay but the *St. Louis* action was not. The factual circumstances of these two cases explain the divergent results.

The *Lamarche* decision

In *Lamarche*, no case management judge had been appointed and the plaintiff still had not effected service of the claim on all defendants by the time of the one-year anniversary date. Months before the one-year anniversary, counsel for certain defendants wrote to class counsel and indicated that once all defendants had been served, "we presume you will be in touch with us further about jointly writing to the court requesting appointment of a case management judge." Defence counsel added that it "will be most efficient to wait until all parties have been served and are represented before seeking an initial case conference." Class counsel did not directly respond to this email or agree to this course of action. However, after the dismissal motion was brought months later, the plaintiff contended that this email met the requirements of section 29.1(1)(b) as it constituted an agreement "in writing to a timetable … for completion of one or more other steps required to advance the proceeding."

Justice Gomery rejected the contention that the parties had complied with section 29.1(1)(b) of the *Class Proceedings Act* and that the plaintiff could avoid dismissal of his action on this basis. Her Honour observed that section 29.1(1)(b) required any agreed timetable to be filed with the court, which had not occurred. In any event, Justice Gomery also found as a fact that the email exchange was not a "timetable," which she explained "requires an undertaking to do something within a specified deadline."

The *St. Louis* decision

In *St. Louis*, by contrast, a case management judge had been appointed and the parties had attended three case management conferences in 2017 and 2018, with a fourth to be scheduled in 2019 (the scheduling of which appeared to have slipped through the cracks). However, the defendant had heard nothing from the plaintiffs in the 30 months preceding October 1, 2021 and then brought its section 29.1 motion. The proposed class action concerned a train derailment and possible environmental contamination. The plaintiffs had advised the defendant and the court that they would undertake early-stage environmental testing to ascertain whether remediation had been successful—something that would influence whether they would prosecute the action. At the case conferences, adjournments were granted to allow for this testing to occur, which included specific deadlines for returning to court for successive conferences.

The *St. Louis* court observed that its first case conference endorsement of October 17, 2017 "called for another case management conference by June 30, 2018, by which time the plaintiffs were to report on the status of their environmental assessment." Justice

Gordon held that this satisfied the requirements of section 29.1(1)(c), since this endorsement met the definition of a court-established timetable "for completion of one or more other steps required to advance the proceeding." Justice Gordon added that section 29.1(1)(c) "does not require the actual advancement of the action or that the parties proceed with scheduled steps [but] only requires the court to have established a timetable for a single step required to advance the proceeding."

St. Louis signals a very generous approach to what constitutes a court-established timetable "for completion of one or more other steps required to advance the proceeding." If Justice Gordon's interpretation is sustained, it suggests that all a plaintiff must do to avoid mandatory dismissal is to have a court establish a timeline for something as innocuous as the next case management conference. Here, a 2017 endorsement requiring the parties to book the next case conference "by June 30, 2018" was sufficient to avoid dismissal notwithstanding that the defendant did not hear from the plaintiffs in the 30 months before the dismissal motion. This kind of delay seems to be incongruent with the legislature's intent in enacting section 29.1 in order to speed up the glacial pace of some class actions in reaching the certification stage. It will be interesting to see whether the defendant seeks to appeal the result in *St. Louis*.

Other takeaways

The *Lamarche* decision also comments on two other topics that will be of interest to parties faced with or considering a section 29.1 motion.

First, in response to class counsel's assertion that the plaintiff's underlying claim was meritorious, Justice Gomery explicitly held that "[t]he merits of the case are irrelevant on a s. 29.1 motion."

Second, class counsel suggested that dismissal of the *Lamarche* action would be a "pointless" exercise because if the case were dismissed, he would "simply find another class representative and start another class action against the same defendants." Class counsel pointed to *Bourque*, in which Justice Belobaba observed that, "in the vast majority of cases, the dismissed proceeding can be refiled against the same defendants with just a change in the proposed representative plaintiff." However, Justice Gomery agreed with the defendants that Justice Belobaba's comment on this issue was *obiter* – meaning that it was not necessary to the result in *Bourque*.

None of the section 29.1 dismissal cases decided to date have resulted in class counsel reconstituting or re-filing the dismissed action as a new proposed class proceeding. It is an unsettled legal question whether the effect of mandatory dismissal of a proposed class action for delay can be mitigated by re-filing the same proposed class action (including with a new representative plaintiff). Notwithstanding Justice Belobaba's *obiter* comment in *Lamarche*, formal resolution of this issue on a proper record will be important for class action plaintiffs and defendants alike, as it will shape whether a section 29.1 dismissal can be easily circumvented, or whether a section 29.1 dismissal has real teeth and precludes further recourse to the class action mechanism in Ontario. *Bourque* or *Lamarche* may subsequently present the court with the opportunity to answer this question, depending on what steps class counsel decide to take following the section 29.1 dismissal of those cases.

By

Ian C. Matthews

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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