Tick tock: Ontario Court of Appeal provides guidance on dismissal for delay under the Class Proceedings Act

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In *Tataryn v. Diamond & Diamond Lawyers LLP*, 2025 ONCA 5 (*Tataryn*), the Ontario Court of Appeal provided the first appellate guidance regarding the 'dismissal for delay' regime established by section 29.1 of Ontario's *Class Proceedings Act, 1992* (CPA).

The Court of Appeal's decision confirms the mandatory nature of dismissal orders under section 29.1. At the same time, *Tataryn* also endorses a "contextual approach" that gives class action judges significant latitude when determining whether certain steps identified in section 29.1 have been satisfied.

Background

As we have previously discussed, section 29.1 of the CPA provides for the dismissal of a proposed class proceeding on a motion brought by the defendant if none of a set of enumerated steps occur within a year of the proceeding's commencement. These steps include the plaintiff filing a "final and complete" certification motion record or the establishment of a timetable "for completion of one or more other steps required to advance the proceeding".

Since its enactment in late 2020, section 29.1 of the CPA has been interpreted in several Superior Court decisions.[1] However, the Superior Court decisions to date have taken divergent approaches towards section 29.1, especially as to what constitutes a "step required to advance the proceeding" and whether judges can effectively avoid making mandatory dismissal orders. For instance, in D'Haene v. BMW Canada Inc., 2022 ONSC 5973, Justice Perell granted what he termed a "Phoenix order" under which the dismissal for delay order would be set aside if the Plaintiffs promptly took steps to advance the action.

At first instance in *Tataryn*, Justice Morgan concluded that a series of steps that were part of a prolonged process of addressing pleadings deficiencies and motions to strike were not steps "required to advance the proceeding". In Justice Morgan's words: "Responding to the Defendant's challenges to their faulty pleading, or timetabling those pleadings motions in the lead-up to the hearings, were not the kind of steps referred to

in section 29.1". Accordingly, he granted the motion and dismissed the action (2023 ONSC 6165).

The Court of Appeal 's decision

In a unanimous decision, the Court of Appeal upheld Justice Morgan's dismissal of the action, finding no reason to disturb his conclusion that the steps relating the pleadings matters and motions to strike the (deficient) claim were not "steps required to advance the proceeding".

In doing so, the Court of Appeal confirmed the mandatory nature of section 29.1 of the CPA. The Court of Appeal held that "there is no judicial discretion engaged in the one-year time parameter", and that where section 29.1 is not complied with, a dismissal motion must be granted. The Court of Appeal also held that "Phoenix orders" are impermissible, as they are contrary to the policy goal underlying section 29.1: avoiding delay in the pursuit of class actions.

At the same time, the Court of Appeal's decision in *Tataryn* makes it clear that a dismissal for delay motion "is not simply a mechanical exercise". Rather, class action judges must apply a "contextual approach" when hearing motions to dismiss a class proceeding for delay. In determining whether a step was one "required to advance the proceeding", a class action judge must have regard to the "totality of the proceeding". In conducting this analysis, class action judges must not accept "inconsequential" steps as being sufficient and they are entitled to consider whether a defendant has engaged in "conduct designed to delay so as to gain the benefit" of section 29.1.

Key takeaways

The Court of Appeal's decision confirms that class action judges have a degree of flexibility in determining whether certain criteria in section 29.1 are satisfied in a given case, and that such decisions will be given substantial deference on appeal.

The Court of Appeal's decision leaves several open questions. Notably the Court of Appeal declined to address whether the right conferred by section 29.1 can be waived by a defendant's conduct. *Tataryn* also does not resolve how class action judges should address circumstances where a claim is dismissed under section 29.1, only for a different representative plaintiff to immediately commence an identical proposed class action. Although the Court of Appeal expressed dissatisfaction with this "hypothetical" from a policy perspective and noted that such a reconstitution of a dismissed class action "arguably circumvents the spirit" of section 29.1, the issue remains to be squarely addressed in a future case.

Footnote

[1] See *e.g. Bourque v. Insight Productions*, 2022 ONSC 174; *St. Louis v. Canadian National Railway Company*, 2022 ONSC 2556; *Lamarche v. Pacific Telescope Corp.*, 2022 ONSC 2553; *LeBlanc et al. v. The Attorney General of Canada et al.*, 2022 ONSC

3257; *Lubus v. Wayland Group Corp.*, 2022 ONSC 4999; D'Haene v. BMW Canada Inc., 2022 ONSC 5973; *McRae-Yu v. Profitly Incorporated et. al.*, 2024 ONSC 5615.

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