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The Act (Mostly) Means What it Says: The First Judicial Insights into Dismissal for Delay under the Class Proceedings Act

On October 1, 2020, section 29.1 of the *Class Proceedings Act* ("CPA") took effect. This provision, designed to address the phenomenon of class actions being started and then languishing in the system without advancement, provides for a mandatory dismissal of an action where, by the one year anniversary of the claim, the plaintiffs certification record has not been filed or there is no established timetable (by consent or Court order). This was a significant improvement to a class actions system that previously had no real tool for dealing with class actions that were languishing.

On January 14, 2022, Justice Belobaba issued the first reported decision interpreting section 29.1 in *Bourque v Insight Productions*. In his decision, Justice Belobaba offers a clear reminder that, sometimes, legislative provisions simply mean what they say. Despite that direction, the Court's decision is also a good reminder that sometimes in litigation when the Court closes a door, it also opens a window.

The proposed class action in this case was commenced on February 21, 2020. The plaintiff sought to certify a class action against a defendant group of television production companies, alleging that employees were systematically misclassified as independent contractors. Section 29.1 of the *CPA* took effect in October 2020 and, as part of the transition provisions, deemed all class actions commenced before that date to have commenced on October 1, 2020.

This meant that the proposed representative plaintiff, Anna Bourque, had until October 1, 2021 to comply with section 29.1.

October 1, 2021 came and went without a timetable or a certification record. The defendants then moved to dismiss the action for delay. On October 6, 2021, six days after the one-year deadline and one day after the defendants brought a motion to dismiss the case for delay, the plaintiff served her certification record.

On the motion, the plaintiff argued that, while no formal timetable was made, there was a discussion during a case

management conference that the plaintiff would serve her certification record “when she can”. The plaintiff argued that this agreement should suffice to meet the timetable requirement in section 29.1. The Court disagreed, finding that a vague agreement without any actual timetable did not cut the mustard and would lead to an interpretation of section 29.1 that rendered it useless.

The plaintiff also advanced an argument that the *CPA* must be given a broad and liberal interpretation and the remedial provisions giving the Court broad case management powers should be interpreted to give the plaintiff some latitude in the interpretation of section 29.1. Justice Belobaba forcefully disagreed, holding that section 29.1 was a mandatory provision that required that the action be dismissed if the strict requirements of the section were not met. The Court directly found that the provision meant exactly what it said.

Justice Belobaba ultimately applied section 29.1 strictly and dismissed the plaintiff’s claim for delay, specifically noting that the provision was intended to force class actions to be advanced rather than moving at a glacial speed. Without being applied strictly, the provision could not have its intended effect.

However, despite this exacting application of the provision, the Court did not leave the members of the proposed class without any available recourse. Justice Belobaba held that the same action could be filed with a different proposed representative plaintiff. Likewise, in considering costs to be awarded on the dismissal motion, Justice Belobaba noted that the parties should consider the likelihood that the dismissed action would be immediately reincarnated with a new representative plaintiff when requesting costs.

The suspension of the limitations period under the *CPA* after an action is filed is relevant to Justice Belobaba’s comments on the impact of a dismissal for delay. While the limitations period has restarted with the dismissal decision, assuming there was some limitations runway at the time of filing, a new representative plaintiff could certainly commence a fresh claim.

However, the difficulty with this interpretation of section 29.1 is that it seems contrary to the policy goals of forcing plaintiffs to move cases forward. If a new, identical action can be filed after a dismissal (restarting the one-year clock) and the plaintiff will face limited costs consequences for failing to advance the original action, the goal of moving cases forward may not be achieved.

Section 29.1 was intended to deal, at least in part, with orphaned class actions which sit on the Court’s docket without

ever moving forward. It is a more complicated strategic question for defendants where a class action has not moved expeditiously enough but it seems likely that the identical case will simply be refiled if the defendants move to dismiss for delay.

It is not clear at this juncture whether the proposed class in this case will in fact take Justice Belobaba's invitation to refile the action. But the case serves as a reminder to defence counsel that, while the statute might mean what it says, that does not mean that a dismissed case is, in fact, a finished case. It is also, as Justice Belobaba notes, a good reminder for plaintiff's counsel to fire up their tickler systems to either move their cases forward before the one-year mark or to start looking for new representative plaintiffs.