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Dismissal for Delay in Class Actions: How Low is the Bar for Avoiding Dismissal?

It has been just under a year since the new dismissal for delay provision in s. 29.1 of the *Class Proceedings Act* started resulting in dismissals for delay. In essentially all of the decisions rendered to date, judges have strictly construed those provisions to require the dismissal of matters where the statutory criteria for avoiding a dismissal are not present. The recent decision of the Ontario Superior Court in *Lubus v Wayland Group Corp* is now an outlier that takes a different approach.

By way of background, *Lubus* is a proposed securities class action against Wayland as well as various underwriters. Wayland was in CCAA protection and so the claim against it was stayed. However, the claim against the underwriters was permitted to proceed.

In the case at bar, the claim was issued on September 3, 2019. By October 1, 2021, the certification material had still not been delivered, and there had been no timetable agreed on by the parties. Consequently, the defendants brought a motion to dismiss the action for delay.

Section 29.1 of the *Class Proceedings Act* requires an action to be dismissed for delay on the first anniversary of the filing of the claim, unless one of four conditions is met:

> (a) the representative plaintiff has filed a final and complete motion record in the motion for certification;
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> (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;
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> (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.

In this case, there was no real basis to say that any of conditions (a), (b), or (d) were met. Rather, the real crux of the decision was on whether the Court had established a timetable "for completion of one or more other steps required to advance the proceeding".

Justice Morgan noted that while there had been no timetable set for delivery of a certification motion, there had been a case conference in July 2021 where he had asked the parties to deal with various issues regarding the form of the claim as well as the various service issues. Justice Morgan held that direction at the case conference constituted a timetable within the meaning of s. 29.1(c), even though the Court's direction did not contain a particular deadline for steps to be taken. Consequently, the Court dismissed the defendant underwriters' motion for delay.

Justice Morgan's interpretation of that direction as meeting the requirements of s. 29.1 represents a liberal and flexible interpretation of that provision. While Justice Morgan recognized the trend in the caselaw towards dismissing for delay when the criteria were not strictly met, he expressly noted that he was prepared to be an outlier that took a more liberal approach that would not automatically see cases dismissed for delay:

> [39] I agree with my colleagues that the purpose of section 29.1 is to put an end to what seems to be chronic stagnation and to ensure that class actions keep moving along. I also agree with them that the wording of the section is strict and applied with that in mind; moreover, I am cognizant of the need for consistency in the way that the section is approached and the operation of what is called "horizontal *stare decisis*": *R. v. Sullivan*, 2022 SCC 19, at para 6.
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> [40] All of that being the case, I am prepared to be the fifth dentist on sugarless gum. I disagree with the previous judgments insofar as they can be seen to pronounce blanket statements covering all circumstances. My colleagues may have been entirely correct in resolving the cases before them; but in implementing any statutory provision, including section 29.1 of the *CPA*, context counts.
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> [41] Plaintiffs' counsel pointed out in argument that a motion under section 29.1 is not brought before the court registrar to be applied mechanically as an administrative

> matter. Rather, the motion for dismissal is brought before a judge – in most cases, the case management judge – because it requires adjudication.
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> [42] The aim of the exercise in a section 29.1 motion is not to implement the section literally no matter what the context or to apply a form of ‘zero tolerance’ regime to the delay question. Like any adjudicative question, it is the court’s role to interpret the statute as befitting the specific context and to apply to the circumstances the purpose that the statute seeks to address: *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para. 27. Adjudication of a delay question necessarily requires a careful consideration of the factual/procedural distinctiveness of the case at bar.

Justice Morgan’s decision is very much an outlier among cases decided under s. 29.1. Thus far, the approach taken by the courts under s. 29.1 has been to combine a) a strictly construed dismissal for delay provision with b) the possibility, as noted in *Bourque v Insight Productions*, that such a dismissal would not preclude a new action being brought in relation to the same subject matter by a different representative plaintiff. That construction of s. 29.1 ensures that any particular action must be moved forward by class counsel in an efficient manner, while not prejudicing the class by barring them from the courtroom entirely if one particular case happens to be thrown out. Justice Morgan’s decision, by contrast, suggests a more permissive approach for dismissal for delay that would broadly construe the term “timetable” in s 29.1(c) such that the action will not be dismissed for delay as long as there is some court approved movement in the case, even in the absence of a formal timetable to move the action forward.

While the impetus behind Justice Morgan's decision in any individual case is understandable, there is significant merit in a more strict application of s. 29.1. There is a long history of a subset of class proceedings lingering for years without being advanced. Section 29.1 was introduced in order to provide clear direction to plaintiffs' counsel as to what they need to do to advance those actions. Indeed, it is not particularly onerous to comply with the strict language of s. 29.1: either deliver certification materials or have a clear and specific timetable for steps to advance the action in place as of the date on which the case would otherwise be dismissed. By stretching the language of the term "timetable", the Court's decision risks undermining the salutary effects of s. 29.1 in keeping actions moving forward. Whether the decision in this case will be followed remains to be seen.