

DUE MEANS DUE: ONTARIO COURT CONSIDERS EFFECT OF PANDEMIC MEASURES ON NEW CLASS ACTION MANDATORY DISMISSAL DEADLINE

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Recently, an Ontario court in [Bourque v. Insight Productions](#)^[1] dismissed a proposed class action for delay, finding that a new provision's deadline in the *Class Proceeding Act*, 1992^[2] ("CPA") was enforceable despite temporary court closures and suspension of limitations periods brought on by the pandemic.

The Decision

The defendants in a proposed employment class action bought a motion for dismissal for delay under section 29.1 of the CPA because the representative plaintiff filed her motion record six days after the new statutory deadline. Coming into force on October 1, 2020, section 29.1 requires courts to dismiss a proposed class action a year after the claim's commencement. This section is available where the representative plaintiff has not yet filed its motion record or no timetable has been agreed upon or ordered.

A party to the action must move for the relief, but section 29.1 confers a mandatory dismissal upon such a motion. The court has no discretion in the matter. As Justice Belobaba remarked in *Bourque*, this is to counter the tendency that "[c]lass actions typically move at a glacial speed".^[3]

The Court granted the defendants' motion for dismissal. In so doing, it rejected a number of the plaintiff's arguments. First, the Court found that a "liberal and purposive" reading of section 29.1 was to promote a timely litigation process, encouraging a strict reading of the deadline. Second, the Court found that brief period of suspended court services during the pandemic did not affect the statutory deadlines, as there was ample opportunity for the plaintiff to file its motion materials after reopening. The Court further found that the temporary suspension of limitations periods was irrelevant, given that section 29.1 came into force after the resumption of limitations periods on September 14, 2020. Finally, the Court rejected arguments by the plaintiffs that the delay was occasioned by business or litigation strategy purposes to "go slow" with the proceeding. In particular, the plaintiff had launched a similar action against another group of defendants. Counsels' decision to prioritize one action over the other for "business reasons" did not justify non-compliance with section 29.1. In fact, the Ontario Legislature designed section 29.1 to counter such an approach.

Notably, the Court remarked in *obiter dicta* that it was open to plaintiff's counsel to refile an identical class proceeding with a different representative plaintiff. Such an approach raises questions for future cases regarding the ultimate efficacy of section 29.1 as it is arguably an abuse of process to re-litigate actions that are dismissed for delay.

Takeaways

The Court promoted a strict adherence to the new section of the CPA:

- The Court noted that the brief suspension of court services and limitations periods during the pandemic had no bearing on this statutory deadline.
- The Court remarked that “the fact that the provincial government lifted the suspension on September 14, 2020 suggests that after that date, the pandemic was no longer regarded as a legitimate justification for failing to meet legislatively imposed deadlines”.^[4]

The Court also noted a proposed solution to the dismissal, suggesting that class counsel could refile an identical action against the defendants with a different proposed class representative.^[5] Such an approach appears to obfuscate section 29.1's purpose and further waste judicial resources.

[1] 2022 ONSC 174 (“**Bourque**”).

[2] S.O. 1992, c. 6.

[3] *Bourque*, at para 4.

[4] *Bourque*, at para 18.

[5] *Bourque*, at para 3.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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