

**CITATION:** McRae-Yu v. Profitly Incorporated et. al., 2024 ONSC 5615  
**COURT FILE NO.:** CV-23-92340-CP  
**DATE:** 2024 10 09

**SUPERIOR COURT OF JUSTICE – ONTARIO**  
**Proceeding under the *Class Proceedings Act*, 1992**

**RE:** TAYLAN MCCRAE-YU, Plaintiff

**AND:**

PROFITLY INCORPORATED, DMCB HOLDINGS INC., IVAN  
AVRAMENKO, ALEXANDRA STINSON, and JOHN DOE, Defendants

**BEFORE:** Mr. Justice Calum MacLeod

**COUNSEL:** Sohaib Mohammad Habib, for the Plaintiff (Responding Party)

N. Joan Kasozi, Chris Macleod & Nicholas Patterson, for the Defendants  
(Moving Parties)

**HEARD:** October 7, 2024

**DECISION AND REASONS**

[1] This is a Motion to Dismiss this proposed class proceeding for delay pursuant to section 29.1 of the *Class Proceedings Act*.<sup>1</sup> Section 29.1 provides for mandatory dismissal of a proceeding on motion if certain listed steps have not occurred “prior to the first anniversary of the day on which the proceeding was commenced”. There is no doubt that the Motion Record for the Certification Motion was not served by the Plaintiff prior to that date. This is at least in part because the parties spent much of the past year focused on interlocutory injunctive relief.

[2] The critical question is whether the scheduling of those Motions and the timetables established by the Court for that purpose can be categorized as a “timetable for completion of one or more steps required to advance the proceeding”. If so, dismissal is not mandated. If not, it is.

---

<sup>1</sup> *Class Proceedings Act*, 1992, S.O. 1992, c. 6 as amended

[3] The Defendants argue for a literal interpretation of the legislation and ask the Court to find that an injunction is not a step “required” to advance a class proceeding. The Plaintiff argues for a more functional interpretation. This is not a dormant action. The steps taken in supporting or opposing the injunction have resulted in disclosure and narrowing of issues. In the Plaintiff’s submission, they are steps that have advanced the proceeding even if the Certification Motion has not yet been scheduled.

## THE LAW

[4] Section 29.1 was added to the *Act* in 2021. As referenced in the Defendants’ Factum, the section was added to the *Act* to weed out dormant class proceedings and to dismiss such proceedings if no meaningful steps are taken to advance them. The section reads as follows:

**29.1** (1) The court shall, on motion, dismiss for delay a proceeding commenced under section 2 unless, by the first anniversary of the day on which the proceeding was commenced,

(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. 2020, c. 11, Sched. 4, s. 26; 2021, c. 25, Sched.1, s. 1.

[5] The wording of the statute contains mandatory language and the weight of authority establishes that it means what it says. I agree with Morgan, J. in *Lubus v. Wayland Group Corp.*, that context matters and the section is not a “zero tolerance” regime designed to “catch plaintiffs out”.<sup>2</sup> In *Lubus*, however, there was a CCAA proceeding which stayed the class proceeding and when the plaintiff sought a timetable for various motions, the case management judge instead ordered a series of preliminary matters be dealt with first. Justice Morgan held that this direction from the class proceedings judge was sufficient to satisfy the statutory requirement for a timetable.

[6] It is also common practice for a class proceedings judge to defer setting a date for the certification motion until after the certification record has been served and simply to set a date for that first step at an initial case conference.<sup>3</sup> A timetable for steps that are necessary before preparing a certification record or a timetable setting a deadline for serving the certification record may plausibly meet the requirements of a timetable for “completion of one or more steps required to advance the proceeding”.<sup>4</sup>

[7] Both of these examples assume that the plaintiff has promptly sought the appointment of a case management judge and where agreement on a timetable to advance the proceeding has not been possible, has sought judicial direction at a case conference or motion.<sup>5</sup> If the Court has directed, or the parties have agreed, that certain steps take place before certification then those steps may be construed to be steps “required to advance the proceeding”.

[8] Motions by the plaintiff to amend a defective pleading, a direction to file the certification record without a deadline for doing so, ongoing settlement discussions or even an agreed upon timetable that has not been filed with the Court have been held insufficient to comply with the section.<sup>6</sup> Ongoing difficulties in effecting service and draft timetables which have not been filed or approved by a Court will be insufficient.<sup>7</sup>

---

<sup>2</sup> 2022 ONSC 4999 @ paras. 42 and 44

<sup>3</sup> See *Bourque v. Insight Productions Ltd.*, 2022 ONSC 174 @ para. 10.

<sup>4</sup> In addition to the paragraphs cited from *Lubus* and *Bourque*, supra, see *St. Louis v. Canadian National Railway Company*, 2022 ONSC 2556 @ paras 19 – 24

<sup>5</sup> Part III, *Consolidated Civil Provincial Practice Direction* and the guidelines and protocols incorporated therein

<sup>6</sup> See *A.B. v. University of Ottawa*, 2023 ONSC 3104 and see *Bourque* and *Lubus*, supra.

<sup>7</sup> *Lamarche v. Pacific Telescope Corp.*, 2022 ONSC 2553

[9] Section 29.1 does not apply automatically and does not result in administrative dismissal. It is a remedy available on motion. As such, it is possible that a defendant may agree not to rely upon the section or because of its actions may be estopped from relying upon it or from bringing the motion.<sup>8</sup>

[10] The Plaintiff also refers this Court to jurisprudence from the Alberta Court of Appeal in relation to *Rule 4.33* of the *Alberta Rules of Court*.<sup>9</sup> That *Rule* applies to all civil proceedings and requires dismissal of an action if “3 or more years have passed without a significant advance in an action” unless, *inter alia*, “the delay is provided for in a litigation plan”. Jurisprudence under that *Rule* is well established and includes at least the following principles<sup>10</sup>:

- a. A functional as opposed to a formulistic approach is required in assessing whether a step constitutes a significant advance.
- b. The *Rule* is context dependent and is not designed to encourage an ambush by one side after the parties had agreed to take a particular step.
- c. The purpose of the *Rule* is not to regulate the efficient prosecution of actions but to prune out actions that have truly died.
- d. Defendants may not obstruct, stall or delay the action in order to get the benefit of the *Rule*.

[11] Arguably the Alberta *Rule* is a more stringent *Rule* than s. 29.1 because it requires there have been a “significant advance” rather than just a timetable for completion of one or more steps. Still, the Alberta *Rule* is neither identical to the Ontario provision in question nor is it specifically aimed at class proceedings.

[12] I think the learning to be drawn from the Alberta Court of Appeal is helpful but not determinative. The four principles mentioned above are not inconsistent with the jurisprudence

---

<sup>8</sup> *A.B.*, *supra* @ para 16 – 17, *Lamarche*, *supra*, para. 21

<sup>9</sup> Alberta Regulation 124/2010

<sup>10</sup> See *Rahmani v 959630 Alberta Ltd.*, 2021 ABCA 110 @ para. 14

developed under s. 29.1. There will undoubtedly be some instances in which it would be unfair to permit a defendant to rely on the section. There will be other instances in which the steps authorized by the Court or filed with the Court, however minimal, will constitute a timetable. Ultimately, however, the section is not worded to provide significant judicial discretion. It does not contain the usual wording importing discretion, “unless otherwise ordered”.<sup>11</sup>

[13] To summarize, s. 29.1 provides that within 12 months of commencing a proposed class proceeding, a plaintiff must either file a complete certification record or have in place a timetable (established by agreement and filing or by order). Unless the defendant has agreed not to bring the necessary motion, has waived the right to do so or is estopped from doing so for some other reason, a plaintiff that has not complied with this deadline is subject to having the action dismissed.

[14] The section is mandatory and leaves little room for judicial discretion. It should be noted that this statutory provision applies only to proposed class proceedings and is in addition to the provisions of the *Rules* which provide that any civil action (including class proceedings) may be dismissed for delay.<sup>12</sup>

## FACTS & ANALYSIS

[15] In this case, the Statement of Claim was issued on June 19, 2023 but it had been preceded by a successful Motion for Injunctive Relief on June 15, 2023.<sup>13</sup> On June 23, 2023 a Motion was scheduled to set aside the Injunction. That Motion was ultimately heard on November 14, 2023 following a number of adjournments and timetable extensions. The Injunction Motion and the Motion to set aside the Injunction included exchange of significant affidavit material and cross-examinations on the affidavits.

[16] Hooper, J. released her decision on March 15, 2024. She declined to set aside the Injunction and she awarded costs against the Plaintiff in the amount of \$32,826.50.<sup>14</sup> The Defendants have a pending Motion for Leave to Appeal before the Divisional Court but they have

---

<sup>11</sup> *Bourque, supra* @ para. 15

<sup>12</sup> See *Barbiero v. Pollack*, 2024 ONSC 1548, a motion under Rule 24.01

<sup>13</sup> Exhibit A to the McCrae-Yu affidavit, reasons of Hooper J. granting *Mareva* injunction, June 15, 2023.

<sup>14</sup> 2024 ONSC 1593 (Exhibit N to the McCrae-Yu affidavit)

not at this point brought a motion to stay the injunction or the costs award pending that Motion. The evidence also suggests that the Defendants have failed to comply with the agreed upon timetable for the Motion for Leave.

[17] The Plaintiff contends that he has repeatedly sought case conference dates with the Class Proceedings Judge to set a timetable for the action and the Certification Motion but the Defendants have failed to cooperate. The Defendants advised they would be bringing this Motion to Dismiss for Delay in July of 2024. On July 22, 2024 in response to that advice, the Plaintiff served a completed Motion Record for Certification. The hearing of the Certification Motion has not yet been scheduled and no timetable is in place for that Motion.

[18] The defining question is whether the timetables that were in place leading up to the hearing of the Motion to set aside the *Mareva* injunction dealt with “steps required to advance the proceeding”.

[19] It is true, as the Defendants argue, that an injunction is not a necessary step in a class proceeding. Seeking interlocutory injunctive relief in any proceeding is not a mandatory step for the obvious reason that such injunctive relief is only available or appropriate in certain cases.

[20] For the *Mareva* injunction to be granted and continued in this case, Hooper, J. had to be persuaded that the Plaintiff had a “strong *prima facie* case”, there were assets within the jurisdiction, there was a serious risk of dissipation of assets if the order was not granted, that the Plaintiff would suffer irreparable harm and the balance of convenience favoured injunctive relief.<sup>15</sup>

[21] The Affidavit evidence before the Court and the extensive cross-examination therefore dealt with the merits of the underlying cause of action, the Defendants’ assets, actions of the Defendants to dispose of assets or move them out of the jurisdiction, harm to the Plaintiff and the balance of convenience. As the action is based on fraudulent misrepresentation in the marketing and sale of non fungible tokens (“NFTs”), these issues required a fairly deep dive into evidence that will play a major part in the action if the action is allowed to continue.

---

<sup>15</sup> *McRae-Yu v Profitly Inc., et al*, 2024 ONSC 1593 @ para. 30

[22] Arguing that an injunction is not a necessary step towards certification does not necessarily lead to the conclusion that setting a schedule for the Injunction Motions are not “steps required to advance the proceeding”. An interlocutory injunction is extraordinary relief but it is relief that a plaintiff is entitled to pursue and where it is obtained *ex parte* and followed by a motion to either continue the injunction or to set it aside, these are proceedings that will necessarily involve a considerable amount of the time of all parties. From the point of view of the Plaintiff, unless an injunction was granted to preserve the assets, it might be futile to pursue the action as either a class proceeding or an individual action.

[23] The definition of “timetable” under the *Rules of Civil Procedure* is “a schedule for the completion of one or more steps required to advance the proceeding (including delivery of affidavits of documents, examinations under oath, where available, or motions), established by order of the Court or by written agreement of the parties that is not contrary to an order”. While this is not identical to the wording of s. 29.1 of the *Act*, it may nevertheless inform my interpretation. The *Rules* apply to class proceedings unless they are contrary to the *Act*.

[24] It is not uncommon for the exchange of material in relation to injunctive relief to include some or all of the evidence and documents that will later be required for production and discovery. Frequently the exchange of affidavits and the cross-examination for such a motion can subsequently shorten the process of production and discovery. Where, as here, the Injunction is granted on the basis of significant evidence of potential fraud and misrepresentation, the steps taken towards obtaining and resisting the Injunction cannot be regarded as a mere side show. This preview of the evidence is likely to be central to the merits of the case but also to questions relating to certification.

[25] The merits of the case will not themselves be adjudicated at a certification motion. The plaintiff must only show that the pleadings disclose a cause of action. It is, however, a necessary component of certification to illustrate that there is some basis in fact for each of the components of the certification test and to show that a class proceeding is the appropriate structure to advance the claims of the proposed class.<sup>16</sup> The evidence used on the Injunction Motions will have some

---

<sup>16</sup> *Hollick v. Metropolitan Toronto*, 2001 SCC 68, [2001] 3 SCR 158, in particular para. 24 & 25

relevance to the Certification Motion and could potentially reduce the need for cross-examination on the Certification Motion.

[26] While not every preliminary motion can be regarded as a step necessary to advance the proceeding, I am satisfied on the evidence before me that the timetables established for the purpose of the Injunction Motions were steps that advanced the proceeding. Indeed, it is the evidence of the Plaintiff that based on information learned during that process, he has refined his proposed class definitions and the common issues he will attempt to certify.

[27] The action is certainly not dormant. The Plaintiff is actively pursuing it. There is at least one other class member who is prepared to step in if the named Plaintiff is not able to continue or is found for any reason to be an unsuitable class representative.

[28] In the circumstances, s. 29.1 is satisfied and the action will not be dismissed for delay.

### **CONCLUSION AND NEXT STEPS**

[29] For the reasons summarized above, the Motion to Dismiss the proposed class proceeding is itself dismissed. As the Plaintiff has now served the Record for the Certification Motion, the next step should be a case conference with the class proceedings judge to set a timetable for the Defendants to respond and for any other steps leading up to the hearing of the Motion.

[30] The parties have uploaded their costs outlines but I have not heard costs submissions and I am not aware of any offers to settle or other matters that should affect an award of costs. I invite counsel to agree on a costs disposition but if they wish to make submissions, they are to contact my office within the next 30 days. I will otherwise assume that the costs outlines are their written submissions and proceed to deal with the matter in accordance with *Rule 57.01 (7)*.

---

Justice C. MacLeod

**Date:** October 9, 2024