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• IMPLICATIONS OF THE *MAREVA* INJUNCTION OVER CRYPTOCURRENCIES IN THE FREEDOM CONVOY CLASS ACTION (*LI ET AL. V. BARBER ET. AL.*) •

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BACKGROUND

A series of protests and blockades in Canada against COVID-19 mandates and restrictions, called the "Freedom Convoy" by organizers, took place earlier this year. It occupied downtown Ottawa

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in January and February, capturing international attention. In response to the protests and blockades in Ottawa's downtown core, the Government of Canada invoked the *Emergencies Act* and declared a Public Order Emergency.[2] A number of executive orders were then passed pursuant to the legislation and the declaration, which not only prohibited certain public assembly and restricted the use of property to support the protests and blockades, but also made it illegal for any person to provide any property, including currency or digital currency, to or for the benefit of participants in the protests and blockades.[3] Meanwhile, a number of persons affected by the Convoy launched a putative class action against certain protest organizers, supporters, and participants on behalf of a proposed class of affected residents, businesses and employees, seeking $300 million in damages and other relief for alleged private and public nuisance.[4]

MAREVA INJUNCTIONS

In the context of that putative class action, the plaintiffs brought a motion on an *ex parte* basis before the Ontario Superior Court of Justice on February 17, 2022 seeking a *Mareva* injunction to restrain the defendants from dissipating their assets in a way that might deprive the plaintiffs of an effective remedy, leaving them with a potentially unenforceable civil judgment.

A *Mareva* injunction is an extraordinary remedy. The test for obtaining a *Mareva* injunction is stringent and well-established. A plaintiff must establish not only the typical factors required for injunctive relief,[5] but also that: (i) the plaintiff has a strong case against the defendant, (ii) the defendant has assets in the jurisdiction, and (iii) there is a serious risk the defendant will dissipate those assets or remove them from the jurisdiction if the order is not granted.[6]

THE INITIAL INTERIM ORDER

The Court granted the *Mareva* injunction on an interim basis (for a period not to exceed 10 days) and

released detailed reasons for its decision.[7] Notably, the order granted by the Court applied expressly to cryptocurrencies and included a schedule setting out a detailed list of specific crypto wallets to be frozen, comprising over 100 wallet addresses. The order restrained any person with notice of the order (including any crypto exchanges served with the order) from selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any of the assets subject to the order. Any person with knowledge of the order and who took steps which helped or permitted the defendants to breach the terms of the order was liable to be held in contempt of the order and could potentially be fined or imprisoned.[8]

In its reasons, the Court held that there was an apparently strong case for establishing tort liability.[9] The Court also found that the plaintiffs presented clear evidence (including in the form of a report from an expert investigator who had been monitoring activity in the relevant digital wallets) that the defendants were the owners of the digital wallets that had amassed bitcoin or other digital assets, and that these digital assets, hosted by digital institutions, were within the jurisdiction of the Ontario courts.[10] The Court was also satisfied that there was a risk of the defendants dissipating the assets as soon as possible. Given these findings and others, the Ontario Court granted the *Mareva* injunction freezing the defendants' crypto assets on an interim basis.[11]

The Court's decision appears to have been guided, in part, by its finding that the defendants moved to crypto-based funding specifically to: (i) avoid government seizure and (ii) shield the funds from platforms such as GoFundMe, which had recently frozen and returned to donors certain funds after it determined that the protest-related activities the fundraising campaign was supporting were in violation of its terms of service.[12] Here, the Court found that the funds were purposely placed outside of the control of any conventional fundraising platform such as GoFundMe and that the defendants were promoting the use of cryptocurrencies as an alternative measure under the mistaken belief that crypto is untraceable and could not be seized by legal authorities. The Court also found that there was considerable evidence, including communications made by the defendants through social media posts, about the plans to distribute the cryptocurrencies as soon as possible, in part to benefit the individual protestors but also to avoid any enforcement activity.[13]

THE EXTENSIONS, AND ULTIMATE DISSOLUTION, OF THE *MAREVA* INJUNCTION

After granting the initial *Mareva* order, the Court subsequently extended the injunction multiple times.[14] On February 28, 2022, the Court granted an order extending and varying the *Mareva* injunction to permit the transfer of certain frozen assets into escrow. On March 9, 2022, the Court granted a further order extending and varying the *Mareva* injunction and the escrow order.[15]

In the context of competing motions brought by the parties to the putative class proceeding (with the plaintiffs seeking to further extend the *Mareva* injunction and the defendants seeking to dissolve the injunction), the parties reached an agreement to resolve the motions, which was endorsed by the Court on May 2, 2022.[16] The Court's order, made at the return of the competing motions, provided that the *Mareva* injunction would be dissolved upon the transfer of certain remaining funds to the escrow agent, with all of the funds in escrow being held by the escrow agent pending the determination of the proceeding or further order of the Court.[17] The result is that the *Mareva* order has effectively been converted into a preservation order, without prejudice to the defendants' rights to move to vary or set aside the preservation order on 30 days' notice to the plaintiffs.

Due to the agreements reached between the parties, there was never a contested adjudication concerning whether or not the initial *Mareva* injunction was appropriate. However, the class action will continue, with the plaintiffs having been directed by the Court to schedule a case conference to set a date for the

certification motion and any other steps in the proceeding within 90 days of May 2, 2022.[18]

SIGNIFICANCE OF THE *MAREVA* INJUNCTION OVER CRYPTOCURRENCIES

The initial granting of the *Mareva* injunction in this case is significant for a number of reasons, including because it appears to be one of the first reported decisions (if not the first reported decision) in Canada of a *Mareva* injunction that explicitly freezes cryptocurrencies.[19] While a *Mareva* injunction is by no means a novel remedy in Canada, and *Mareva* orders will generally apply to all of a defendant's assets, which naturally would include a defendant's crypto assets, this appears to be one of the first times (if not the first time) that a Canadian reported decision in respect of a *Mareva* injunction has expressly dealt with the freezing of digital cryptocurrency wallets specifically. In its decision, the Court noted that digital funds are not immune from execution and seizure to satisfy a debt any more than funds in a bank account.[20] This is consistent with the practice currently taking shape in other jurisdictions, such as the U.K., where Courts have recently granted similar civil freeze orders over cryptocurrencies.[21]

Another noteworthy aspect of the Court's decision to grant the initial *Mareva* injunction is that the Court exercised its discretion to dispense with the need for the plaintiff to provide an undertaking as to damages, which is a typical condition for obtaining injunctive relief.[22] Under Rule 40.03 of the Ontario *Rules of Civil Procedure*, unless the Court orders otherwise, a party seeking an injunction is required to give an undertaking to pay damages to the defendant if the injunction is ultimately shown to be unjustified and proven to have caused the defendant to suffer harm.[23] It is rare for courts to dispense with this requirement, although courts may do so in certain limited circumstances if deemed appropriate, such as where the case has broad public interest significance, the case involves human rights, or the undertaking would be required from a representative plaintiff acting for the benefit of a class.[24] Here, the Court was satisfied that it was appropriate to dispense with the requirement for an undertaking as to damages given the nature of the action as a class action and the evidence presented to it on the initial *ex parte* motion.

As cryptocurrencies and other digital assets are stored on blockchain-based public ledgers that can be viewed by anyone, and the sophistication of litigants and the investigative and tracking techniques they can employ have improved, cryptocurrencies and other digital assets are no longer capable of being hidden to readily evade detection, and, indeed, are becoming increasingly subject not just to regulatory enforcement and seizure, but also civil enforcement and seizure by private litigants, including in the context of class proceedings.

Although relatively nascent, the cryptocurrency space has already provided fertile ground for civil and class action litigation, including litigation directly against crypto lending and exchange platforms and other operators in the crypto space for, among other things, breach of securities laws, breach of consumer protection legislation, civil fraud, breach of contract, misrepresentation and unjust enrichment.

While there was never a *contested* adjudication concerning the appropriateness of the *Mareva* injunction in this case, the initial granting of the *Mareva* injunction may represent a watershed moment as it reflects the beginning of an increasing trend in digital asset enforcement activity by private civil litigants and the courts. It is likely this will only become more prevalent as more mainstream acceptance and adoption of blockchain technology, cryptocurrencies and other digital assets takes hold.

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2 *Proclamation Declaring a Public Order Emergency*, SOR/2022-20.

3 *Emergency Measures Regulations*, SOR/2022-21; *Emergency Economic Measures Order*, SOR/2022-22.

4 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at para. 1 (Ont. S.C.J.).

5 There must be a genuine issue to be tried, the moving party must establish that they may suffer irreparable harm if the order is not granted, and the balance of convenience must favour the granting of the order.

6 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at para. 8 (Ont. S.C.J.).

7 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at para. 8 (Ont. S.C.J.).

8 *Li et al. v. Barber et. al.*, Mareva Injunction Order (February 17, 2022), Ontario, Court File Number: CV-22-00088514-00CP (Ont. S.C.J.).

9 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at para. 14 (Ont. S.C.J.).

10 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at para. 24 (Ont. S.C.J.).

11 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at para. 36 (Ont. S.C.J.).

12 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at para. 17 (Ont. S.C.J.).

13 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at para. 1 (Ont. S.C.J.).

14 See *Li et al. v. Barber et. al.,* [2022] O.J. No. 921, 2022 ONSC 1351 (Ont. S.C.J.)*,* Endorsement to extend the initial *Mareva* injunction granted on February 17, 2022 (February 28, 2022), Ontario, Court File Number: CV-22-88514-CP (Ont. S.C.J.) at para. 11; see also *Li et al. v. Barber et. al.,* [2022] O.J. NO. 1125, 2022 ONSC 1543 (Ont. S.C.J.)*,* Endorsement to extend the *Mareva* injunction extended on February 28, 2022 (March 10, 2022), Ontario, Court File Number: CV-22-88514-CP (Ont. S.C.J.) at para. 25; see also *Li et al. v. Barber et. al.*, Fourth Extension of *Mareva* Injunction Order (May 2, 2022), Ontario, Court File Number: CV-22-00088514-00CP (Ont. S.C.J.). Note that while dissolved in respect of all represented defendants, the *Mareva* order was extended indefinitely as against one of the defendants, Patrick King, who is currently in detention, has never appeared in the proceeding, is not represented by counsel, and is not part of the agreements that served as the basis for the dissolution for the *Mareva* injunction as against the other defendants.

15 *Li et al. v. Barber et. al.,* Fourth Extension of *Mareva* Injunction Order (May 2, 2022), Ontario, Court File Number: CV-22-00088514-00CP (Ont. S.C.J.).

16 *Li et al. v. Barber et. al*., 2022 ONSC 2662, Endorsement (May 2, 2022), Ontario, Court File Number: CV-22-88514-CP (Ont. S.C.J.)

17 *Li et al. v. Barber et. al*., 2022 ONSC 2662, Endorsement (May 2, 2022), Ontario, Court File Number: CV-22-88514-CP (Ont. S.C.J.)

18 *Li et al. v. Barber et. al*., 2022 ONSC 2662, Endorsement (May 2, 2022), Ontario, Court File Number: CV-22-88514-CP at para. 8 (Ont. S.C.J.)

19 Bennett Jones LLP has acted on at least one case where a preservation order over cryptocurrencies was obtained from the Ontario Superior Court of Justice, on consent, with no reported decision (*Hyatt v. Burns*, CV-18-00595740-00CL). Similar orders may have been granted by Canadian courts in other cases without reported decisions.

20 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at para. 23 (Ont. S.C.J.).

21 See for example, *Ion Science Ltd v. Persons Unknown* (unreported decision of the U.K. Commercial Court, 21 December 2020).

22 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at paras. 37 and 38 (Ont. S.C.J.).

23 O. Reg. 194/90.

24 *Li et al. v. Barber et. al.*, [2022] O.J. No. 815, 2022 ONSC 1176 at para. 38 (Ont. S.C.J.), citing *Cardinal v. Cleveland Indians Baseball Company Limited Partnership* (2016), 134 O.R. (3d) 340, 2016 ONSC

6929 (Ont. S.C.J.); *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.,* [2006] B.C.J. No. 1639, 2006 BCSC 1018 (B.C.S.C.); aff'd in part, [2007] B.C.J. No. 2182, 2007 BCCA 481 (B.C.C.A.).

• EVIDENTIARY REQUIREMENTS FOR DATA BREACH PRIVACY CLASS ACTIONS •

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Privacy and data breaches continue to be the basis for class actions representing hundreds, even thousands of individuals who have experienced a breach of privacy. On the one hand, given the modest damages awarded to date, a class action seems ideal for addressing the wrong suffered. However, two relatively recent decisions demonstrate the significant evidentiary hurdle that claimants must clear in order to have a chance at certification. In the cases discussed below, the courts have made clear that evidence of the breach alone is not sufficient. It must be shown that the proposed class members were actually affected by the breach and there must be some evidence of actual harm.

SETOGUCHI V. UBER

Last year, the Court of Queen's Bench of Alberta released its decision in *Setoguchi v. Uber B.V.*,[1] and it has proven to be an important one with respect to the development of privacy class actions in Canada. In it, the court held that the nature of the personal information that was the subject of a data breach was not sufficiently sensitive to give rise to a claim for damages. As a result, and in the absence of evidence showing harm to class members, evidence of the data breach alone did not form the basis for certification of the class action.

The claim in *Uber* proposed a national class on behalf of users of, or drivers for, Uber. The proposed class action followed the 2016 hacking, by third parties, of Uber's storage of the proposed class members' personal information.[2] The claim alleged that Uber failed in its contract, common law, and statutory obligations to protect the personal data, and to ensure it was not accessed by unauthorized parties. Both personal and punitive damages were sought.[3]

WAS THERE HARM?

In considering whether the proposed class action was appropriate for certification, the court was primarily concerned with whether there was some evidence or some basis in fact for any real harm resulting in common loss or damage.[4]

Ultimately, the court found that the proposed representative plaintiff had provided no evidence to show a breach of any truly confidential information.

As a result, there was no evidence of loss related directly to the breach or consequential loss following the hack.[5]

PRIVACY CASES ACROSS CANADA

In denying certification, the court considered the body of privacy jurisprudence that has developed across Canada. The court noted,

> to the extent that the courts have struggled [with the development of privacy cases], no matter the reason, to protect the security of truly private confidential information, I believe the real issue is the ability to separate "token" or "nominal" or "baseline" cases where there is no evidence of real harm or loss, from cases where there is actual harm or loss.[6]

The defendants directed the court to different categories of privacy class actions, including eleven cases involving data breaches by external actors, of which only two had been certified.[7] The defendants argued that a review of these cases revealed that no Canadian court had ever certified a data breach class action that involved disclosure of the same or similar type of benign or public information at issue in the *Uber* case, i.e.: name, email address and phone number.[8]

Ultimately, Uber argued that certification was dependent on evidence of actual harm and, therefore, the sensitivity of the information accessed and the impact to class members of dissemination.[9] The court agreed and noted that it was clear from *Jones v. Tsige* that harm will arise in a breach of privacy case only where the breach is highly invasive, causing distress, humiliation or anguish and involves a deliberate and significant invasion of personal privacy. While proof of harm to a recognized interest is not an element of the cause of action of intrusion upon seclusion, individuals who are unusually concerned about their privacy are excluded.[10]

In considering whether the data at issue could be described as private information or "information which tends to reveal intimate details of the lifestyle and personal choices of the individual", the court found that there was no evidence or basis in fact that any class member had, or would have had, any reasonable expectation of privacy in the subject information.[11]

In this respect, the court considered the decision in *Bourbonnière c. Yahoo! Inc.*,[12] where the Quebec court found that the need to change a password following a data breach, or the embarrassment of spam mail to friends, was not sufficient to allow the matter to proceed as a class action. The court considered the cases discussed in *Bourbonnière,* which demonstrate "the distinction between minor and transient upset and compensable injury ... [which] must be 'serious and prolonged' and rise above the ordinary annoyances, anxieties and fears that a person living in society may experience", and thus, in the result: "[t]he transient embarrassment and inconvenience ... are of the nature of ordinary annoyance and do not constitute compensable damages..."[13]

The defendant argued there was no factual evidence of any type of economic harm in the four years since the breach and directed the court to the decisions where certification was granted – being those in which the breaches were directly linked to individual harm and the personal information was "actually very sensitive."[14] The court noted that while not all cases for nominal damages should be "sent to the dust bin," there still must be some evidence of actual harm or loss, or the claim is incomplete. In this case, the court found not only that there was no evidence of significant harm, or insignificant harm; there was evidence that loss or harm was wholly non-existent.[15]

The court also considered the decision in *Li v. Equifax*,[16] noting that similar circumstances were not sufficient for certification/authorization in that case. The court noted that "the risk of a future injury developing – a hypothetical injury – is not an injury that can be compensated," distinguishing this from real harm arising out of preventing further interference with personal information.[17]

Ultimately, in the *Uber* case, the court found that the disclosure of the personal information at issue in this particular data breach did not rise to the level of sensitive information that would result in harm to

the proposed class members. After considering the criteria for certification under the class proceedings legislation, the court denied certification.

SIMPSON V. FACEBOOK

Subsequent to *Uber*, Belobaba J. of the Ontario Superior Court of Justice reached a similar conclusion in his decision denying certification in the proposed class action in *Simpson v. Facebook*,[18] finding that where there was no evidence that members of the class were actually personally affected by a data breach, there could be no class action.

In *Facebook,* the court considered a proposed class action arising from the very high profile data breaches involving Facebook and the consulting firm Cambridge Analytica, events which made headlines across the globe in 2016. The data breaches at issue were connected to the 2016 U.S. election campaign, during which American voters were targeted with messages tailored to influence the outcome of the election. The targeting and tailoring was done using personal data collected from Facebook users, which was accessed without the users' knowledge or consent through a third party application called "*thisisyourdigitallife"* (the "app").[19] The fallout resulted in many government inquires, privacy commissioner reports and class actions.

THE PROPOSED CLASS ACTIONS

The fallout of the unauthorized collection of personal information impacted Canadians. Of the estimated 87 million Facebook users whose data was accessed in the breach, approximately 622,161 were Facebook users living in Canada, 272 of whom actually installed the app and another 621,889 "friends" whose personal data was obtained because the app gained "cascading access" to this information.[20] As a result, three class actions were commenced in Ontario, with a carriage order resulting in two actions proceeding, and one being stayed.[21]

Mr. Donegani was granted carriage of a proposed class action on behalf of Facebook users world-wide whose personal information was improperly obtained "either directly or indirectly" by third parties. Facebook users who voluntarily downloaded a third-party app were excluded. The class included everyone else with one important carve-out: "Canadian residents whose Facebook Information was shared with Cambridge Analytica Group" (the *"Donegani Action")*.

Ms. Simpson was granted carriage of a proposed class action on behalf of "Canadian residents whose Facebook Information was shared with Cambridge Analytica Group" (the "*Simpson Action*"). The plaintiff alleged that Canadian Facebook users' personal data was improperly shared with Cambridge Analytica, which was a breach of Facebook's own terms of use and constituted a breach of the privacy of class members. The plaintiff relied on the tort of intrusion upon seclusion, seeking symbolic or moral damages of $622 million and $62 million in punitive damages.[22]

NO EVIDENCE

The test for certification of a class proceeding requires the plaintiff to show some basis in fact, or "some evidence", to support its claim. In this case, the plaintiff had to show some evidence to support the allegation that Canadian users' personal data was shared with Cambridge Analytica.[23] The primary proposed common issue specifically contemplated whether the sharing of Canadians' personal data with Cambridge Analytica constituted an invasion of privacy or an intrusion upon seclusion.[24] If the proposed common issues could not be certified, then the proposed class action could not be certified.[25]

Over the course of the certification hearing, the court found it apparent that the plaintiff had no evidence that any Canadian user's personal data had actually been shared with Cambridge Analytica.[26] As a result, the plaintiff tried to shift focus to argue that Facebook violated users' privacy by willfully or recklessly providing the third-party app with unauthorized access to Facebook users' personal information, whether or not any such information was actually used.[27] The court would not permit the plaintiff to pursue this argument further as such an

allegation would be captured by the *Donegani Action*, which had been granted carriage of all claims relating to personal information obtained by third party apps. The court also rejected the plaintiff's submission that the third party app, *thisisyourdigitallife*, was an 'affiliate' of Cambridge Analytica, noting that the submission was contrary to the Carriage Orders and Statements of Claim.[28]

The court found that the plaintiff's failure to provide any evidence that Canadian users' personal data was shared with Cambridge Analytica was enough to deny certification.[29] The court noted:

> The applicable law on this point is not in dispute. It is fundamental to class action certification that the plaintiff adduce some evidence (some basis-in-fact) for both the existence and commonality of each of the proposed common issues. Here, the focus is on the first part of this requirement, the evidentiary basis for the *existence* of a proposed common issue. As the Court of Appeal noted in *Fulawka*:
>
> > While the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities, there must nonetheless be some evidentiary basis indicating that a common issue exists beyond a bare assertion in the pleadings.
>
> No such evidence has been presented.
>
> It follows that there is no basis in fact for any of the proposed common issues that ask whether the defendants invaded any class member's privacy, whether at common law under the tort of intrusion upon seclusion or in breach of provincial privacy statutes. None of these PCIs can be certified. Absent common issues, there is no justification for a class proceeding.[30]

In the result, the court found there was no evidence of the existence of the breach of privacy and denied certification in this case. Notably, Justice Belobaba did not close the door to these types of privacy class actions, stating

> the dismissal of this certification motion does not diminish the paramount importance of protecting individual privacy and personal data. An individual's ability to control their personal information is intimately connected to individual autonomy, dignity and privacy. Significant invasions of personal privacy are serious matters and deserve regulatory and judicial attention. If Facebook, in breach of its own policies and procedures, recklessly allowed third-party apps to improperly access users' personal data, it should be held accountable by all appropriate means, including class actions.[31]

CONCLUSION

Cases like *Facebook* and *Uber* provide important guidance on the landscape of privacy class actions in Canada.

Several years ago, when privacy class actions first arose, the claims were novel and the potential for large damages awards was daunting. However, since those early days, a much broader body of jurisprudence has developed across Canada. As demonstrated by the developments in those cases, a successful certification motion must overcome the hurdle of demonstrating evidence of harm. As in the *Uber* case, evidence of the breach alone is unlikely to be sufficient to meet this threshold. If plaintiffs are unable to show that the proposed class members suffered actual harm, which is more than nominal or everyday inconvenience, they are unlikely to be successful with certification. Part of the analysis requires the court to look carefully at the type of information at issue, the nature of that information, whether the class members had a reasonable expectation of privacy with respect to the information, and whether disclosure of the personal data has resulted in demonstrable harm.

Uber and the cases that follow it may well result in there being two types of privacy breach cases: those in which the disclosure of the type of information (such as very sensitive health information or intimate details of a sexual nature) in and of itself gives rise to a level of distress, humiliation or anguish that provides a basis for a claim for damages; and those in which the type of information that is the subject of the breach is somewhat more benign, but it can be shown that its disclosure has resulted in actual harm (such as financial information giving rise to identify theft, including fraudulent credit card usage and incurred debt).

Facebook demonstrates that if the proposed class action cannot overcome the initial hurdle of showing some basis in fact for the existence of the primary proposed common issue, then the certification motion will fail. As in the *Uber* case, evidence that the breach occurred by itself is unlikely to be sufficient to meet this threshold. Plaintiffs will have to show some evidence of the alleged breach, some evidence that they were personally affected by the breach, and some evidence that the proposed class members suffered actual harm (more than nominal or everyday inconvenience) to ultimately be successful at certification.

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1 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 (Alta. Q.B.).

2 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 at para. 1 (Alta. Q.B.).

3 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 at para. 1 (Alta. Q.B.).

4 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 at para. 2 (Alta. Q.B.).

5 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 at para. 29 (Alta. Q.B.).

6 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 at para. 49 (Alta. Q.B.).

7 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 at para. 50 (Alta. Q.B.).

8 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 at para. 50 (Alta. Q.B.).

9 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 at para. 51 (Alta. Q.B.).

10 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 at para. 51 (Alta. Q.B.), citing *Jones v. Tsige* (2012), 108 O.R. (3) 241, 2012 ONCA 32 (Ont. C.A.).

11 *Setoguchi v. Uber B.V.*, [2021] A.J. No. 22, 2021 ABQB 18 at para. 52 (Alta. Q.B.).

12 [2019] Q.J. No. 5584, 2019 QCCS 2624 at para. 37 (Qu. S.C.).

13 Emphasis added. [2019] Q.J. No. 5584, 2019 QCCS 2624 at para. 53 (Qu. S.C.).

14 [2019] Q.J. No. 5584, 2019 QCCS 2624 at para. 54 (Qu. S.C.), citing to *Ari v. Insurance Corporation of British Columbia*, [2013] B.C.J. No. 1600, 2013 BCSC 1308 at para. 54 (B.C.S.C.), aff'd [2015] B.C.J. No. 2465, 2015 BCCA 468 (B.C.C.A.); *Evans v. Bank of Nova Scotia*, [2014] O.J. No. 2708, 2014 ONSC 2135 (Ont. S.C.J.), leave to appear ref'd [2014] O.J. No. 6014, 2014 ONSC 7249 (Ont. Div. Ct.); *Tucci v. Peoples Trust Company*, [2017] B.C.J. No. 1707, 2017 BCSC 1525 (B.C.S.C.); and *Grossman*, also relied upon, at para. 10, for the statement, "Your name and address are certainly not private...".

15 *Bourbonnière c. Yahoo! Inc.*, [2019] Q.J. No. 5584, 2019 QCCS 2624 at para. 55 (Qu. S.C.)

16 [2019] J.Q. no. 8976, 2019 QCCS 4340 (Qu. S.C.).

17 [2019] J.Q. no. 8976, 2019 QCCS 4340 at para. 55 (Qu. S.C.), citing to *Zuckerman v. Target Corporation*, [2017] Q.J. No. 143, 2017 QCCS 110 at paras. 73, 77-78 (Qu. S.C.), referenced in *Equifax QC* at para. 28.

18 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 (Ont. S.C.J.).

19 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 2 (Ont. S.C.J.).

20 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 5 (Ont. S.C.J.).

21 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 7 (Ont. S.C.J.).

22 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 12 (Ont. S.C.J.).

23 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 25 (Ont. S.C.J.).

24 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 25 (Ont. S.C.J.).

25 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 26 (Ont. S.C.J.).

26 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 19 (Ont. S.C.J.).

27 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 30 (Ont. S.C.J.).

28 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 37 (Ont. S.C.J.).

29 *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 42 (Ont. S.C.J.).

[30] *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at paras. 43-45 (Ont. S.C.J.).

[31] *Simpson v Facebook,* [2021] O.J. No. 726, 2021 ONSC 968 at para. 49 (Ont. S.C.J.).

• DISMISSAL FOR DELAY UNDER SECTION 29.1 OF ONTARIO'S CLASS PROCEEDINGS ACT, 1992 – THE CURRENT LEGAL LANDSCAPE •

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A. INTRODUCTION

On October 1, 2020, significant amendments to Ontario's *Class Proceedings Act, 1992*, came into force, implementing a new dismissal for delay regime under section 29.1 of the Act:

> *Mandatory dismissal for delay*
>
> 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.[1]

If an action is dismissed under section 29.1(1), class counsel must provide notice of the dismissal to the class under section 29.1(2) and bear the costs of giving notice under section 29.1(4).

The dismissal for delay regime applies to all Ontario class proceedings, whether commenced before or after October 1, 2020.

Under section 39(2) of the Act, all proceedings commenced before October 1, 2020 are deemed to have been commenced on October 1, 2020 for the purposes of section 29.1 (making the deadline October 1, 2021 to take steps).

B. CASES INTEPRETING AND APPLYING SECTION 29.1

I. *Borque v. Insight Productions Ltd.*, [2022] O.J. No. 150, 2022 ONSC 174 (Ont. S.C.J.)

In January 2022, Justice Belobaba (one of four judges on the Toronto Class Actions List) dismissed an action for delay under section 29.1 of the Act. Justice Belobaba's decision in *Borque v. Insight Productions Ltd.* was the first published decision interpreting section 29.1 after the provision came into force in October 2020.

In reaching his decision, Justice Belobaba made several findings and comments, which provided direction on how the dismissal for delay provision may be interpreted and applied moving forward.

a. Dismissal for Delay is Mandatory

Justice Belobaba found that if none of the steps detailed in section 29.1(1) are taken by the one-year anniversary date, the proposed class action "shall" be dismissed for delay.[2] Stated simply, "s. 29.1 of the CPA means what it says."[3] The court has no discretion, including under section 12 of the Act, which gives the court broad discretionary powers to determine the conduct of the proceeding.[4]

As Justice Belobaba noted, there is nothing in section 29.1 that says "unless the court orders or directs otherwise" or "unless there is good reason not to dismiss for delay."[5]

b. Avoiding Dismissal for Delay is a Low Bar

Justice Belobaba found that to avoid the application of section 29.1(1), only one of the conditions in subsections (a), (b) or (c) must be satisfied—no other relevant steps or circumstances have been specified by regulation under subsection (d).[6]

For example, a representative plaintiff could avoid dismissal for delay by establishing and filing a timetable for the service of the plaintiff's certification motion record. Justice Belobaba defined a timetable as "a plan of times at which events are scheduled to take place, especially toward a particular end."[7]

c. Justice Belobaba Suggested a Class Action Could be Reconstituted

In *obiter*, Justice Belobaba commented that compliance with section 29.1 is "easy", and non-compliance although "inconvenient, is not particularly onerous" since a different representative plaintiff can start a different proceeding asserting the same causes of action against the same defendants[8] (assuming such a new claim is not otherwise subject to a limitation time-bar).

Justice Belobaba's suggestion that a class proceeding can be reconstituted with a different representative plaintiff is arguably at odds with his other comments, including that the purpose of section 29.1 is "to help advance class action proceedings that otherwise tend to move at glacial speed."[9]

Justice Belobaba's comments suggested the effect of section 29.1 could prove to be limited. If a class proceeding could simply be reconstituted by the same class counsel, making the same allegations, with a different representative plaintiff—thereby restarting the section 29.1 clock—the upside for defendants of moving for dismissal for delay could prove to be limited.

Importantly for defendants, however, even if a class proceeding were reconstituted, and even if defendants could not successfully resist that reconstitution, there is still value to defendants in seeking dismissal for delay for older class proceedings commenced before the amendments to the Act came into force. In particular, the reconstituted class proceeding would be subject to the new, stricter certification test.

II. *Lamarche v. Pacific Telescope Corp.,* [2022] O.J. No. 1948, 2022 ONSC 2553 (Ont. S.C.J.)

On April 26, 2022, the second published decision interpreting section 29.1 of the Act was released. In *Lamarche v. Pacific Telescope Corp.*, a case involving alleged price-fixing of telescopes, Justice Gomery considered—and ultimately rejected—several new arguments against the strict application of the dismissal for delay provision, including that:

- the class action is meritorious;
- section 29.1 creates hardship for plaintiffs in class proceedings involving foreign defendants; and
- dismissing the action is "pointless," as it can be reconstituted with a new class representative.

Justice Gomery's findings in response to those arguments were instructive for class actions stakeholders and continued to suggest that the requirements under section 29.1 will be applied strictly.

a. The Merits are Irrelevant

Class counsel argued that based on the outcome of parallel proceedings in the United States, the proposed class action had merit and thus should not be dismissed. Justice Gomery disposed of that argument summarily, confirming that "[t]he merits of the case are irrelevant on a s. 29.1 motion."[10]

b. Hardship for Plaintiffs in Cases Involving Foreign Defendants is Irrelevant

Class counsel also argued that the one-year limitation period under section 29.1 is unfair, particularly in cases involving foreign defendants.[11] In *Lamarche*, class counsel had to serve a defendant in China under the Hague Convention's rules of service on foreign

defendants. Class counsel had tried to do so, having translated the pleading into Mandarin and having provided a copy of the pleading to the Chinese Central Authority, but as of the date of the motion, the Chinese defendant still had not been served.

Justice Gomery rejected that argument as well, finding that "class counsel… must live with the section as enacted."[12] That finding was notable as it reinforced that even where class counsel may have taken some steps to seek to advance the proceeding, if class counsel has not taken any of the specific steps within the timeline detailed in section 29.1, the proceeding will be dismissed for delay.

It remains to be seen whether Justice Gomery's finding about foreign defendants motivates class counsel to more diligently pursue service under the Hague Convention or whether it discourages class counsel from suing foreign defendants in Ontario class actions in some cases.

c. Whether a Class Proceeding Can be Reconstituted is a Question for Another Day

Relying on Justice Belobaba's comments in *Bourque* (discussed above), class counsel argued that the dismissal of the proceeding for delay is "pointless" as the action can be reconstituted with another representative plaintiff.[13]

Justice Gomery specifically found that Justice Belobaba's comments in that regard were in *obiter,* and that whether defendants could resist such a reconstitution is a question for another day.[14]

C. CONCLUSION

The decisions in *Bourque* and *Lamarche* suggest that Ontario courts will apply the requirements under section 29.1 strictly. Whether a class action can be reconstituted by the same class counsel, making the same allegations, with a different representative plaintiff, has yet to be determined.

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1 *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 29.1(1).

2 *Bourque v. Insight Productions Ltd.*, [2022] O.J. No. 150, 2022 ONSC 174 at para. 7 (Ont. S.C.J.).

3 *Bourque v. Insight Productions Ltd.*, [2022] O.J. No. 150, 2022 ONSC 174 at para. 2 (Ont. S.C.J.).

4 *Bourque v. Insight Productions Ltd.*, [2022] O.J. No. 150, 2022 ONSC 174 at para. 17 (Ont. S.C.J.).

5 *Bourque v. Insight Productions Ltd.*, [2022] O.J. No. 150, 2022 ONSC 174 at para. 15 (Ont. S.C.J.).

6 *Bourque v. Insight Productions Ltd.*, [2022] O.J. No. 150, 2022 ONSC 174 at para. 5 (Ont. S.C.J.).

7 *Bourque v. Insight Productions Ltd.*, [2022] O.J. No. 150, 2022 ONSC 174 at para. 13 (Ont. S.C.J.).

8 *Bourque v. Insight Productions Ltd.*, [2022] O.J. No. 150, 2022 ONSC 174 at para. 19 (Ont. S.C.J.).

9 *Bourque v. Insight Productions Ltd.*, [2022] O.J. No. 150, 2022 ONSC 174 at para. 4 (Ont. S.C.J.).

10 *Lamarche v. Pacific Telescope Corp.*, [2022] O.J. No. 1948, 2022 ONSC 2553 at para. 24 (Ont. S.C.J.).

11 *Lamarche v. Pacific Telescope Corp.*, [2022] O.J. No. 1948, 2022 ONSC 2553 at para. 25 (Ont. S.C.J.).

12 *Lamarche v. Pacific Telescope Corp.*, [2022] O.J. No. 1948, 2022 ONSC 2553 at para. 25 (Ont. S.C.J.).

13 *Lamarche v. Pacific Telescope Corp.*, [2022] O.J. No. 1948, 2022 ONSC 2553 at para. 26 (Ont. S.C.J.).

14 *Lamarche v. Pacific Telescope Corp.*, [2022] O.J. No. 1948, 2022 ONSC 2553 at para. 26 (Ont. S.C.J.).