CITATION: Tolhurst v. Rolf C. Hagen Inc., 2026 ONSC 1757
COURT FILE NO.: CV-18-00597981-00CP
DATE: 20260323

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PATRYCIA TOLHURST and WESLEY JORDAN, Plaintiffs

– AND –

ROLF C. HAGEN INC., Defendant

BEFORE: Justice EM Morgan

COUNSEL: *Ryan Kornblum*, for the Plaintiffs

Jeffrey E. Goodman, for the Defendant

HEARD: March 11, 2026

MOTION TO DISMISS

[1] The Defendant brings a motion under s. 29.1 (1) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("*CPA*") to dismiss this proposed class action for delay.

[2] Section 29.1 (1) provides that on a motion brought by the Defendant, the court must dismiss a class action for delay where the Plaintiff has failed to take certain steps toward certification within one year of commencement (or for actions commenced before October 1, 2020, by October 1, 2021). The deadline is meant to be strictly applied. In *Tataryn v. Diamond & Diamond Lawyers LLP*, 2025 ONCA 5, at para. 61, the Court of Appeal stated that, without exception, "there is no judicial discretion engaged in the one-year time parameter".

[3] The Plaintiffs commenced this employment-related action on May 16, 2018. The Statement of Claim proposes that this is a national class action, with the Plaintiffs as representatives of the Defendants' employees claiming pay in lieu of notice and outstanding vacation pay across multiple provinces in Canada.

[4] Section 29.1 requires that the Plaintiffs, by no later than October 1, 2021, either (a) file a final and complete certification motion record; (b) enter into a written timetable agreement with the Defendant for service of the Plaintiffs' motion record in the motion for certification or for the completion of one or more steps required to advance the proceeding and have it filed with the court; or (c) obtain court approval of a certification timetable. The Plaintiffs did none of these things by October 1, 2021. They still have not taken any of these steps.

[5] On September 17, 2018, all counsel attended an initial case conference before Justice Perell. They were to re-attend before Justice Perell on November 26, 2018 to determine the status of the matter and to identify next steps in the class proceeding. Due to ongoing settlement discussions between the parties, the November 26, 2018 case conference was subsequently rescheduled to February 22, 2019, and then further rescheduled to April 17, 2019.

[6] On April 17, 2019, Defendant's counsel appeared before Justice Perell on behalf of both parties. Goodman advised Justice Perell that the parties were engaged in ongoing settlement discussions and that a case conference was not required at that time.

[7] In all, from about November of 2018 to January of 2025 the parties were engaged in settlement discussions. Both sides concede that during the course of the settlement discussions, there were significant delays on both sides.

[8] Three years into those discussions – on or about November 16, 2021 – the parties apparently arrived at a global settlement figure that the Defendant was willing to pay to the entire class. From there, the parties eventually exchanged draft settlement documents. But those documents were never finalized or signed as the parties could not agree on important details that impacted on the viability of the overall settlement.

[9] More particularly, the distribution of the settlement funds was a matter of some concern and disagreement. In fact, on a notation to the draft settlement agreement, Defendant's counsel specifically told Plaintiffs' counsel that the Defendant could not agree to the settlement until the Plaintiff produced a Distribution Protocol on which the two sides agreed.

[10] In a draft Administration and Distribution Protocol, Plaintiffs' counsel had indicated that only a small number of class members – Ontario employees of long-term duration – would be getting any money at all from the settlement. As both counsel explain it, the difference between Ontario's employment legislation and that of the other provinces is very meaningful to longer term employees of 5 years or more. Those employees would be entitled to substantially more compensation than would the rest of the Defendant's former workforce. Counsel have advised me that of the 440 former employees that make up the class, there are only 50 to 100 Ontario 5-year veteran employees.

[11] Perhaps realizing that a proposed settlement where a majority of the class gets none of the settlement funds and a small minority gets all of the funds might encounter so many objectors that it would be overwhelmed and difficult to approve, Plaintiffs' counsel proposed moving to amend the class definition to shrink the size of the class. In an email dated February 10, 2022, Plaintiffs' counsel wrote to Defendant's counsel with the proposal that the Plaintiffs bring a motion to limit the class to Ontario employees of 5 years or more, and to do so without notifying the rest of the class that were being excluded. Plaintiffs' counsel went on to surmise that Justice Perell, as case management judge, would likely agree to that change since the action had not yet been certified.

[12] Needless to say, this proposal prompted considerable concern with the Defendant. As Defendant's counsel explains it, the Defendant viewed it as important that if the settlement were to be finalized, it be approved by the Court for the entire national class. Otherwise, the excluded former class members would be free to sue again and the global amount agreed to by the Defendant would not cover all of the class. On the other hand, Defendant's counsel was equally concerned that if the distribution of settlement funds excluded a large segment of the class there would be so many opt-outs that even a nationally approved settlement would only cover a small portion of the class members.

[13] In other words, it was crucial to the Defendant that the national class remain intact. From the Defendant's point of view, the distribution of the proceeds of settlement had to be sufficiently equitable among the class members for there not to be too many opting out and for the majority of class members to be bound by the settlement. This impasse, however, was never overcome by the parties.

[14] In a memo dated April 18, 2023 summarizing the steps remaining in the proposed settlement, Defendant's counsel expressly stated that a Distribution Protocol, along with an opt-out clause, had yet to be agreed upon. Defendant's counsel indicated that an agreed-upon Distribution Protocol was central to the settlement proposal, and that without it the proposal could not be finalized and submitted to the court for approval.

[15] This impasse between the parties was never overcome. In January 2025, the Defendant terminated negotiations with the Plaintiffs. The matter has been at a standstill since that time. It only revived when Defendant's counsel sought a case conference to set a date for this section 29.1 motion.

[16] Counsel for the Plaintiffs submits that there is a settlement generally agreed upon and that the remaining issues to be agreed upon are in the nature of mechanical details rather than points of principle. He argues that since the Defendant agreed to the tentative settlement, it is estopped from now seeking to undermine it by invoking the one-year provision in section 29.1 of the *CPA*. He therefore moves here for a date to be set for a settlement approval hearing to take place.

[17] I am not inclined to set a date for a settlement approval hearing. I find there was no meeting of the minds and thus no settlement agreement concluded. Under the circumstances, a workable and agreed-upon Distribution Protocol is far more than a detail or a matter of mere mechanics. Defendant agreed to a settlement where its global payment would put an end to the litigation against it; Plaintiffs proposed a form of settlement which would include at most one-fifth of the class and leave the rest free to sue the Defendant again.

[18] Defendant's counsel would doubtless be prepared to advise their client to accept a settlement that produced the typical small handful of opt-outs that arise in the usual course. But to severely reduce the settling class, or to prompt a large number of opt-outs, would fail to accomplish what the Defendant was willing to pay for. And since a judge at a settlement hearing can only accept or reject, and cannot amend, the proposed settlement, a settlement approval hearing without an actual agreement between the parties would not produce an approved settlement.

[19] It short, there is no settlement agreement between the parties, and there are no grounds on which the Plaintiff can invoke estoppel. Eight years have passed since the issuance of the Notice of Action and Statement of Claim. In all this time, the parties have failed to fulfill any of the steps toward certification set out in section 29.1 of the *CPA*.

Disposition

[20] The action is dismissed for delay under section 29.1 of the *CPA*.

[21] In accordance with section 29.1(2)(a) and (b) of the *CPA*, Plaintiff's counsel shall publish a notice and a copy of the Order on the law firm where he practices, and shall send a notice and a copy of the Order to every class member who has contacted him or his firm to express an interest in the proceeding.

[22] Counsel for the Defendant should send my assistant a draft Order in Word format once it is approved by both parties as to form and content.

[23] The parties may make written submissions on costs. I would ask Defendant's counsel to email my assistant as well as Plaintiff's counsel short submissions within two weeks of today, and for Plaintiffs' counsel to email my assistant and Defendant's counsel equally short submissions within two weeks after receiving the Defendant's submissions.

Morgan J.

Date: March 23, 2026