CITATION: Forbes & Lagacé v. Toyota Canada Inc., 2017 ONSC 2743
COURT FILE NO.: 16-70667CP
DATE: 2017/05/02

SUPERIOR COURT OF JUSTICE – ONTARIO

In the matter of the Class Proceedings Act, 1992, S.O. 1992, c. 6 as amended

RE: DEVIN FORBES and STEVE LAGACÉ, Plaintiffs

AND:

TOYOTA CANADA INC., Defendant

BEFORE: MR. JUSTICE CALUM MACLEOD

COUNSEL: Jeff Orenstein, for the Plaintiffs in this action (Responding Parties)

Bryan C. McPhadden, for the Plaintiffs in the Toronto action (Moving Parties)

No one appearing for the Plaintiffs in the London action

James Gotowiec, for the Defendant in all three actions

HEARD: April 25, 2017

ENDORSEMENT

Introduction

[1] This is an unusual situation in which the plaintiff in one action seeks an order transferring two other actions to Toronto. This arises in the context of competing class proceedings in which each of the plaintiffs seeks to represent the same national class.

[2] These reasons address the manner in which the ordinary rules on venue and transfer apply to class proceedings. In the present instance I have concluded that transfer may be appropriate but in the course of argument it became clear that the issue of transfer is a proxy for a carriage motion and it is premature to decide the question when the outcome is unknown.

[3] For the reasons that follow I am adjourning the issue of venue until after questions of carriage and consolidation are determined. I am seizing myself of that issue and setting a timetable for the question to be resolved.

Background

The nature of the claim

[4] This is a proposed class proceeding against Toyota Canada Inc. arising from allegations of premature rust in the frames of certain model years of Toyota Tacoma, Tundra and Sequoia vehicles sold in Canada. The defendant is the Canadian arm of Toyota and is responsible for the importation, manufacturing, distribution and marketing of Toyota vehicles in this country. The plaintiffs claim compensation for themselves and for all other Canadian purchasers of the affected vehicles.

[5] There were apparently three similar class proceedings in the United States involving Toyota U.S.A. I am advised that the U.S. litigation has been tentatively settled. The issue of compensation for Canadian purchasers of the vehicles in question is the subject of this action. It is not the only Canadian action.

The Competing Canadian Class Proceedings

[6] On November 17th, 2017 a class proceeding was started in Montreal (the "Quebec Action"). That is just days before the Ottawa action. In that action, David Assor is the lawyer of record. He is not before the court as no relief is sought in respect of the Quebec action but the evidence establishes that Mr. McPhadden (counsel for the moving party) is co-operating with counsel in the Quebec action as well as with the counsel in the United States responsible for the U.S. proposed settlement.

[7] This action was begun on November 21, 2016 (the "Ottawa Action"). The representative plaintiff is a resident of Comox, British Columbia although the claim was recently amended to add a plaintiff who is a resident of Sudbury, Ontario. The proposed class would be all persons who had purchased the affected vehicles during the relevant time periods anywhere in Canada. Mr. Orenstein is the lawyer of record. His law firm, Consumer Law Group P.C. (CLG) is said to specialize in class proceedings and currently maintains offices in Montreal, Ottawa and Toronto – although the latter may be shutting down. Mr. Orenstein also claims to be collaborating with U.S. counsel.

[8] On February 9th, 2017 action CV-17-569403-00CP was issued in Toronto (the "Toronto Action") Mr. McPhadden is the lawyer of record. The representative plaintiff resides in Seeley's Bay which is located in the United Counties of Leeds and Grenville, Ontario (for which the county seat is Brockville in the East Region). The proposed class is the same as in the other actions, that is all persons who purchased the affected vehicles anywhere in Canada. In fact the action appears identical in every way to the Ottawa action.

[9] On March 13th, 2017 court action 618/17 CP, another virtually identical action was begun in London, Ontario. (the "London Action"). In that action Michael Peerless of London and Harvey Strosberg of Windsor are shown as lawyers of record. The representative plaintiff resides in Delhi, Ontario which is in South Western Ontario.

Appointment of class proceedings judge

[10] Under the Ontario legislation and the practice direction governing class proceedings, the first step in a class proceeding is the appointment of a case management judge.[1] The primary function of the case management judge is to set a timetable for the certification motion and to hear all other motions in the proceeding.

[11] I am the class proceedings judge appointed in the Ottawa action. Mr. Justice Paul Perell has been appointed in the Toronto action. At this point no one has been appointed to manage the London action. Of the Ontario actions, the Ottawa action is marginally more advanced only in the sense that it was started first, a case management judge was appointed, a case conference was held and this motion was scheduled. But pleadings are not yet closed in any of the actions so they are all in their infancy. I understand that Justice Perell was contacted by the parties but has directed that they first address the issues of venue or carriage in the motion already scheduled before me.

[12] The motion was scheduled as a transfer motion under Rule 13.1. Ordinarily such a motion would be brought by the defendant but that is not the case here. Toyota takes no position as to whether or not the action should remain in Ottawa. The defendant does not however wish to respond to three competing class proceedings and it is of the view that carriage must be determined first. The motion before me was brought by Mr. McPhadden who is plaintiff's counsel in the Toronto action. It was scheduled at a case conference on March 6th, 2017 in which counsel for the Ottawa action, Toronto action and Quebec action participated. At that time I was not aware of the London action.

Standing

[13] Ordinarily a plaintiff in one action would have no standing to try to move another action to a different place. Rule 13.1.02 (2) permits any party to bring a motion to transfer a proceeding to a county other than the one where it was commenced. Originally Mr. Orenstein had intended to oppose the motion on this basis and he would have argued that Mr. McPhadden lacked standing in a situation where Toyota was not itself bringing a motion and took no position. At the hearing, he withdrew this ground of opposition so it was not argued.

[14] It is necessary to deal with this issue however because simply not opposing a motion on this ground is not sufficient to cloak the court with jurisdiction. In the unique circumstances of competing class proceedings there is standing and jurisdiction. Each plaintiff proposes to bring

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[1] *Class Proceedings Act, 1992* S.O. 1992, c. 6, s. 2 & 34 and paras. 36 & 44, *Consolidated Provincial Practice Direction,* www.ontariocourts.ca/scj

their respective actions on behalf of the same class and each is a member of the proposed class set out in the other plaintiff's pleading. They may be treated as a party for the purposes of the rule but even were that not the case, section 12 of the *Class Proceedings Act*, permits the court on the motion of a party or a class member to make any order it considers appropriate respecting the conduct of a class proceeding.

[15] Of course standing and jurisdiction simply allows the motion to proceed. It does not mean it is appropriate or the relief will be granted.

Application of Rule 13.1

[16] Under the *Act*, the Rules of Civil Procedure apply to a class proceeding.[2] Naturally this will not be the case if a provision of the *Act* conflicts with the rules and in any event the rules will have to be applied having regard to the intent and purpose of the legislation.

[17] Rule 13.1.02 (a) is the traditional "change of venue" rule which permits the transfer of a proceeding if it is likely that a fair hearing cannot be held in the county where the action was commenced or is scheduled to be tried[3]. Rule 13.1.02 (b) serves a different purpose. It permits a transfer if it is desirable in the interests of justice having regard to a set of enumerated factors. The subrule reads as follows:

> (2) ... the court may, on any party's motion, make an order to transfer the proceeding to a county other than the one where it was commenced, if the court is satisfied,
>
> (a) that it is likely that a fair hearing cannot be held in the county where the proceeding was commenced; or
>
> (b) that a transfer is desirable in the interest of justice, having regard to,
>
> (i) where a substantial part of the events or omissions that gave rise to the claim occurred,
>
> (ii) where a substantial part of the damages were sustained,
>
> (iii) where the subject-matter of the proceeding is or was located,
>
> (iv) any local community's interest in the subject-matter of the proceeding,
>
> (v) the convenience of the parties, the witnesses and the court,
>
> (vi) whether there are counterclaims, crossclaims, or third or subsequent party claims,
>
> (vii) any advantages or disadvantages of a particular place with respect to securing the just, most expeditious and least expensive determination of the proceeding on its merits,
>
> (viii) whether judges and court facilities are available at the other county, and
>
> (ix) any other relevant matter.

[18] Of the enumerated factors, the moving party can show that factors (ii), (v) and (vii) may be engaged. It was argued that Toyota's head office is located in Toronto, that there are more

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[2] S. 35 of the *Class Proceedings Act.*

[3] "County" is the generic term used in the rules for a judicial centre or judicial district.

direct flights to Toronto from various locations in North America than there are to Ottawa, and that in Toronto the court has an established system for managing class proceedings. These facts are all true but they are not of sufficient substance to justify moving the action to Toronto. I agree with Mr. Orenstein that the plaintiff is *dominus litis* and has the right to start the litigation where he or she chooses. That choice will ordinarily be disturbed only if one or more of the factors in the rule apply with sufficient force that the interests of justice demand the action be relocated.[4]

[19] More importantly, it makes no sense to move the action to Toronto so that there can then be a carriage motion before a Toronto judge. None of the nominal plaintiffs live in Toronto. The argument that there are probably more class members in Toronto than elsewhere simply because Toronto is Canada's largest city is without foundation. Determining where class members are located would require sales information that the defendant may have but has not yet produced. Mr. Orenstein's admittedly unscientific evidence gleaned from the number of individuals that have registered on his firm's web site shows the greatest number of class members in Calgary and very few in Toronto.

[20] The only real connection with Toronto is the location where Mr. McPhadden would prefer the action to be located if he becomes class counsel. Mr. Orenstein would prefer Ottawa for the same reason. In a national class, where the proposed class covers all of Canada, he argues that there is no local community to consider. The classic venue principles have less relevance and the choice of venue is somewhat artificial in any event. He argues that in such a proceeding, a representative plaintiff should be able to seek out the counsel he or she believes is most competent and the action should be situated in the location where that counsel can most efficiently litigate. [5]

[21] That is not necessarily a general principle applicable to all class proceedings[6] but it certainly makes sense in the context of this proceeding. Toyota carries on business throughout the country and takes no position on venue. None of the representative plaintiffs live in any of the cities where the actions have been commenced and the only connection with Ottawa or Toronto is the filing decision originally made by counsel.

[22] Factor (ix) in the rule is "any other relevant matter". This is broad enough to include the fact that the action is a proposed class proceeding and the fact that there are three competing class proceedings located in three separate cities. Transferring the case may be appropriate as part of a decision on carriage or it may not be necessary if two of the existing actions are stayed. In any event carriage should be decided before any decision is made to move the action.

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[4] *Hagar v. Toronto Transit Commission* 2011 ONSC 714
[5] *Joseph v. Lefaivre Investments (Ottawa) Ltd.* [2005] O.J. No. 2324 (quicklaw) (SCJ)
[6] See *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2002) 20 CPC (5th) 377, [2002] OJ No. 1198 (quicklaw) (SCJ)

Disposition of the Motion

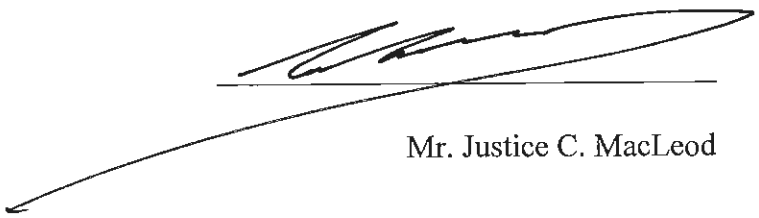
[23] There is no doubt there must be a carriage motion. There cannot be two or more certified class actions in the same jurisdiction representing the same class in relation to the same claim.[7] In a carriage motion, the court will authorize one of the actions to continue and stay the other two. It is putting the cart before the horse to decide whether or not to transfer this action to Toronto prior to the carriage motion.

[24] Mr. Orenstein argues that the proper disposition of this venue motion is simply to dismiss it because the moving party has not met the necessary onus. If I take that step and certainly if I do so without also scheduling a carriage motion the parties will simply be left to their own devices and for the time being all three actions will proceed.

[25] I do not think this is appropriate for several reasons. Firstly, a great deal of the affidavit material filed on this motion and certainly some of the argument had to do with factors relevant to the issue of carriage. I am therefore already familiar with the background and at least some of the arguments. Secondly, it is a waste of judicial resources to have case management judges appointed in three separate proceedings (although that could be remedied by an order under Rule 37.15)[8]. Thirdly, it will be an engine of delay because Toyota has only delivered notices of intent to defend and should not be required to deliver a defence until it knows to which pleading it must respond or with which counsel it should be negotiating. Finally, it is not in the interest of the class and is contrary to the case management regime in place for class proceedings to simply cast the parties adrift.

[26] In fairness, this is not what Mr. Orenstein is requesting. He asks that the venue motion be dismissed and I schedule a carriage motion. In fact he argues that it is consistent with the direction provided by Justice Perell that I be seized of both. I agree I should remain seized but I view the decision on transfer as intertwined with the question of carriage and there is at the moment no carriage motion before the court. Accordingly, rather than dismiss the venue motion, I am directing that the carriage motion proceed and the venue question will be adjourned until that question is determined.

[27] A carriage motion will be scheduled before me as soon as possible and a timetable will be fixed for exchange of materials. My judicial assistant will be in touch with counsel to schedule a conference call for that purpose.



Mr. Justice C. MacLeod

Date: May 2, 2017

[7] *Mancinelli v. Barrick Gold Corporation,* 2016 ONCA 571

[8] *Vitapharm Canada Ltd. V. F. Hoffman-Laroche Ltd.* (2000) 48 OR (3d) 21; (2000) 4 CPC (5th) 169 (S.C.J.)

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MacLeod J.

Released: May 2, 2017