Ontario Superior Court provides direction on proper conduct in carriage motions

June 05, 2020

In *Del Giudice v. Thompson*, 2020 ONSC 2676, the Ontario Superior Court of Justice recently provided important guidance on how carriage motions ought to be prepared and argued.

Background and decision

This case concerns a data breach that is alleged to have compromised the personal and confidential information of an estimated six million Canadian Capital One customers in 2019. Several proposed national class actions were commenced across Canada, including two in Ontario, which gave rise to the carriage motion. One consortium represented plaintiff Rina Del Giudice, and the competing consortium represented plaintiff David Slapinski. Justice Perell held that it was in the best interests of the putative class that the Del Giudice action be granted carriage, rather than the Slapinski action, because its case theory had prompted it to join two relevant parties as defendants.

In reaching this conclusion, Justice Perell offered "faint praise" to the consortia prosecuting both actions as he was satisfied that either consortium would have fulfilled their responsibilities to the class.

He was critical, however, of the fact that the putative class counsel did not retain external independent counsel to prepare the materials and argue the motion, as he has previously recommended that counsel do on carriage motions. The motion materials, he stated, caused him to "grimace" and "gag" as the prose was "prolix, tedious, whiningly-polemic, conceited, pompously preachy, wanting in objectivity, and grossly overstated." Further, the pleadings contained a number of "egregious violations" of the rules of pleading and failed to concisely state the material facts.

Finally, though the Del Giudice action was successful in winning carriage, class counsel in that action had failed to comply with the case management timetable prompting Justice Perell to invite the Slapinski class counsel to make submissions on whether costs ought to be imposed against the Del Giudice counsel *personally*.

Takeaway

While the carriage decision itself is not groundbreaking, the decision provides important direction to class counsel on proper conduct in carriage motions. Justice Perell made it clear that drafting pleadings to please class members or "vilify the defendants in the media" is unprofessional and "disappointing."

Instead, lawyers involved in a carriage motion should: (i) consider retaining independent counsel to argue the carriage motion on their behalf; (ii) avoid overstating their case or engaging in excessive rhetoric (which is never good advocacy); and (iii) give careful consideration to their theory of the case, which may be determinative of the motion.

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