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Revisiting First Principles Applicable to Motions for Leave to Intervene in Class Proceedings

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By

In *Romeo v. Ford Motor Co.*,[1] a recent decision of the Ontario Superior Court of Justice, Justice E.M. Morgan considered the principles applicable to a motion to intervene in a certification motion in a class proceeding. This case offers a helpful reminder of first principles applicable to interventions under the *Class Proceedings Act, S.O. 1992, c. 6 ("**CPA**").*

The motion concerned two proposed multi-jurisdictional class actions – one in Saskatchewan and another in Ontario – on behalf of people in Canada who purchased or leased a Ford Focus or Ford Fiesta equipped with a dual-clutch transmission. The representative plaintiffs in the proposed class action in Saskatchewan (the "**Moving Parties**") sought leave to intervene in the certification motion in the proposed Ontario class action. Justice Morgan found that the proposed Saskatchewan class action raised "essentially the same claim" as the proposed Ontario class action.

The representative plaintiffs in the proposed Ontario class action (the "**Plaintiffs**") had previously been granted standing to intervene in the Saskatchewan certification motion. The Saskatchewan certification motion was heard roughly six months before the motion to intervene in the Ontario certification motion, and was still under reserve at the time Justice Morgan heard the motion.

The parties agreed that rule 13 of the *Rules of Civil Procedure* (which ordinarily governs intervenors) is inapplicable to a certification motion governed by the *CPA*.

The case highlights a distinction between the Ontario and Saskatchewan class action regimes with respect to intervention. Subsection 6(2) of Saskatchewan's *Class Actions Act*, S.S. c. C-12.01 expressly allows out-of-province parties to participate in a Saskatchewan certification hearing. In contrast, Ontario's *CPA* does not contain a parallel provision. Justice Morgan accepted the Plaintiffs' argument that it is for the respective legislatures of each province to determine on their own and for their own policy reasons how class certification is to proceed.

The Moving Parties argued that the Court's obligation, under subsection 5(1)(d) of the *CPA*, to assess whether "the class proceeding would be the preferable procedure for the resolution of the common issues" incorporates a need to consider the position of claimants in an out-of-province action and requires an evaluation of the "comparative virtues" of the two proposed class actions.

The Plaintiffs opposed the intervention on two grounds: (1) that the Moving Parties had no standing to seek leave to intervene; and (2) that the Moving Parties had nothing to add to the Ontario proceeding and would not play a productive role in contributing to the analysis on the question of certification.

On the question of standing, Justice Morgan noted that the *CPA* does not contain a prohibition on a non-party having standing to intervene. Consequently, the broad inherent jurisdiction of the Superior Court of Justice to govern its own processes permits the Court to grant standing if it is just and equitable to do so. Justice Morgan concluded that he would be willing to exercise the Court's

inherent jurisdiction to grant standing if the Moving Parties otherwise qualified as proper intervenors.

However, Justice Morgan denied leave to intervene on the second ground raised by the Plaintiffs, i.e. that the Moving Parties would add nothing to the certification motion.

In arguing that the Moving Parties had nothing to contribute to the certification proceedings, the Plaintiffs pointed to the fact that the Moving Parties did not indicate in their materials what position they would take on certification if they were permitted to intervene. The Moving Parties confirmed that they "were keeping their options open in terms of specific ruling sought". *Citing Fairview Donut Inc. v. TDL Group Corp.*,[2]Justice Morgan turned to a first principles analysis, noting that motions to intervene require not only a consideration of the proposed intervenor's interest in the issue between the parties, but also an evaluation of the likelihood that the intervenor can make a useful addition to the resolution of the issues before the Court without causing injustice to the parties.

Justice Morgan concluded that because the Saskatchewan action had not yet been certified, the Moving Parties would potentially be arguing for the exclusion of some part of the class from a claim in either jurisdiction. As such, the proposed intervention was effectively aimed at potentially derailing the rights of a portion of the class, rather than advancing them. Moreover, he found that the intervenors had nothing to contribute on the question of certification because the opt-out provision of the *CPA* provides a complete remedy for any class members (including the Saskatchewan-based members) who might dissent from the proceeding being certified as a class action. Justice Morgan confirmed the holding in *Fairview Donut* that allowing dissenting putative class members to bypass the opt-out provision by instead intervening at the certification stage would cause undue delay and expense, and would be antithetical to the procedure contemplated under the *CPA*.

The motion for leave to intervene was dismissed with costs awarded to the Plaintiffs on a partial indemnity scale.

Key Takeaways

– There is no prohibition under the *CPA* to a non-party having standing to intervene in a class action at the certification stage. The Court may, in appropriate circumstances, exercise its inherent jurisdiction to grant standing if the proposed intervenor otherwise qualifies as a proper intervenor.

– Motions to intervene require a consideration of the proposed intervenor's interest in the issue between the parties and the likelihood that the proposed intervenor will make a useful contribution to the resolution of the issues before the Court without causing injustice to the parties.

[1] 2017 ONSC 6674.

[2] [2008] O.J. No. 4720 (S.C.J.).

For more information or inquiries:

Toronto Email:

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035