



Court of Appeal for Ontario weighs in on appeal route for carriage motions

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While the route of appeal for decisions on carriage motions has been examined in other jurisdictions in Canada, the recently released reasons in [Locking v. Armtec Infrastructure Inc.](#) mark the first time that the Court of Appeal for Ontario has weighed in on the issue. Noting the absence of specific guidance on the matter in the [Class Proceedings Act, 1992](#) (the CPA), the Court turned to the [Courts of Justice Act](#) (the CJA) and found that a motion judge's order on a carriage motion is interlocutory and appeal lies to the Divisional Court, with leave.

Background

Two class proceedings were commenced against the defendant, Armtec Infrastructure, and certain of its officers, directors and underwriters alleging misrepresentations under both the common law and the Ontario [Securities Act](#) in respect of a March, 2011 offering of common shares. The first action was commenced on June 16, 2011 by Sutts, Strosberg LLP on behalf of the proposed representative plaintiffs Bruce Simmonds, Robert Grant and Gordon Moore (the Simmonds Action). The second action was commenced on July 7, 2011 by Siskinds LLP on behalf of proposed representative plaintiff Keith Locking (the Locking Action). Counsel in both actions sought carriage on a [motion heard before Justice Thomas in December 2011](#). After reviewing the factors to be considered on a carriage motion and comparing the two actions, Justice Thomas dismissed the carriage motion brought by Siskinds, stayed the Locking Action and awarded carriage to Sutts, Strosberg LLP in the Simmonds Action.

Siskinds appealed to the Court of Appeal. On May 22, 2012, [the Court of Appeal ruled that it did not have jurisdiction to hear the appeal](#), but did not release reasons for the decision until November 14.

The Decision of the Court of Appeal

After examining the CPA, the CJA and decisions from the Courts of Appeal for British Columbia and Newfoundland and Labrador, the Court of Appeal for Ontario came to the conclusion that a motion judge's order on a carriage motion is interlocutory in nature; staying the Locking Action would not bring the proceedings to an end and Locking had not lost his right to sue the defendants - he could remain as part of the proposed class action in the Simmonds Action or he could opt out and pursue his action independently. The Court was of the view that this was consistent with the jurisprudence in other jurisdictions and noted that "to the extent possible, there is some advantage to uniformity of approach in class proceedings in Canada".

As an interlocutory order, the decision on carriage in the Locking Action should have been appealed to the Divisional Court, with leave. On September 18, 2012, Justice Grace granted Locking leave to appeal in respect of whether the motion judge erred in his analysis of the theories and attributes of the Locking and Simmonds actions, and if so, whether the motion judge erred in his disposition of the carriage motions - [2012] OJ No 4444 (SCJ). The Appeal has not yet been argued.

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