## Polgampalage v. Devani, 2021 ONSC 1157

The Ontario Superior Court of Justice recently released the decision of *Polgampalage v. Devani*, where Justice Myers dismissed a consent motion to move a trial from Windsor to Toronto. Justice Myers noted that the affidavit drafted in support of the motion failed to provide the evidence necessary in order to meet the requirements of Rule 13.1.02(2).

### The Statutory Test

Under Rule 13.1.02(2) of the *Rules of Civil Procedure* RRO 1990, Reg 194, a party who seeks a change in venue must satisfy the court:

> (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.

Justice Myers highlighted the case of *Estate of Byung Sun Im, deceased*, 2018 ONSC 2223 (CanLII), which states that the application of rule 13.1.02 is fact specific and must include a balancing of all factors to ensure that any transfer granted is desirable in the interest of justice.

Justice Myers also referred to the case of *Telus Communications Company v. Her Majesty the Queen*, 2015 ONSC 1345, which states that "a plaintiff has a *prima facie* right to select a venue for an action. The plaintiff does not have to justify that the choice made is a reasonable one. Rather, if the other party is of the view that the choice is unreasonable, it may bring a motion to change the venue. Paragraph 48 of the *Consolidated Provincial Practice Direction* provides that "the onus rests with the moving party to satisfy the court that a transfer is desirable in the interest of justice, having regard to the factors listed in rule 13.1.02 (2)(b)."

### Justice Myers' Reasons

Justice Myers concluded that there was no basis in the evidence adduced to support a submission that a transfer to Toronto was desirable in the interest of justice. Justice Myers also found that the affidavit asserted a number of findings of law more appropriate for a factum.

The plaintiff's evidence was adduced by a student at the plaintiff's lawyers' firm. The affidavit advised that the student had reviewed the file and had knowledge of the matters to which they testified, save and except where their evidence was based on information and belief. Justice Myers stated that ignoring the waiver of privilege issues arising from that statement, all evidence before the student was hearsay.

The student's affidavit outlined that the action was commenced in Windsor on the misunderstanding that both parties were residing in Windsor, and that it had been determined that the action should have been commenced in Toronto. Justice Myers gleaned from the medical records attached as an exhibit that the plaintiff lived in Ajax, Ontario, but the affidavit failed to include this information.

Further, there is no evidence provided to state why the motion is to move the proceedings to Toronto, when the City of Ajax, the supposed location of the plaintiff, is 50 km east of Toronto. The location of the subject accident is Vaughan, Ontario, which is also located outside of Toronto. The affidavit failed to connect the

action with Toronto in a way that would help Justice Myers understand the request to move the trial from Windsor to Toronto.

The student then attached an exhibit of a clinical note to the affidavit, outlining that the plaintiff had mentioned to a doctor two years prior that they were unable to sit down for long periods of time, and would therefore struggle to make the trip to Windsor for the trial. Justice Myers noted that this exhibit is not admissible as evidence and does not help him understand the reasons behind why Toronto was chosen as the preferred location. Justice Myers also noted that civil trials were being held remotely throughout the province in 2020, and it could have been arranged for the plaintiff to have participated by videoconference from home.

The affidavit also argued that the plaintiff would be subject to "considerable disadvantage." Justice Myers compared a single trip to Windsor with driving to and from downtown Toronto on the DVP during rush hour and cannot determine how one would subject the plaintiff to more of a disadvantage over the other.

Finally, the affidavit argued that the transfer proposed is for the convenience of the plaintiff. The affidavit fails, however, to explain why they have not chosen Oshawa, which would have been significantly closer and much easier for the plaintiff to attend as it is half the distance to Toronto.

Justice Myers concluded that "there is not a single factor in Rule 13.1.02 that has been shown to connect this action with Toronto. There is no basis in the evidence adduced to support a submission that a transfer to Toronto is desirable and in the public interest."

**Key Takeaways**

Justice Myers was not only critical of the motion material, but also included a general comment to partners, employers, and mentors, to reiterate the importance of continued mentorship throughout the pandemic. Formal training, informal feedback, and educational opportunities are of the utmost importance to junior lawyers. Further, all students and lawyers have an independent duty to scrutinize with great care every word to which they put their names.

This case also provides an insight into the ways in which judges expect affidavits to address the reasons for why a transfer is desirable and in the interest of justice.