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An Unpredictable Battleground: Twelve Years of the Class Action Carriage Motion in Canada

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The Canadian class action carriage wars turn 12 this year. Since the first carriage motion in 2000, hopeful class counsel have expended significant time and financial resources to attempt to secure an award of carriage. This paper tracks the growth of the carriage wars in Canada, from birth in 2000, through the development over the following ten years, to its current status in 2012. Twelve years of case law demonstrate that the carriage motion remains an unpredictable battleground.

The Birth of the Canadian Class Action Carriage Battle: *Vitapharm v. F. Hoffman-La Roche*

Vitapharm v. F. Hoffman-La Roche[1] was the first carriage motion in Canada. In *Vitapharm*, the plaintiffs alleged that the defendant manufacturers fixed pricing of the distribution and sale of vitamins and related products. The motion technically involved ten class actions, but the carriage battle was between two counsel groups. The Strosberg/Siskinds Group was composed of two law firms and five reconstituted actions, each relating to a distinct vitamin, and a broad class definition that included retail purchasers. The Borden Group represented retail purchasers only.

Cumming J. found authority to determine carriage of the class action under sections 12 and 13 of the *Class Proceedings Act* (the "*CPA*").[2] Section 13 grants

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[1] [2000] O.J. No. 4594 (S.C.J.) [*Vitapharm*]
[2] *Vitapharm* at para. 25; 1992, SO 1992, c 6 [*CPA*]

authority to the court to stay any proceeding, and section 12 permits the court to make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination.

Cumming J. stated that the overarching goal in deciding carriage is to further the policy objectives of the *CPA*, and to find a resolution that was in the best interests of the class while being fair to the defendants.[3] Relying on American texts and case law, Cumming J. listed the following six factors as relevant to a carriage motion:

> (i) the nature and scope of the causes of action advanced;
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> (ii) the theories advanced by counsel as being supportive of the claims advanced;
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> (iii) the state of each class action, including preparation;
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> (iv) the number, size and extent of involvement of the proposed representative plaintiffs;
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> (v) the relative priority of commencing the class actions; and
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> (vi) the resources and experience of counsel.[4]

Cumming J. awarded carriage to the Strosberg/Siskinds group. He found that the majority of the above factors did not favour one group over the other in this action. His decision ultimately turned on the differences in the structure of the class action. The Borden Group proposed that its action involving retail purchasers proceed in tandem with the non-retail purchaser class actions. The Strosberg/Siskinds Group proposed that the reconstituted actions proceed so that a global assessment of damages could be done on a product-by-product basis for all class members. Cumming J. preferred the approach of the Strosberg/Siskinds Group, finding that it was the "least expensive"

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[3] *Vitapharm* at para. 48
[4] *Vitapharm* at para. 49

method of determining the common issues and that having the same counsel for all the actions was efficient.[5]

Development of the Carriage Battle: The First Ten Years after *Vitapharm*

Cumming J.'s reliance on section 12 of the *CPA* in *Vitapharm* and the list of six factors for consideration made it clear that a carriage decision is discretionary and, therefore, subject to wide variation. The ten years of case law decided after *Vitapharm* confirm that carriage decisions vary depending on the circumstances of each case.

Carriage in *Ricardo v. Air Transat A.T. Inc.*[6] was decided two years after *Vitapharm*. *Ricardo* involved a claim in negligence for personal injuries suffered as a result of the emergency landing of an Air Transat Flight. The motion for carriage was between two counsel. Citing the *Vitapharm* factors, Cullity J. awarded carriage to the firm that had superior knowledge, expertise, experience and resources in relation to aviation law. In his reasons, Cullity J. noted that applying the factors involved "comparative and, to some extent, invidious judgments".[7]

In 2004, two firms sought carriage of a class action involving claims for interest on retroactive payments for disability pension under the *Canada Pension Plan*. In *Gorecki v. Canada*,[8] Rady J. found that both actions were generally on equal footing considering the *Vitapharm* factors. She ultimately awarded carriage to the firm that had filed its claim approximately one year before the other and had a more appropriate class definition. Rady J.'s reasons contain the important statement that on a carriage motion

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[5] *Vitapharm* at para. 50-56
[6] [2002] O.J. No. 1090 (S.C.J.) [*Ricardo*]
[7] *Ricardo* at para. 33
[8] 2004 CanLII 8798 (Ont. S.C.J.) [*Gorecki*]

it was inappropriate "to embark on an analysis of which claim is more likely to succeed". She stated that the court should only be satisfied that none of the claims advanced were fanciful or frivolous.[9]

By 2006, it became apparent that there was no strategy that could guarantee success on a carriage motion. The result was that class action firms started partnering together to build a strong front against competing law firms. The carriage decisions in 2006 and 2007 demonstrate that there is strength in numbers.

In *Setterington v. Merck Frosst Canada*,[10] the plaintiffs sought damages in connection with the recall of the painkiller, Vioxx, amid concerns of an increased risk of cardiovascular events, including heart attack and strokes. By the time the carriage motion was held, counsel in numerous actions had formed a national consortium of 19 law firms across Canada, with a "Steering Committee" of seven counsel from these firms to direct the conduct of the action. The competing law firm was the Merchant Law Group ("MLG").

Winkler J. (as he then was) awarded carriage to the national consortium. While his decision was based largely on the existence of a direct conflict on the part of MLG, because MLG had also launched a related securities class action against Merck, Winkler J. found that there was a distinct advantage to the national consortium. He noted that the team's "combined resources, financial and otherwise, and breadth of experience are significant". In relation to the direct conflict that had not been disclosed by MLG, he stated that on a carriage motion there is a requirement of utmost good faith

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[9] *Gorecki* at paras. 14, 17-19

[10] 2006 CanLII 2623 (Ont. S.C.J.) [*Setterington*]

on the part of counsel to disclose to the court all material facts that could have any bearing on carriage, whether in their interests or not.[11]

In 2007, MLG lost another carriage battle against a national consortium of law firms. *Whiting v. Menu Foods*[12] involved the recall of 95 name brands of cat and dog food. One set of counsel, The Whiting Group, was part of a national consortium of 11 law firms. The competing counsel was MLG. Lax J. awarded carriage to the Whiting Group, finding that its action was the most "expeditious" and "efficient" method of resolution of the class action. In her reasons, she noted the broad experience and expertise of the numerous counsel in the Whiting Group. In contrast, she stated that MLG's last minute preparation and quality of motion materials did not "inspire confidence" that MLG could advance the interests of class members in a diligent and efficient manner. She also found that amendments made to MLG's action to address deficiencies in the class definition flowed directly from the benefit of the Whiting Group's claim and, as such, it was only fair to determine the motion on the basis of the claim as originally pleaded, which had been deficient.[13]

In 2009, the carriage battle became more sophisticated. *Sharma v. Timminco*[14] involved a securities class action against Timminco Ltd., a Canadian metals company, under Part XXIII.1 of Ontario's *Securities Act*. Both firms battling for carriage, Siskinds

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[11] *Setterington* at paras. 23-28
[12] 2007 CanLII 43903 (Ont. S.C.J.) [*Whiting*]
[13] *Whiting* at paras. 14-40
Note that shortly before the *Whiting* motion was heard, the British Columbia Supreme Court decided that carriage of the British Columbia class action against Menu Foods should be awarded to Branch McMaster, instead of MLG. The court's decision was based on the finding that the former action's narrow focus would offer a greater likelihood of certification and earlier recovery. This finding is arguably contradictory to the statement of Rady J. in *Gorecki* that on a carriage motion it was inappropriate to analyse which action was more likely to succeed. (*Joel v. Menu Foods Genpar Limited*, 2007 BCSC 1482)
[14] 2009 CanLII 58974 (Ont. S.C.J.) [*Timminco*]

and Kim Orr, had expertise in securities litigation. Both firms had prepared extensively including conducting their own investigations of Timminco at considerable expense. Consequently, Perell J. found that the majority of the *Vitapharm* factors were not helpful in this case.

Perell J. ultimately awarded carriage to Kim Orr, based on the nature and scope of the causes of action and the theories advanced in support of the claims. In his reasons, he cited Rady J. in *Gorecki* that it was inappropriate to analyse the likelihood of certification and success of the actions. Nevertheless, his decision appears to be implicitly based on the likelihood of success of the actions. He found that while Siskinds' action, specifically with regard to longer class period and broader class definition, was not incapable of success, it set a "higher and more challenging legal bar for the representative plaintiff and for the class to vault over". In his view, the theory and causes of action of Kim Orr were "cohesive and more straightforward". In his reasons, he also noted that Kim Orr's affiliation with a U.S. class action law firm was a "sterile or neutral" factor.[15]

The Carriage Battle in 2012: *Smith v. Sino-Forest* and *Simmonds v. Armtec*

Arguably, the previous years of Canada's carriage battles brought little or no certainty to the law. Instead, ten years of discretionary decisions ensured that counsel seeking carriage would expend significant resources in an attempt to outdo the preparation of competing law firms. In January, 2012, two carriage motion decisions were released that demonstrate how advanced preparation for the carriage battle has become.

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[15] *Timminco* at paras. 15, 18, 72, 88-96

Smith v Sino-Forest Corporation[16] could be considered the grandest carriage battle to date. The plaintiffs alleged that Sino-Forest, a Canadian listed Chinese forest corporation, fraudulently overstated its timber inventories. Trading of the shares of Sino-Forest was eventually suspended, but not before shares in the corporation plummeted from $25 to under $5. A carriage battle commenced between four different law firms, with two of the law firms joining forces: Kim Orr; Rochon Genova; and Siskinds/Koskie Minsky.

All three contenders had expertise in securities class actions. All had working or other arrangements with U.S. class action firms. All had hired consultants, analysts and/or investigators in connection with their proposed class actions. All had incurred a shocking amount of fees and disbursements in advance of the carriage motion. Rochon Genova had incurred $350,000, Siskinds $440,000, Koskie Minsky $350,000, and Kim Orr $1.07 million. Perell J. noted that it was "an enormous shame" that the fruits of approximately $2 million of preparation might never be shared.[17]

The evidence regarding the funding of the class action was also far more advanced than in previous years. Two of the three contenders had secured third party funding, subject to court approval, but were prepared to indemnify their representative plaintiffs against any adverse costs awards. With regard to the other firm, Perell J. "assumed" that it would indemnify the plaintiff, even though no evidence on this had been provided.[18]

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[16] 2012 ONSC 24 (S.C.J.) [*Sino-Forest*]
[17] *Sino-Forest* at paras. 91, 102, 108, 242
[18] *Sino-Forest* at paras. 140-144

In a 55-page decision, Perell J. awarded carriage to Siskinds/Koskie Minsky, which he stated was "a close call". In addition to the six *Vitapharm* factors, he added six more factors that he considered relevant to this case: (a) funding; (b) definition of class membership; (c) definition of class period; (d) joinder of defendants; (e) the plaintiff and defendant correlation; and (f) prospects of certification.[19]

Perell J. found that many factors were neutral in this case. His decision to award carriage to Siskinds/Koskie Minksy turned on the following seven interrelated factors: attributes of the proposed representative plaintiffs; definition of class membership; definition of class period; theory of the case; causes of action; joinder of defendant; and prospects of certification.

With regard to the proposed representative plaintiffs, the argument was made that the appointment of an institution as representative plaintiff did not further the access to justice objective of the *CPA*. After much deliberation, Perell J. found that an institutional representative plaintiff actually weighed in favour of carriage. He reasoned that the expertise and participation of institutional investors could contribute to the success of the class action.[20]

With regard to class definition, Perell J. found that the Rochon Genova action had the best class period, and that the other two actions were "somewhat paranoid" with regard to the definition of the class period. However, he then stated that this factor was

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[19] *Sino-Forest* at paras. 18, 328.
[20] *Sino-Forest* at paras. 274-282.

not determinative, especially since it was open for the class definition to be amended to include a longer class period.[21]

With regard to the theory of the case, causes of action, joinder of defendants, and prospects of certification, Perell J. stated that it would further the policy objectives of the *CPA* to award carriage to the action that "secures the just, most expeditious and least expensive determination of the dispute on its merits". He noted the difficulty in reconciling this statement with the inappropriateness of determining the likelihood of success of the actions. Nevertheless, he found that Kim Orr's fraudulent misrepresentation claim added "needless complexity" to the class action and was a "substantial weakness".[22]

Perell J. concluded his decision with an implicit warning to Siskinds/Koskie Minksy to consider amendments in response to the "lessons learned" at the carriage motion:

> In granting leave, I grant leave generally and the plaintiffs are not limited to the amendments sought as a part of this carriage motion. It will be for the plaintiffs to decide whether some amendments are in order to respond to the lessons learned from this carriage motion, and it is not too late to have more representative plaintiffs.[23]

Released only two weeks after Perell J.'s decision in *Smith v. Sino-Forest, Simmonds v. Armtec Infrastructure*[24] saw Siskinds again seeking carriage of a securities class action. *Armtec* involved an action against Armtec for alleged misrepresentations in a preliminary prospectus and prospectus. The class included purchasers of

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[21] *Sino-Forest* at paras. 293-304
[22] *Sino-Forest* at paras. 305-328
[23] *Sino-Forest* at para. 330
[24] 2012 ONSC 44 (S.C.J.) [*Armtec*]

securities under the Prospectus and purchasers of securities under the secondary market. Carriage was sought by Siskinds and Sutts, Strosberg.

This time, Siskinds was not successful. Thomas J. viewed his decision as a balance of the *Vitapharm* factors to "determine which action best melds the cohesive with the comprehensive". Thomas J. was critical of the unjust enrichment and waiver of tort claims included in Siskinds' action. He found the Sutts, Strosberg action was a "simple, direct, uncomplicated claim" and provided for a straightforward assessment of damages. He found that the waiver of tort claim added unnecessary complexity and costs, and could possibly delay the resolution of the action. Citing Perell J. from *Timminco*, he stated that there was no need to "set a higher, more challenging legal bar for the class to vault over, even if the strategy is potentially successful".[25]

With regard to the class definition, Thomas J. seemed to accept the argument of Sutts, Strosberg that any issue with regard to the start date for the class period could be resolved at certification. However, with regard to the issue of whether the class definition should include early sellers, Thomas J. seemed to reject the argument that the class definition could later be amended, as well as the case law that suggested that early sellers should be included. On this issue, Thomas J. found that the exclusion of early sellers was a "simple method" of defining the class and determining damages.[26]

With regard to the proposed representative plaintiff, Thomas J. had no problem with the fact that Sutts, Strosberg only had a bare authorization from the representative plaintiffs that did not include a limitation on fees or a costs indemnity even though

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[25] *Armtec* at paras. 20, 24-30
[26] *Armtec* at paras. 37-45

Siskinds had entered into a detailed contingency fee agreement with the representative plaintiff and indemnified the plaintiff against any adverse cost award.[27]

This decision is currently under appeal by Siskinds.

Has the Law of the Carriage Battle Become Any More Certain?

When an area of law is developing, counsel hope to achieve some certainty in the law. Certainty is important to an efficient allocation of resources and to the management of client expectations and is particularly important in carriage cases, where the expenditure to enter the fray can be daunting. Unfortunately, based on the case law of the past 12 years, the determination of carriage appears no more certain than when *Vitapharm* was decided.

Part of the reason for this lack of certainty is that the carriage decision remains a highly discretionary one. The determination of carriage is rooted in the discretion of the court under section 12 of the *CPA*. In addition, the list of factors for consideration is only getting longer. Cumming J. set out six factors in *Vitapharm*. Perell J. added six more in *Sino-Forest*. As a result, the judge hearing a carriage motion has at least a dozen factors to consider when coming to his or her decision.

Compounding this uncertainty are the inconsistencies between and within different carriage decisions. For instance, Rady J. said in *Gorecki* that it is inappropriate to determine the likelihood of success of an action unless one of the actions is fanciful or frivolous. However, explicit in many carriage decisions and implicit in others is a determination of which action will more efficiently resolve the claims of the class, which

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[27] *Armtec* at paras. 82-83

in effect is an analysis of the likelihood of success. Perell J. in *Sino-Forest* went so far as to consider the prospect of certification as a relevant factor on a carriage motion. In *Joel v. Menu Foods Genpar Limited*, the British Columbia Supreme Court favoured the action that offered "a greater likelihood of certification and earlier potential recovery" and "facilitate[d] the expeditious prosecution of the claims of the proposed class members".[28]

In recent decisions, there are also inconsistent approaches to the analysis of the pleadings. In both *Sino-Forest* and *Armtec* there are findings that certain parts of a claim are deficient and, therefore, weigh against an award of carriage. In those same decisions, there are also findings that other parts of a claim are deficient, but can be corrected at certification. It is unclear why one part of a claim is acceptable because it can be amended, but another is not. In *Sino-Forest*, Perell J. uses the carriage decision to suggest that the successful firm refine its claim, based on his analysis of the competing actions.

It is possible that carriage decisions continue to vary so widely because counsel have become so good at preparing for them. Experienced class action law firms expend significant resources preparing for the motion exemplified by *Timminco*, *Sino-Forest* and *Armtec*. The judge is left with the task of deciding which of two or three very suitable law firms and actions should be granted carriage. It may not be surprising that decisions might appear internally inconsistent and somewhat arbitrary.

[28] 2007 BCSC 1482 at paras. 82 and 83

Amid the murkiness, there does appear to be two trends developing in the law of the carriage battle. The first is the court's emphasis on manageability when choosing between two proposed class actions. From the beginning, in *Vitapharm*, Cumming J. chose the action that was the "least expensive" method of determining the common issues. In *Whiting*, carriage was awarded to the action that was most "expeditious" and "efficient". In *Timminco*, Kim Orr's action won carriage because it was "cohesive and more straightforward". In *Armtec*, carriage was awarded to the "simple, direct, uncomplicated claim". These are all different ways to express the favouring of a class action that is manageable and most likely to efficiently resolve the class members' claims.

However, the emphasis on efficiency and manageability comes with a price. By avoiding "complexity" or claims that are capable of success yet challenging, courts are discouraging the inclusion of class members and/or causes of action that may very well have merit and advance the law.

For instance, in *Armtec*, Thomas J. was critical of Siskinds for including unjust enrichment and waiver of tort claims in its action. Courts have recognized waiver of tort as a valid cause of action, including in the context of a class action trial.[29] It is a valid alternative to traditional tort compensation and, if successful, avoids the need for the proof of damages and individual trials. Unjust enrichment and waiver of tort are arguably appropriate claims to include, especially now that class actions are increasingly proceeding past certification towards trial. Despite all this, Thomas J. found the claim added needless complexity and proposed "a more challenging legal bar

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[29] *Andersen v. St. Jude Medical Inc.*, 2010 ONSC 77 (S.C.J.)

for the class to vault over, even if the strategy is potentially successful". There was no evidence that a waiver of tort claim was fanciful or frivolous so as to weigh against carriage, as was stated in *Gorecki*. Nevertheless, Thomas J. found that the inclusion of the claim was a factor against awarding carriage to Siskinds. It is apparent that Thomas J. was concerned about manageability and efficiency, when making this finding.

If the lesson for counsel is that by including novel and challenging claims in class actions, they will not win carriage, they will no longer include them. This will encourage watered down class actions and discourage growth in the law.

The other trend developing in the carriage battle is the concept of strength in numbers. In the carriage decisions reviewed for this paper, every time firms joined forces, they were successful at winning carriage over other firms acting alone. Perhaps when firms form a team, their collective resources and preparation are stronger than that of their opponents. Or perhaps there is implicit approval from the court looking favourably on competing counsel who reach an agreement. Whatever the reason, there appears to be a distinct advantage to a counsel team or consortium against individual law firms.

Conclusion

While the Canadian class action carriage wars may have become more sophisticated, the end result certainly has not become more predictable. Competing class counsel expend significant resources preparing for a carriage motion, because the potential reward can be great. This makes the decision of the judge hearing the motion more difficult. But the law of carriage is nascent and developing, and has not yet been the subject of appellate comment, so there is still time for an injection of certainty into

this inherently discretionary issue. Until then, the secret to carriage may be to negotiate an agreement with competing counsel and thus avoid the battle altogether.