ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

CLASS ACT

Volume 2, No. 2 – July 2012 Class Action Law Section

Carriage Motions: What is the Preferred Form of a Class Action?

*By Rebecca Case**

To paraphrase Justice Perrell, a carriage motion has aspects of a casting call or a rehearsal for certification, whereby competing plaintiff counsel submit that their proposed class action and plan will best serve the interests of class members[1].

Carriage motions also provide insight into what the Courts view as preferred forms of a class action as they are asked to choose between the options before them. Ultimately, carriage decisions reflect judicial thinking on what serves the best interests of class members, is fair to defendants, and fulfils the Class Proceedings Act's underlying objectives of promoting access to justice, behaviour modification, and judicial economy.

Carriage motion jurisprudence has most recently been developing in the area of securities class actions; i.e. in *Sino-Forest* and *Armtec*[2]. In these two cases, the Courts focused on the relative nature and scope of the competing class actions, the theories advanced by counsel in support of the respective claims, and various aspects of the proposed representative plaintiffs. Other considerations such as proposed claim periods, class composition and named defendants were also important, but not determinative in and of themselves because any alleged deficiencies in these regards were viewed as matters capable of being remedied.

The class actions preferred in *Sino-Forest* and *Armtec* were those that did *not* advance additional claims of unjust enrichment, the oppression remedy, waiver of tort, and fraudulent misrepresentation. While both decisions noted that Courts dealing with carriage motions were not positioned to decide whether any proposed class action would be certified or ultimately successful[3], the inclusion of such additional causes of action was considered less desirable from the perspective of complexity and their potential effect on results for the class members.

For example, in *Sino-Forest*, Justice Perrell held that the claim of fraudulent misrepresentation inevitably would add unnecessary complexity and expense to the litigation[4]. Fraud was not only a very serious and difficult to prove allegation, but one likely to impact on the potential recovery for the class members. To Justice Perrell, "the claim for fraudulent misrepresentation seems a needless provocation that will just fuel the defendants' fervour to defend and to not settle the class action. Fraud is a very serious allegation because of the moral and not just the legal turpitude of it, and the allegation of fraud also imperils insurance coverage that might be the source of a recovery for class members"[5]. Inclusion of the

[1] *Smith v Sino-Forest Corporation*, 2012 ONSC 24 (CanLII) ("*Sino-Forest*"), at paras. 2-3
[2] *Simmonds v. Armtec Infrastructure Inc*., 2012 ONSC 44 (CanLII) ("*Armtec*")
[3] *Sino-Forest*, at para. 307 and *Armtec*, at para. 19
[4] *Sino-Forest*, at para. 309
[5] *Sino-Forest*, at para. 311

fraudulent misrepresentation claim was therefore seen as a significant weakness[6]. Justice Perrell also noted that unjust enrichment and the oppression remedy added little, as "[t]he claims for unjust enrichment are unnecessary for victory and they will not snatch victory if the other claims are defeated. Much the same can be said about the oppression remedy claim"[7].

In *Armtec*, Justice Thomas formed a similar view when considering the pleas of waiver of tort and unjust enrichment. It was argued that, "as an alternative approach to damage assessments, unjust enrichment and waiver of tort claims provide otherwise unattainable exposure of profits and enhances settlement to the benefit of the class"[8]. However, Justice Thomas found the claims of unjust enrichment and waiver of tort would, "potentially add unnecessary complexity and costs to the litigation, and perhaps delay resolution for class members"[9]. In his view, "there is no need to set a higher, more challenging legal bar for the class to vault over, even if the strategy is potentially successful"[10].

Both decisions also indicate a judicial preference for class actions being advanced by representative plaintiffs with professional expertise. While class actions advanced solely by inexperienced or non-professional individual investors were not undesirable, professional expertise in a representative plaintiff was viewed favourably. Class actions being advanced by a collection of representative plaintiffs comprising both individual and institutional investors, or individuals with professional experience were preferred[11].

In *Sino-Forest*, Justice Perrell held representative plaintiffs who were institutional investors could assist with results for the class at large under the auspices of the court-supervised class action process[12]. In *Armtec*, Justice Thomas held that the two individual investors with professional and high-level business acumen were more desirable as, "their experience will not only benefit the class but it is important to recognize that they will be an easily accessed resource for plaintiffs' counsel"[13].

These two recent decisions suggest that the Courts will prefer smaller and more manageable class actions that, in conception at least, suggest recovery to the class at trial in the most timely and least costly manner. This is not to suggest that more complex or comprehensive class actions will not be certified, or will not succeed. However, when presented with competing options, simplified and tightly conceived causes of actions with knowledgeable representative plaintiffs, are more likely to be chosen.

** Rebecca Case, Lerners LLP, Toronto*

[6] *Sino-Forest*, at para. 325
[7] *Sino-Forest*, at para. 326
[8] *Armtec*, at para. 26
[9] *Armtec*, at para. 30
[10] *Armtec*, at para. 30
[11] *Sino-Forest*, at para. 292 and *Armtec*, at paras. 69-74
[12] *Sino-Forest*, at paras. 286-288 and 291
[13] *Armtec*, at para. 74