Case Name:

Whiting v. Menu Foods Operating Limited Partnership

Between
Amanda Whiting, Gillian Alexander, Dina des Roches, Hayley Boam, Robert Milette, Diana Krstic and Debbie Mullen, Plaintiffs, and
Menu Foods Operating Limited Partnership, Menu Foods, Inc., Menu Foods Midwest Corporation, and Menu Foods Limited (Ontario), Defendants
And between
Sharon Powell, Bobby-Joe Rovensky, and Katherine Ewasew, Plaintiffs, and
Menu Foods Income Fund, Defendant

[2007] O.J. No. 3996

53 C.P.C. (6th) 124

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160 A.C.W.S. (3d) 947

Court File Nos. 07-CV-329875CP, CV-07-0999-CP

Ontario Superior Court of Justice

J.L. Lax J.

Heard: September 27, 2007.
Judgment: October 19, 2007.

(32 paras.)

Civil procedure -- Parties -- Class or representative actions -- Carriage of the class action was granted to the "Whiting Group", and the Powell action advanced by the Merchant Law Group was stayed -- Each of the relevant factors favoured the Whiting Group, and it would be more advantageous to the class to have that action proceed.

The plaintiffs in two actions brought motions seeking the carriage of proposed class actions arising from the recall cat and dog food because of concerns regarding the ingestion of the food and renal failure in the pets -- HELD: Carriage of the class action was granted to the "Whiting Group", and the Powell action advanced by the Merchant Law Group was stayed -- Each of the relevant factors favoured the Whiting Group, and it would be more advantageous to the class to have that action proceed -- The Whiting motion was clearly more advanced, and if the consolidation motion was successful this would likely delay the hearing of the certification motion, but the preparation of the Whiting counsel was superior to that of MLG -- The Whiting Group counsel team consisted of eleven law firms from seven provinces across Canada and includes some of the most experienced class action firms in Canada with a broad range of experience in class actions with particular expertise in product liability class actions and personal injury -- Four of these law firms were in Ontario where the action will be based and included counsel who were very experienced in class action litigation and had the resources and experience to advance this claim in Ontario or on a national scale -- The Whiting action provided for an expeditious and efficient method of resolution while preserving a supplementary avenue for recovery for class members through the Retailer action.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12, s. 13

Counsel:

Harvey T. Strosberg, Q.C., Joel P. Rochon, Theodore P. Charney, for the Plaintiffs.

Peter F.C. Howard, for the Defendants.

Jane Ann Summers, Casey Churko, Daman S. Aujla for the Plaintiffs.

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1 **J.L. LAX J.**:-- On October 15, 2007, I released a decision in these proceedings arising from motions by the plaintiffs in two actions, each seeking carriage of a proposed class action brought by their respective counsel. I concluded that carriage of the class action should be granted to counsel in the "Whiting Group", Harvey T. Strosberg, Q.C., Joel P. Rochon, Theodore Charney and David Himelfarb. I stayed the Powell action advanced by the Merchant Law Group ("MLG") and indicated that reasons would follow.

2 These actions arise from the recall of 95 name brands of cat and dog food because of concerns regarding the ingestion of the pet food and renal failure in pets. The Whiting Group is part of a national consortium of law firms formed to advance the claims of all Canadians with respect to the recalled pet food and aims to certify a national class in Ontario. Other members of the national consortium of law firms have commenced actions in Alberta, British Columbia, Manitoba, New Brunswick, Quebec and Nova Scotia. MLG is counsel of record in the Powell action and in actions commenced in Quebec, Manitoba, Saskatchewan, Alberta and British Columbia. The British Columbia Supreme Court heard a similar carriage motion on September 14, 2007 and granted carriage of the proposed class action in that province (the "Joel action") to Branch MacMaster, which is a

part of the national consortium of law firms. I understand that a carriage motion was also heard in Quebec and is under reserve.

3 The court has broad discretion under sections 12 and 13 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 to make any order the court considers appropriate, including discretion to stay any related proceeding(s), on such terms as the court considers appropriate " ... to ensure its fair and expeditious determination" (s. 12). The primary consideration on a class action carriage motion is arriving at a solution that is in the best interests of all putative class members and is fair to the defendants, consistent with the policy objectives of the *CPA*: *Vitapharm Canada Ltd. V. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 at para 48 (S.C.J.)

4 In *Vitapharm*, the court outlined the factors to consider in determining who should be appointed as solicitor of record in a class action. These factors were adopted by Cullity J. in *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 and by Winkler J. in *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376. They have also been accepted by the B.C. Court of Appeal in *Richard v. British Columbia* (2004), 30 B.C.L.R. (4th) 336 and were followed in determining the carriage motion in British Columbia: *Joel v Menu Foods GenPar Limited*, [2007] B.C.J. No. 2159, 2007 BCSC 1482 (*per* Hinkson J.). They include:

(a) the nature and scope of the causes of action advanced;
(b) the theories advanced by counsel as being supportive of the claims advanced;
(c) the state of each class action, including preparation;
(d) the number, size and extent of involvement of the proposed representative plaintiffs;
(e) the relative priority of commencing the class actions; and
(f) the resources and experience of counsel.

5 I will address these factors, but in a different order.

6 The chart below is reproduced from the Factum filed by the Whiting Group and seeks to illustrate the differences between the actions. It is presented here only as a convenient summary that I will expand on in these reasons.

[Editor's note: A chart illustrating the difference between the actions could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@quicklaw.com and request the following document: 07oj3996_chart.doc]

Status of Whiting Action

7 This action was commenced on March 21, 2007 by Notice of Action in Toronto. By order dated May 17, 2007, it was consolidated with the Krstic action. On May 22, 2007, a case conference was held before Winkler J. at which the Whiting Group requested and received an expedited timetable. They delivered their certification motion record on May 25, 2007 in accordance with the timetable set by Mr. Justice Winkler. The Menu Food defendants also adhered to the timetable, delivering their certification motion record on June 11, 2007. By agreement, the parties abandoned their rights to cross-examine the witnesses on the certification motion and are ready to proceed to certification, subject to resolving a motion in the "Retailer action". In view of Mr. Justice Winkler's appointment as Chief Justice of Ontario, the Menu Foods actions in Toronto were assigned to me commencing September 2007.

8 The Retailer action is a consolidation of two actions (the "Milette action" and the "Landry action") commenced by Falconer Charney LLP. The defendants in the consolidated action are two Menu Foods defendants, Loblaws Inc., Sobeys Inc., The Iams Company, Nutro Products and Walmart Canada Corp. The plaintiffs in this action intend to discontinue against the Menu Foods defendants and commence a companion action against the remaining retailers in Canada who sold the recalled pet food and are not already defendants in the Retailer action. The "Dayman action" was commenced in August against three American brand name manufacturers and sellers of pet food.

9 Although Mr. Charney appears as solicitor of record in the Retailer action, he is a part of the Whiting Group. As the Whiting counsel view the defendants in the Whiting action as having primary liability, the joint strategy is to hold the Retailer action in abeyance pending the outcome of the Whiting action and only proceed against the defendants in the Retailer action if the Whiting action does not result in full recovery for the class members. The defendants in the Retailer action intend to bring a motion to consolidate the Retailer action and the Whiting action. The Whiting Group intends to oppose the motion. A date for this motion has not been fixed and no material has been filed.

Status of Powell Action

10 The Powell action was commenced on March 28, 2007 in Brampton. As of early July, the only step that had been taken to advance this action was to seek the appointment of a case management judge and Mr. Justice John Murray was assigned. Over the summer, Mr. Justice Cullity held two case conferences with counsel in both actions. On June 29, he set a date for the hearing of the carriage motion on September 27 and fixed a timetable for the delivery of materials. At the July 31 case conference, counsel were advised that Mr. Justice Murray was willing to have the Powell action transferred to Toronto in order to facilitate the hearing of the carriage motion and MLG was directed to arrange for transfer of the file to Toronto.

11 The parties filed motion records in the Whiting action in accordance with the timetable set by Cullity J., but MLG took no steps to arrange for transfer of the Powell action to Toronto. Instead, MLG arranged a telephone case conference in the Powell action with Mr. Justice Murray on September 19 seeking an Order by way of amendment to the Powell claim to delete two representative plaintiffs, to add additional Menu Foods entities and retailers as defendants and to deliver a Fresh as Amended Statement of Claim. Mr. Justice Murray declined to hear the motion as the action was being transferred to Toronto.

12 On September 20, MLG sought to have this motion heard in Toronto on an urgent basis. In a case conference on September 23, I declined to hear the motion and ordered the carriage motion to proceed as scheduled on the basis of the pleading filed and on the basis that MLG, if given carriage, intended to amend its pleading in accordance with the proposed Fresh as Amended Statement of Claim. MLG delivered further materials for the carriage motion late in the day on September 26, 2007.

Priority of Actions Including Preparation

13 Both actions were commenced within one week of each other and the Whiting Group concedes this is a neutral factor. MLG has filed the affidavit of Sharon Powell, but I can find nowhere in this affidavit any evidence of any preparation by MLG to advance the Powell action. Although she deposes on information and belief that 22 MLG lawyers "have done some work on the Menu Foods class action and have been working together regarding the prosecution of this case on behalf

of class members in various jurisdictions", this action is at the pleadings stage and the pleadings and parties have changed considerably. There are now over 30 additional proposed defendants, none of whom have been served.

14 The Whiting action is clearly more advanced. If the consolidation motion is successful, this will likely delay the hearing of the certification motion, but the preparation of the Whiting Counsel Group is superior to that of MLG - they have retained experts, waived cross-examination, delivered a certification record and are ready to have the certification motion heard. If the Powell action is selected, these gains will be lost. There is also potential unfairness to the Menu Foods defendants who have delivered responding materials in the certification motion in the Whiting action. The pleading in the Whiting action may also require some amendment, but certainly not on the scale contemplated in the Powell action. This factor favours the appointment of the Whiting Group.

The Resources and Experience of Counsel

15 Ms Powell deposes that she has "no knowledge of, nor has ever heard of the lawyers or firms in the Strosberg group". She emphasizes that MLG has been contacted by telephone and the internet by approximately 2,490 Canadians of whom 1,043 reside in Ontario, whereas the Whiting Counsel Group has been contacted by 831 individuals.

16 In *Setterington*, Winkler J. observed that the ability to communicate with large numbers of putative class members speaks to the relative resources of counsel. He also said, in discussing a somewhat different point, that when the court is asked to choose between proceedings, the "analysis must be qualitative rather than quantitative" (at para 18). In *Ricardo*, Cullity J. thought that the number of clients, or potential clients, who contact a law firm should be given some weight, but he rejected the submission that the court should draw an inference that these individuals had made an informed choice and expressed a preference for counsel. On this point, I adopt the comments of Cullity J. in *Ricardo* at para. 30, where he stated:

> ... the court should be concerned not to create an incentive in class proceedings for attempts to pre-empt - or influence - the decision of the court by encouraging unedifying scrambles between members of the bar to obtain retainers from members of a proposed class.[1]

17 I attach no significant weight to this and it is outweighed by several other factors that favour the appointment of the Whiting Group over MLG. While MLG has offices in a number of Canadian cities, it has no office in Ontario and Mr. Tony Merchant, senior counsel of the firm and the lawyer in control of the Powell action, is ineligible to appear in Ontario as a result of ongoing disciplinary issues in Saskatchewan. There are practical difficulties to managing class litigation in Ontario from offices in Calgary and Regina, which became evident on this motion. MLG's eleventh hour preparation for the motion and the quality of the material it filed did not inspire confidence that this law firm has the ability to advance the interests of class members either in Ontario or nationally in a diligent and efficient manner.

18 The Whiting Group counsel team consists of eleven law firms from seven provinces across Canada and includes some of the most experienced class action firms in Canada with a broad range of experience in class actions with particular expertise in product liability class actions and personal injury. Four of these law firms are in Ontario where the action will be based and includes counsel

who are very experienced in class action litigation and have the resources and experience to advance this claim in Ontario or on a national scale. This factor favours the Whiting Group.

The Number, Size and Extent of Involvement of the Representative Plaintiffs

19 The Whiting Group has named seven putative representative plaintiffs who are pet owners. In some cases, their pets have died, and in other cases, the pets are undergoing treatment for renal failure. In the Powell action as presently constituted, there are three representative plaintiffs: Sharon Powell, Bobby-Joe Rovensky and Katherine Ewasew. Mr. Rovensky is also a representative plaintiff in actions commenced by MLG in Alberta and Manitoba. Ms Ewasew is the representative plaintiff in the British Columbia action. In that proceeding, she swore an affidavit dated July 7, 2007 in which she deposed that her claim and the claim of the proposed B.C. class members should be determined only in British Columbia, yet she is a representative plaintiff in Ontario. Mr. Justice Hinkson pointed out in *Joel* at paras 88-92, that this reflected adversely on her credibility and took this into account in concluding that this factor favoured Branch MacMaster. Further, as discussed below, Ms Ewasew is currently a plaintiff in an action in Ontario that asserts a national class. This cannot be reconciled with her evidence in the B.C. proceeding.

20 MLG now proposes to delete Mr. Rovensky and Ms Ewasew as representative plaintiffs in the Powell action, leaving Sharon Powell as the sole representative plaintiff. This presents other difficulties, which are discussed under the next factor.

Nature and Scope of Causes of Action Advanced

21 The disposition of the carriage motion should be based on the Powell Action as originally pleaded. Otherwise, this criterion would be without meaning as it is always open for counsel to amend their claims based on the more comprehensive and well-researched pleadings by competing counsel that demonstrates a higher degree of preparation.

22 The Whiting Action is framed in negligence and strict liability and seeks to certify the following class:

> all persons in Canada who purchased or acquired dog and/or cat food in Canada and/or who owned a dog or cat that consumed food that was included in the Recall.

23 The Powell action advances causes of action in negligence, negligent misrepresentation, unjust enrichment, waiver of tort and for statutory breaches of "consumer and trade legislation" and seeks to certify the following classes:

> On behalf of Ontario residents: All persons (including their estates, executors, or personal representatives), corporations, and other entities in Canada (except for the province of Quebec), who purchased recalled pet food manufactured, distributed or ultimately offered for sale and sold to the public in Canada by the Defendant, its affiliates, or retailers supplied with products by the Defendant.
>
> On behalf of non-residents of Ontario: All persons (including their estates, executors, or personal representatives), corporations, and other entities in Canada (except for the province of Quebec), who purchased recalled pet food manufactured, distributed or ultimately offered for sale and sold to the public in Canada

by the Defendant, its affiliates, or retailers supplied with products by the Defendant.

24 The class definition in the Powell action is underinclusive as it does not include those owners whose pets consumed the recalled pet food, but did not purchase it. The Fresh as Amended Statement of Claim seeks to rectify this, but I believe that this amendment flows directly from the benefit of the Whiting pleading. The class definition in the proposed pleading is formulated as owners of pets who consumed the food and "subsequently developed kidney failure". This imports a causation analysis into the class definition and offends the requirement that the class be objectively defined. The Whiting class definition is not perfect. Arguably, it is broad enough to include private label suppliers who purchased pet food from the Menu Foods group of defendants and resold it, thus entitling them to be members of the class. I accept that there was no intention to include them in the class.

25 In the Powell Action, MLG will have to establish the elements of negligence, unjust enrichment and negligent misrepresentation. One of the elements of negligent misrepresentation is reliance, which in this case is largely an individual issue and could be detrimental to certification on the basis of preferable procedure. The basis for the claim for statutory breaches is unclear to me. Furthermore, the Powell action is fundamentally defective in that it names Menu Foods Income Fund, a trust, as the sole defendant when the proper parties in an action against a trust are the trustees: Rule 9:01(1), *Rules of Civil Procedure*; *United Service Funds v. Richardson Greenshields of Canada Ltd.* (1987), 40 D.L.R. (4th) 94 (B.C.S.C.); (1987), 16 B.C.L.R. (2d) 187. According to counsel for Menu Foods, Menu Foods Income Fund did not manufacture, distribute or offer for sale the recalled food. By way of contrast, the Whiting action has named four Menu Foods defendants, who are entities capable of being sued and on the record before me are the only entities that had any involvement in the manufacture, sale or distribution of the recalled pet food. The parties can of course, seek amendments, but the Whiting pleading overall reflects a more thoughtful and precise analysis of the claim.

26 The proposed MLG pleading now names as defendants the trustees of Menu Foods Income Trust; all of the corporations in the Menu Foods Group, their officers and directors; and ten retailers. This pleading is also flawed. For example, the remaining representative plaintiff has no cause of action against the retailer defendants except Wal-mart and Pet Valu, from whom she alleges she purchased the recalled pet food. If a representative plaintiff does not have a cause of action against a named defendant, the claim will be struck: *Hughes v. Sunbeam Corp.* (Canada) (2002), 61 O.R. (3d) 433, [2002] O.J. No. 3457 (C.A.) at para. 15(QL). This pleading will inevitably be attacked and is discussed further under the next factor.

Theories Advanced

27 There are fundamental differences in strategic approaches between the two counsel groups. The Whiting Group has adopted a streamlined approach and is the result of a combined effort to certify a national class in Ontario. Only if courts in other provinces reject this approach will the national consortium prosecute claims in each province. I will say little on the subject of national classes except that counsel provided me with a number of examples where this approach has been accepted. In any event, the Powell action as pleaded also asserts a national class, but this strategy has apparently been abandoned. MLG has provided no explanation for this.

28 The Whiting action advances causes of action in negligence and strict liability against the defendants who manufactured and sold the tainted food. While the claim based on strict liability presents challenges, it is not fanciful or frivolous. To succeed in the negligence claim requires the proposed class members to establish that the conduct of the Menu Food defendants fell below a reasonable standard of care, causing loss. It is submitted that in view of the Recall, liability will be easily established.

29 The original approach in the Powell action was to assert a national class and sue only the trust, an entity that is not capable of being sued in Ontario. Now, the proposed claim asserts an Ontario class and has been reformulated as a spray gun' approach asserting that the trust is a sham and advancing causes of action based on the intentional misconduct of trustees, directors and officers, without providing any rationale for this or to explain what justifies these theories of enterprise liability. The pleading of negligence is structured in an unusual form. The claims for unjust enrichment and negligent misrepresentation seem to have fallen away, but there is now a claim for rescission under the *Consumer Protection Act*, R.S.O. 1990, c. C.31. There are notice requirements in section 18 of the *Consumer Protection Act*, 1992, S.O. 1992, c. C.30 which apply, but notice has not been pleaded. There are real questions as to whether the proposed pleading will issue in this form and there is likely to be protracted litigation on the pleading if MLG is awarded carriage.

30 In my view, the Whiting action provides for an expeditious and efficient method of resolution while preserving a supplementary avenue for recovery for class members through the Retailer action. Counsel has coordinated with Mr. Charney, solicitor of record in the Retailer action, to include his firm in the national consortium and as a member of the Whiting Group. The rationale for this approach is to put the class members in the position of being first to obtain judgment against the global insurance funds available from Menu Foods while providing a supplementary avenue for recovery for class members if the Menu Foods defendants are unable to satisfy judgment or adequately fund the settlement. Plaintiffs are entitled to restrict the claims in a class proceeding to make it more amenable to certification: *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.) at para. 30. I find no glaring deficiencies in either the scope or the approach adopted by the Whiting Group and it has much to commend it. These factors favour the appointment of the Whiting Group.

Conclusion

31 In summary, each of the *Vitapharm* factors favours the Whiting Group. For these reasons, I concluded that it would be more advantageous to the class to have the Whiting action proceed. This action is consistent with the goals of the *CPA* and presents no unfairness to the defendants. I therefore issued an Order appointing the Whiting Group as lead counsel in Ontario, staying the Powell action, and declaring that no other class proceeding may be commenced in Ontario against the defendants in respect of the recalled pet food manufactured by the defendants without leave of the Court.

32 It is not usual to award costs on carriage motions and none are sought.

J.L. LAX J.

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1 See also, *Joel v. Menu Foods GenPar Limited* at paras. 94-95.

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