

Class Actions

The mirage of judicial economy

BCCA denies certification on issues of preferable procedure

By **Nadia Campion**



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(May 25, 2017, 10:09 AM EDT) -- A recent decision by the Court of Appeal for British Columbia suggests that questions of preferable procedure are featuring more prominently in certification decisions.

Long gone are the days when class actions were, as a general proposition, presumed to promote access to justice and achieve behaviour modification. Instead, the courts have progressively become more vigilant in assessing whether class actions are the best way to achieve a fair and efficient resolution of claims advanced in light of other available procedures, including small claims court and government action.

In *Vaugeois v. Budget Rent-A-Car of B.C. Ltd.* 2017 BCCA 111, the plaintiffs alleged that Budget Rent-A-Car engaged in a "systematic scheme" of improperly charging or overcharging consumers for repairs to its rental cars. In particular, they alleged that Budget Rent-A-Car concealed damage from consumers when vehicles were initially inspected upon rental and then improperly charged repair costs after the vehicles were returned. It was also alleged that Budget Rent-A-Car paid employees a commission for overcharging customers for repairs. The proposed class affected by the alleged scheme consisted of approximately 34,000 to 85,000 consumers.

The court at first instance declined to certify the action as a class proceeding under s/ 4(1) of British Columbia's *Class Proceedings Act*. While the court determined that the plaintiffs had adequately pleaded various causes of action, including conspiracy and unjust enrichment, and there existed a broad range of questions relating to the alleged scheme sufficiently common to the class of consumers affected, it ultimately concluded that a class proceeding was not the preferable procedure for the fair and efficient resolution of the plaintiffs' claims.

The court expressed concern that individual questions of fact surrounding each proposed class member's rental of a vehicle would overwhelm the common issues. In addition, it recognized the defendant's right to cross-examine each renter to test their credibility and to show that the damage to the rental vehicle occurred during the rental period.

As a result, certification of the action as a class proceeding would only delay the inevitable need for separate hearings to establish liability on an individualized basis. The court suggested that British Columbia's provincial court is "well-suited to handle small claims of this nature in a fair and efficient manner."

The decision was upheld by the Court of Appeal, which analyzed whether the decision to deny certification undermined considerations of access to justice in circumstances where the proposed representative plaintiff deposed that he would not be able to justify proceeding with a claim on his own given the cost of doing so relative to the repair expenses that were charged. The Court of Appeal recognized this as a "fair concern" and considered the possibility that claims may not be advanced at all if the class action is not certified.

However, it went on to conclude that these concerns were not compelling because they rest on the assumption that consumers would be able to obtain relief without the expense of individual

hearings.

In other words, if certified, the class proceeding would "merely be a prelude to many individual trials."

The Court of Appeal also endorsed the lower court's reliance upon the government's ability to bring an action pursuant to British Columbia's *Business Practices and Consumer Protection Act* as a means of effecting behaviour modification. Although there was no evidence to suggest that the government intended to take up the complaints of class members, the Court of Appeal confirmed that courts "fairly proceed on the assumption that the officers of the legislature will use the tools at their disposal to protect consumers and effect behaviour modification as necessary."

This case has important implications for class action lawyers across the country. Although British Columbia differs from other provinces in that it requires common issues to predominate over individual issues as compared to the less restrictive requirement that resolution of the common issues meaningfully advance the case, class action counsel nevertheless face an increasingly uphill battle in certification motions.

The unavailability of individual liability trials may be fatal to the frequently argued position by plaintiffs that class actions promote access to justice, result in behaviour modification and serve judicial economy. For one thing, defendants can point to small claims court as a preferable forum for resolving claims of a smaller nature. They can also rely on the assumption that the government will use the necessary tools, such as penalties and causes of action available under consumer protection legislation, to bring about behaviour modification.

In short, the mirage of judicial economy that was once presumed to exist in the world of class action litigation is fading. However, the impact on the consuming public and whether legislative officers will take up such issues still remains to be seen.

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