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CLASS ACTIONS

Class actions in British Columbia: Go west, young plaintiffs, go west

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British Columbia has long been a plaintiff-friendly forum for class proceedings in Canada. In contrast to other provincial jurisdictions, plaintiffs in B.C. enjoy the benefit of favourable costs rules that limit their potential exposure to adverse cost rulings at the certification stage of a case. B.C.'s popularity with potential plaintiffs as a jurisdiction for the commencement of class actions was further bolstered this year by the adoption of important amendments to Ontario's *Class Proceedings Act, 1992* in September 2020. Under these amendments, proposed representative plaintiffs now face a more onerous burden in seeking class certification in Ontario. This change has led to a migration of new national class actions away from Ontario to B.C. and other provinces. In addition, since 2018, B.C. has permitted the certification of national classes that include extra-provincial residents on an opt-out basis.

In 2021, two key decisions were issued that affect B.C. class actions practice and that have not been uniformly plaintiff-friendly. On the one hand, the Supreme Court of Canada refused leave to appeal from a decision of the B.C. Court of Appeal that affirmed a long jurisdictional reach of B.C. courts in relation to price-fixing conspiracy claims and foreign defendants in a class proceeding. On the other hand, the B.C. Court of Appeal held that certification should not be presumed to be the first step in a proposed class action; consequently, in the right case, defendants should be able to bring preliminary substantive motions, such as jurisdictional challenges or motions to strike, before the motion for certification is even heard.

Both rulings provide important guidance for class actions practice in the province. They also suggest that, although plaintiffs may view B.C. as plaintiff-friendly, defendants continue to have meaningful opportunities to dispose of or narrow unmeritorious cases through substantive motions prior to the determination of class certification.

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The long reach of B.C.'s jurisdiction over foreign defendants

The B.C. Court of Appeal first set out its willingness, in some cases, to take jurisdiction over foreign defendants in *British Columbia v. Imperial Tobacco Canada Ltd*. In *Imperial Tobacco*, on the specific facts of that case, the Court of Appeal found that a foreign defendant may be called to account in the jurisdiction where the alleged harm was suffered, *regardless* of where the alleged wrongful conduct occurred. The Court of Appeal also found that B.C. courts had jurisdiction over the foreign defendants who did not manufacture any cigarettes sold in Canada, but who were alleged to have participated in a conspiracy with the other defendants, including the domestic manufacturers, to prevent British Columbians from learning about the harmful and addictive properties of cigarettes.

Subsequently, in *Fairhurst v. De Beers Canada Inc.*, the B.C. Court of Appeal extended the jurisdictional approach set out in *Imperial Tobacco* to a price-fixing conspiracy claim. In *Fairhurst*, the plaintiff alleged a price-fixing conspiracy by various companies in the gem grade diamond business. While not all the defendants in *Fairhurst* conducted business in B.C., the foreign defendants' products all entered the channels of trade in B.C., and therefore those defendants were subject to the jurisdiction of the B.C. courts.

In 2020, in *Ewert v. Höegh Autoliners AS*, the B.C. Court of Appeal combined the approaches from *Imperial Tobacco* and *Fairhurst*. The Court found that a foreign defendant whose products or services do *not* enter the channels of trade in B.C. can nevertheless be subject to B.C.'s jurisdiction on the basis of conspiracy claims based on indirect economic harm suffered in the province.

In *Ewert*, the plaintiffs alleged that Höegh Autoliners AS and other roll-on/roll-off marine shipping providers conspired *outside* Canada to artificially inflate prices *inside* Canada. The alleged conspiracy was said to affect British Columbians by increasing the prices of imported vehicles in the province. The Höegh defendants moved to stay the case against them on the basis that

they had no presence in B.C., they did not carry on business in B.C., and their services had never entered the channels of trade in B.C.

In dismissing the jurisdiction motion, the Court of Appeal held that a B.C. court may take jurisdiction over a foreign defendant if the plaintiffs allege that the foreign defendant participated in a foreign price-fixing conspiracy and that it resulted in raised prices in Canada for the goods or services of *other* defendants. In other words, if the conspiracy increased prices for Canadian consumers, then *anyone* who participated in the conspiracy could be called to account in the province, whether or not the alleged foreign conspirator's own goods or services were provided in B.C. The foreign defendant can refute the presumption of jurisdiction by adducing evidence contesting the allegation that it participated in the conspiracy – raising, of course, the challenge of requiring the foreign defendant to respond on the merits at a jurisdictional stage.

In April 2021, the Supreme Court of Canada dismissed an application for leave to appeal from the *Ewert* decision.

Certification if necessary, but not necessarily certification

For over a decade, courts in B.C. have asserted that certification is presumed to be the first step in a class proceeding. This has created challenges for defendants who have struggled to have preliminary motions, such as motions to strike or jurisdictional motions that could narrow or dispose of a case, heard on a preliminary basis, before incurring the cost of a certification motion. It has also created a practical challenge, as certification of even an unmeritorious case can present a significant risk to defendants by creating settlement leverage for plaintiffs.

That changed this year. In *British Columbia v. The Jean Coutu Group (PJC) Inc.*, the B.C. Court of Appeal held that certification is not presumed to be the first procedural step in a proposed class action. Rather, the court held that each proposed motion must be considered in the context of each unique case:

> *Each pre-certification motion must be decided on its own individual merits. Each application must be determined in the context of the particular case before the court. The court's discretion ought to be exercised in a manner that facilitates and achieves judicial efficiency and the timely resolution of the dispute.... I reject the proposition that there is a presumption that the certification motion ought to be the first procedural matter to be heard. The cases that have so held were, in my opinion, wrongly decided and should not be followed.*

Jean Coutu may dampen the appeal of B.C. as a class proceedings jurisdiction. While B.C. remains a "no-costs" jurisdiction, meaning that representative plaintiffs are not liable to pay defendants' costs, that protection is only available once the certification motion has been brought. Consequently, if a defendant can have an unmeritorious claim dismissed *before* it is certified, the proposed representative plaintiff may find themselves on the hook for significant legal costs.

The future of class actions in B.C.?

As a result of changes to class action proceedings legislation and practice, particularly in Ontario, there is renewed attention being given to B.C. as a perceived plaintiff-friendly jurisdiction for class action proceedings. For several reasons, the province remains a choice jurisdiction for class action plaintiffs. B.C. class action proceedings legislation and related case law provide support for plaintiffs, lower the risk to plaintiffs of initiating a proceeding and improve the ease with which class actions may be commenced, potentially including against foreign defendants.

In 2021, however, the B.C. Court of Appeal signalled that it supports an approach that will weed out unmeritorious cases at an early stage. It remains to be seen whether the B.C. Supreme Court will take up that standard in 2022 and, if it does, how this will affect the perception of B.C. as a class action friendly province.

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