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ARTICLE

# Supreme Court of Canada Says to Yield to the Arbitration Clause in the Case of Consumer/Non-Consumer Class Actions

The Supreme Court of Canada recently released its decision in *TELUS Communications Inc. v. Wellman*. In a 5-4 split, Moldaver J., writing for a majority, concluded that s. 7(5) of the *Arbitration Act* does not permit courts to ignore valid and binding arbitration agreements. The case involved a proposed class action composed of consumers and non-consumers. Both groups had agreed to an arbitration clause in their contracts with TELUS Communications Inc. While the consumers were entitled to pursue their claims in court by virtue of the *Consumer Protection Act* and thereby avoid arbitration, the Supreme Court found that the non-consumers must have their proceeding decided by way of arbitration and that they could not participate in the class action.

A helpful summary of the parties' positions before the Supreme Court of Canada can also be found here.

## Legislative Provisions

Two statutes were at the heart of this appeal: the *Arbitration Act* and the *Consumer Protection Act*.

Section 7(1) of the *Arbitration Act* establishes a general rule that where a party to an arbitration agreement commences a proceeding in respect of a matter dealt with in the agreement, the court "shall", on the motion of another party, stay the court proceeding in favour of the arbitration.

Exceptions to s. 7(1) are set out under s. 7(2) of the *Arbitration Act*, which provides that a court may refuse to stay a proceeding where, for example, a party has entered into an arbitration agreement while under a legal incapacity, or where the arbitration agreement is invalid.

Section 7(5) of the *Arbitration* Act, which was squarely at issue in this appeal, allows for a partial stay of proceedings where a court finds that: (1) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and (2) it is reasonable to separate the matters dealt with in the agreement from the other matters.

Sections 7(2) and 8(1) of the *Consumer Protection Act* invalidate an arbitration clause insofar as it would otherwise prevent class members who qualify as "consumers" from commencing or joining a class action. Importantly, the *Consumer Protection Act* speaks only of "consumers", which includes "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes". In this sense, "non-consumers" do not qualify as "consumers" and they cannot invoke the legislative protections that consumers enjoy.

## Facts & Issues

Avraham Wellman filed a proposed class action in Ontario against TELUS Communications Inc. ("TELUS") on behalf of about two million Ontario residents who entered into contracts for phone services during a specified timeframe. The class action consists of both consumers and non-consumers (non-consumers being those individuals who are business customers).

Mr. Wellman sought to certify the action as a class action, and in response, TELUS brought a motion to have the proceeding stayed with respect to the non-consumer claims, relying on an arbitration clause contained in the standard terms and conditions drafted by TELUS.

Both parties agreed that, by virtue of the *Consumer Protect Act*, the consumers were entitled to pursue their claims in court. However, the crucial question for this appeal was: does s. 7(5) of the *Arbitration Act* grant the court the discretion to refuse to stay the business customer claims?

## The Majority's Reasons

After reviewing the "purpose and scheme" of the *Arbitration Act*, and the text of s. 7 in light of its full context, Moldaver J. stated that the use of the word "shall" in s. 7(1) indicates a mandatory obligation. The fact that a court "shall" stay a proceeding under s. 7(1) "reaffirms the concept of party autonomy and upholds the policy underlying the *Arbitration Act* that parties to valid arbitration agreement should abide by their agreement."

Moldaver J. then explained that s. 7(5) contains two preconditions that must be satisfied before a court may issue a partial stay. The first precondition is met where: (a) at least one matter is dealt with in the arbitration agreement; and (b) at least one matter falls outside of the arbitration agreement. The second precondition is satisfied where it is reasonable to separate the matters dealt with in the arbitration agreement from those matters that are not dealt with in the arbitration agreement.

Where both preconditions under s. 7(5) are met, a court may allow matters not dealt with in the arbitration agreement to proceed to court. However, if the preconditions are not met, then the discretionary exception under s. 7(5) is not triggered, and in those cases, unless one of the exceptions under s. 7(2) applies, the general rule under s. 7(1) stands, meaning that the proceeding must be stayed.

In Moldaver J.'s view, s. 7(5) of the *Arbitration Act* is not an independent, and standalone provision to be read and applied in isolation from ss. 7(1) and (2). Rather, "there is a logical and necessary link between the two provisions".

Applying this analysis to Mr. Wellman's case, the majority concluded that business customers could not rely on the *Consumer Protection Act* to avoid a stay under s. 7(1) because this legislation applies only to consumers. Thus, the business customers were left with only two options to avoid a stay: ss. 7(2) and (5) of the *Arbitration Act*.

Mr. Wellman did not argue any of the exceptions under s. 7(2) of the *Arbitration Act*, and s. 7(5) did not apply because the preconditions were not met (the proceeding involved a single matter – the alleged overbilling – and that matter was dealt with in the arbitration agreement). Accordingly, the proceeding ought to be stayed as against the business customers pursuant to s. 7(1) of the *Arbitration Act*.

Finally, the majority responded to the dissenting reasons. Moldaver J. explained that absent legislative amendments, courts must work within the legislative framework that is before them. In the majority's eyes, the dissenting approach would "undermine the legislature's stated objective of ensuring parties to a valid arbitration agreement abide by their agreement, reduce the degree of certainty and predictability associated with arbitration agreements, and weaken the concept of party autonomy in the commercial setting."

## The Dissenting Reasons

The dissent was penned by Abella J. and Karakatsanis J., who found that s. 7(5) must be interpreted to give judges the discretion to refuse to stay arbitrable claims if it is unreasonable to separate them from non-arbitrable claims.

The dissenting justices criticized the majority for resorting to textualism, and effectively reducing the contextual policy objectives of both the *Arbitration Act* and the *Class Proceedings Act*. Viewing the applicable legislation through a more practical lens, Abella J. and Karakatsanis J. saw no value in having courts and parties spend time trying to separate arbitrable claims from non-arbitrable claims where the substance of both claims are identical.

Further, the *Arbitration Act* should be applied in a manner that promotes access to justice. Arbitration is intended to act as an alternative dispute mechanism for parties on relatively equal footing. In this case, however, there is no "equal bargaining power" and "party autonomy" because TELUS has exclusive contractual authority. TELUS's individualized arbitration clause effectively precludes access to justice for business clients when a low-value claim does not justify the expense.

## Implications

This decision effectively narrows the instances in which judicial discretion for a partial stay under s. 7(5) of the *Arbitration Act* will apply. On a much broader level, however, this decision promotes the policy rationale underlying the *Arbitration Act* and re-enforces the use of arbitration provisions in the commercial context.

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By: Ewa Krajewska, Veronica Sjolin

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