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ARTICLE

Supreme Court to Hear Appeal on Interaction between Arbitration Clauses and Class Proceedings: TELUS Communications Inc. v. Avraham Wellman

TELUS Communications Inc. ("TELUS") has been granted leave to appeal the Ontario Court of Appeal's decision in *TELUS Communications Inc. v. Avraham Wellman*, 2017 ONCA 433.

Section 7(5) of the *Arbitration Act* provides that a court may stay a proceeding with respect to matters dealt with in an arbitration agreement and allow the court proceeding to continue with respect to other matters where it 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.

Put simply, s. 7(5) aims to avoid the bifurcation of litigation and arbitration, and empowers a court to take jurisdiction over all disputed matters, rather than hearing only part of the dispute and sending other matters to arbitration.

Practically speaking, however, there is much needed clarification of the words "other matters" in s. 7(5) in consumer/non-consumer cases. More specifically, can the "matters" between a business and its consumers determine the "matters" between the same business and its non-consumers when those consumer and non-consumer claims are subject to different arbitration agreements? Or do "other matters" refer to other matters arising only between the same contracting parties but that are not covered by their arbitration agreement?

An additional question for the Supreme Court will be whether litigants should be entitled to circumvent what are otherwise statutory impediments to proceeding in court with an arbitral claims simply by adding a consumer claim which cannot be stayed by virtue of the *Consumer Protection Act*. As Justice Blair put it in his concurring reasons, should the *Class Proceedings Act* be used to override the *Arbitration Act*?

We will continue to monitor for any developments on these issues.

TELUS' Application for Leave to Appeal to the Supreme Court

In its Application for Leave, TELUS states that the Court of Appeal "permitted the procedural mechanism of a mass consumer class action to override the lawful choice of arbitration by business customers...". TELUS submits that in this case, the arbitration agreement covers *all* disputes between TELUS and its business customers (*i.e.* non-consumers) and that there are no "matters" between the parties that are not subject to the arbitration clause. Consequently, TELUS argues, the Court of Appeal incorrectly concluded that section 7(5) of the Ontario *Arbitration Act* provides a legislative override of an otherwise enforceable arbitration agreement and the Court had no proper grounds to reject the instructions given by the Supreme Court in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 ("*Seidel*").

Further, TELUS submits that the Court of Appeal's decision leads to inconsistent results across the country. Courts in British Columbia, Saskatchewan and Quebec have correctly separated consumer claims from business claims in proposed class actions involving an arbitration agreement. It argues that these decisions "recognize that courts may not adjudicate claims within a class action where they would not have jurisdiction if the claims were brought individually." The result in Ontario, however, means that the enforceability of an arbitration agreement as against business consumers now depends on the form of the action in which the claim is brought. Businesses will no longer be able to rely on their freedom of contract and the selection of a particular mode of dispute resolution.

Finally, TELUS says there is good reason to doubt the correctness of the Court of Appeal's decision and points to the Saskatchewan Court of Appeal's decision in *Saskatchewan Power Corporation v. Alberici Western Constructors, Ltd.*, 2016 SKCA 46 which rejected the interpretation of the partial stay power adopted in Ontario.

Response to TELUS' Application for Leave to Appeal to the Supreme Court

In response to TELUS, Avraham Wellman ("Wellman") takes the position that there is no conflict in appellate jurisprudence regarding the interpretation and application of section 7(5) of the *Arbitration Act* and equivalent provincial statutes.

Wellman submits that in reality, TELUS seeks a stay of proceedings for business customers, not because they seek to have those claims resolved through arbitration, but because a stay of those claims would effectively defeat their resolution. Thus, the exercise of discretion pursuant to s. 7(5) is important to remedy this unfairness and mitigate against "arbitrator bias in favour of the dominant and repeat-player corporate client" as was noted in *Seidel*.

Contrary to TELUS' assertions, Wellman argues that the present case and past jurisprudence, like *Griffin v. Dell Canada Inc.*, 2010 ONCA 29 ("*Griffin*"), do not stand for the proposition that arbitration agreements are *de facto* unenforceable in class proceedings that involve consumer and non-consumer claims. Further, these cases do not contradict the general principle that contractual arbitration clauses are presumptively enforceable. Rather, the Court of Appeal's decision at issue demonstrates that the "determinative factor to consider in exercising the broad discretion conferred by s. 7(5) is the reasonableness of granting, or refusing to grant, a partial stay of the proceeding in respect of matters that are subject to an arbitration agreement, when the proceeding continues with respect to similar or, in this case, virtually identical matters that are not governed by an arbitration agreement."

Wellman, echoing the Court of Appeal's interpretive approach, goes on to say that in the same way that *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 and *Rogers Wireless v. Muroff*, 2007 SCC 35 were decided based on the "intricacies of the *Civil Code of Quebec*", *Seidel* reflects the interpretation of the relevant British Columbia legislation. In the same vein, the decision in *Griffin* was limited to the interpretation of the Ontario legislation. "Statutory consistency or difference is a matter of legislative policy for each provinces, not a matter of national importance. It cannot be as the Applicants would have it, that every intersection of an arbitration agreement with litigation admits of an issue of national importance."

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