B.C. legislature signals major shift to consumer protection legislation

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The B.C. Government has proposed major changes to the province's consumer protection legislation which would render class action waivers, mandatory dispute resolution, and arbitration clauses void in respect of consumer transactions and inoperable in non-consumer transactions where claims are of low value. If the amendments pass as currently drafted, businesses will lose the ability to stop or limit a class action through a pre-certification stay order premised on their contracts including either of these clauses.

The proposed amendments

The *Business Practices and Consumer Protection Amendment Act, 2025* (the *Amending Act)* would amend the existing *Business Practices and Consumer Protection Act* (BPCPA). The *Amending Act* introduces the "Consumer Contract"[1], defined as a "contract relating to a consumer transaction", relying on the existing definition of "consumer transaction" as "a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family, or household, or, a solicitation, offer, advertisement or promotion by a supplier with respect to [one of these transactions]"[2]. Functionally, this will include any standard form contract between a supplier of goods and services and a member of the public, ranging from signed paper contracts for physical goods to clickable "terms and conditions" for electronic products and services.

Under the proposed s.14.3, suppliers will be barred from including in a Consumer Contract any term that prevents the consumer from commencing or becoming a member of a class in a class proceeding relating to a matter arising out of the contract.[3] Commonly, these are known as "class action waiver" clauses. If a class action waiver is included in the Consumer Contract, it will be deemed void.[4] Under the same provision, suppliers will also be barred from including any "dispute resolution terms" which require a consumer to submit any dispute arising out of the contract to arbitration or other dispute resolution processes. As with class action waivers, any dispute resolution term included in the Consumer Contract will be void. Notably, s. 14.3(3) will allow for parties to *agree and choose* to submit disputes arising out of the Consumer Contract to arbitration or dispute resolution, but only *after* a dispute has arisen.

The proposed s.14.4 introduces the “low value claim”: claims arising out of contracts that seek recovery of values less than the yet-to-be-specified prescribed amount.[5] Dispute resolution or class action waiver clauses in relation to low value claims will be deemed “inoperative”. The use of “inoperative” rather than “void” and the lack of an explicit ban on the inclusion of the clauses in the contract creates a necessary distinction from s.14.3, presumably to allow for these provisions to operate in circumstances of high value claims under the same contract. As with s. 14.3 parties may again choose dispute resolution after the dispute under the contract has arisen. Crucially, “contract” in this section is defined to “not include a Consumer Contract”. Additionally, the existing s. 2(1) will be amended to include s. 14.4 as “[applying] to transactions, matters or things, *regardless of whether they involve a consumer*” (emphasis added)[6]. Read together, these provisions make clear that s.14.4 will broadly apply to *any* contract, or at least any commercial or business contract.

The *Amending Act* would also amend s.189(2) to make it an offence to contravene either s.14.3 or s.14.4[7]. These two new sections (189(2)(c.2) and(c.3), respectively), would immediately follow the existing s.189(2)(c) “unconscionable acts or practices” offence.

The new s. 203.001 will expressly establish that s. 14.3 and 14.4 are retrospective and would apply to contracts entered into before, on or after the coming into force of those sections.[8] S. 14.3 and s.14.4 will come into force as at the date of Royal Assent, while s.189(2) will not come into force until regulations are enacted by the Lieutenant Governor in Council.[9]

Other proposed amendments include a prohibition on terms that bar consumers from posting reviews of goods or transactions on the internet[10], prescribed information that must be included in Consumer Contracts such as the itemized purchase price, return, exchange cancellation and refund policies, and renewal terms[11], and restrictions on the type of products that can be sold using direct sales contracts, including furnaces, duct cleaning services, air conditioners, cleaners or purifiers, and water heaters, purifiers or softeners[12].

The *Amending Act* was introduced by Attorney General the Honourable Niki Sharma K.C. It passed its First Reading in the Legislative Assembly on February 25, 2025. MLAs debated the *Amending Act* on February 27 and March 3, 2025, after which its Second Reading was unanimously approved.[13]. The *Amending Act* must still undergo further examination and votes at the Committee Stage, the Report Stage, and the Third Reading, before being eligible for Royal Assent. Associated regulations would then follow.

Past legal challenges to class action waivers and mandatory arbitration clauses

The last several decades have seen a marked increase in the inclusion of mandatory dispute resolution/arbitration clauses and class action waivers in consumer contracts. These clauses have become particularly prevalent in electronic “clickwrap” contracts. The practical effect of mandatory dispute resolution/arbitration clauses and class action waivers (where coupled with arbitration provisions) is to preclude class action litigation in favour of alternative dispute resolution. Defendants have frequently relied on these

clauses to stop or limit prospective class actions through pre-certification stay orders, requiring prospective litigants to act individually through the prescribed resolution processes.

Historically this has been a hard-fought area of the law. The propriety of these clauses has been consistently challenged by plaintiffs' counsel as unconscionable, and contrary to public policy and class proceedings goals (judicial economy, access to justice, behaviour modification). Despite these challenges, these provisions have been held to be valid and enforceable in numerous instances, based on the policy of the law favouring reference to alternative dispute resolution. Courts have chosen to consider the clauses within the specific factual and contractual context of the dispute, with varying results.[14]

The Supreme Court of Canada has considered mandatory arbitration clauses in the class action context multiple times in the past twenty years, indicating the public importance of the issue.[15] In 2011's *Seidel v Telus Communications Inc.*, the Court considered the stay of a proposed class action that sought broad relief under the BPCPA, including remedial relief under s.172. The claim concerned a standard form cell phone contract containing a mandatory arbitration clause. In a 5-4 decision, the Court upheld the mandatory arbitration clause and stayed all claims *except* those sought under s.172. Under s.3 of the BPCPA, any agreement between parties that would waive, or release "rights, benefits or protections" conferred by the BPCPA is void. Because s.172 explicitly conferred a right to bring an action in court, the mandatory arbitration clause could not impede this right. The effect of this decision was to leave the door open for contractual clauses to preclude BPCPA remedies; "absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause."[16]

By contrast, in 2020's *Uber Technologies Inc. v Heller*[17], the Court allowed the class action to proceed despite the contract's mandatory arbitration clause.[18] The plaintiff alleged that Uber's standard form services agreement violated Ontario's employment standards legislation. Uber sought and was granted a stay of the class action, relying on the contract's mandatory arbitration clause. The Ontario Court of Appeal allowed Heller's appeal and set aside the stay order. In a 7-1 majority[19] ruling, the Supreme Court dismissed Uber's appeal. The Court held that the clear inequality of bargaining power, the financial and logistical costs of arbitrating in the Netherlands as required under the clause, and the unfair terms that resulted, rendered the mandatory arbitration clause unconscionable and invalid.

Potential effects

If passed, the *Amending Act* will markedly shift class actions practice in B.C. These amendments will slam the door left open to defendants in *Seidel* and put a wide range of BPCPA remedies and other claims back on the table for plaintiffs. We expect subsequent consumer protection class actions to thus be broader in scope, with plaintiffs seeking statutory claims and relief that extend beyond the s.172 remedy. With the *Amending* Act, defendants will no longer be able rely on these clauses as the basis for early stay application to avoid or limit certification of consumer class actions. With this comes increased legal risk and litigation costs.

S. 14.4 would bring similar, although perhaps further reaching, affects outside of the consumer sphere. The impact of this proposed section will depend on the prescribed amount for a “low value claim”.

The *Amending Act* could also once again increase B.C.’s attractiveness as a class action venue for potential plaintiffs. While B.C. has been an outlier by not precluding mandatory dispute resolution/arbitration clauses and class action waivers under the BPCPA, the *Amending Act* would now bring B.C.’s consumer protection legislation in line with that of other provinces, including Ontario, Quebec, Alberta and Saskatchewan.[20] However, the extension to “low value claims” in the non-consumer context goes further than the legislation in those jurisdictions and could open the floodgates to new class actions arising from contracts previously subject to class action waivers and mandatory dispute resolution.

Steps to take

Concerned businesses should monitor the *Amending Act*’s progression through the legislature and follow BLG’s Class Action page for continued updates.

For any questions about the topics and cases covered in this review, or to learn more about how BLG can advise you, please contact one of our Vancouver office Class Actions team members listed below.

Footnotes

[1] Proposed s.14.1(1).

[2] S. 1(1) of the BPCPA.

[3] Proposed s.14.1(1)

[4] Proposed s.14.1(2)

[5] Proposed s.14.4(1).

[6] The new s. 2(1) would read: “Section 14.4 *[dispute resolution and class proceeding term or acknowledgment inoperative – low value claim]* and Parts 6 *[Credit Reporting]* and 7 *[Debt Collection]* apply to transactions, matters or things, regardless of whether they involve a consumer.” (Proposed amendment underlined)

[7] Proposed s. 189(c.2) and s.189(c.3) – inclusion of an offence provision seems likely a drafting error in so far as s. 14.4 is concerned.

[8] Proposed s. 203.001: Division 4 of Part 2 applies to contracts entered into before, on or after the coming into force of that Division.

[9] See Items 1 of the table at s. 41 (s.3 of the *Amending Act* which creates s.14.3 and 14.4), and Item 4 (s.36 of the *Amending Act*, which will amend s.189(2)).

[10] Proposed s.14.2.

[11] Proposed s. 18.2.

[12] Proposed s. 20.1.

[13] Hansard Blues, Morning Session Draft Transcript for February 27, 2025; Hansard Blues, Afternoon Session Draft Transcript for February 27, 2025.; Hansard Blues, Afternoon Session Draft Transcript for March 3, 2025.

[14] In B.C., see, for example *Pearce v 4 Pillars Consulting Group Inc.*, where the Court of Appeal deemed a class action waiver unenforceable in a debt restructuring fees case; see also *Williams v Amazon* and *Spark Event Rentals Ltd. v Google LLC*, where in both cases the Court of Appeal upheld the stay of class proceedings because of the mandatory arbitration clause in the underlying contracts.

[15] See *Dell Computer Corp. v Union des consommateurs* 2007 SCC 34 and *Rogers Wireless Inc. v Muroff,* 2007 SCC 35 (2007); *Seidel* (2011); *Telus Communications Inc. v Wellman*, 2019 SCC 19 (2019); *Uber* (2020).

[16] *Seidel* at para 2.

[17] 2020 SCC 16.

[18] The action has since been certified. See *Heller v Uber Technologies Inc.,* 2021 ONSC 5518.

[19] Brown J. concurring with the majority.

[20] See ss. 7(2) and 8(1) of Ontario's *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A; s. 11.1 of Quebec's *Consumer Protection Act*, C.Q.L.R., c. P-40.1; and s. 101 of Saskatchewan's *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2. Alberta's consumer protection legislation also expressly prohibits mandatory arbitration clauses: see s. 16 of the *Consumer Protection Act*, R.S.A. 2000, c. C-26.3.

By

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