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Once more unto the breach: the Supreme Court of Canada weighs in again on arbitration clauses and class actions

The question of whether and when arbitration clauses will preclude a class proceeding is seemingly continually litigated. In some circumstances—such as in the consumer protection context—legislatures have clarified that certain claims cannot be subject to arbitration. In other cases, however, it is up to courts to craft the appropriate rules. The recent decision of *TELUS Communications Inc v Wellman* shows that the question of what rules are appropriate can attract significant disagreement. In a 5-4 split decision, the majority of the Supreme Court of Canada held that valid arbitration clauses in contracts should generally be given effect and that persons with such contracts should not be included in class proceedings.

By way of background, the plaintiff had brought a proposed class proceeding in Ontario against Telus, alleging that Telus was improperly overcharging customers by rounding up calls to the next minute without disclosing this practice to consumers. The effect of this was that consumers would more quickly use up their monthly allotment of minutes and incur additional charges.

The plaintiff's proposed class action included both consumers and business customers. Telus' contracts with customers contained clauses requiring that their disputes be resolved in binding arbitration. Telus conceded that Ontario's *Consumer Protection Act* invalidated the arbitration clauses in the consumer contracts. However, Telus argued that the claims asserted on behalf of business customers in the class should be stayed, as those contracts were subject to arbitration clauses that remained valid.

The plaintiff argued that the claims on behalf of business customers should not be stayed. While s 7(1) of Ontario's *Arbitration Act* provides that a court "shall" stay an action where a matter is subject to an agreement to arbitrate, the plaintiff relied on s 7(5) of the *Act* to argue that the claims of business customers should not be stayed. Section 7(5) provides as follows:

> 7(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

Numerous courts in Ontario had previously held that s 7(5) of the *Arbitration Act* permits courts to decline to grant a partial stay where some class members' claims were subject to a valid arbitration clause and others were not. The practical effect of this is that if some class members' contracts included valid arbitration clauses while others did not, but there were common issues across all class members, Ontario courts would often let all class members be included in a class action out of concerns for efficiency and access to justice.

The Ontario Superior Court of Justice accepted the plaintiff's position and rejected Telus' partial stay motion, as did the Ontario Court of Appeal. Telus sought and was granted leave to appeal to the Supreme Court of Canada.

In its decision released on April 4, 2019, the Supreme Court of Canada allowed Telus' appeal in a 5-4 decision. The majority, authored by Justice Moldaver, noted that Ontario legislature had made a clear policy statement to emphasize party autonomy in allowing the parties to resolve their disputes by way of arbitration. The Court noted that courts were generally required to stay proceedings where they are subject to a non-arbitration clause and court intervention arbitrations are limited.

Turning to the interpretation of s 7(5) of the *Arbitration Act*, the majority of the Supreme Court interpreted that section different than how Ontario courts had previously interpreted it. The majority held that s 7(5) could only be employed where two pre-conditions were met: first, the agreement deals with only some of the matters in respect of which the proceeding was commenced; and second, it is reasonable to separate the matters dealt with in the agreement from the other matters. Where both of those conditions are met, s 7(5) provides the court the ability to stay the proceeding with respect to the matters dealt with in the arbitration agreement, and allow it to continue with respect to other matters.

The majority did not accede to the plaintiff's submission that s 7(5) provided a basis on which courts could refuse to stay the proceeding where it was not reasonable to separate the matters dealt with in the agreement from the other matters. The

Court specifically held that s 7(5) could not be used to allow cases to proceed to litigation in courts where there was a valid arbitration clause. Put differently, in the majority's view, s 7(5) could be used to stay a proceeding, but not to refuse to stay a proceeding where there is an otherwise valid arbitration clause. Justice Moldaver also noted the policy reasons in support of his conclusion:

> …Mr. Wellman's interpretation sits at odds with the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement. If accepted, Mr. Wellman's interpretation would reduce the degree of certainty and predictability associated with arbitration agreements and permit persons who are party to an arbitration agreement to "piggyback" onto the claims of others. Ultimately, this would reduce confidence in the enforcement of arbitration agreements and potentially discourage parties from using arbitration as an efficient, cost-effective means of resolving disputes. Clearly, this was not what the legislature had in mind when it passed the *Arbitration Act*.

The plaintiff had advanced, and the dissent considered seriously, a number of other policy concerns that supported their position that the claims of such class members should not be stayed in favour of arbitration. These policy considerations included access to justice, the potential for abuse of arbitration clauses in contracts of adhesions, multiplicity of proceedings, and the difficulties distinguishing between consumers and non-consumers. The majority rejected all of these concerns, holding that they could not prevail in the face of clear legislative text to the contrary.

Interestingly, with respect to the point about contracts of adhesion, the Supreme Court of Canada noted that any concerns about unfairness resulting from standard form contracts would be better dealt with through the doctrine of unconscionability, as the Ontario Court of Appeal had done in its recent decision in *Heller v Uber Technologies Inc,* rather than through s 7(5) of the *Arbitration Act*. Because the plaintiff in *Wellman* had not raised the issue of unconscionability, that argument was not available.

In the result, Justice Moldaver, for the majority, held that s 7(5) provided Ontario courts no jurisdiction to decline to stay class members' claims where those class members had entered into a valid arbitration clause.

The Supreme Court of Canada's decision in *Wellman* confirms that the legislative policy of giving effect to arbitration

agreements should not be easily set aside in class actions on policy grounds by courts alone. Certainly, the legislature can always choose to dissent certain types of claims from arbitration in favour of class proceedings, as most legislatures have for claims under provincial consumer protection statutes. However, in the absence of clear legislative guidance to the contrary, the majority of the Supreme Court refused to stretch the language of the *Arbitration Act* in order to allow claims subject to a valid arbitration clause to be included within a class action.

Ultimately, as I have pointed out in previous blog post here and here, identifying the appropriate boundary between the competing policy objectives of favouring party autonomy to agree to arbitrations and allowing plaintiffs to pursue effective redress in the form of a class action is difficult. Courts have generally approached this issue through careful interpretation of the applicable legislation. The majority's decision in *Wellman* employs a textual approach to interpreting the *Arbitration Act* and lands in favour of giving primacy to valid arbitration clauses.

To the extent that decisions like *Wellman* do not reflect the appropriate balance of these competing policy objections, it remains open to the legislature to either specifically permit or decline to permit the use of arbitration clauses in particular contexts. Indeed, legislatures are likely better placed to draw this line than are courts. However, for the time being, parties with valid arbitration clauses (at least outside the employment law context) can feel secure in the knowledge that courts will give serious effect to such arbitration clauses.