Supreme Court of Canada Allows Parties to Escape Arbitration Clause and Pursue Class Action

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On March 18, 2011, the Supreme Court of Canada released its much-anticipated decision in *Seidel v. Telus Communications Inc. (Telus)*. At issue was whether a mandatory arbitration clause in the appellant's consumer contract with *Telus* meant that she could not proceed with a class action against Telus. In a ruling which appears to weaken the enforceability of arbitration clauses in both consumer and commercial agreements across the country, a narrow, five-judge majority of the Court permitted the class action to proceed with respect to one statutory claim notwithstanding the arbitration clause.

Background

Seidel had entered into a standard-form consumer contract with Telus for cellular telephone service. The agreement included a term mandating that any dispute between the parties be settled by arbitration, and that any right to participate in a class action be waived.

Despite the existence of the arbitration clause, Seidel commenced a class action against Telus on behalf of a proposed class of customers, alleging that Telus unlawfully charged her for time that her phone was not actually connected to its cellular network. Seidel argued that Telus engaged in deceptive business practices in violation of various provisions of the *Business Practices* and *Consumer Protection Act*, S.B.C. 2004, c. 2 (the BPCPA).

In light of the arbitration clause Telus applied to stay the class proceeding pursuant to Section 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55.

The Supreme Court of Canada had previously addressed the issue of whether a class proceeding should be stayed on the basis of an arbitration clause in 2007 in the context of two Québec actions: *Dell Computer Corp. v. Union des Consommateurs (Dell)* and *Rogers Wireless Inc. v. Muroff (Rogers Wireless)*.

Dell was decided first and its reasons were subsequently applied in *Rogers Wireless*. As such, it is *Dell* which is often cited as the leading Supreme Court of Canada decision in the area. In *Dell*, the Court stayed the class proceeding and referred the

parties back to arbitration. The Court reasoned that while class action legislation confers a right to pursue an action through a certain procedure, it does not create a new substantive right which would override the terms of a contract, including an arbitration clause.

The Decision

The primary question which remained unanswered following *Dell* was its applicability outside of Québec in the common law provinces. This was the issue at the heart of the appeal in *Telus*. In its decision to stay the entire class action on the basis of the arbitration clause, the B.C. Court of Appeal applied *Dell*, holding that its reasons applied beyond Québec.

In a narrow 5-4 decision, a majority of the Supreme Court of Canada granted the appeal from the B.C. Court of Appeal in part. It upheld the stay ordered by the Court of Appeal over most of the causes of action, but lifted the stay in respect of the claim under Section 172 of the *BCPCA*. Section 172 allows any individual, whether or not that individual is affected by a particular transaction, to bring an action in B.C. Supreme Court to restrain a supplier from contravening the *BCPCA*. The Court interpreted this provision as creating a right to bring an action as a "public interest plaintiff" with the intention to "shine a spotlight on allegations of shabby corporate conduct." The Court held that the policy behind this provision would not be served by private arbitrations. Accordingly, it held that Section 3 of the *BCPCA*, which mandates that rights under the Act cannot be released or waived, overrode the arbitration clause in the parties' agreement.

Seidel was, therefore, permitted to pursue a class action against *Telus* in respect of her Section 172 claim under the *BCPCA*, despite having agreed to settle all such disputes with *Telus* through arbitration. Justice Binnie, writing for the majority, concluded that the legislation was enacted to encourage private enforcement in the public interest. As such, it was a right conferred by statute and could not be waived by contract.

With regard to the central issue of the appeal – the applicability of *Dell* outside of Québec – Justice Binnie offered surprisingly little commentary. The majority's decision to uphold the stay in respect of Seidel's other claims does suggest, however, that *Dell* applies in the common law provinces. This is also supported by Justice Binnie's unqualified statement: "*Dell* and *Rogers Wireless* stand, as did *Desputeaux*, for the enforcement of arbitration clauses absent legislative language to the contrary."

The above comment begs the question of what constitutes "legislative language to the contrary." Given that the majority was only able to locate the legislative intent behind Section 172 of the *BCPCA* after engaging in a lengthy and complex exercise of statutory interpretation, it appears that courts following *Telus* will not necessarily require express language of legislative intent to override an arbitration clause. This could, therefore, present more opportunities for contracting parties to escape their arbitration agreements. Perhaps sensing this possibility, Justices Deschamps and LeBel authored a dissenting opinion, notable for its sharp criticism of the majority's approach.

The Impact of Telus in the Commercial/Non-Consumer Context

In provinces such as Ontario, Alberta and Québec, consumer protection legislation expressly prohibits mandatory arbitration clauses in consumer agreements. As such, the relevance of *Telus* for these provinces is the enforceability of arbitration provisions in a non-consumer context.

Following *Telus*, parties who in the past might have believed the court process was not available to them in light of an arbitration clause, will be more likely to attempt to circumvent the arbitration clause and pursue their dispute before the courts. Commercial parties should, therefore, be prepared for an increased number of claims proceeding to the court system.

Franchisors in provinces where there is franchise disclosure legislation in place should be on guard as such legislation (which is remedial and akin to consumer protection legislation) is typically interpreted generously in favour of franchisees, and includes rights which may not be waived or released. An example of this is subsection 4(1) of the *Arthur Wishart (Franchise Disclosure) Act*, 2000 (the *Wishart Act*) which affords franchisees in Ontario the right to associate. Subsection 4(2) of the *Wishart Act* provides that this right cannot be interfered with, prohibited or restricted by contract or otherwise. Indeed, under Subsection 4 (4) of the *Wishart Act*, any provision in a franchise agreement or any other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising the right to associate is void. A franchisee may attempt to rely on *Telus* to argue that a provision in its franchise agreement requiring the franchisee to arbitrate any disputes interferes with its right to associate (which according to the Ontario Court of Appeal in *405341 Ontario Limited v. Midas Canada Inc.* includes the right to collective action) and is therefore void.

The increased vulnerability of arbitration clauses in the non-consumer context is already apparent in recent, pre-*Telus* Ontario decisions. In *Griffin v. Dell Canada*, for example, the Ontario Court of Appeal allowed small businesses which purchased allegedly defective computers, to participate in class proceedings along with consumers in spite of an arbitration provision. Similarly, in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, the Ontario Superior Court of Justice held that franchisees should be permitted to participate in a class proceeding against a franchisor notwithstanding an arbitration clause on the basis that the question of whether to enforce an arbitration clause should be determined at the certification hearing. Finally, in *Stoneleigh Motors Limited et al. v. General Motors of Canada Limited*, the Ontario Superior Court of Justice permitted various GM dealers to participate in a group action against GM despite the inclusion of an arbitration clause in their dealer agreement.

In spite of the stay being lifted with respect to the claim under Section 172 of the *BCPCA*, it should be noted that the Court did express broad support for arbitration and emphasized its importance as a form of dispute resolution. Notwithstanding, the decision in *Telus* may invite greater judicial intervention into the arbitration process.

Conclusion

The majority decision in *Telus* suggests that arbitration clauses may be more vulnerable to escape than previously believed. The extent to which future litigants will be successful in avoiding arbitration agreements remains to be seen but given the recent number of Ontario cases which have permitted commercial parties to pursue court action in spite of arbitration agreements, it appears likely that *Telus* will lead to a greater amount of public litigation for commercial parties down the road.

If you have any questions or wish to discuss this further, please contact the authors, Jennifer Dolman or Matthew Thompson or any members of our International Commercial Arbitration and Alternative Dispute Resolution Group or the Franchise Group.