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Wellman v. TELUS: Supreme Court emphasizes enforceability of arbitration provisions

APRIL 5, 2019 7 MIN READ

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In its recent 5-4 decision in *Wellman v. Telus*, the Supreme Court of Canada confirmed the enforceability of arbitration provisions in the context of business (i.e., non-consumer) contracts by granting the defendants' request to stay such claims in a proposed class proceeding. Notably, the Supreme Court granted the stay notwithstanding the fact that the class action — which included both consumer and business claimants who were subject to mandatory arbitration provisions — was allowed to proceed on behalf of the *consumer* claimants, whose rights to avail themselves of the class actions regime were preserved by statute.

The decision provides increased certainty and predictability with respect to the enforceability of arbitration agreements between commercial parties and emphasizes the legislature's role in setting policy in the face of competing public policy objectives.

Background

As we have previously written (in earlier blog posts "Ontario Court of Appeal clarifies the impact of arbitration clauses on class proceedings" and "Supreme Court grants leave to appeal"), the underlying class proceeding involved claims by consumer and business customers against the defendants TELUS Communications Inc. and related entities (the Defendants) grounded in an alleged practice of overcharging customers without disclosure. The Defendants' contracts with all customers contained standard terms and conditions, including a mandatory arbitration provision.

The Defendants conceded that the arbitration clause was unenforceable against consumers by virtue of the statutory protections provided by the Ontario *Consumer Protection Act*. However, the Defendants sought to stay the business customers' claims on the basis that these claimants were subject to a valid and binding arbitration agreement and were not governed by the *Consumer Protection Act*.

The motion was heard by Justice Conway, who held that section 7(5) of the Ontario *Arbitration Act*

...grants the court the discretion to determine whether it is reasonable to separate the matters dealt with in an arbitration agreement from the other matters in the litigation. If the court does not consider it reasonable to separate them and refuses the partial stay, all matters may proceed in the litigation, regardless of the arbitration clause.

Finding that it would be unreasonable to separate the business customer claims from the consumer claims in this case, she refused to grant the stay and certified the class.

The Court of Appeal's decision

The Ontario Court of Appeal dismissed the appeal and affirmed Justice Conway's decision. In so doing, Justice van Rensburg, writing for the majority, reviewed the governing jurisprudence and concluded as follows:

Accepting the primacy of arbitration over judicial proceedings where the parties have a contractual agreement to arbitrate does not alter the *Griffin* analysis or the disposition of the present appeal. Rather, both *Seidel* and *Griffin* accept that arbitration agreements will generally be enforced, that any restriction of the parties' freedom to arbitrate must be found in the legislation of the jurisdiction, and that the ability of the court to interfere with this freedom depends on the legislative context.

Having accepted that the applicable legislative framework will govern the interpretation and enforceability of arbitration provisions in a given context, Justice van Rensburg went on to find that the Ontario legislative scheme granted the court sufficient discretionary authority to decline to enforce arbitration provisions in appropriate circumstances. On this basis, she ultimately accepted the lower court's ruling that, in the circumstances of this case, it would have been unreasonable to separate the business customer claims from the consumer claims as it could lead to "inefficiency, risk inconsistent results and create a multiplicity of proceedings."

In a concurring decision, Justice Blair — while agreeing that *Griffin* was still binding authority — expressed reservations about *Griffin*'s correctness due to concerns that litigants might be able to "sidestep" the substantive right to arbitrate non-consumer claims by adding consumer claims to their proceeding. More specifically, given that the protections afforded by Ontario's *Consumer Protection Act* cannot be stayed in favour of arbitration, he expressed reservations about the potential for non-consumer claimants to bundle their claims together with consumer claimants with a view to avoiding arbitration.

The Supreme Court's decision

Writing for the majority, Justice Moldaver found that section 7(5) of Ontario's *Arbitration Act* does not grant the court the discretion to refuse a stay of matters that are subject to a mandatory arbitration agreement. Rather, he noted that section 7(1) of the *Arbitration Act* establishes the general rule that provides for a mandatory stay in favour of arbitration where a proceeding is commenced in respect of a matter governed by an arbitration agreement. While this rule is not absolute, and is subject to a number of exceptions — including the partial stay provision in section 7(5) of the *Arbitration Act* — Justice Moldaver noted that section 7(5) grants the court discretion only if two preconditions are met:

- The "proceeding must involve both (1) at least one matter that is dealt with in the arbitration agreement and (2) at least one matter that is not dealt with in the arbitration agreement"; and
- it is reasonable to separate the matters dealt with in the arbitration agreement from the other matters not dealt with in the agreement.

In this case, Justice Moldaver found that the proceeding involved only one issue (the alleged overcharging), which was covered by the arbitration agreement, and that the first precondition to section 7(5) was therefore not met. Accordingly, as neither section 7(5) nor any of the other *Arbitration Act* exceptions applied, the general rule of section 7(1) mandating a stay in favour of arbitration applied.

While acknowledging the policy concerns raised by the dissent (including the desire to facilitate access to justice), the majority held that absent "express direction from the legislature," these could not be allowed to overwhelm the objectives advanced by the *Arbitration Act*. In his view, the dissent's 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. It would expand the opportunities for parties to a valid arbitration agreement — even a heavily negotiated one between sophisticated commercial entities — to avoid their agreement and seek relief in court. This would in turn steer parties away from a "good and accessible method of seeking resolution for many kinds of disputes" that "can be more expedient and less costly than going to court"

In conclusion, the majority of the Supreme Court emphasized that "the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts."

The dissent

The dissenting opinion, delivered by Justices Abella and Karakatsanis, interpreted section 7(5) of the *Arbitration Act* as granting judges broader discretion to grant or refuse a stay in favour of arbitration. In their view, Justice Conway's discretion was properly exercised in allowing the business customers' claims to proceed with the consumer class action.

The dissent characterized the majority's approach as a "textualist" interpretation that did not pay appropriate heed to policy considerations and would result in

... a dispute-resolution universe that has the effect of forcing litigants to spend thousands of dollars to resolve a dispute worth a fraction of that cost; denies others meaningful access to a remedy if they are not prepared, or cannot afford to, engage in a cost-benefit losing proposition; and invites the very proliferation of proceedings a class action was invented to avoid. The result of these disincentives is that business consumers will simply not enforce their rights.

Implications

The Supreme Court's decision in *Wellman* provides much-needed guidance and clarity regarding the appropriate circumstances in which a court will grant a stay under the *Arbitration Act*. In essence, the decision narrows the instances in which judicial discretion for a partial stay under section 7(5) will apply and portends greater use of the mandatory stay provision under section 7(1) in the context of commercial contracts.

While the case highlights the tension between the policy rationales for enforcing arbitration agreements and those underpinning the class actions regime, the majority decision in *Wellman* ultimately underscores the central tenet that it is the role of legislature to set policy and navigate these competing objectives — not the role of the courts.

As we have previously written, Canadian courts have interpreted provincial consumer protection laws as evidencing a legislative intent to permit consumer class proceedings despite the presence of mandatory arbitration provisions. The Supreme Court's decision in *Wellman* clearly limits this principle to the consumer context and reaffirms the enforceability of such arbitration provisions in the commercial context. This dichotomy between business and consumer contracts will likely feature prominently in future disputes regarding the

enforceability of arbitration provisions and the ability of claimants to avail themselves of the class proceedings regime.