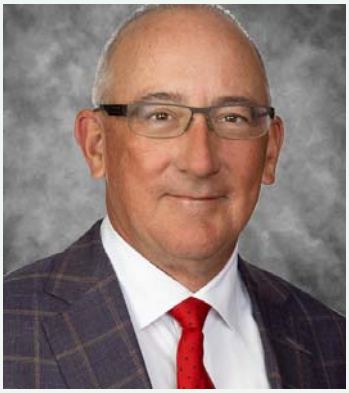
Wellman v. TELUS Communications Inc.:

The Supreme Court of Canada Reinforces Arbitral Party Autonomy in the Context of Class Proceedings



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Introduction

Many consumer agreements in Canada contain arbitration clauses that require any dispute arising from the consumer transaction to be determined by way of private arbitration. These clauses often also preclude any form of class dispute resolution. In recent years, most Canadian jurisdictions have enacted legislation that overrides such clauses. Consequently, Canadian consumers—notwithstanding any contractual commitment to the contrary—may resort to the courts in the event of a dispute with a supplier, including by way of class action. However, the same may not be true when the litigation includes non-consumers, even if they are subject to the same contract with the supplier as the consumers, but to whom the consumer protection legislation does not apply.

In *Wellman v. TELUS Communications Inc.*,[1] a majority of the Supreme Court confirmed that a class proceeding brought on behalf of such non-consumers constitutes an impermissible attempt to negate a mandatory contractual arbitration. In a split 5-4 decision, two diverging perspectives were expressed. On the one hand, the majority upheld the legislature's stated objective of ensuring that parties to a valid arbitration agreement abide by it, confirmed the degree of certainty and predictability associated with arbitration agreements, and reinforced the concept of party autonomy in the commercial setting. On the other hand, the minority expressed concern that arbitration in these circumstances would be corrosive to the goal of greater access to justice owing to the cost of individual arbitrations.

The majority decision in *Wellman* is consistent with the Supreme Court's decision eight years ago in *Seidel v. TELUS*,[2] which was decided under a different legislative regime in the Province of British Columbia. *Seidel* also

concerned a dispute arising out of a cell phone contract between Telus and one of its customers who sought to bring a class action. The contract also contained a mandatory arbitration clause and Telus applied to stay the class proceeding based on the *Arbitration Act* in B.C.[3] Similarly, in a split 5-4 decision, the majority of the Supreme Court held that an arbitration clause will prevail "absent legislative intervention."[4] As a result, the non-consumer claims were stayed in favour of arbitration, while the consumer protection claims were allowed to proceed to court by way of class proceeding.

Prior to the Supreme Court's decision in *Wellman*, the Ontario Court of Appeal had interpreted the Ontario *Arbitration Act, 1991*,[5] as giving discretion to the court to allow consumer claims to proceed to court (thereby bypassing the mandatory arbitration clause) on the basis that the non-consumers were "inextricably linked" to the consumer protection claims. The Court of Appeal for Ontario first expressed this view in *Griffin v. Dell Canada*[6] in 2010, and upheld it again in its decision in *Wellman*.[7]

The Supreme Court in both Seidel and in overturning the Court of Appeal in Wellman confirmed the concept of party autonomy and upheld the policy underlying Canadian arbitration statutes: parties to a valid arbitration agreement should abide by their agreement, even where the mandatory arbitration clause is contained in a standard form contract. Policy considerations will not be permitted to distort the actual words of the statute so as to oust mandatory arbitration where the legislature has allowed for it.

The Legislative Context in Ontario

The starting point for the Court's analysis is section 7 of the Ontario *Arbitration Act*, whose overriding legislative intent is to promote arbitration.

Stay

7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

Effect of refusal to stay

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

Agreement covering part of dispute

(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.[8]

No appeal

(6) There is no appeal from the court's decision. [emphasis added]

Lower Courts' Decisions

Wellman was a proposed class proceeding, which involved claims by consumer and business (i.e. non-consumer) customers against Telus and related entities for allegedly overcharging customers without disclosing the billing practice.[9] The defendants' contracts with customers contained standard terms and conditions, including a mandatory arbitration clause. The defendants conceded that by virtue of the statutory protections of the substantive and procedural rights prescribed by Ontario's *Consumer Protection Act*, the arbitration clause was unenforceable against consumers (representing about 70% of the class).[10] However, relying on s. 7(5) of the *Arbitration Act*, the defendants sought a partial stay of the business customers' claims (about 30% of the class) on the basis that such claims were not governed by the *CPA*.

Hearing both the motion for a partial stay and the motion for certification together, Justice Conway refused to

grant the partial stay and certified the class. Relying on *Griffin*, she found that it would be 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."[11] Telus appealed that decision on the basis that the motions judge had erroneously relied on *Griffin*, which, Telus argued, had been overtaken by the Supreme Court's decision in *Seidel*. Telus argued that in light of *Seidel*, s. 7(5) of the *Arbitration Act* cannot be read as conferring jurisdiction over claims the parties have agreed to submit to arbitration and that such claims are subject to the mandatory stay provision in s. 7(1).

The Court of Appeal for Ontario dismissed the appeal. Writing for the majority, Justice van Rensburg held that *Griffin* had not been overtaken or altered by *Seidel* since *Griffin* was "consistent in principle with *Seidel* but was decided in a different legislative context."[12] *Seidel* was determined in the context of B.C.'s legislative framework regarding arbitration and consumer protection, whereas *Griffin* was decided in the context of Ontario laws. Those different legislative frameworks drove the different outcomes in each case; in particular:

- section 7(5) of the Ontario *CPA* expressly exempts consumer contracts from mandatory arbitration, while the British Columbia equivalent contains no such provision;[13] and
- the *Arbitration Act* provides broader authority for courts to intervene in arbitration than B.C.'s equivalent legislation, which provides courts with a very limited right of intervention.[14]

In her reasons, Justice van Rensburg emphasized the importance of the legislative context in determining whether a mandatory arbitration clause will be enforced:

> 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.
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> …
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> In Ontario, accordingly, courts have the discretion to refuse to enforce an arbitration clause that covers some claims in an action when other claims are not subject to domestic arbitration. It is this legislative choice that drives the analysis. The bifurcation of proceedings in *Seidel* resulted from B.C.'s statutory scheme and was described as "an outcome … consistent with the legislative choice made by British Columbia in drawing the boundaries of s. 172 as narrowly as it did": *Seidel*, at para. 50. One might add that the bifurcation of

proceedings in *Seidel* also resulted from the absence of a discretion similar to that granted to courts pursuant to s. 7(5) of the *Arbitration Act* in B.C.'s arbitration legislation.[15]

In concurring reasons, Justice Blair agreed that *Seidel* had not overtaken *Griffin* because it did not determine the same issues as those raised in *Griffin*. However, he expressed reservations about the correctness of *Griffin* as it relates to a partial stay of the non-consumer claims. He questioned whether litigants ought to be entitled "to sidestep what would otherwise be substantive and statutory impediments to proceeding in court with an arbitral claim by the simple expedient of adding consumer claims (which cannot be stayed by virtue of the Ontario *CPA*) to non-consumer claims (which generally are subject to a mandatory stay) and wrapping all claims in the cloak of a class proceeding."[16]

Majority Reasons of the Supreme Court

Telus was granted leave to appeal to the Supreme Court of Canada. It argued that under s. 7(5) of the *Arbitration Act*, a court has no authority to refuse to stay claims that are subject to an otherwise valid and enforceable arbitration agreement. Rather, the only exceptions to the general stay provision are contained in s. 7(2), and unless one of those exceptions applies, claims that are subject to arbitration *must* be stayed. It argued that since none of the exceptions applied, the business customer claims must be stayed in favour of arbitration.[17] Thus, the sole issue before the Supreme Court was whether, in the context of a proposed consumer/non-consumer class action where only the non-consumer claims are subject to an otherwise valid and binding arbitration agreement, the court has discretion pursuant to s. 7(5) of the *Arbitration Act* to refuse to stay the non-consumer claims.

Writing for the majority, Justice Moldaver's approach to the interpretation of s. 7 was with regard to the purpose of the *Arbitration Act*, consistent with the policy choices made by the legislature in the *Arbitration Act* and in other relevant statutes.[18] In that respect, he held that s. 7(5) of the *Arbitration Act* does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement. Borrowing from the language in *Seidel*, he stated that s. 7(5) "is not a legislative override of the parties' freedom to choose arbitration."[19] While consumers remain free to pursue their claims in court, the business customers do not. Rather, they remain bound by the arbitration agreements into which they entered, thereby leaving them exposed to a stay under s. 7(1) of the *Arbitration Act*.

Justice Moldaver acknowledged Justice Blair's concern with respect to joining business customers in class proceedings involving consumers:

> If non-consumers bound by a valid arbitration agreement could do an end run around s. 7(1) of the *Arbitration Act* simply by joining their claim with that of a consumer and pointing to s. 7(5) of the *Consumer Protection Act*, then this provision could become a vehicle for "piggybacking" non-consumer claims onto consumer claims.[20]

He then interpreted the two preconditions set out in s. 7(5) of the *Arbitration Act* as follows:

- The first precondition (a) is that the proceeding must involve both (i) at least one matter that *is* dealt with in the arbitration agreement and (ii) at least one matter that *is not.*
- If this precondition is met, then the court must determine whether it would be reasonable to separate the two matters such that the second precondition is also met under s. 7(5)(b).
- If it would be reasonable to separate the matters, then s. 7(5) would permit the court to stay the proceeding in respect of the matter dealt with in the arbitration agreements and allow the proceeding to continue in respect of the matter *not* dealt with in the arbitration agreements.
- Alternatively, if the court were to determine that it would *not* be reasonable to separate the two matters such that the second precondition is *not* met, then the general rule under s. 7(1) would apply and the court must stay the proceeding.[21]

In this case, the majority held that the proposed class proceeding commenced by Mr. Wellman involved a single matter – alleged overbilling – and that matter fell squarely within the arbitration agreements into which both consumers and business customers had entered. Accordingly, the first precondition of s. 7(5) was not met and thus, the analysis stops there. Since s. 7(5) does not apply, the business customers' claims must be stayed pursuant to the general rule under s. 7(1) of the *Arbitration Act.*

The Minority's Reasons

An unusually strong dissent penned by Justices Abella and Karakatsanis, characterized the majority's approach as representing "the return of textualism," which "creates 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."[22] The minority's position was that the overall purpose of the *Arbitration Act* is to promote access to justice: promoting accessibility by giving parties the choice of resolving disputes outside the court system. The minority preferred the Court of Appeal's interpretation of s. 7(5) in *Griffin* and by Justice van Rensburg in the court below, because it "avoids the unpalatable consequences while invigorating the purposes and effective functioning of

the relevant legislative schemes."[23]

The minority held that nothing in the text directs a court to read s. 7(5) (or s. 7 as a whole) on a party-by-party basis. Rather, in their view, the focus on the provision is on "matters in respect of which the proceeding was commenced."[24] In this case, it held that Telus' arbitration agreement deals with only some of the matters in respect of which the proceeding was commenced, namely the claims of business customers; whereby the consumer claims are "other matters" which are not subject to arbitration. Therefore, in the minority's view, s. 7(5)(b) gave the motions judge discretion to consider whether it was reasonable to separate the matters dealt with in the agreement [the claims of business customers] from the other matters [the consumer claims.][25]

Conclusion

Ultimately, *Wellman* and *Seidel* do not enable courts in Canada to enforce mandatory arbitration clauses any more forcefully than in the past. Rather, the approach remains that courts should analyze whether a proposed class proceeding may be permitted to override any otherwise applicable arbitration clause. That analysis will largely depend on the legislative context and claims raised by the putative class, and who is in the class or classes.

For example, based on the majority's interpretation of s. 7(5), while the approach taken in *Griffin* has apparently been overtaken, the analysis in *Wellman* applied to the facts in *Griffin* does not alter the outcome of that decision. In *Griffin*, not only did the proposed class action include claims that were captured by the arbitration clause, but also claims that fell outside of the arbitration clause (i.e. claims based on a breach of the *Competition Act*). According to the majority's reasoning, this would be sufficient in order to meet the first precondition in s. 7(5). The court could then use its discretion to refuse the stay and allow all claims to proceed to court in the event that it determines that it would be unreasonable to separate the matters dealt with in the agreement from other matters (which is what the court ultimately found in *Griffin*).

The majority did call on the Ontario legislature to respond to any of the policy concerns outlined in the decision, should it see fit to do so, including:

- Access to justice and the courts;
- Abuse of arbitration clauses in adhesion contracts;
- Shrinking class sizes;
- Multiplicity of proceedings; and
- Difficulty distinguishing between consumers and non-consumers.[26]

However, if, or until, the legislature decides to amend the *Arbitration Act* on this basis, the majority decision in *Wellman* confirms that where claims are advanced in a proposed class action, which fall within an arbitration clause, the court has discretion to grant a stay under s. 7(5) of the *Arbitration Act*.

1 2019 SCC 19 [*Wellman*].
2 2011 SCC 15.
3 RSBC 1996, c. 55.
4 *Seidel, supra* note 2 at para. 2.
5 S.O. 1991, c. 17 [the "*Arbitration Act*"], s. 7(5).
6 2010 ONCA 29, leave to the SCC refused.
7 2017 ONCA 433 [*Wellman OCA*]. See also our earlier article "Is Canada Ready for Class Arbitration? *A Discussion about the Implications of the Ontario Court of Appeal decision in Wellman v. TELUS Communications Company*," Canadian Arbitration and Mediation Journal, vol. 26, No. 2, Fall/Winter 2017.
8 The jurisdictions of British Columbia, Quebec, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut, do not permit a partial stay in its legislation similar to s. 7(5) of the Ontario Arbitration Act.
9 The action centres on the allegation that Telus engaged in an undisclosed practice of "rounding up" calls to the next minute such that customers were overcharged and were not provided the number of minutes to which they were entitled.
10 See s. 7(5) of the *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A [*CPA*], which renders arbitration clauses invalid to the extent that it would otherwise prevent class members who qualify as "consumers" from commencing or joining a class action of the kind commenced by Mr. Wellman. Indeed, the *CPA* expressly shields consumers from a stay of proceedings under the *Arbitration Act*: see *Wellman, supra* note 1 at para. 4.
11 *Wellman, OCA, supra* note 7 at para. 17.
12 *Ibid.* at para. 59.
13 *Ibid.* at paras. 65-67.
14 *Ibid.* at paras. 68-73.
15 *Ibid.* at para. 63 & 73.
16 *Ibid.* at para. 105.
17 *Wellman, supra* note 1 at para. 7.
18 Such as the *CPA, supra* note 10 and the *Class Proceedings Act, 1991*, SO 1992, c. 6; *Wellman, ibid.* at para. 47.
19 *Wellman, ibid*. at para. 8.
20 *Wellman, ibid*. at para. 98.
21 *Wellman, ibid*. at paras. 100-101.
22 *Wellman, ibid*. at para. 109.
23 *Wellman, ibid*. at para. 110.
24 *Wellman, ibid*. at para. 148.
25 *Wellman, ibid*. at para. 171.
26 *Wellman, ibid*. at para. 77.