

IS CANADA READY FOR CLASS ARBITRATION?

By Michael Schafler and Amer Pasalic

Presented at ADRIC 2013 – Gold Standard ADR, Friday, October 25, 2013
Session 5E (Class Action Arbitration), Humber Room (Lobby Level).

Michael Schafler

Tel: 416-863-4457

Fax: 416-863-4592

Email: michael.schafler@dentons.com

Amer Pasalic

Tel: 416-863-4630

Fax: 416-863-4592

Email: amer.pasalic@dentons.com

Introduction

What is Class Arbitration?

Class arbitration (also known as “class action arbitration” or “class-wide arbitration”) has been characterized as a uniquely American procedure. It has been said to have originated as a common law, judge-made dispute resolution mechanism, which evolved in response to the American corporate community’s opposition to judicial class actions.¹ So as to circumvent consumer class actions, corporations began introducing mandatory arbitration clauses in their standard form contracts. However, rather than giving precedence to one form of dispute resolution over another, judges began to harmonize arbitrations and judicial class actions, resulting in the gradual evolution of a new form of alternative dispute resolution known as “class arbitration”. While there is evidence to suggest that class arbitration has been in existence in the U.S. since at least the early 1980s, the device gained significant traction across the United States only in 2003, when the United States Supreme Court implicitly approved the procedure in *Green Tree Financial Corp. v. Bazzle*.²

Class arbitration is a hybrid of a traditional judicial class action and a contractual bilateral private arbitration. Yet, class arbitration may be distinguished from both of its origins. It is different from a class action because it involves a type of representative proceeding injected into the arbitral realm, and many of the classic hallmarks of arbitration, including choice of decision-maker, customized procedures, and confidentiality, would characterize class arbitration as well. Further, the arbitral class in a class arbitration is restricted to parties governed by similar arbitration agreements as the class arbitration representative. In other words, the claims advanced in a class arbitration are limited by the nature of the contract in which the arbitration agreement is found.

On the other hand, class arbitration is different from traditional arbitration because it can involve up to hundreds of thousands of parties in a single proceeding, while most arbitrations are either bilateral in nature, or involve relatively few parties at most. Whereas a traditional arbitration involves claims advanced on behalf of a single party, a class arbitration involves a party seeking relief on a representative

¹ S.I. Strong, “Resolving Mass Legal Disputes through Class Arbitration: the United States and Canada Compared” (2012) 37 Int’l L. & Com. Reg. 921 at 936 (HeinOnline).

² *Green Tree Financial Corp. v. Bazzle*, 539 US 444. (2003) [*Bazzle*].

basis. As a result, issues that generally do not arise in arbitration, such as certification of a class, issues of notice, opting in/opting out, etc. do manifest themselves in class arbitration.

In the United States, class arbitrations have either been administered on an *ad hoc* basis or by arbitral institutions, such as the American Arbitration Association (AAA)³ or Judicial Arbitration and Mediation Services (JAMS).⁴ Class arbitrations have been used to resolve disputes in a wide variety of subject matters, although they have most commonly been applied in the consumer, employment, and health care contexts.⁵ The large number of class arbitration proceedings in the U.S. to date⁶ suggests that this dispute resolution device has had utility in large-scale domestic disputes. However, the greatest potential for class arbitration yet may lie in addressing international disputes:

Large-scale cross-border disputes are one of the biggest issues facing the international legal community today, and class or collective arbitration is uniquely placed to provide parties from different states with the opportunity to resolve their claims at a single time and in a single, neutral venue, not only helping parties obtain justice more quickly and efficiently but also overcoming problems associated with obtaining jurisdiction over parties from a variety of states. Notably, arbitration's ability to obtain jurisdiction over a geographically diverse group of individuals may also influence the development of domestic class arbitration in states (such as Canada) that face legal obstacles to multi-jurisdictional class actions.⁷

ADR in Canadian Class Actions

To date, there have been no class arbitration proceedings held in Canada. Canadian statutes do not provide for class arbitration, nor is there domestic jurisprudence on the subject. Currently, the role of alternative dispute resolution ("ADR") in Canada in the context of class actions generally occurs in three potential stages in the class litigation process:

- As a procedure that is preferable to certification;

³ <http://www.adr.org/>

⁴ <http://www.jamsadr.com/>

⁵ Class arbitrations are usually not involved in cases based exclusively in tort, since they rarely involve pre-existing contractual relationships involving arbitration clauses.

⁶ Since *Bazzle* in 2003, the AAA's Class Arbitration Case Docket (<http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket>) records over 300 class arbitration proceedings as of the writing of this paper, a figure that is likely a gross underestimate of the total number of class arbitrations conducted since the figure does not include arbitrations administered by arbitral institutions other than AAA, nor does it include *ad hoc* arbitrations.

⁷ Strong, *supra* note 1 at 942-943.

- As a means of reaching settlement; and
- As a means of resolving claims pursuant to a settlement agreement.

ADR as Preferable Procedure in Certification

Certification of a class proceeding in Canada involves court approval of the proposed class action on the basis of statutory requirements which are very similar across all jurisdictions in Canada, except Quebec.⁸

One of the requirements of certification involves demonstrating that a class action is the “preferable procedure” for the resolution of the common issues in the litigation. Defendants have recently begun to implement various ADR proposals prior to the certification hearing as a means of defeating the certification motion. This approach, however, has resulted in limited success. For instance, in *Brimner v. Via Rail Canada*,⁹ the defendant’s proposed arbitration and compensation scheme was held to be neither definitive nor preferable, in part because the proposal failed to lay out the procedure for going forward under court supervision, and because it lacked definite timelines in which negotiations would take place prior to proceeding to arbitration.¹⁰

ADR in Settlement

ADR is also available to parties who wish to avoid continuing with the class action litigation. Engaging the services of a neutral arbitrator can often assist the parties in reaching a favourable settlement. Additionally, a history of negotiations between the parties may be useful at the certification or settlement hearings as evidence of the reasonableness of the proposed settlement. In *Corless v. KPMG LLP*,¹¹ it was alleged that KPMG failed to compensate employees for the hours they had worked, contrary to employment standards legislation. In response, KPMG issued a voluntary Overtime Redress Plan (“ORP”), and as part of the eventual settlement agreement, it was agreed that the ORP would be incorporated into the class proceeding as a mechanism to resolve employees’ (both past and present) claims. Framed as a mechanism of the proposed class proceeding, the ORP satisfied the “preferable procedure” criterion of certification for settlement purposes. In addition, Justice Perell approved the ORP

⁸In Quebec, mediation may occur both pre- and post-certification in class actions, and is not part of the “preferable procedure” analysis, as this criterion does not exist in Quebec.

⁹ 1 CPC (5th) 185 (Ont Sup Ct J).

¹⁰ For more examples, see: *Pearson v. Inco Ltd.* (2005), 18 CPC (6th) 71 (ONCA); *Rumley v. British Columbia* (2001), 205 DLR (4th) 39 (SCC).

¹¹ [2008] OJ No 3092 (Sup Ct J).

as the basis for settlement for several reasons: the claims administrator was independent of KPMG, unsatisfied employees could still proceed to mediation and arbitration, and the ORP administration was similar to a court-ordered class action claims administration program.

ADR for Individual Claims under Settlement

Finally, parties to a proposed settlement may use arbitration, mediation, or other ADR processes with respect to the distribution of settlement funds to individual class members. Often, third party arbitrators are involved to determine the compensation for individual claimants at this stage.

Is Canada ready for Class Arbitration?

Statutory Framework in Canada

On the basis of the current statutory framework, Canada is not ready for class arbitration. In part, this is due to Canada's constitutional framework, which differs significantly from that in the United States.

In the United States, class proceedings are governed by the relevant rules of civil procedure, at both the state and federal levels. The class action provisions “simply ride on the coattails of broad jurisdictional principles reflected in other parts of the procedural law”,¹² and therefore national class actions in the U.S. are possible with relative ease. In addition to individual state courts acting as possible venues for class actions, the U.S. federal courts are also empowered to assert jurisdiction over parties from multiple states.

On the other hand, Canadian class proceedings are based on statutory provisions enacted by the provincial and territorial legislatures. Currently, nine of the ten Canadian provinces have enacted comprehensive class proceedings legislation, and Prince Edward Island is in the process of considering draft legislation. Even in those jurisdictions without class proceedings legislation, courts there have the ability to structure class proceedings using the applicable rules of civil practice.¹³ However, national (or “multi-jurisdictional”) class actions in Canada are faced with significant obstacles because of jurisdictional issues, discussed below, which create uncertainty as to the size and composition of class membership.

¹² Strong, *supra* note 1 at 928.

¹³ *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534 at para 34.

Jurisdictional Issues

The jurisdictional Canadian patchwork poses a significant barrier to the potential introduction of class arbitration. The reason for the localized nature of class proceedings in Canada is due to the constitutional framework of the Canadian judicial system. The Canadian constitution assigns jurisdiction over property and civil rights to the provinces, and thus class proceedings are advanced in the superior courts of each province. These courts have broad jurisdiction that covers virtually all areas of criminal, civil, and constitutional law; this breadth in jurisdiction is comparable to U.S. Federal District Courts rather than U.S. State courts.

Because each jurisdiction has its own set of legislation, judicial decisions regarding procedural issues that arise in one jurisdiction may have very little persuasive value in another, even if the statutes under consideration are similar to each other. Further, judicial interpretations of the relevant provincial statutes – even from the Supreme Court of Canada – may always be changed by subsequent legislative amendment.¹⁴ To complicate the situation further, the interaction of different statutes *within* a province (or territory) may result in a different legal landscape in each jurisdiction. For example, the ability to assert a consumer class proceeding may differ from one province to another, depending on the relationship between arbitration and consumer protection statutes in each province. This issue will be elaborated on in the subsequent section of the paper.

Provincial courts in Canada may assert jurisdiction over a party only if the party is present in the jurisdiction, if the party consents to the jurisdiction, or if the court can assume jurisdiction. Unlike the U.S., Canada does not have a multi-district litigation (MDL) mechanism for dealing with cases involving inter-provincial claims, and provincial courts experience difficulties when attempting to assert jurisdiction over non-residents in class actions. Judges from one province cannot require judges from another province to transfer a case or to determine who shall have carriage of an action in another province. It is left for the courts in each province to deal with inter-jurisdictional issues that arise in class actions.

¹⁴ In *Dell Computer Corp. v. Union des consommateurs*, the Supreme Court of Canada considered the issue of whether to stay a judicial class action in favour of arbitration in a consumer dispute, and ultimately decided to stay the class proceeding and refer the parties back to arbitration. However, the decision is no longer applicable in Quebec, the jurisdiction which generated the case, due to a change in the underlying legislation during the appeals process to the Supreme Court of Canada which essentially prohibits the arbitration of consumer claims.

Although there are numerous issues that affect multi-jurisdictional class actions in Canada (and will likely impact any class arbitration regimes as well), including issues of legal representation, enforcement of class actions from other jurisdictions, and suitability of staying a class action in the face of similar proceedings commenced elsewhere, one question that has received particular attention is whether non-residents of a province can be included in a plaintiff class. Naturally, this question has a direct impact on class arbitration. In Ontario and Quebec, Canada's two most populous provinces, as well as in Nova Scotia, the class proceedings legislation is silent on the issue of including non-residents as class members. The class proceeding legislation of the other six provinces specifically contemplates the inclusion of non-resident class members, with four provinces allowing non-resident class members to opt in to a proceeding commenced in another province, and Manitoba and Saskatchewan allowing for certification of non-resident class members on an opt-out basis. Although there is no legislative direction, the approach taken by certification judges in Ontario is that a national class action may be certified on an opt-out basis, as long as there is a real and substantial connection between the subject matter of the action and Ontario.¹⁵

The combination of limited jurisdictional competence and local class proceedings legislation acts as a significant obstacle to introducing class arbitration, at least with respect to proposed multi-jurisdictional arbitrations. This is further complicated by the fact that class arbitration is not provided for in any of the class proceedings statutes of the provinces, such that questions of the status of non-residents (as discussed in the context of class actions), issues of the appropriate representative class member, and issues of award enforcement, to name a few, are unaddressed.

The Effects of Other Provincial Legislation on Class Proceedings

The interaction between arbitration agreements and class actions remains relatively unsettled in Canada, creating another major obstacle to implementing class arbitration. The viability of a class arbitration regime in Canada is dependent on whether the provinces have enacted legislation that curtails the ability of parties to contractually agree upon arbitration as a dispute resolution mechanism. As mentioned

¹⁵ *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 OR (3d) 331 (Gen Div); *Carom v. Bre-X Minerals Ltd.* (1999), 43 OR (3d) 441 (Ont Ct (Gen Div)).

earlier, the provincial legislatures have the power to alter the judicial landscape in each province through statutory reform, thereby negating any judicial interpretations that are seen as inconsistent with the direction of the legislature. Depending on the jurisdiction, a mandatory arbitration provision in a standard form contract may either lead to a stay of a proposed judicial class proceeding, or be considered as part of the preferability analysis on a class certification motion. The area of consumer protection provides an excellent example of the difficulty that a class arbitration regime would encounter in Canada.

An arbitration clause in a commercial contract is generally enforceable in Canada, unless there is an express contrary legislative intention – typically found in consumer protection legislation.¹⁶ While every Canadian jurisdiction has enacted its own arbitration and consumer protection legislation, occasionally the statutory wording is not sufficiently clear as to whether it manifests what the court in *Seidel* called a “legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to ‘private and confidential’ mediation/arbitration”.¹⁷ In these circumstances, it is left for the courts to interpret the relevant statutes, and determine whether the arbitration clause is ousted by the consumer protection legislation.

In Ontario, Quebec, and Alberta,¹⁸ consumer protection legislation expressly prohibits mandatory arbitration clauses in consumer agreements which have the effect of preserving a consumer’s access to the courts and, perhaps more significantly, access to class actions. Therefore, the potential for class arbitration in these provinces would automatically be precluded for consumer claims if the consumers wished to seek a remedy in court.

In British Columbia, the language of the *Business Practices and Consumer Protection Act* (“BPCPA”),¹⁹ which was at issue in *Seidel*, is not as explicit as that in Ontario and Quebec. However, the majority of the Supreme Court of Canada in *Seidel* interpreted the BPCPA to produce the same effect. Section 172 of the BPCPA allows any person (other than a supplier) to bring an action in the B.C. Supreme Court,

¹⁶ *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 SCR 531 [*Seidel*].

¹⁷ *Ibid* at para 2.

¹⁸ In Alberta, the legislative choice has been to confer upon the Minister the power to monitor consumer contracts and to approve only those arbitration and mediation clauses that do not bar class actions and do not frustrate consumer protection legislation.

¹⁹ SBC 2004, c 2.

whether or not they are affected by the particular consumer transaction in question. In effect, the provision provides a cause of action to a consumer irrespective of whether he or she was privy to the contract with the supplier and, in this way, this provision creates an exception to a contractual requirement to arbitrate. The potential chilling effect that the *Seidel* decision poses for class arbitration is discussed more fully below.

Similar to BC, consumer protection legislation in Manitoba is not explicitly clear when it comes to the effects of arbitration clauses in consumer contracts. *Briones v. National Money Mart Co.*²⁰ recently explored the issue of whether, as a matter of statutory interpretation, the *Unconscionable Transactions Relief Act*²¹ ("UTRA") and the *Consumer Protection Act*²² limited the arbitration clause in the consumer agreement. Sections 2-4 of the UTRA provide a statutory right to bring an action in the Court of Queen's Bench with respect to lending transactions involving excessive borrowing costs or which are otherwise harsh or unconscionable. Section 2 of the UTRA confers express remedial powers on the court to address the consequences of such transactions. The court's interpretation of these provisions was analogous to the one employed by the Supreme Court in *Seidel* as to sections 3 and 172 of the BPCPA. Specifically, section 3(b) of the UTRA was interpreted to mean that, to the extent an arbitration clause purported to be an agreement contrary to the consumer's right to bring an action under the UTRA, it did not apply. Section 96 of the CPA, which provides a right to recover "in the court" money paid under an agreement which limited the application of the CPA, was held to be analogous to the non-waiver provision in section 3 of the BPCPA.

The only province in Canada that appears to permit arbitration of consumer contracts is Saskatchewan. Under Part II of *The Consumer Protection Act* ("CPA"), subsection 14(2) permits a consumer who has suffered a loss as a result of an unfair practice to commence an action in court against the supplier. Section 32 of the CPA provides that the sections found in Part II (including section 14) apply notwithstanding any agreement to the contrary, and that any waiver or release of the rights, benefits, or protection provided pursuant to Part II are void. The Saskatchewan Court of Queen's Bench recently

²⁰ 2013 MBQB 168, 2013 CarswellMan 380.

²¹ CCSM c U20.

²² CCSM c C200.

interpreted this provision which, following *Seidel*, might reasonably have been expected to override an arbitration clause in a consumer contract. However, in *Zwack v. Pocha*,²³ the court held that this provision did not preclude arbitration. Rather, the court distinguished the Supreme Court of Canada's approach as to section 172 of the BPCPA on the basis that that provision conferred a "public" right of action that is not available under Part II of the CPA. As such, Part II fell short of manifesting a "legislative intent to intervene in the marketplace to relieve consumers" of their agreements.

In summary, at least with respect to consumer protection proceedings, there is no uniformity within the country about the treatment of pre-dispute mandatory arbitration in consumer contracts, thereby making a comprehensive national class arbitration scheme impossible at present. Some jurisdictions in Canada specifically limit the ability of parties to insist on arbitration (bilateral or class-wide) as the dispute resolution mechanism of choice, while at least one jurisdiction (Saskatchewan) does not appear to preclude arbitrations in consumer contracts. Presently, the issue remains unaddressed in the other Canadian jurisdictions.

This discussion illustrates the importance and necessity of considering other legislation (in addition to arbitration and class proceedings statutes) and decisions from provincial courts when considering the circumstances in which class arbitration might arise. If an arbitration clause has the effect of precluding class litigation, the consumer is left with pursuing a remedy in arbitration for his or her individual claim only. On the other hand, if an arbitration clause cannot preclude the litigation of a class claim in court, then the issue of pursuing a claim through class arbitration becomes moot. The majority decision of the Supreme Court of Canada in *Seidel* also seems to have had a further chilling effect on the possibility of class arbitration in the country, at least at common law.

The Effects of *Seidel* on the Potential for Class Arbitration

As discussed briefly, *Seidel* involved an intended class action by *Seidel* in the British Columbia Supreme Court notwithstanding a provision in the contract with TELUS which mandated arbitration as the dispute resolution mechanism of choice, and which specifically waived the consumer's rights to commence or

²³ 2012 SKQB 371, 354 D.L.R. (4th) 83.

participate in any class action against TELUS. Seidel's complaint was essentially that TELUS unlawfully charged its customers for incoming calls based on when the caller connects to TELUS's network, but before the customer answers the call.

In a strongly divided 5-4 split in the Supreme Court of Canada, Justice Binnie, writing for the majority, allowed the class action to proceed, despite the fact that the parties had the mandatory arbitration provision in the consumer agreement. The majority opinion poses forceful resistance to the concept of class arbitration in Canada for several reasons.

First, Justice Binnie framed the issue as one of "access to justice", noting that "private arbitral justice, because of its contractual origins, is necessarily limited".²⁴ Thus, the court found that some types of claims could only be afforded relief by a court, and "cannot be waived by an arbitration clause".²⁵ The emphasis that Justice Binnie seems to have placed is that the proper forum to exercise rights, benefits, or protection conferred by the consumer protection legislation (BPCPA) is in the courts. The corollary is that being required to assert the same complaint before an arbitral tribunal is tantamount to an impairment of such right, benefit, or protection.

Second, *Seidel* emphasized that the publicity of a public trial was an important policy consideration for class action law suits, and by allowing arbitration, the court would be condoning "low-profile, private and confidential arbitrations where consumers...have little opportunity to connect with other consumers [or] seek vindication through well-publicized court action".²⁶

Finally, the court held that the choice to restrict or not restrict arbitration clauses in contracts was a matter for the legislature, at least with respect to consumer contracts. Because the multiple legislatures in Canada have taken different positions on the role of arbitration clauses in consumer contracts, courts should give effect to the legislative choices made.

The apparent effects of *Seidel* on class arbitration are three-fold. First, the decision can be read narrowly, suggesting that the Supreme Court simply added British Columbia to the list of existing

²⁴ *Seidel*, supra note 15 at paras 7 and 22.

²⁵ *Seidel*, supra note 15 at para 7.

²⁶ *Seidel*, supra note 15 at para 37.

jurisdictions where consumer class actions will be permitted to proceed, thereby precluding the possibility of class arbitration in those jurisdictions. The potentially broader implication of *Seidel* is outside of the consumer context with respect to other remedial legislation akin to consumer protection legislation. For instance, provinces which have franchise disclosure legislation (such as the *Arthur Wishart (Franchise Disclosure) Act, 2000*) may be faced with cases in the future where franchisees may attempt to argue that arbitration provisions in franchise agreements interfere with their right to associate and are thereby void. Finally, the majority decision in *Seidel* suggests that courts, rather than arbitrators, are a better forum for resolving certain types of disputes, which sends a signal that the courts may not be receptive to class arbitration.

Cultural Framework in Canada

Notwithstanding that Canada's legal landscape apparently is not ready for class arbitration at this time, the potential certainly exists that Canada's legal climate, which values access to justice through alternative dispute resolution, will be receptive to class arbitration in the future.

Canada's Pro-Arbitration Reputation

Canada has an international reputation and a rich culture as an arbitration-friendly jurisdiction. In 2009, the Global Dispute Resolution Report²⁷ conducted by Taylor Wessing ranked Canada third behind Switzerland and Australia in a list of 21 countries as a desirable place for arbitration. The study found that Canada, the U.K., Australia, and Singapore, were "predictable and reliable jurisdictions in which to determine disputes".²⁸ On the question of the integrity of the legal procedure and the judiciary, Canada ranked near the top.²⁹ Canada was at the top of the list as the jurisdiction offering the best "value for money" in dispute resolution.³⁰ The country has prospered as a place for commercial arbitrations for several reasons, including its bilingual and multicultural status, its reputation for fairness and neutrality, legal systems in both the common and civil law traditions, its proximity to the United States, and a court

²⁷ Taylor Wessing, "Global Dispute Resolution – The Report", online: Taylor Wessing <<http://aryme.com/docs/adr/2-2-1639/adr-wessing-2009-taylor-wessing-global-dispute-resolution-report.pdf>> [*Global Dispute Resolution Report*].

²⁸ *Ibid* at 3.

²⁹ *Ibid*.

³⁰ *Ibid*.

system supportive of arbitration.³¹ In part, Canada's pro-arbitration reputation is reflected in the growing number of reputable arbitral institutions across the country. Although the majority of the court in *Seidel* appears to have questioned arbitration as a proper dispute resolution forum, at least in the consumer protection context, the Supreme Court of Canada's general attitude towards arbitration, as well as the minority decision in *Seidel* discussed below, suggests that Canada is still receptive to evolving forms of arbitration.

Arbitral Institutions

Over the years, Canada has earned its reputation in the world as an "arbitration-friendly" jurisdiction. In 1986, Canada was the first country in the world to adopt the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), which was implemented by legislative enactments at both the federal and provincial levels. In the same year, Canada, with the consent of its provinces, acceded to and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), an international treaty covering foreign arbitration awards. The accession to these international treaties encouraged the development of Canadian autonomous arbitral institutions across the country, especially in Toronto, Montreal, Calgary, and Vancouver. The most prominent of these institutions today include the ADR Institute of Canada,³² ADR Chambers,³³ the British Columbia International Commercial Arbitration Centre (BCICAC),³⁴ the Canadian Commercial Arbitration Centre (CCAC)³⁵ and, most recently, Judicial Arbitration and Mediation Services (JAMS).³⁶

Strong Domestic Pro-Arbitration Policy

Canada's pro-arbitration policy has also evolved through a series of important pronouncements by Canadian courts, including the Supreme Court of Canada, that arbitration is an alternative dispute resolution mechanism of equal importance and legitimacy to that of the courts.

³¹ Paul Brent, "Getting the word out – Legal Reports: ADR" *Canadian Lawyer Magazine* (September 2011), online: Canadian Lawyer <<http://www.canadianlawyermag.com/3851/getting-the-word-out.html>>.

³² <http://www.amic.org/>

³³ <http://adrchambers.com/ca/>

³⁴ <http://bcicac.com/>

³⁵ <http://www.ccac-adr.org/en/>

³⁶ <http://www.jamsadr.com/jams-toronto/>

Initially, the use of arbitration was promoted over class proceedings, even in the consumer protection context. One of the first decisions to consider the interaction of arbitration and consumer class actions was the Ontario Superior Court decision in *Kanitz v. Rogers Cable Inc.*,³⁷ which involved the issue of whether Rogers Cable was allowed to rely on an arbitration clause in its user agreement that would prevent a class action proceeding. The consumers argued that the arbitration clause was unconscionable and thus unenforceable. Justice Nordheimer rejected this argument, holding that the arbitration clause simply required the parties to seek ADR in another forum, and that this alone was not evidence that Rogers Cable was taking advantage of its customers.

In the aftermath of *Kanitz*, the Supreme Court of Canada released its decision in *Desputeaux v. Editions Chouette (1987) inc.*,³⁸ which was a high-level endorsement of arbitration as a legitimate dispute resolution mechanism. Writing for a unanimous Supreme Court, Justice Lebel held that statutory claims could be arbitrated, unless the statute “explicitly” stated otherwise. The issue in *Desputeaux* was whether the *Copyright Act* prohibited arbitration of ownership disputes because section 37 provided that disputes were to be resolved by the federal or provincial courts.

Rejecting the plaintiff’s argument that claims could not be arbitrated on the basis of that provision, the Supreme Court held that section 37 did not exclude arbitration, but merely identified the court which would have jurisdiction to hear cases involving a particular subject matter within the judicial system. Justice Lebel held that a presumption in favour of arbitration in Canada was consistent with “the trend in the case law, which has been, for several decades, to accept and even encourage the use of civil and commercial arbitration, particularly in modern western legal systems, both common law and civil law”.³⁹ The Supreme Court recognized the important role placed by arbitration in the Canadian legal system, noting that “it is necessary to have regard to the legislative policy that accepts this form of dispute resolution and even seeks to promote its expansion”.⁴⁰

³⁷ [2002] OJ No 665 (Sup Ct J) [*Kanitz*].

³⁸ 2003 SCC 17 [*Desputeaux*].

³⁹ *Ibid* at para 38.

⁴⁰ *Desputeaux*, supra note 37 (Headnote).

Several years later, the Supreme Court of Canada revisited the arbitration/class action debate in the context of consumer protection in *Dell Computer v. Union des consommateurs*⁴¹ and *Rogers Wireless Inc. v. Muroff*.⁴² One of the key issues in *Dell* was whether an arbitrator or the court should first consider the validity and applicability of an arbitration agreement. Writing for the majority, Justice Deschamps affirmed the primacy of the “competence-competence” principle, which essentially means that an arbitral tribunal is competent to decide its own competence – in other words, it has jurisdiction to decide its own jurisdiction. Justice Deschamps held “that in any case involving an arbitration clause, a challenge to the arbitrator’s jurisdiction must be resolved first by the arbitrator ... [unless] ... the challenge to the arbitrator’s jurisdiction is based solely on a question of law...”.⁴³ With respect to the arbitration/class action debate, the majority held that parties who have, by virtue of their agreement to arbitrate, created a substantive right that overthrows the court’s jurisdiction, thus re-affirming the primacy of arbitration even in the face of a consumer class action.

Support for Arbitration by the Seidel Minority

As discussed earlier, the Supreme Court of Canada in *Seidel* held that the relevant provisions of the BPCPA operated to preclude the arbitration of the consumer’s claims under the BPCPA, but in a strongly divided 5-4 split decision, which saw a powerful dissent penned by Justices LeBel and Deschamps that was unusually critical of Justice Binnie’s approach.

Justices LeBel and Deschamps first carefully reviewed Canadian jurisprudence on arbitration, concluding that, until the late 1980s, Canadian courts had been openly hostile towards arbitration. That hostility eventually gave way to a new approach in the series of Supreme Court pronouncements on the topic (canvassed above), to the effect that where a legislature intends to exclude arbitration as a vehicle for resolving a particular category of legal disputes, it must do so explicitly. The dissent found that Justice Binnie’s reading of the relevant provisions of the BPCPA “exhibits the same reluctance to fully accept arbitration as a legitimate form of dispute resolution that permeated the older jurisprudence”,⁴⁴ further

⁴¹ 2007 SCC 34 [*Dell*].

⁴² 2007 SCC 35.

⁴³ *Dell*, supra note 40 at para 84.

⁴⁴ *Seidel*, supra note 15 at para 101.

noting that “[h]is hostility towards arbitration is now couched as an exercise in statutory interpretation”.⁴⁵

Instead, Justices LeBel and Deschamps reasoned that while section 3 of the BPCPA protected substantive rights, the forum in which these rights were to be dealt with was a procedural matter:

An arbitrator can grant the remedies contemplated in s. 172 of the *BPCPA* against TELUS. The arbitration agreement between Ms. Seidel and TELUS does not therefore constitute an improper waiver of Ms. Seidel’s rights, benefits, or protections for the purposes of s. 3 of that Act. Consequently, the *BPCPA*, in its current form, does not provide a court considering a stay application under s. 15 of the *CAA* with a reason for refusing to grant it. Section 3 of the *BPCPA* does not prohibit agreements under which consumer disputes are to be submitted to arbitration or that otherwise limit the possibility of having a proceeding certified as a class proceeding, since s. 172 of the *BPCPA* merely identifies the procedural forum in which an action with respect to the rights, benefits and protections provided for in s. 172 may be brought in the public court system. However, s. 172 does not explicitly exclude alternate fora, such as an arbitration tribunal from acquiring jurisdiction.⁴⁶

Arbitration Post-Seidel

For many, *Seidel* signalled a departure from the Supreme Court of Canada’s recent endorsements of arbitration as a viable alternative to the courts. Any hostility to arbitration on behalf of the national courts or legislature “would be fatal to the development of a novel form of arbitration”.⁴⁷ One scholar opined that *Seidel* marked a “philosophical shift in Canadian arbitration law”, and an abandonment of the interpretative presumption that came out of *Desputeaux* that a matter is arbitrable unless a statute expressly provides otherwise.⁴⁸ On the topic of class arbitration in Canada post-*Seidel*, another scholar wrote:

[*Seidel*]...may be seen as having a chilling effect on the further development of the [] device, at least as a matter of the common law. This is not to say that courts in Canada are foreclosed from considering use of the device, particularly since the localized nature of Canadian

⁴⁵ *Ibid.*

⁴⁶ *Seidel*, supra note 15 at para 164.

⁴⁷ S.I. Strong, “Class Arbitration Outside the United States: Reading the Tea Leaves” (Draft Paper delivered at the ICC Institute 30th Anniversary Symposium on Multiparty Arbitration, 8 December 2009) [unpublished].

⁴⁸ Frederic Bachand, “The Supreme Court of Canada: Pro-Arbitration No More”, online: Kluwer Arbitration Blog <<http://kluwerarbitrationblog.com/blog/2011/03/31/the-supreme-court-of-canada-pro-arbitration-no-more/>>.

class action and arbitration statutes means that precedent – even from the Supreme Court – may not be followed elsewhere in the nation.⁴⁹

However, in the end, there is considerable scope to suggest that the dissenting reasons in *Seidel* are more persuasive than the majority's. The dissent emphasized that the Supreme Court of Canada's prior judgments in *Dell* and *Desputeaux* called for "clear" and "explicit" statements of legislative intent in order for a court to oust contractually-agreed upon arbitration provisions. Further, the dissent argued that "access to justice is fully preserved by arbitration".⁵⁰ The minority's arguments that "access to justice" is preserved by arbitration would further be bolstered if class arbitration had been an option for the consumer, and many of the reservations that Justice Binnie had, such as encouraging deterrence and allowing consumers to pursue collective relief, would also have been addressed by a class arbitration regime.

Conclusion: Necessary Changes before Canada is Ready

Although class arbitration is a novel, and thus far unutilized concept in Canada, it is a device that should be critically analyzed and openly discussed if there is to be any possibility of introducing an effective class arbitration regime in the future. Although the following discussion is not meant to be an exhaustive list of issues that require further resolution before such a regime can be introduced, it is meant to provoke ideas and responses that will further the development of this innovative form of alternative dispute resolution, and assist in any potential institutional reform efforts.

Resolving Jurisdictional Issues: Recognition of Class Arbitration through Harmonized Legislation across Canada

As a matter of statutory interpretation, the possibility of class arbitration has not been addressed by the legislatures, though legislative preference for arbitration is reflected in the arbitration statutes across Canada.

One possible approach to introduce class arbitration in Canada is through legislative means. Most Canadian common law provinces have statutes that address class proceedings as well as arbitrations. Although there are some variations among the different jurisdictions, usually the arbitration statutes

⁴⁹ Strong, *supra* note 1 at 940.

⁵⁰ *Seidel*, *supra* note 15 at para 163.

contain mandatory language that a court “shall” stay a court action and refer it to arbitration, if the dispute falls under the arbitration agreement, with certain exceptions stipulated in the arbitration statute. These exceptions include where an arbitration agreement is invalid or void, or if the subject matter of the dispute is not capable of being the subject of arbitration. This mandatory language reflects a legislative choice to limit judicial intervention in the face of an arbitration agreement. However, class arbitrations do not appear to fall under one of the exceptions for judicial intervention, since they are a matter of procedure, arising only after the arbitrability of the dispute has been established.⁵¹ Therefore, one would surmise that the arbitration of class claims is possible. The problem arises because class proceeding statutes also prescribe mandatory criteria for certification of a class action if certain certification requirements are met. Canadian courts have struggled in these provinces to reconcile the apparent tension between the public policy objectives envisioned in each statute.⁵² As one commentator notes, “it would be paradoxical if, on the one hand, courts adopt a systematically deferential approach in favour of arbitration to recognize it as a separate system of justice...and on the other hand categorically refuse to recognize an arbitrator’s procedural power to arbitrate representative proceedings in the absence of any express legislation.”⁵³

Thus, amendments to existing arbitration or class proceedings legislation are required, not only to resolve this apparent tension between the two statutes, but to harmonize the legislation across the country to enable national certifications of class arbitrations. For instance, the arbitration statutes in each Canadian jurisdiction could be amended to expressly provide for class arbitration to the extent that the claim advanced satisfied the traditional certification requirements of the provincial class proceeding legislation for a class action, with some modifications to account for the differences in how a class is conceived in a class arbitration versus a class proceeding. Similarly, amendments would have to be made to other statutes, such as the consumer protection statutes discussed earlier, that preclude the arbitration of claims in certain contexts in favour of prosecuting claims in court. Because legislation such as consumer protection statutes currently conceive arbitration as generally only involving two parties, a common policy justification for consumer class actions is that individual claims would not otherwise be pursued, given the

⁵¹ Jeffery S. Leon, Eric R. Hoaken & Rebecca Huang, “Class Arbitration in Canada: The Legal and Business Case” (2010) 6:2 Canadian Class Action Review 383 at 407.

⁵² *Ibid.*

⁵³ *Ibid* at 416.

high costs of litigation compared to the relative low values of the claims. If class arbitration was an option, the legislative policies favouring access to justice, judicial economy, and deterrence would still be met in a class proceeding outside of the courts. This would require legislators to revisit these statutes, and determine whether the same policy objectives would be met in arbitrations. This would necessarily require significant consultation with Canadian lawmakers to determine a straightforward, efficient, and practical method to harmonize the laws, but one which also allows courts to maintain their core supervisory roles (perhaps in the form of judicial review) in relation to arbitration and representative proceedings in their respective jurisdictions.

Recognition of Class Arbitration Procedures by Rules

Although class arbitration in the United States has existed in some shape or form for several decades, no statute (state or federal) imposes rules or procedures for class arbitration to ensure that the process is fair, efficient, and consistent across the country. Further, the role of the judiciary in the United States with respect to class arbitration is undefined and plagued with uncertainty. In response to this uncertainty, the American Arbitration Association (AAA) and other arbitral organizations in the U.S. promulgated new rules outlining arbitration procedures applicable to class actions to streamline the process and provide guidance. Since *Bazzle* was released by the U.S. Supreme Court in 2003, the AAA interpreted the decision to mean that class arbitration can occur where the arbitration agreement expressly provides for class arbitration, or when it can be construed to have the same effect. In the same year, the AAA developed the Supplementary Rules for Class Arbitrations (“AAA Rules”), whose goals are:

1. To provide a roadmap for the conduct of class action arbitrations where the underlying contract either expressly or as a matter of contract interpretation authorizes class arbitration (or where class arbitration is ordered by a court);
2. To address significant fairness and due process concerns applicable to all sides, especially absent class members;
3. To balance the efficiencies and cost savings of arbitration with the need for an appropriate level of judicial oversight.⁵⁴

⁵⁴ Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party, online: American Bar Association <http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_1198_NeutralAmCuAAA.authcheckdam.pdf>.

The AAA Rules provide for 3 stages in class arbitration⁵⁵:

1. **Clause Construction Award:** As a threshold matter, the arbitrator must determine whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class. This stage would involve looking into whether the clause in question can be construed as to permit class arbitration. After a decision is made, the arbitration is stayed for up to 30 days to permit any party to ask a court to confirm or vacate the award.
2. **Class Certification:** Next, the arbitrator must decide whether the arbitration should proceed as a class action, taking into account criteria that resemble a traditional class certification analysis performed by Canadian courts. The arbitrator must be satisfied that each class member has entered into an agreement with an arbitration clause that is “substantially similar” to the one signed by all the other class members. Once certification is complete, class members are provided with the “best notice practicable”, and have a right to opt out of the class.
3. **Final Award:** The final award is to be decided on the merits of the case, and shall be reasoned and define the class with specificity. Where the contract is silent regarding class arbitration and there is no state law to address the silence, arbitrators have ruled in favour of class arbitration on the basis of *contra proferentem* and a public policy favouring arbitration.

These rules are meant to provide for interim opportunities for judicial review as well as certain basic procedural safeguards, such that due process is followed. Similarly, in Canada, an official body, such as a domestic arbitral organization, might decide to amend existing arbitral rules or create a new set of specialized rules to outline the procedures used in class arbitration. This would involve significant consultation with working professionals in the industry to determine what the best procedures would be in Canada.

Selection of Arbitrators

A final point of discussion involves the potential problems associated with choosing an arbitrator in a class arbitration. As mentioned, the ability to choose a mutually-agreed upon neutral arbitrator (or panel of arbitrators) has been considered one of the hallmarks of traditional arbitration. In multi-party arbitrations, the complexity of arbitrator selection becomes quickly apparent. If there are more than two parties to a dispute, what procedures are in place to select the arbitrator? Are there any safeguards to ensure that the wealthier party in an arbitrable dispute does not unilaterally have the ability to pay for, and thereby have the option of selecting, an arbitrator of their choice?

⁵⁵ Supplementary Rules for Class Arbitrations, online: American Arbitration Association <http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edis/adrstg_004129.pdf>.

When multi-party and class arbitrations in the United States first began to get traction, the issue of instituting an alternative appointment mechanism resulted in many multiparty proceedings failing to materialize, which further reinforced the presumption that bilateral proceedings were the only possible form of arbitration.⁵⁶ In response to this concern, many national laws and arbitral rules in the United States began to permit courts or arbitral institutions to appoint the entire tribunal of arbitrators if parties could not come to a consensus as to the arbitrator or the selection procedure. Class arbitration procedures in Canada would also have to address some of the same issues, such as how to ensure that neutral arbitrators are selected, and what procedures to employ when parties cannot agree on an arbitrator. Finally, arbitrators must also be equipped with the necessary tools and resources to deal with disputes on a much larger scale than previously encountered.

⁵⁶ S.I. Strong, "Does Class Arbitration 'Change the Nature' of Arbitration ? *Stolt-Nielsen, AT&T*, and a Return to First Principles" (2012) 17 Harv. Negot. L. Rev. 201 at 232.