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**Arbitration Agreements**

# TELUS v. Wellman calls for legislative action | William Horton

By **William Horton**

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(April 8, 2019, 5:54 AM EDT) -- Pity the Supreme Court of Canada.

In *TELUS Communications Inc. v. Wellman* 2019 SCC 19, the court was called upon to choose between:

1. Excluding tens of thousands of TELUS' business customers from any effective remedy by keeping them out of a class action which would decide the exact same claims advanced by customers who are consumers; and
2. Stretching the words of s. 7(5) of the *Arbitration Act* beyond the meaning that the words literally bear.

The minority of four judges would have adopted the solution of stretching the meaning of the words using familiar statutory interpretation principles. Had the minority prevailed, their reasoning would have substantially compromised the future effectiveness of arbitration in the non-class action context. Essentially, they would have recognized a discretion under s. 7(5) of the *Arbitration Act not to stay* a lawsuit with respect to claims *covered by an arbitration agreement*, even though that section literally only provides a discretion *to stay* the action with respect to matters *not covered by an arbitration agreement.* The minority's reasoning would have been a very serious step backward in arbitration jurisprudence.

The majority chose to adhere to the literal meaning of the words — and to blame the legislature for the problem.

Apart from relying on the literal words of s. 7(5) and the grammatical relationship between that section and s. 7(1), which mandates the staying of an action with respect to claims that are covered by an arbitration agreement, the majority relied on the same argument that had won the day in the earlier SCC decision in *Seidel v. Telus* 2011 SCC 15, to the effect that by giving consumers protection from arbitration agreements, the legislature had made a clear choice not to protect non-consumers.

However, it surely cannot be suggested that, by enacting consumer protection legislation, the legislature intended to weaken any grounds on which non-consumers may be able to resist the enforcement of arbitration agreements.

In *Seidel*, the court did not have to consider legislation similar to s.7(5). Therefore, it is not clear how the consumer protection legislation impacts the interpretation of s. 7(5) in terms of whether or not it creates a judicial discretion *not to stay* an action in the face of an arbitration agreement

Neither the majority nor the minority, perhaps because of the way the case was presented to the court, addressed the class action context of the case as providing a discrete basis (not applicable in other contexts) for resolving the apparent conflict between enforcing the provisions of the *Arbitration Act* on the one hand and, on the other, providing access to justice as contemplated by the *Class Proceedings Act*.

It would appear that the average individual claim in the *Wellman* case would amount to about

$1,000. The idea that such claims could realistically be pursued in individual arbitrations, particularly with no limits on the defence that could be mounted by the defendant, and replicated in each case at minimal incremental costs, is not realistic to say the least.

While it is possible for arbitration systems to be set up that will process smaller claims, there is no indication that any such measures were in place in *Wellman*. In any event such systems, even if they are economical for the adhering party, often create issues regarding the impartiality of the arbitrators.

Essentially, the enforcement of arbitration agreements such as the one in question in this case means that there will be no effective recourse for the individual claims, and certainly no recourse for the excluded class as a whole.

In contracts of adhesion used in mass market transactions, once the arbitration clause has served the purpose of shutting down a class action, its remaining functions are, for the most part, ornamental.

Such arbitration clauses are an indirect, albeit highly effective way of contracting out of class proceedings legislation. Often, they are accompanied by explicit clauses in which the adhering party waives access to class proceedings.

Functionally, arbitration clauses and class action waiver clauses are the same. In effect, such agreements give *defendants* the right to opt out of a class action. Given the public policy objectives of class actions, including access to justice and behaviour modification, can this be permissible?

The majority decision in *Wellman* hints that the doctrine of unconscionability may be called into service in support of an argument that such arbitration agreements are invalid under s. 7(2) of the *Arbitration Act* — a point not argued in *Wellman*.

In the recent decision of the Court of Appeal in *Heller v. Uber* 2019 ONCA 1, unconscionability was one of two grounds on which an arbitration clause in an online contract for Uber drivers was invalidated. The question is whether unconscionability puts the bar too high.

A more basic issue is whether arbitration agreements that can be shown to be arbitration agreements in name only are entitled to the same rights of enforcement as agreements that could actually result in arbitrations, and which could effectively resolve the claims in question in a given class action.

Ultimately, the issues are the efficacy of class proceedings legislation and the legitimacy of arbitration as a bona fide method of dispute resolution. It is time for the legislature to act to protect both.

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