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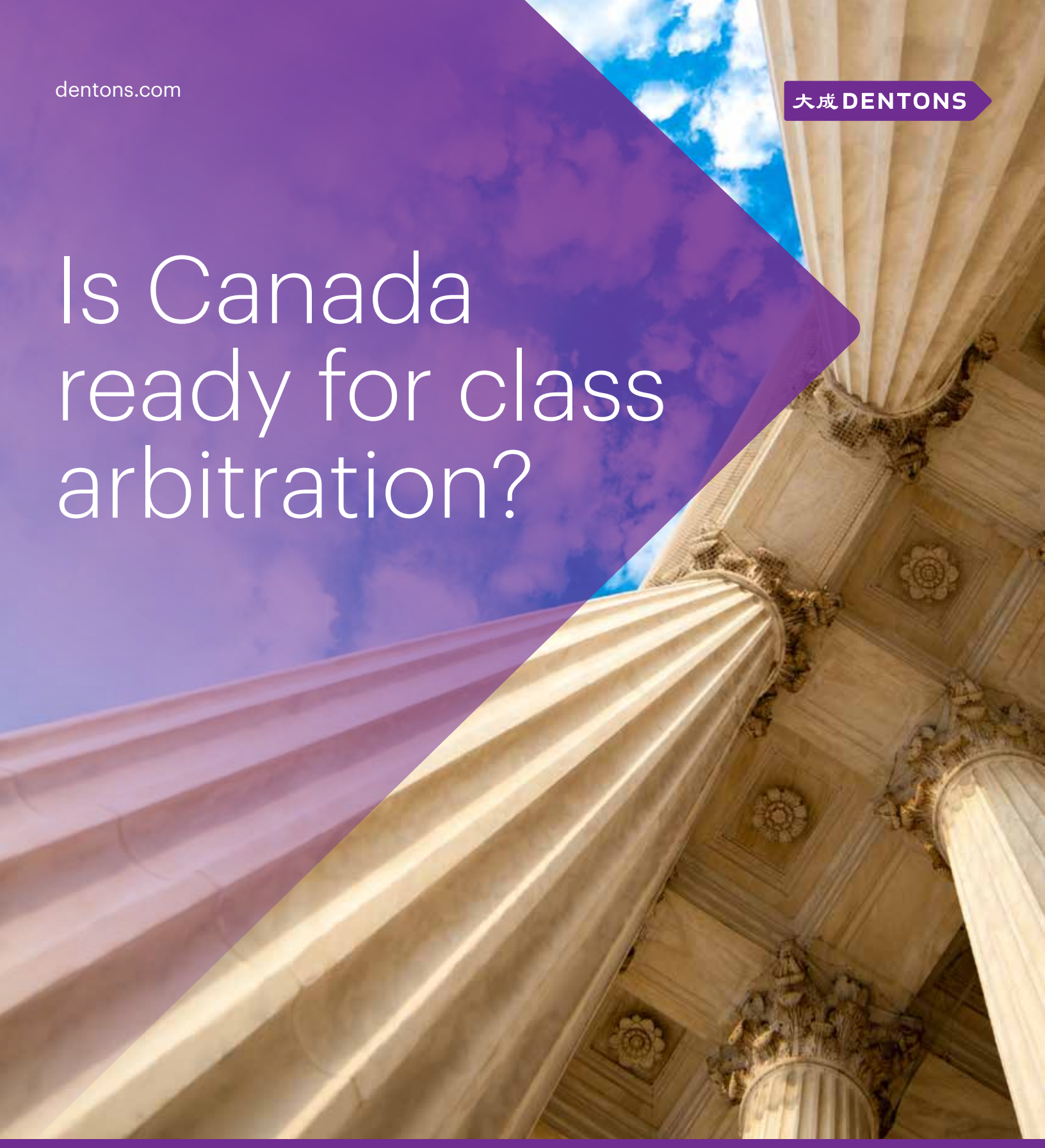
Is Canada ready for class arbitration?



A Discussion about the Implications of the Ontario Court of Appeal decision in *Wellman v. TELUS Communications Company**

By Michael Schafler and Barbara Capes

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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 consumer protection legislation that effectively overrides such clauses.[1] 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. But what happens when the litigation includes non-consumers, who are subject to the same contract with the supplier as the consumers, but to whom the consumer protection legislation does not apply?

This question raises important legal and policy considerations as, generally speaking, domestic arbitration legislation requires the courts to stay any court proceeding in respect of a matter that the parties have agreed to submit to arbitration. Canadian appellate courts, but not yet the Supreme Court of Canada, have grappled with whether to permit the entire class action to proceed or to stay the non-consumer claims in favour of arbitration while the consumer claims continue. What has emerged is an apparent bright line rule that precludes such a partial stay, as most recently seen in the Ontario Court of Appeal's decision in *Wellman v. TELUS Communications Company*.[2] Citing the usual concerns about a multiplicity of proceedings, which impair judicial efficiency and risk inconsistent findings, Wellman appeared to follow an earlier Ontario Court of Appeal decision, *Griffin v. Dell Canada Inc.*[3] The effect of this jurisprudence is to allow non-consumer claims to avoid being determined by way of arbitration on the basis that they are sheltered under legislation that applies only to consumers. Subject to one important caveat, it would seem that the policy objective of encouraging parties to private arbitration has thus been judicially eroded.

This caveat comes courtesy of the concurring opinion of Justice Blair in *Wellman*. The *Wellman* Court had been asked to opine on whether the *Griffin* analysis as it applies to mixed consumer and non-consumer class actions had been overtaken by the Supreme Court of Canada's intervening decision in *Seidel v. TELUS Communications Inc.*[4] While all three judges agreed that *Seidel* had not overruled *Griffin*, Justice Blair expressed reservations about the correctness of *Griffin*, raising two fundamental questions:

1. Did the court in Griffin give appropriate weight to the policy objectives of encouraging parties to resolve their disputes through private arbitration and to support their contractual agreements to do so?

2. Ought non-consumers be entitled to "sidestep" substantive and statutory impediments to proceeding in court with an arbitral claim "by the simple expedient" of adding consumer claims to their action?

In this paper, we explore these issues and seek to resurrect an idea that has received some attention in the past but thus far has not materialized – class arbitration. While this proposed solution has its own challenges, it seems to be best equipped to foster the seemingly competing policy objectives of promoting access to justice, improving judicial economy and supporting contractual agreements favouring arbitration.

The Legislative Context

a. Stay Provisions in Domestic Legislation

The starting point for this discussion is domestic arbitration legislation that is fairly uniform across Canada[5]. In particular, most Canadian jurisdictions have enacted provisions, such as s. 7 of Ontario's *Arbitration Act, 1991*, S.O. 1991, c. 17 (the **"Ontario Arbitration Act"**) whose overriding legislative intent is to promote arbitration.[6]

> **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.[7]

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

It is apparent that s. 7 is akin to a rulebook that delineates how arbitration and court proceedings are to relate to one another, if at all, in circumstances where party A and party B have entered into an arbitration agreement:

1. The overarching principle is that the courts must stay any proceeding in respect of a matter to be submitted to arbitration under an arbitration agreement;[8]

2. The courts can deviate from this rule only in very limited circumstances (none of which applied in *Griffin* or *Wellman*);[9] and

3. Where A has commenced a court proceeding against B in respect of matters that were supposed to be submitted to arbitration, along with other matters not so to be submitted, the courts may grant a partial stay, if it would be reasonable to separate the matters.[10]

To foreshadow our analysis, neither *Griffin* nor *Wellman* dealt with the party A and party B paradigm that is the foundation of s. 7. Instead, the courts in those cases, while applying s. 7(5), were in fact dealing with not only the relationship between A and B (non-consumers) but also A and C (consumers), who had their own, independent, contractual relationship with the supplier. Essentially, the courts appear to have ignored the rule of contractual privity upon which all domestic arbitration legislation is premised. For example, while the Ontario Arbitration Act defines "arbitration agreement" with reference to two or more parties, it is also clear that only one contract between those parties is contemplated. To the extent that multiple contracts and resulting arbitrations are involved, the Ontario Arbitration Act also makes it clear that these matters remain separate unless expressly consolidated (under s. 8). It would appear that the courts' analysis in Griffin and Wellman assumed that "other matters" in s. 7(5) of the Ontario Arbitration Act applies not only to matters arising between A and B but hundreds or thousands of additional contracts, i.e., A and C, A and D, etc.[11]

b. Consumer Class Actions and Arbitration Provisions

Disputes such as the one at issue in Wellman are not new. In early 2002, Justice Nordheimer dealt with a class action in which it was alleged that the defendant had charged customers full internet rates notwithstanding that internet service had allegedly been interrupted or slow: *Kanitz v. Rogers Cable Inc.*[12] As in *Wellman*, the contract contained a mandatory arbitration clause and the defendants successfully moved for a stay under s. 7(1) of the Ontario Arbitration Act. During the course of his analysis, Justice Nordheimer made a number of observations that bear directly on this discussion.

Justice Nordheimer found that class proceedings legislation and domestic

arbitration legislation engage different public policies (access to justice and encouraging appropriate dispute resolution). He also noted there was no reason to prefer one over the other and that in any event the legislation did not have to be interpreted in a manner such that it conflicted. He justified his reasoning, in part, on the preferability analysis to be undertaken by a court being asked to certify a proceeding as a class action. This preferability requirement was intended to capture the question of whether a class proceeding would be preferable when compared to other procedures, including, in Justice Nordheimer's view, class arbitration.[13] This may be inferred from his comment that s. 20 of the Ontario Arbitration Act would appear to permit an arbitrator to consolidate a number of individual arbitrations which raise the same issue.[14] Justice Nordheimer did not refer to s. 8(4) of the Ontario Arbitration Act, which permits the court to consolidate multiple arbitrations "on the application of all of the parties".[15] In any event, Justice Nordheimer was clearly alive to the possibility of individual arbitrations effectively being converted into one class arbitration. Justice Nordheimer also found that such a process would save time and expense for all parties and that this would militate against the argument that a private arbitration clause operates as an "economic wall", barring consumers from effectively seeking relief against a supplier.[16] As discussed below, this view was rejected by all levels of court in *Griffin* and *Wellman*. (Surely, Justice Nordheimer's elevation to the Ontario Court of Appeal this month adds another interesting twist to this story.)

Three years after *Kanitz*, the Ontario *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A ("Ontario CPA") came into force. Sections 7 and 8, which have similar counterparts in other provinces,[17] are of particular significance:

No waiver of substantive and procedural rights

7 (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

Limitation on effect of term requiring arbitration

(2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.

Procedure to resolve dispute

(3) Despite subsections (1) and (2), after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.

Settlements or decisions

(4) A settlement or decision that results from the procedure agreed to under subsection (3) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply.

Non-application of *Arbitration Act, 1991*

(5) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

Class proceedings

8 (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act*, 1992 or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

Procedure to resolve dispute

(2) After a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.

Settlements or decisions

(3) A settlement or decision that results from the procedure agreed to under subsection (2) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply.

> Non-application of *Arbitration Act, 1991*
> (4) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (1) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

While the outcome in *Kanitz* would have been different had these provisions then been in effect, Justice Nordheimer's discussion of the various policy considerations and his views on class arbitration remain particularly apt.

Post-2005 Decisions

The interface between provisions similar to s. 7(5) of the Ontario Arbitration Act and sections 7 and 8 of the Ontario CPA spawned the decisions in *Griffin* and *Wellman*, amongst others.

The relevant facts in *Griffin* were as follows: A non-consumer brought a class action against Dell, seeking damages for defective laptops. The standard form sales agreement contained a mandatory arbitration clause that also restricted any arbitral proceeding to the individual consumer and Dell. Presumably in response to Dell's motion to stay the proceeding in favour of arbitration, and to engage the Ontario CPA, the non-consumer plaintiffs moved to expand the class to include consumers. The record before the court indicated that 70% of the plaintiffs were consumers and 30% were non-consumers.

Citing s. 7(5)(b) of the Ontario Arbitration Act, the court found that it would not be reasonable to separate the consumer from the non-consumer claims such that a partial stay ought not to be granted.[18] The court found that granting a partial stay would lead to inefficiency, a potential multiplicity of proceedings, and added cost and delay, all of which would be contrary to s. 138 of the *Courts of Justice Act* ("CJA").[19] The court also found that since the consumer claims "dominate[d]" (ie. 70%), it was reasonable that the remaining claims should follow the same procedural route as the consumer claims.[20] Potentially contradicting that finding, the court was also concerned that a partial stay would require an examination of each claim and a determination of whether it was a consumer or non-consumer claim. The court accepted the evidence that individual arbitration claims would be too costly to prosecute,[21] such that a stay of any of the claims would not result in them being arbitrated and that, in reality, a stay would "clothe" Dell with immunity from liability for defective goods.[22]

These reasons do raise a number of questions, some of which Justice Blair seems to have adverted to in *Wellman*. Does s. 7(5)(b) of the Ontario Arbitration Act really involve asking whether it would be reasonable to separate the consumer from the non-consumer claims? This approach assumes multiple arbitration agreements between two or more parties when the express language of s. 7 seems to contemplate only one agreement between two or more parties, and claims arising in connection with this singular agreement, as well as other claims involving the same contracting parties. As Justice Blair pointed out, correctly we think, s. 7 of the Ontario Arbitration Act "appears to address circumstances relating to a single arbitration agreement, and not the interconnection between a number of such agreements involving different parties".[23] Certainly, the underlined portions of s. 7 (set out above) would support this view.

The next difficulty relates to s. 138 of the CJA. Presumably, the CJA deals with legal proceedings before the *courts*, and not *private arbitrations*. Accordingly, when considering a partial stay motion under s. 7(5) of the Ontario Arbitration Act, the fact that the consequence of granting a stay would be a class action (before the courts) and one or more private arbitrations (not before the courts), should be neutral. One class action and one or more arbitrations does not entail a multiplicity of "legal proceedings" within the meaning of s. 138 of the CJA. As such, s. 7 of the Ontario Arbitration Act and s. 138 of the CJA do not need to be interpreted as being in conflict with one another.

It is also unclear, at best, why a partial stay would result in added cost and delay. One of the advantages of arbitration is that it is typically faster and often cheaper than court proceedings. Arbitration, particularly *ad hoc* arbitration, can be tailored to take into account the claimant's lack of resources. As Justice Nordheimer observed in *Kanitz*, s. 20 of the Ontario Arbitration Act confers broad power on the tribunal to determine any procedure to be followed in the arbitration, so long as basic rules of equal and fair treatment of the parties are observed.[24]

The impact of the court's determination that the consumer claims "dominate[d]" the non-consumer claims raises other concerns. What if only 51% of the plaintiffs were consumers? 49%? 33%? In any event, as the record disclosed in *Griffin*, it was already known that 70% of the plaintiffs were consumers, so it is unclear why, as the court cautioned, any further examination of the claims was necessary to determine who was a consumer and who was not.

All of this is to suggest that *Griffin* cannot have been intended to introduce a rule of general application to the effect that a partial stay would *never* be granted in class actions involving both consumer and non-consumer claims, thereby defeating the legislative intent of s. 7(5) of the Ontario Arbitration Act. Indeed, the court in *Griffin* considered whether class arbitration was reasonable in the circumstances, and concluded otherwise:

> It is important to note in this regard that Dell's arbitration clause not only requires all claims to be arbitrated, but also provides that "[t]he arbitration will be limited solely to the dispute or controversy between Customer and Dell", thereby precluding the possibility of a class arbitration. I would have found Dell's position much more persuasive had Dell been prepared to submit to an arbitration that would allow for the efficient adjudication of the claims on a group or class basis. However, in oral argument, Dell's counsel confirmed that his client would insist upon the enforcement of this provision and resist any attempt before an arbitrator to join together the claims of a group or class of consumers.[25]

It would appear, then, that *Griffin* simply turned on its own specific facts, and the court's views on class arbitration were greatly affected by Dell's position. It would be difficult to imagine the same outcome had Dell agreed to class arbitration, for example. Yet, from *Griffin* emerged what appears to be a bright line rule for determining whether the courts should grant a partial stay of non-consumer claims in a class proceeding.[26]

A little more than one year after *Griffin* was decided the Supreme Court of Canada released its reasons in *Seidel*. The case arose in British Columbia, which does not have an equivalent of s. 7(5) of the Ontario Arbitration Act. British Columbia's consumer protection legislation is also different. The relevant facts were that consumer and non-consumer plaintiffs had sought class certification of their claims against TELUS for unfair billing practices. TELUS applied for a stay of all claims on the grounds that the arbitration agreement precluded the court proceeding.[27] The Court of Appeal for British Columbia granted the stay, reasoning that British Columbia's consumer protection legislation did not expressly exclude arbitral jurisdiction in the consumer context, and that the competence-competence principle required that a challenge to the existence, validity and scope of an arbitration agreement be brought before the arbitrator in the first instance.[28]

On further appeal, Justice Binnie, writing for a 5-4 majority, varied this result and ordered a partial stay. In his view the British Columbia legislature had clearly delineated which consumer claims could proceed in the courts, and by way of class action, notwithstanding contractual language to the contrary, and which could not (and therefore needed to be arbitrated). Justice Binnie specifically turned his mind to the very same concerns that had persuaded the court in *Griffin* not to grant a partial stay, commenting:

> On the other hand, I would uphold the stay in relation to her other claims which may, if she pursues them, go to arbitration. This may lead, if the arbitration is proceeded with, to bifurcated proceedings. Such an outcome, however, is consistent with the legislative choice made by British Columbia in drawing the boundaries of s. 172 [of the *Business Practices and Consumer Protection Act "BPCPA"*] as narrowly as it did.[29] [emphasis added]

Given that the policy objectives underlying s. 172 of the BPCPA and ss. 7 and 8 of the Ontario CPA are substantially the same, the different outcomes in *Griffin* (no partial stay) and *Seidel* (partial stay) are difficult to rationalize. The latter, we suggest, is more closely aligned with Justice Nordheimer's thinking in *Kanitz*.

It was hardly surprising, then, that TELUS, when confronted with the claims advanced against it in *Wellman*, argued that a partial stay of the non-consumer claims should issue, since *Seidel* had essentially overtaken *Griffin*. In *Wellman*, TELUS conceded that the relevant arbitration

agreement was void as against the consumer plaintiffs (which, as in *Griffin*, comprised 70% of all plaintiffs), but argued that the non-consumer claims should be stayed pursuant to the reasoning in *Seidel*. The motions judge, determined that section 7(5) of the Ontario Arbitration Act "permits the court to deny a partial stay where one party is subject to an arbitration clause and another party is not"[30] and "[p]ursuant to *Griffin*, this discretion may be exercised to allow non-consumer claims (that are otherwise subject to an arbitration clause) to participate in a class action, where it is reasonable to do so."[31] In her view, essentially for similar reasons as in *Griffin*, a partial stay should be refused.

The sole issue on appeal was whether the *Griffin* analysis and framework for determining whether a partial stay of proceedings should be granted had been overtaken by *Seidel*. The majority decision, penned by Justice van Rensburg, concluded that *Seidel* had not overtaken *Griffin*. In fact, the court concluded that "*Griffin* is consistent in principle with *Seidel* but was decided in a different legislative context".[32] According to the court's analysis, s. 7(5) of the Ontario Arbitration Act reflects a legislative choice (not present in British Columbia) that confers a judicial discretion "to refuse to enforce an arbitration clause that covers some claims in an action when other claims are not subject to domestic arbitration".[33]

Commentary

Is the current state of the law satisfactory? We expect that the answer to this question depends on one's views regarding arbitration. *Griffin* suggested that the following factors are relevant to the partial stay analysis:

i. Whether consumer claims "dominate";[34]

ii. Whether the specific liability and damage issues can be administered effectively in arbitration;[35]

iii. Whether the arbitration agreement provides for class arbitration;[36] and

iv. The willingness of the non-consumers and the supplier to submit to class arbitration.[37] (Interestingly, in *Wellman*, the issue as to TELUS' willingness to submit to class arbitration appears not to have arisen. One wonders if that would have changed things.)

We offer the following food for thought as this issue will undoubtedly need further refinement, particularly in light of Justice Blair's opinion in *Wellman*.

As mentioned earlier, the dominance criterion is not without its challenges. Suppose there is a class action where 70% of the class members are non-consumers. Applying the dominance criterion, a partial stay should issue. But what if the arbitration agreement regarding this non-consumer class did not provide for class arbitration and the claims were required to be heard individually? In the event of a partial stay there would be many individual arbitrations. According to the courts' views expressed to date, this would engage a new concern: namely a multiplicity of proceedings within the meaning of s. 138 of the CJA. That very concern, however, was not one shared by the majority in *Seidel*.

The inherent danger of the current framework, in that it relies on notions of "dominance" and the application of s. 138 of the CJA (or similar legislation), is that it is inconceivable to imagine a scenario where non-consumer claims will ever be stayed under s. 7(5) of the Ontario Arbitration Act (or equivalent). Given that s. 7(5) of the Ontario Arbitration Act uses a reasonableness test, one additional factor – previously not considered – ought to play a role: the parties' reasonable expectations. Any supplier aware of consumer protection legislation would presumably know that any mandatory arbitration clause would be invalid against consumers. But by the same token, the supplier – and the sophisticated non-consumer alike – must be taken to have understood their arbitration agreement as binding on both parties. In some way, this approach is consistent with the majority approach in *Seidel* that found it perfectly acceptable to have multiple proceedings, essentially because this was the result the legislature favoured. Yet, under *Griffin* and *Wellman*, with the introduction of even one consumer claim, the risk is that non-consumer claims become sheltered under consumer protection legislation. Certainly Justice Blair appears to have had some misgivings when he questioned a litigant's right to add consumer claims to non-consumer claims in order to "wrap [...] all claims in the cloak of a class proceeding".[38]

Is there a way to harmonize these seemingly competing values? Class arbitration in Canada has been a topic of lively discussion for many years.

One of the co-authors has previously hypothesized as to what legislative landscape and/or judicial authority would be required for class arbitration to take root in Canada.[39] *Kanitz* and *Griffin* left open this possibility. Perhaps it is time to embrace the idea of class arbitration which is well entrenched south of the border. At the very least a fulsome debate is in order.

In an era where judicial resources are scarce,[40] it would seem appropriate to encourage class arbitration wherever possible. Consider in this context the broad wording of s. 25(1)(c) of the Ontario *Class Proceedings Act, 1992*, SO 1992, c.6 (the "Ontario Class Proceedings Act") that appears to permit arbitration of individual issues after the common issues are determined, provided that the parties agree. Further, s. 12 of the Ontario Class Proceedings Act confers tremendous power on the court to make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose such terms on the parties as it considers appropriate. Why not order the class arbitration of non-consumer complaints?[41] This would be particularly apt where the supplier and the non-consumers are willing to submit to class arbitration, regardless of the wording of their arbitration agreement, as the Court appears to have contemplated in *Griffin*.

Where this is all headed remains unclear. Certainly Justice Blair has breathed some interesting life into the conversation. Some will argue that the outcomes in *Griffin* and *Wellman* were pragmatic and therefore acceptable. Others will want to better understand why a contractual agreement can be overridden by a statute that does not govern the contract. We hope that this paper at least contributes to a healthy discussion. On August 30, 2017, TELUS did its part to keep the conversation alive, filing an application for leave to appeal the Ontario Court of Appeal's judgment to the Supreme Court of Canada. If leave is granted, the Court's final decision may be expected to have far reaching consequences on consumer and non-consumer class actions alike and, perhaps, even usher in a framework for class arbitration in Canada.

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Notes

1—Some consumer protection legislation expressly prohibits arbitration clauses and waivers of class proceedings: see *Consumer Protection Act,* 2002, SO 2002, c 30, Sched A, ss. 7, 8 [Ontario CPA]; *Consumer Protection Act*, CQLR c P-40.1, s. 11.1 [Quebec CPA]; *The Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, s. 101 [Saskatchewan CPA]. In Alberta, arbitration agreements will not bar a consumer from commencing an action unless the arbitration agreement is in writing and it has been approved by the Minister: see *Fair Trading Act*, RSA 2000, c F-2, s. 16 [Alberta FTA]. There are general non-waiver provisions that may similarly invalidate arbitration agreements and/or class action waivers in the consumer protection legislation of British Columbia, Manitoba, Nova Scotia, Yukon, Northwest Territories, and Nunavut: see *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss 3, 172 [BPCPA]; *Consumer Protection Act*, CCSM c C200, s 96 [Manitoba CPA]; *Consumer Protection Act*, RSNS 1989, c 92, s 28 [Nova Scotia CPA]; *Consumers Protection Act*, RSY 2002, c 40, s 88 [Yukon CPA]; *Consumer Protection Act,* RSNWT 1988, c C-17, s 107 [NWT CPA]; *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, s 107 [Nunavut CPA].

2—2017 ONCA 433 [*Wellman*].

3—2010 ONCA 29 [*Griffin*].

4—2011 SCC 15 [*Seidel*].

5—See *Arbitration Act*, RSBC 1996, c 55 [BC Act]; *Arbitration Act*, RSA 2000, c A-43 [Alberta Act]; *The Arbitration Act*, 1992, SS 1992, c A-24.1 [Saskatchewan Act]; *The Arbitration Act*, CCSM c A120 [Manitoba Act]; *Arbitration Act*, 1991, SO 1991, c 17 [Ontario Arbitration Act]; *Code of Civil Procedure*, CQLR c C-25.01, art. 622 [Quebec CCP]; *Arbitration Act*, SNB 2014, c 100 [New Brunswick Act]; *Arbitration Act*, RSNS 1989, c 19 [Nova Scotia Act]; *Arbitration Act*, RSPEI 1988, c A-16 [PEI Act]; *Arbitration Act*, RSNL 1990, c A-14 [Newfoundland Act]; *Arbitration Act*, RSY 2002, c 8 [Yukon Act]; *Arbitration Act*, RSNWT 1988, c A-5 [NWT Act]; *Arbitration Act*, RSNWT (Nu) 1988, c A-5 [Nunavut Act].

6—See BC Act, *ibid*, s. 15; Alberta Act, *ibid*, s. 7; Saskatchewan Act, *ibid*, s. 8; Manitoba Act, *ibid*, s. 7; New Brunswick Act, *ibid,* s. 7; Nova Scotia Act, *ibid*, s. 7; PEI Act, *ibid*, ss. 6, 7; Newfoundland Act, *ibid*, s. 4; Yukon Act, *ibid*, s. 9; NWT Act, *ibid*, s. 10; Nunavut Act, *ibid*, s. 10.

7—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.

8—Ontario Arbitration Act, *supra* note v, s 7(1).

9—*Ibid*, s. 7(2).

10—*Ibid*, s. 7(5).

11—See Anthony Daimsis, "All is Not Well, Man: Ontario Courts Should Pay Closer Attention to Arbitration in Law when Deciding Arbitration Cases" (August 8, 2017), Bay Street Chambers (Blog), online: <http://baystreetchambers.com/2017/08/08/all-is-not-well-man-ontario-courts-should-pay-closer-attention-to-arbitration-law-when-deciding-arbitration-cases-2/>. We agree in this regard with Anthony Daimsis' analysis, but question his view on whether the consumer arbitration agreement is an offer to arbitrate or, rather a valid contract, leaving this point for another day.

12—(2002), 58 OR (3d) 299 (SCJ) [*Kanitz*].

13—*Ibid* at para 53, citing *Hollick v Toronto (City),* 2001 SCC 68 at para 31.

14—*Ibid* at para 55.

15—Ontario Arbitration Act, *supra* note v at s 8(4).

16—*Kanitz, supra* note viii at para 55.

17—*Supra* note 1.

18—*Griffin, supra* note iii at para 47.

19—*Ibid.*

20—*Ibid* at para 50.

21—*Ibid* at para 51.

22—*Ibid* at para 57.

23—*Wellman, supra* note ii at para 104.

24—*Kanitz, supra* note viii at paras 46, 55.

25—*Griffin, supra* note iii at para 60 [emphasis added].

26—See *Briones v National Money*, 2013 MBQB 168 at para 61.

27—*Seidel v TELUS Communications Inc.*, 2008 BCSC 933.

28—*Seidel v TELUS Communications Inc.*, 2009 BCCA 104

29—*Seidel, supra* note iv at para 50

30—*Wellman and Corless v TELUS and Bell*, 2014 ONSC 3318 at para 85.

31—*Ibid* at para 89.

32—*Wellman, supra* note ii at para 59.

33—*Ibid* at para 73.

34—*Griffin, supra* note iii at para 50.

35—*Ibid* at para 58.

36—*Ibid* at para 60.

37—*Ibid*.

38—*Wellman, supra* note ii at para 105.

39—Michael Schafler & Amer Pasalic, "Is Canada Ready for Class Arbitration?", (Paper delivered at the ADRIC 2013 – Gold Standard ADR Conference, October 25, 2013) [unpublished].

40—See *R v. Jordan*, 2016 SCC 27 at paras 27, 116, 117: The Supreme Court of Canada found that Canadians expect a justice system that is reasonably efficient and timely, and that all justice system participants should be more proactive in avoiding inefficient practices to reduce the strain on limited judicial resources. Similarly, in *Hyrniak v. Mauldin*, 2014 SCC 7, at paras 1, 2, 24, 27, 28, the Supreme Court of Canada established that access to justice is a serious concern and that undue process and lengthy trials create costs and delays, which prevent fair and just dispute resolution. The Court stated that Canada is in need of a culture shift that incorporates the view that alternative models of adjudication are legitimate.

41—See *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879, at para 49: Justice Perell acknowledged that s. 12 of the Ontario Class Proceedings Act does not give the court jurisdiction to outsource its judicial function beyond s. 25(1) and Rules 54 and 55 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, thus it cannot force parties to enter into an arbitration agreement to resolve their dispute without the parties' consent.

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