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CASE LAW UPDATE

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Seidel v TELUS Communications Inc

2011 SCC 15 (Released 18 March, 2011)

Class Action – Consumer Contract – Arbitration Clause

In this case the Supreme Court of Canada permitted a proposed representative plaintiff ("**Seidel**") to proceed with a class action against TELUS Communications Inc. ("**TELUS**") despite an arbitration clause in the parties' contract.

The cellphone contract between Seidel and TELUS purported to require the parties to settle any dispute by arbitration and purported to prevent Seidel from participating in a class action. This did not stop Seidel from commencing an action alleging that TELUS had misrepresented its formula for calculating air-time usage and had thereby engaged in deceptive and unconscionable practices contrary to the *Business Practices and Consumer Protection Act*, SBC 2004, c 2 ("**BPCPA**") and the *Trade Practice Act*, RSBC 1996, c 457 ("**TPA**"). TELUS had charged consumers for phone calls from when their phone began to ring rather than from when they answered it.

The B.C. Court of Appeal had stayed the action, in reliance on the Supreme Court decisions in *Dell Computer Corp* v *Union des Consommateurs*, 2007 SCC 34 ("***Dell***") and *Rogers Wireless Inc v. Muroff*, 2007 SCC 35 ("***Rogers Wireless***"). These decisions out of Québec stayed class actions which had sought to proceed in the face of arbitration clauses.

By a majority of 5-4 the Supreme Court in *Seidel* allowed the claim under section 172 of the BPCPA to proceed on the basis that the BPCPA provided a cause of action to a person regardless of whether that person had a contractual relationship with the defendant. In contrast, the Court upheld the stay of the common law and TPA claims. In effect, the Supreme Court extended the *Dell* and *Rogers Wireless* decisions to common law Canada, except insofar as legislation, such as the BPCPA, prevents the enforcement of arbitration clauses.

Section 172 of the BPCPA allows consumer activists or others, whether or not they are personally "affected" by a "consumer transaction", to bring an action in the B.C. Supreme Court. As Justice Binnie stated for the majority, the "clear intention" of the BPCPA is to "supplement and multiply" the government's ability in "an era of tight government budgets" to implement fair

consumer practices. The BPCPA seeks to achieve that goal by "enlisting the efforts of a whole host of self-appointed private enforcers".

This means that Seidel is able to advance her claim by "sheltering" under section 172. In effect, she brings the claim under this section as a consumer advocate and not simply as a wronged party to a contract. The majority further held that the competence-competence principle (arbitrators have power to rule on their own jurisdiction) did not apply because the issue of jurisdiction was raised on undisputed facts and an authoritative judicial interpretation was appropriate.

In dissent, Justices LeBel and Deschamps characterized the legal issue as the determination of the proper role and status of arbitration, and stated that the majority decision was "hostile" to that role and status. They held that the BPCPA does not foreclose, by means of sufficiently explicit language, the use of arbitration as a means to resolve disputes. In their view, because arbitrators can provide the same remedies as the BPCPA contemplates and because arbitral awards would have an impact beyond the immediate parties, arbitration would preserve access to justice.

Ontario, Alberta and Québec already prohibit mandatory arbitration clauses in consumer contracts. In those provinces the impact of this decision will be felt where persons rely on other remedial legislation, such as franchise protection legislation, to circumvent arbitration clauses.

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