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Not All Customers Are the Same: Top Court Rules Business Customers Cannot Join Consumer Class Action

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In its recent ruling in *TELUS Communications Inc. v Wellman*, 2019 SCC 19 (*Wellman*), the Supreme Court of Canada held that business customers of TELUS that entered into mandatory arbitration agreements cannot seek relief in court by participating in a class action together with consumers.

In *Wellman*, a narrow majority of the Supreme Court ruled that for consumers as a protected category of litigant, the right to seek redress by way of class action takes precedence over any contrary promise to resolve disputes through arbitration. For all other litigants, however, the importance of enforcing an arbitration agreement trumps the right of these parties to participate in a class proceeding covering the same subject matter.

Key Takeaways

- Non-consumers cannot simply disregard otherwise-binding arbitration agreements by "piggybacking" on the claims of consumers.
- The decision represents a departure from a line of case law in Ontario and some other provinces, and brings the law in these provinces in line with the law in British Columbia.
- Arbitration clauses are enforceable against non-consumers even if they are included in standard-form contracts.
- Non-consumers may, however, still be able to challenge the enforceability of standard-form arbitration clauses by arguing that those clauses are invalid due to unconscionability.

Background

The case involved an Ontario class proceeding that had been brought against TELUS on behalf of two groups of the company's customers: (i) consumers who purchased its telecom services, and (ii) businesses that purchased these services. Both groups alleged that TELUS had improperly "rounded up" billable airtime to the next minute without disclosing this practice.

Both sets of customers had executed agreements promising to resolve disputes exclusively by way of binding arbitration. The difficulty for TELUS is that Canadian consumer protection legislation generally treats mandatory arbitration agreements as unenforceable against consumers and thus ineffective to prevent consumers from participating in class actions. However, that legislation grants no such protection to non-consumers (such as TELUS's business customers).

Despite this distinction, the courts below had rejected TELUS's challenge to the make-up of the class action and had allowed the class action to proceed on behalf of both consumers and business customers of TELUS. In doing so, the courts below had followed a line of case law to the effect that, under the Ontario *Arbitration Act*, the court has the discretion to refuse to grant a stay of claims that are subject to a valid arbitration agreement if it would not be reasonable to separate them from non-arbitrable claims. Courts in provinces where similar arbitration legislation was enacted (such as Manitoba and Alberta) have also adopted this reasoning.

Decision of the Supreme Court of Canada

The Supreme Court divided 5-4, with the majority ruling that the courts below had erred by refusing to stay that portion of the class action that involved claims by TELUS's business customers.

As the majority noted, the Ontario *Arbitration Act* requires that all disputes that involve a matter that falls within an arbitration agreement must be arbitrated, rather than litigated. Because the dispute regarding overbilling was unquestionably captured by the TELUS arbitration agreement, it was not a matter that could be properly pursued by way of class proceeding. This conclusion would have precluded both consumers and business customers from participating in the class action were it not for the special treatment granted to consumers under the applicable consumer protection legislation. Because of that unique protection, those TELUS customers who were considered consumers were not bound by their arbitration agreements and were consequently permitted to proceed with the class action.

In contrast, the majority affirmed that those same arbitration clauses are enforceable against non-consumers, even if these clauses are contained in standard-form contracts. Had the legislature wished to render such agreements unenforceable outside the consumer context, it could have done so. In reaching this decision, the majority effectively rejected the relevant case law in Ontario and some other provinces, and affirmed the approach that the Supreme Court of Canada had previously adopted in the British Columbia case of *Seidel v TELUS Communications Inc.*, 2011 SCC 15.

Importantly, however, the majority left open the possibility that standard-form arbitration clauses could still be challenged (even in non-consumer contracts) through the doctrine of unconscionability. Notably, the Ontario Court of Appeal found a mandatory arbitration clause – incorporated into a standard-form employment contract – to be unconscionable, and thus unenforceable, in *Heller v Uber Technologies*, 2019 ONCA 1. The Ontario Court of Appeal emphasized that the plaintiffs in that case had "no reasonable prospect of being able to negotiate any of the terms" of the agreement, and there was "a significant inequality of bargaining power" between the parties.

Going beyond the facts in the *Wellman* case, the majority also clarified that, under the Ontario *Arbitration Act* (and similar legislation in other provinces), the default rule is that the court must stay a court proceeding if at least one subject matter of the proceeding is covered by an arbitration agreement, even if the proceeding involves other matters not covered by the arbitration agreement. In those circumstances, the court can exercise its discretion to grant a partial stay over claims that are not dealt with in the arbitration agreement if certain conditions are met; but the court has no discretion to refuse to grant a stay of claims that are subject to a valid arbitration agreement.

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