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The Supreme Court of Canada: Pro-Arbitration No More

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Anyone considering Canada as the seat of an arbitration or as one among several jurisdictions where recognition and enforcement proceedings could be commenced should pay close attention to the Supreme Court of Canada's March 18 decision in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, which appears to mark a philosophical shift in Canadian arbitration law that is as significant as it was unexpected. For foreign practitioners, the key aspects of the decision are: *i)* the effective abandonment of an interpretive presumption—adopted by the Court in 2003—that a matter is arbitrable unless a statute expressly provides otherwise; *ii)* the suspicion as to arbitration's ability to provide an effective forum for the vindication of public-interest statutory rights that permeates the Court's opinion; and *iii)* a clear statement by the Court that it is not the judiciary's role to encourage arbitration as a dispute resolution method. The key lesson is that, when faced with an ambiguity in statutory provisions or precedents bearing on an arbitration law issue, Canadian courts can no longer be safely expected to prefer the pro-arbitration solution.

The case concerned the enforceability of arbitration clauses inserted in consumer contracts. The issue, which has been highly controversial throughout North America in recent years, was first tackled by the Supreme Court four years ago, in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34. The decision in that case was firmly pro-arbitration, the Court refusing to find arbitration clauses inserted in consumer contracts—even when coupled with class action waivers—to be *per se* unenforceable. In *Seidel*, the main issue was whether section 172 of British Columbia's *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, upon which the plaintiff primarily based her action, rendered her claim inarbitrable. Five features of that section, which has been described as a "public interest remedy," are particularly noteworthy: *i)* first, it derogates from the general requirements regarding standing by allowing any person—irrespective of whether he or she has been affected by a given consumer transaction—to seek a declaration that an act or practice relating to that transaction contravenes the statute, and/or an interim or permanent injunction restraining the defendant from contravening the statute; *ii)* second, it identifies the British Columbia Supreme Court (a court of first instance) as the forum before which an action thereunder may be brought; *iii)* third, it allows that court to grant remedies benefiting all persons affected by the impugned act or practice, and to order the defendant to advertise to the public the particulars of the judgment made; *iv)* fourth, it makes no mention of arbitration; *v)* and finally, the rights, benefits and protections granted by that section—like those granted by all other sections of that statute—are unwaivable. The plaintiff also asserted alternative claims seeking compensation for the prejudice she had personally suffered as a result of the defendant's actions.

In a split decision, a narrow majority of the full Supreme Court (5-4) ruled that, despite the absence of express language to that effect, claims made under section 172 were inarbitrable. To justify its decision, the majority first pointed to the text of section 172 and held that the reference to the British Columbia Supreme Court was indicative of the legislature's intention to confer a right to proceed before that court. The majority also found that, because section 172 treats the plaintiff as a public interest plaintiff, its policy objectives could not be effectively served by "low profile, private and confidential arbitrations where consumers of a particular product may have little opportunity to connect with other consumers who may share their experience and complaints and seek vindication through a well-publicized court action." Finally, the majority was of the view that an arbitral tribunal was unable to grant some of the remedies provided for in section 172; in particular, it insisted on the facts that "arbitrators, who derive their jurisdiction by virtue of the parties' contract, cannot order relief that would bind third parties, [and] that only superior courts have the authority to grant declarations and injunctions enforceable against the whole world." As for the plaintiff's alternative private interest claims—which were based on a different section of the statute as well as on the common law—, they were referred to arbitration; the Court's decision thus confirms that consumer claims are generally arbitrable at common law.

To appreciate the significance of the Court's ruling on section 172, it is important to first recall its 2003 decision in *Desputeaux v. Éditions Chouette (1987) Inc*., 2003 SCC 17, which also concerned the arbitrability of statutory rights. The issue there was whether a section of the federal *Copyright Act*, R.S.C. 1985, c. C-42 granting concurrent jurisdiction to federal and provincial courts over claims based on that statute ought to be interpreted as rendering such claims inarbitrable. The Quebec Court of Appeal had ruled that it did, in a ruling that essentially stood for the proposition that statutory claims are inarbitrable unless the relevant jurisdictional provisions expressly provide otherwise. In an unambiguously pro-arbitration—and unanimous—decision, the Supreme Court reversed the presumption and held that statutory claims were arbitrable unless the relevant provisions expressly stated otherwise. Furthermore, the Court was explicit as to the philosophical underpinnings of its decision, as it openly embraced "*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" [emphasis added]. Two years later, in *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, the Court reiterated its commitment to the promotion of arbitration by reminding lower courts that arbitration clauses had to be encouraged and their enforcement facilitated.

However, none of these considerations mattered to the majority in *Seidel*. Its opinion is clearly inconsistent with the presumption adopted in *Desputeaux*, as it stands for the proposition that a limit to the arbitrability of statutory claims can be implied in the structure or purpose of a legislative provision. And the significance of the majority's reasoning on this point cannot be minimized on the ground that it may have been caused by an oversight on its part. Indeed, as the dissenting judges emphasized—in a compelling and thoroughly-reasoned opinion—the inconsistency between the majority's approach and *Desputeaux*, the majority was surely very much aware of what was at stake. Therefore, it is hard to resist the conclusion that the presumption adopted in *Desputeaux* has effectively been abandoned in *Seidel*.

The shift in the Court's view of arbitration's place and importance in the Canadian legal system is also apparent from the majority's analysis of the compatibility of arbitration with the structure and purpose of section 172, which is neither thorough nor convincing. As the reference in section 172 to the British Columbia Supreme Court can be read as a mere allocation of jurisdiction *rationae materiae*, it is by no means clear that it evidences the legislature's intention to grant an unwaivable

right to proceed in court. Furthermore, the public interest aspect of section 172 and the statute's policy of ensuring that unacceptable corporate conduct can be publicly denounced would not be defeated by resorting to arbitration, as an award finding that breaches of the statute have occurred would necessarily fall within the public domain upon the commencement of recognition and enforcement proceedings. And, contrary to what the majority believed, section 172 does not contemplate remedies that would be enforceable against the entire world, and that would thus be outside an arbitral tribunal's jurisdiction: the section only contemplates that certain remedies could *benefit*—rather than *be binding on*—other persons than the claimant. The cursory reasoning offered by the majority suggests that it did not view declaring certain claims to be inarbitrable as a particularly serious matter. This is a far cry from recent decisions by some Canadian appellate courts standing from the proposition that the right to resort to arbitration is a fundamental right.

Finally, and perhaps most significantly, the majority overtly rejected the idea—earlier embraced in both *Desputeaux* and *GreCon*—that courts should somehow be encouraging arbitration. While responding to the dissenting judges' pointed criticism to the effect that its opinion exhibited "an undercurrent of hostility towards arbitration" and represented "an inexplicable throwback to a time when courts monopolized decision making and arbitrators were treated as second-class adjudicators," the majority's response was not to challenge the dissenting judges' assertions, but merely to state that "the Court's job is neither to promote nor detract form private and confidential arbitration." Not only will this statement surely be routinely invoked against parties defending a pro-arbitration position in those hard cases where the applicable statute provides no obvious answer, it also suggests—more strongly than any other aspect of the majority's opinion—that the Court's decision may very well have been animated by a desire to mark the beginning of a new era in the relationship between Canadian courts and the arbitral process.

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