COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Seidel v. TELUS Communications Inc.,***
2009 BCCA 104

Date: 20090313
Docket: CA036299

Between:

Michelle Seidel

Respondent
(Plaintiff)

And

TELUS Communications Inc.

Appellant
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Rowles
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Neilson

R. S. Anderson, Q.C., S. Hern and N. T. Hooge	Counsel for the Appellant
B. W. Lemer and A. M. Grant	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia January 16, 2009
Place and Date of Judgment:	Vancouver, British Columbia March 13, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Madam Justice Rowles
The Honourable Madam Justice Newbury
The Honourable Madam Justice Neilson

2009 BCCA 104 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

[1] This appeal and the appeal heard immediately preceding it, *MacKinnon v. National Money Mart Company*, 2009 BCCA 103 ("*MacKinnon* (2009)"), deal with the interplay between class proceedings and arbitration clauses contained in the contracts between the parties. In this appeal, TELUS Communications Inc. ("TELUS") appeals from the order of the chambers judge dated July 16, 2008 dismissing its application for a stay, pursuant to s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, of the intended class action commenced by Ms. Seidel.

[2] The issue common to this appeal and the appeal in *MacKinnon* (2009) is whether the decision of this Court in *MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd.*, 2004 BCCA 473, 50 B.L.R. (3d) 291 ("*MacKinnon* (2004)") has been effectively overruled by decisions of the Supreme Court of Canada. In addition, there are three issues unique to this appeal.

Background

[3] Ms. Seidel became a customer of TELUS's cellular services in the year 2000. The parties have been unable to locate a TELUS contract signed by Ms. Seidel in 2000 and, if she did sign one, it is not known with certainty whether the contract contained an arbitration clause.

[4] Ms. Seidel entered into a "renewal" contract with TELUS in February 2003. The service terms of this contract included an arbitration clause, which reads in part:

2009 BCCA 104 (CanLII)

> 15. ARBITRATION: Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise and whether pre-existing, present or future – except for the collection from you of any amount by TELUS Mobility) arising out of or relating to: (a) this agreement; (b) a phone or the service; (c) oral or written statements, or advertisements or promotions relating to this agreement or to a product or service; or (d) the relationships which result from this agreement (including relationships with third parties who are not parties to this agreement), (each, a "Claim") will be referred to and determined by private and confidential mediation before a single mediator chosen by the parties and at their joint cost. Should the parties after mediation in good faith fail to reach a settlement, the issue between them shall then be determined by private, confidential and binding arbitration by the same person originally chosen as mediator. … By so agreeing, you waive any right you may have to commence or participate in any class action against TELUS Mobility related to any Claim and, where applicable, you hereby agree to opt out of any class proceeding against TELUS Mobility otherwise commenced.

[5] Ms. Seidel signed a TELUS renewal form in 2004. The form included a provision that its terms supplemented the service terms of her existing TELUS Mobility service.

[6] The intended class action was commenced by Ms. Seidel on January 21, 2005. She claims against TELUS for breach of contract and for deceptive and unconscionable practices contrary to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. The claim is based on the allegation that, in addition to charging for the time during which Ms. Seidel's cellular phone had a connection with another phone, TELUS charged for the time it took to make the connection with the other phone.

[7] *MacKinnon* (2004), which was decided prior to the commencement of the action, involved an interpretation of the *Commercial Arbitration Act* in the context of an intended class proceeding. Section 15(1) of the *Commercial Arbitration Act*

2009 BCCA 104 (CanLII)

permits a party to an arbitration agreement to apply for a stay of legal proceedings so that an arbitration may proceed. Section 15(2) stipulates that the court is required to stay the legal proceedings unless the arbitration agreement is "void, inoperative or incapable of being performed". This Court held in *MacKinnon* (2004) that an arbitration agreement applicable to a dispute is inoperative if the court certifies an action dealing with the dispute as a class proceeding under the *Class Proceedings Act*, R.S.B.C 1996, c. 50, and that it is premature to determine whether the action should be stayed until the court has dealt with the certification application.

2009 BCCA 104 (CanLII)

[8] The parties took steps over the next two and a half years in connection with Ms. Seidel's intended application to have the action certified as a class proceeding. Documents were exchanged and affidavits were sworn for the purpose of the certification hearing. TELUS did not file a statement of defence but, as a condition of postponing TELUS's obligation to file a statement of defence until after the certification application, the chambers judge ordered TELUS to provide Ms. Seidel's counsel with a list of its intended defences.

[9] On July 13, 2007, the Supreme Court of Canada issued its decisions in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, and *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921, dealing with arbitration clauses and class proceedings under the laws of Quebec. Shortly thereafter, TELUS delivered an application for a stay of the action under s. 15 of the *Commercial Arbitration Act*. In support of its application, TELUS filed affidavits of a Quebec lawyer providing expert evidence with respect to the laws of Quebec dealing with arbitrations and class actions.

[10] Prior to the hearing of TELUS's application, another application for a stay of proceedings was heard in the MacKinnon action. In reasons for judgment issued on May 13, 2008 (2008 BCSC 710, 84 B.C.L.R. (4th) 369), the judge, who had previously certified the action as a class proceeding, ruled that *MacKinnon* (2004) was not overruled by *Dell* and *Rogers*, and dismissed the application. It was one of the orders under appeal in *MacKinnon* (2009).

2009 BCCA 104 (CanLII)

Decision of the Chambers Judge

[11] In his reasons for judgment (2008 BCSC 933, 295 D.L.R. (4th) 511), the chambers judge first ruled that the expert evidence of the Quebec lawyer was admissible. He then considered the application of *Dell* and *Rogers* to British Columbia law with reference to the expert evidence. He concluded the class proceedings legislation in British Columbia and Quebec were not fundamentally different, but he held there were three significant differences between the laws of the two provinces with respect to arbitration law. As a result, he held that the decisions in *Dell* and *Rogers* were not applicable to the law of British Columbia. The chambers judge also held that, even if *Dell* and *Rogers* did apply to British Columbia law, they did not effectively overrule *MacKinnon* (2004).

[12] Relying on *MacKinnon* (2004), the chambers judge dismissed TELUS's stay application. He decided that it was not necessary to decide three other issues raised by Ms. Seidel on the application. These issues are also raised on this appeal.

2009 BCCA 104 (CanLII)

Issues on Appeal

[13] In addition to the principal issue of whether *MacKinnon* (2004) has been effectively overruled, the three issues raised on this appeal are as follows:

(a) is the arbitration clause inoperative by virtue of s. 3 of the *Business Practices and Consumer Protection Act*?

(b) is TELUS estopped from making an application for a stay of proceedings under s. 15 of the *Commercial Arbitration Act*?

(c) should the stay of proceedings apply to the claims of Ms. Seidel that pre-date the February 2003 contract containing the arbitration clause?

Discussion

MacKinnon (2004)

[14] As explained by Madam Justice Newbury in *MacKinnon* (2009), it was held by the Supreme Court of Canada in *Dell* and *Rogers* (and in its earlier decision in *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666), that a class action is a procedural vehicle that does not modify or create substantive rights. While an arbitration clause in a contract deals with a procedure for resolving disputes between the parties to the contract, it nevertheless creates substantive rights and cannot be modified by the procedural provisions applicable to class actions. There are broad similarities between the arbitration and class action legislation of Quebec and British Columbia, and the technical differences between

the laws of the two provinces are not material to the analysis of whether the reasoning in *Dell* and *Rogers* extends to British Columbia.

[15] In the present case, the chambers judge found three differences between the arbitration laws of British Columbia and Quebec (namely, (i) different wording in s. 15 of the *Commercial Arbitration Act* and its Quebec counterpart, (ii) unlike the situation in Quebec, the *Commercial Arbitration Act* does not give an arbitrator the jurisdiction to decide the question of his or her own competence, and (iii) unlike the Quebec domestic arbitration provisions, the *Commercial Arbitration Act* is not based on the New York Convention and Model Law referred to in *MacKinnon* (2009)). In *MacKinnon* (2009), Madam Justice Newbury, for the Court, discussed the differences between the laws of British Columbia and Quebec, and concluded that the differences that do exist are not material to the analysis of whether the reasoning in *Dell* and *Rogers* extends to British Columbia. The differences do not impact on the proposition accepted by the Supreme Court of Canada in *Bisaillon*, *Dell* and *Rogers* that procedural provisions applicable to class actions cannot modify the substantive rights created by an arbitration clause. Also, the chambers judge failed to address this proposition when he reasoned that *Dell* and *Rogers* did not effectively overrule *MacKinnon* (2004) if they did apply to British Columbia law.

[16] As *MacKinnon* (2004) was effectively overruled by the Supreme Court of Canada, the chambers judge could not properly rely on it as the basis for denying TELUS's application for a stay of proceeding.

2009 BCCA 104 (CanLII)

Other Issues

(a) *Business Practices and Consumer Protection Act*

[17] Ms. Seidel argues the arbitration clause is inoperative because s. 3 of the *Business Practices and Consumer Protection Act* renders void any waiver or release of any rights, benefits or protections under the Act. Two of those rights or benefits, submits Ms. Seidel, are contained in ss. 10(2) and 172(1) of the Act, which give jurisdiction to the court in respect of unconscionable and deceptive practices of the nature she is alleging against TELUS.

[18] Section 10(2) reads as follows:

> (2) If a court determines that an unconscionable act or practice occurred in respect of a consumer transaction that is a mortgage loan, as defined in section 57 [*definitions*], the court may do one or more of the following:
>
> (a) reopen the transaction and take an account between the supplier and the consumer or guarantor;
>
> (b) despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the consumer from any obligation to pay the total cost of credit at a rate in excess of the prevailing prime rate;
>
> (c) order the supplier to repay any excess that has been paid or allowed by the consumer or guarantor;
>
> (d) set aside all or part of, or alter, any agreement made or security given in respect of the transaction and, if the supplier has parted with the security, order the supplier, to indemnify the consumer;
>
> (e) suspend the rights and obligations of the parties to the transaction.

2009 BCCA 104 (CanLII)

[19] The fallacy of the argument in relation to s. 10(2) is apparent on the face of the provision. Section 10(2) applies to "a consumer transaction that is a mortgage loan" ("mortgage loan" is defined in s. 57 as "a loan of money secured by an interest in real property..."). The transaction between Ms. Seidel and TELUS was not a mortgage loan.

[20] Section 172(1) of the Act reads as follows:

> 172(1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:
>
> (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
>
> (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

[21] A similar argument was made in *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178. In that case, s. 37 of the *Copyright Act*, R.S.C. 1985, c. C-42, provided that the Federal Court had concurrent jurisdiction with provincial courts to deal with proceedings relating to the Act, and it was argued that s. 37 prevented an arbitrator from ruling on the question of copyright. Mr. Justice LeBel, on behalf of the Court, disposed of the argument in the following manner:

> [42] The purpose of enacting a provision like s. 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states.

2009 BCCA 104 (CanLII)

[22] In the case at bar, s. 172(1) identifies the Supreme Court as the court in which applications for declarations and injunctions can be made. It does not exclude arbitral jurisdiction and does not render inoperative the arbitration agreement between Ms. Seidel and TELUS.

2009 BCCA 104 (CanLII)

(b) Estoppel

[23] Ms. Seidel submits TELUS allowed the action to continue for over two and a half years before applying for a stay and cites *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, 80 D.L.R. (4th) 652, in support of her position that TELUS is estopped from making a stay application before determination of the preferable procedure under s. 4 of the *Class Proceedings Act*.

[24] The facts in *Maracle* are not relevant to this case, and it is cited for the following summary of the doctrine of promissory estoppel at p. 57:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[25] In the case at bar, there is no evidence that TELUS made a promise or assurance that it would not apply for a stay of proceedings on the basis of the arbitration clause. Ms. Seidel points to the fact that the list of defences provided by TELUS did not make mention of the arbitration clause. However, the provision of the list of defences did not constitute a promise or assurance that TELUS would never apply for a stay of proceedings. The list of defences cannot be construed in

the circumstances to have been intended to be an exhaustive list. TELUS was entitled to supplement the list of defences in the same fashion as defendants normally have the ability to amend statements of defence.

2009 BCCA 104 (CanLII)

[26] Section 15(1) of the *Commercial Arbitration Act* specifically deals with the timing of stay applications. It provides that the application may be made by a party to legal proceedings "before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings". TELUS has not delivered a statement of defence, and the provision of the list of defences did not constitute a step in the proceeding. TELUS did apply to strike out certain of Ms. Seidel's claims but such an application is not a step in the proceedings: see *Fathers of Confederation Buildings Trust v. Pigott Construction Co.* (1974), 44 D.L.R. (3d) 265 (P.E.I.S.C.).

[27] It must be remembered that when Ms. Seidel commenced her action, *MacKinnon* (2004) was binding authority in this province, and it held that an application for a stay under s. 15 prior to the certification application of an intended class proceeding was premature. TELUS delivered its stay application promptly after the issuance of *Dell* and *Rogers* cast doubt on the correctness of *McKinnon* (2004). TELUS cannot be faulted for its failure to make an earlier application when such an application was bound to fail pursuant to *MacKinnon* (2004).

(c) <u>Pre-February 2003 Claims</u>

[28] Under the authority of *Dell* and *Rogers*, the court is required to grant a stay of proceedings in respect of Ms. Seidel's claims that are covered by an arbitration

agreement between the parties. It is clear that the claims arising after Ms. Seidel signed the "renewal" contract in February 2003 are covered by the arbitration clause contained in that contract. What is less clear is whether her claims arising before February 2003 are covered by an arbitration agreement. Should this issue be determined at first instance by the court or the arbitrator?

2009 BCCA 104 (CanLII)

[29] In *Dell*, the Court considered the two schools of thought regarding the degree of judicial scrutiny of an arbitrator's jurisdiction, one favouring the "interventionist judicial approach" and the other advocating the "competence-competence principle". Under the former, it is the court that should settle any challenge to the arbitrator's jurisdiction at first instance (para. 69). Under the latter, the court is required to limit itself to a *prima facie* analysis and "to refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable" (para. 75).

[30] Madam Justice Deschamps, on behalf of the majority in *Dell*, accepted the competence-competence principle as the general rule:

> [84] First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's

> jurisdiction, consider the facts leading to the application of the arbitration clause.
>
> [85] If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

In her preceding comments, Deschamps J. indicated that the general rule should apply to issues regarding the validity of the arbitration agreement as well as issues relating to its applicability (para. 82).

[31] The ability of an arbitrator to decide his or her own competence was one of the three areas in respect of which the chambers judge found the laws of British Columbia to be different from the laws of Quebec. He was in error in this regard. He stated that the *Commercial Arbitration Act* does not give an arbitrator the jurisdiction to decide competence, but s. 22 of the Act makes the domestic commercial rules of the British Columbia International Commercial Arbitration Centre applicable to arbitrations unless the parties otherwise agree. Rule 29(1) of the Centre's Domestic Commercial Arbitration Rules provides that an arbitration tribunal may rule on its own jurisdiction.

[32] The acceptance of the competence-competence principle in *Dell* has been followed in several jurisdictions other than Quebec: see *Wheeler v. Hwang*, 2007 NLTD 145, 33 B.L.R. (4th) 300; *Bearlap Inc. v. Joffe* (2007), 39 B.L.R. (4th) 80 (Ont. S.C.J.); *Sumitomo Canada Ltd. v. Saga Forest Carriers (Intl.) AS*, 2007 BCPC 373, 42 B.L.R. (4th) 203; *St. Joseph Corp. v. Canada (Attorney General)* (2008),

2009 BCCA 104 (CanLII)

46 B.L.R. (4th) 314 (Ont. S.C.J.); and *GPEC International Ltd. v. Canadian Commercial Corp.*, 2008 FC 414, 71 C.L.R. (3d) 234.

[33] TELUS says that the following facts and issues will have to be determined in order to decide whether Ms. Seidel's pre-February 2003 claims are covered by an arbitration agreement between the parties:

1. What were the terms of the 2000 agreement?

2. Does the 2003 agreement amend the 2000 agreement (it deals with the same phone number) or are they completely separate contracts?

3. If there are two completely separate contracts, what is the proper interpretation of the arbitration clause?

4. If there is an ambiguity, should extrinsic evidence be heard to resolve the ambiguity?

[34] In my opinion, these matters do not solely involve a question of law and require more than a superficial consideration of the relevant documents. It follows that the competence-competence principle requires the issue of the applicability of an arbitration agreement to the pre-February 2003 claims to be first determined by an arbitrator. If the arbitrator rules that the pre-February 2003 claims are not covered by an arbitration agreement, then Ms. Seidel may apply to continue with her court action.

2009 BCCA 104 (CanLII)

Conclusion

[35] I would allow the appeal and stay Ms. Seidel's action in its entirety.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Madam Justice Rowles'

I agree:

'The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Neilson"

2009 BCCA 104 (CanLII)