SCC File No.: 37722

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

TELUS COMMUNICATIONS COMPANY, TELE-MOBILE COMPANY and TELUS COMMUNICATIONS INC.

APPLICANTS
(Appellants)

-and-

AVRAHAM WELLMAN

RESPONDENT
(Respondent)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL (AVRAHAM WELLMAN, RESPONDENT)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW

1. This leave application relates to the interpretation and application of s. 7(5) of the Ontario *Arbitration Act, 1991*[1] in the context of class proceedings.

2. The question raised by the Applicants is whether the court may exercise its discretion, pursuant to s. 7(5), to refuse a partial stay of claims that are subject to an arbitration agreement in the context of a class proceeding, when the claims that are sought to be stayed and the consumer claims that are not arbitrable invoke similar or identical legal issues.

3. The answer to this question lies exclusively in the wording of each province's legislation. Here, the Court of Appeal for Ontario (the "Court of Appeal") engaged in a contextual, textual and purposive interpretation of s. 7(5), as required by the framework established by this Honourable Court in *Seidel v. TELUS Communications*,[2] and answered this question in the affirmative.

4. There is no conflict in appellate jurisprudence regarding the interpretation and application of s. 7(5) of the *Arbitration Act, 1991* and equivalent provisions in other provincial statutes. In *Griffin v. Dell Canada Inc.*,[3] a five-judge panel of the Court of Appeal determined that, notwithstanding the deference to be accorded to arbitration agreements, s. 7(5) grants the court discretion to refuse a partial stay of a proceeding where some, but not all, matters are subject to an arbitration agreement.[4] In this case, the Court of Appeal interpreted this provision consistently, applying the guidance provided by this Court in *Seidel.*

5. In *Briones v. National Money Mart Co.*,[5] the Manitoba Court of Appeal adopted the Court of Appeal's interpretation in *Griffin* and reached the same conclusion with respect to the

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[1] S.O. 1991, c. 17 [*Arbitration Act, 1991*].
[2] *Seidel v. TELUS* Communications, 2010 SCC 15 at para. 33 [*Seidel*].
[3] *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, leave to appeal refused [2010] S.C.C.A. No.75 [*Griffin*].
[4] Reasons for Judgment of the Ontario Superior Court of Justice dated, November 25, 2014, 2014 ONSC 3318 at para 85 [Motion Decision]; *Griffin* at paras. 48-49.
[5] *Briones v. National Money Mart Co.*, 2014 MBCA 57, leave to appeal refused [2014] S.C.C.A. No. 355 [*Briones* Appeal Decision].

scope of discretion conferred by s. 7(5) of *The Arbitration Act* [6] of Manitoba. The court upheld the motion judge's exercise of discretion to refuse to stay arbitrable claims in the context of a consumer class action. *Briones* was decided subsequent to *Seidel*, where this Court, quoting Sharpe J.A.'s reasoning in *Griffin*, simply interpreted the relevant British Columbia legislation without overruling *Griffin.*

6. In 2010, this Court refused to grant leave to appeal the findings of the Court of Appeal in *Griffin*.[7] In 2014, this Court also refused leave to appeal the decision of the Manitoba Court of Appeal in *Briones*.[8] Similarly, the Applicants' request for leave to appeal should be refused in this case.

7. Contrary to the Applicants' submissions, *Griffin*, *Briones* and the present case do not stand for the proposition that arbitration agreements are *de facto* unenforceable in class proceedings that involve consumer and non-consumer claims. Further, they do not contradict the general principle that contractual arbitration clauses are presumptively enforceable.[9] Rather, these decisions are grounded in the rationale that, in the context of class proceedings, the determinative factor to consider in exercising the broad discretion conferred by s. 7(5) is the reasonableness of granting, or refusing to grant, a partial stay of the proceeding in respect of matters that are subject to an arbitration agreement, when the proceeding continues with respect to similar or, in this case, virtually identical matters that are not governed by an arbitration agreement. This exercise of discretion is fact-driven and requires an examination of the evidence.

8. Further, s. 7(6) of the *Arbitration Act, 1991* prescribes an unqualified prohibition against any appeal arising from the court's exercise of its powers pursuant to the statute, including the exercise of discretion conferred by s. 7(5). Section 7(6) of the *Arbitration Act, 1991* expressly states: "[t]here is no appeal from the court's decision".[10]

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[6] C.C.S.M. c. A120 [*The Arbitration Act*].
[7] *Griffin*, leave to appeal refused [2010] S.C.C.A. No.75.
[8] *Briones* Appeal Decision, leave to appeal refused [2014] S.C.C.A. No. 355.
[9] Reasons for Judgment of the Court of Appeal for Ontario dated, May 31, 2017, 2017 ONCA 433 at para. 62 [Appeal Decision].
[10] *Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 ONCA 721 at para. 4 [*Radewych*].

9. As emphasized by Sharpe J.A. in *Griffin*, the exercise of the discretion granted pursuant to s. 7(5) serves an important purpose: it remedies the unfairness and impracticality which would inevitably result from "the mischief" of having no proceeding at all.[11] In *Seidel*, this Court began its reasons by referencing the following observation by Sharpe J.A. in *Griffin*:

> The seller's stated preference for arbitration is often nothing more than a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually but when aggregated form the subject of a viable class proceeding … When consumer disputes are in fact arbitrated through bodies such as NAF that sell their services to corporate suppliers, consumers are often disadvantaged by arbitrator bias in favour of the dominant and repeat-player corporate client... [12]

10. The practical reality here is that the Applicants seek a stay of proceedings for some 600,000 business customers, not because they seek to have those claims resolved through arbitration, but because a stay of those claims would effectively defeat their resolution.

11. The Court of Appeal's decision in no way diminishes the principle described by this Court in *Seidel* and, in particular, its holding that "[t]he choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature",[13] and "whether and to what extent the parties' freedom to arbitrate is limited or curtailed by legislation will depend on a close-examination of the law of the forum".[14] As this Court emphasized in *Seidel*, the focus of the inquiry is whether the applicable statute "manifests a legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to 'private and confidential 'mediation/arbitration and, if so, under what circumstance".[15]

12. The central question in *Seidel* was whether s. 172 of the British Columbia's *Business Practices and Consumer Protection Act*[16] ("BPCPA") manifested such legislative intent. The Court concluded that it did,[17] and permitted the plaintiff to pursue her claims pursuant to s. 172 while upholding the stay of her other claims in the class action.[18] Just as the particular findings

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[11] *Seidel* at para. 1.
[12] *Ibid*.
[13] *Ibid* at para. 2.
[14] *Ibid* at para. 42.
[15] *Ibid.*
[16] S.B.C. 2004, c. 2
[17] *Seidel* at para. 33.
[18] *Ibid* at para. 5, 7.

of this Court in *Dell Computer Corp. v. Union des consommateurs*[19] and *Rogers Wireless v. Muroff*[20] reflect "the intricacies of the *Civil Code of Quebec*",[21] the ultimate findings in *Seidel* are restricted to an interpretation of s. 172 of the BPCPA.

13. In the same vein, the decisions of the Court of Appeal in this case and *Griffin* are limited to the interpretation and application of a single statutory provision enacted by the Ontario legislature. Consistent with s. 92(13) of the *Constitution Act, 1982*,[22] provinces such as Ontario and Manitoba have enacted legislation that confers on the court discretion to stay, or refuse to stay, matters that are subject to arbitration agreements. Other provinces, such as British Columbia, have adopted a different legislative approach.

14. Far from departing from *Seidel*, both the motion judge and the Court of Appeal applied the principles established in *Seidel*, and the applicable law of the forum, including *Griffin*, and held that s. 7(5) manifested a legislative intent to confer on courts the discretion to grant a partial stay of arbitrable proceedings in the context of class proceedings which invoke identical legal questions by consumer and non-consumer class members that cannot reasonably be separated.

15. Echoing the interpretative approach in *Seidel*, the Court of Appeal further clarified that "[t]he question of whether the substantive right to arbitrate must be given effect is governed by the domestic legislation of Ontario and cannot be determined in a legislative vacuum as the appellants would have us do."[23] Despite these cautionary words, the Applicants now urge this Court to engage in that very exercise.

16. Statutory consistency or difference is a matter of legislative policy for each province, not a matter of national importance. It cannot be, as the Applicants would have it, that every intersection of an arbitration agreement with litigation admits of an issue of national importance. While the issues are no doubt of importance to the parties, the issue of statutory interpretation

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[19] 2007 SCC 34.
[20] 2007 SCC 35.
[21] *Seidel* at para. 41.
[22] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[23] Appeal Decision at para. 90.

does not rise to the level of national importance, especially where this Court has twice denied leave on this same underlying issue in *Griffin*[24] and *Briones*.[25]

17. The Applicants strain to establish a conflict among appellate decisions in Canada on the interpretation and application of s. 7(5) (or equivalent provisions). However, the Applicants' strong reliance on the Saskatchewan Court of Appeal's decision in *Power Corporation v. Alberici Western Constructors Ltd.*[26] is misplaced. The central issue in *Alberici* was not the scope and exercise of the court's discretion under s. 8(5) of the *Arbitration Act, 1992*[27](which is equivalent to s. 7(5) of the Ontario and Manitoba statutes) in the context of class proceedings. Rather, the question in *Alberici* was whether one of two competing sophisticated parties to an arbitration agreement could move, pursuant to the provisions of s. 8 of the *Arbitration Act, 1992*, to stay its own court proceeding in favour of parallel arbitration proceedings.[28] The motion judge determined that the remedy sought by the applicant could only be granted pursuant to s. 37 of *The Queen's Bench Act, 1998*.[29] The Saskatchewan Court of Appeal affirmed this determination.

18. *Alberici* involved commercial parties with substantial claims – not consumers seeking recovery of modest sums in the context of a class proceeding. In determining that the prospect of multiple proceedings is not sufficient to stay arbitration proceedings, the motion judge and the Saskatchewan Court of Appeal did not engage in a textual, contextual, and purposive interpretation of s. 8(5) of the *Arbitration Act, 1992*, as required by *Seidel*. Indeed, the courts' fleeting reference to s. 8(5) of the legislation can hardly be said to amount to a conflicting decision.

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[24] *Griffin*, leave to appeal refused [2010] S.C.C.A. No.75.
[25] *Briones* Appeal Decision, leave to appeal refused [2014] S.C.C.A. No. 355.
[26] 2016 SKCA 46 [*Alberici* Appeal Decision]. Memorandum of Argument of Applicants at paras. 50-53.
[27] *Arbitration Act, 1992*, S.S. 1992, c. A-24.1.
[28] Section 8 of the *Arbitration Act, 1992* is equivalent to s. 7 of the Ontario and Manitoba statutes.
[29] 2015 SKQB 74 at para. 41 [*Albericia* [*Alberici* Queen's Bench Decision]. *Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01. "[a]ny person, whether a party or not to an action or matter, may apply to the Court of Queen's Bench for a stay of proceedings".

19. This application raises no issue of national importance; nor does it raise issues that require clarification through adjudication by this Court. The decision of the Court of Appeal below is entirely consistent with the analytical framework established in both *Griffin* and *Seidel*.

a) Facts

20. This certified class proceeding against TELUS arises from the mobile service provider's allegedly undisclosed billing practice of "rounding up" calls to the next minute. It is alleged that between 2002 and 2010, TELUS's Standard Terms and Conditions made no mention of rounding up to the next minute, and that TELUS's practice of rounding up constituted a breach of contract and consumer protection legislation.[30] All TELUS contracts that were effective during the class period contained standard terms and conditions, including a clause requiring mediation and, failing resolution, arbitration of any dispute other than in respect of the collection of accounts by TELUS (the "Arbitration Agreement").

21. The class is comprised of approximately two million subscribers who purchased monthly plans which provided for a fixed number of minutes for a set fee. The plans included provisions authorizing additional charges for excess minutes used over the set allotment. Seventy percent of the class members are consumers who purchased plans for personal use, while thirty percent are non-consumers who purchased plans for business use.[31] TELUS concedes that the Arbitration Agreement is not enforceable against consumers pursuant to the *Consumer Protection Act*.[32] However, it moved for a stay of the non-consumer claims, asserting that this Court's decision in *Seidel* overruled the Court of Appeal's holding in *Griffin*, and that accordingly, the motion judge had no authority to refuse to stay the claims of the non-consumer class members. TELUS asserts that s.7(5) merely permits courts to allow non-arbitrable claims to proceed in court if it is reasonable for the non-arbitrable claims to be separated from the arbitrable claims raised in the same proceeding.[33]

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[30] *Ibid* at para. 12.
[31] *Ibid* at paras.9-11.
[32] *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A.
[33] Memorandum of Argument of the Applicants at para. 5.

b) Judicial History

i) Decision of the Motion Judge

22. The motion judge refused to grant a partial stay of the non-consumer claims. She held that *Seidel* did not overrule *Griffin.*[34] She also held that *Seidel* addressed only the issue of whether s. 172 of the BPCPA manifested a legislative intent to relieve consumers from the effects of arbitration clauses.[35] The motion judge observed that "[t]here was no issue [in *Seidel*] of whether [s. 172 of the BPCPA] permits the court to allow claims to be litigated in a class action, notwithstanding the existence of an arbitration clause".[36] Applying *Griffin*, she held that s. 7(5) of the *Arbitration Act, 1991* "expressly grants the court the discretion to determine whether it is reasonable to separate the matters dealt with in an arbitration agreement from the other matters in the litigation."[37] She noted that "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."[38]

23. In reaching this conclusion, the motion judge analyzed the reasonableness of separating the non-consumer claims from the consumer claims. She reasoned that in this case, as in *Griffin*: a) the consumer claims against TELUS that will be litigated in the class proceeding represent 70 percent of the total number of claims; b) issues relating to liability and damage will be identical for consumer and non-consumer class members; c) there is no group arbitration permitted for the non-consumer claims; and d) separating the two proceedings could lead to inefficiency, risk inconsistent results and create a multiplicity of proceedings.[39]

ii) The Decision of the Court of Appeal

24. The sole question before the Court of Appeal was whether the motion judge erred in finding that *Griffin* is still good law in Ontario and was not overturned by *Seidel.* Contrary to the

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[34] Motion Decision at para. 88.
[35] *Ibid* at para. 87.
[36] *Ibid* para. 88
[37] *Ibid* at para. 89.
[38] *Ibid* at para. 89.
[39] *Ibid* at para. 90.

suggestion of the Applicants, all three judges of the Court of Appeal concurred in the result.[40] The Court of Appeal applied the guidance provided by this Court in *Seidel* to the question on appeal, and determined that s. 7(5) of the *Arbitration Act, 1991* amounts to a legislative override as contemplated in *Seidel*. The Court of Appeal reasoned that "[i]n Ontario, the legislature chose to exempt consumer claims from mandatory arbitration and, in the domestic context, to provide the court with the discretion to determine whether it is reasonable to separate matters subject to an arbitration clause from other matters in the litigation".[41] The Court of Appeal held that "the combination of these legislative provisions, which differ from those in B.C., drove the result in *Griffin* as well as the result in this case."[42]

25. Shortly before the release of *Seidel*, this Court refused to grant leave to appeal in *Griffin*. Further, Chief Justice Strathy twice rejected the Applicants' request for a five-judge review of the correctness of *Griffin*[43] – first, prior to the hearing of the appeal, and second, subsequent to the release of the Court of Appeal's decision, when Chief Justice Strathy refused the Applicants' request for the "withdrawal" of the May 31, 2017 decision and for a rehearing of the appeal by a five-judge panel.

PART II – QUESTIONS IN ISSUE

26. The sole issue is whether this application raises issues of national or public importance in circumstances where there are no conflicting appellate decisions addressing the exercise of the court's discretion under s. 7(5) of the Ontario *Arbitrations Act, 1991* (and equivalent provisions) in the context of class proceedings.

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[40] Appeal Decision at para. 97-99 and 107.
[41] *Ibid* at para. 76.
[42] *Ibid*.
[43] *Ibid* at para. 19.

PART III – STATEMENT OF ARGUMENT

a) The application does not raise a matter of national importance

27. The Court of Appeal's application of the governing principles established by this Court in *Seidel* and by other appellate courts does not raise issues of national importance regarding the enforceability of arbitration agreements in the context of class proceedings.

28. At its core, the issue for which the Applicants seek leave to appeal is a matter of statutory interpretation of Ontario legislation. Section 7(5) indicates a clear legislative intent by the Ontario legislature to confer on its courts discretion to determine whether it is reasonable to grant, or to refuse to grant, a stay of arbitrable or non-arbitrable matters when such matters are raised in the same proceeding. The word "proceeding" is not defined as, and has not been amended to refer exclusively to, two-party proceedings. Therefore, s. 7(5) has also been applied in the context of class proceedings, where Ontario courts have exercised their discretion to refuse to stay matters that are subject to arbitration agreements when those matters raise legal issues that are similar or identical to the issues that are raised by matters that are not subject to arbitration agreements.

29. The Applicants generalize from the effect of the Court of Appeal's decision in this case and submit that this case raises matters of national importance with respect to the intersection between arbitration agreements and class proceedings. Whether or not it is reasonable to stay arbitrable claims and to allow non-arbitrable claims to proceed in court is a context-driven analysis that turns on the facts of each case. There may well be class proceedings that yield the opposite answer; for example, where the legal issues of liability and damages are not identical as between consumer and non-consumer class members, where the quantum of damages claimed by non-consumer claimants are materially larger than those suffered by consumers, or where inconsistent outcomes are not only tolerable but also justifiable. This particular class action is not such a case.

30. The choice to confer discretion upon courts to intervene in the enforcement of arbitration agreements is a policy decision made by each province's legislature exercising their exclusive jurisdiction. The Ontario legislature could have restricted the courts' powers to intervene in the

enforcement of arbitration agreements, including in the context of class proceedings, but chose not to do so. The Applicants acknowledge this reality,[44] but seek to enlist the powers of this Court to "reconcile the policy choices made in consumer and arbitration legislation".[45]

31. It is not the role of this Court to reconcile the asymmetrical policy considerations that animate the consumer and arbitration legislations of the provinces. Ontario courts have been granted broader powers to intervene in the enforceability of arbitration clauses in the context of multi-claim and multi-party proceedings. Contrary to the Applicants' characterization, the exercise of this discretion does not amount to "usurp[ing] a jurisdiction that is not available to courts in other provinces with similar arbitration legislation".[46]

32. What the Applicants seek is not legal clarification, but legislative change. The Applicants are effectively asking this court to make a policy determination that the Ontario legislature has declined to make. They seek to arbitrarily restrict the discretion granted by s. 7(5) by precluding claims raised in class proceedings from the ambit of "other matters" and by limiting the court's discretion to traditional, two-party litigation. However, this narrow interpretation of s. 7(5) is not supported by the wording of the provision.

33. Further, the narrow reading of s. 7(5) advanced by the Applicants would not merely result in the bifurcation of arbitrable and non-arbitrable claims arising in the context of a class proceeding, but, for the reasons set out by Sharpe J.A. in *Griffin* and adopted by this Court in *Seidel*, it would also effectively defeat hundreds of thousands of claims that have no real prospect of resolution through arbitration.

34. Despite unequivocal appellate authority on the interpretation and application of s. 7(5) in the context of class proceedings,[47] the Applicants suggest that this provision has been misinterpreted and misapplied. However, as described below, there are no conflicting appellate decisions in Canada with respect to the application of s. 7(5) and equivalent provisions in the context of class proceedings. Only the Court of Appeal for Ontario[48] and the Manitoba Court of

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[44] Memorandum of Argument of the Applicants at para. 2.
[45] *Ibid.*
[46] *Ibid* at para. 30.
[47] Appeal Decision; *Griffin* Appeal Decision; and *Briones* Appeal Decision.
[48] Appeal Decision at para 74.

Appeal[49] have interpreted and applied s. 7(5) in the context of class proceedings. Both courts have done so following the release of *Seidel*. Conversely, the decision of the Saskatchewan Court of Appeal in *Alberici* was not rendered in the context of a class proceeding, and did not involve a purposive and comprehensive analysis of s. 8(5) of the Saskatchewan legislation.

b) Ontario appellate authority is consistent with *Seidel*

35. The Applicants attempt to create tension between Ontario appellate authority and *Seidel*, where none exists. Contrary to the Applicants' submission, the motion judge and the Court of Appeal did not "refus[e] to follow" *Seidel*.[50] Rather, both courts recognized that this Court's analysis in *Seidel* was confined to an interpretation of the British Columbia legislation.

36. Despite differences in the British Columbia and Ontario statutes, the Court of Appeal applied the overarching principles affirmed in *Seidel*.[51] Any apparent difference between the outcome in *Seidel* and this case is a function of unique statutory provisions, not differences in the courts' respective approaches to legislative interpretation.

37. Nationwide consistency, as sought by the Applicants,[52] cannot be achieved where provincial statutes diverge in material respects. Here, the Ontario legislature has departed from the British Columbia legislature by adopting a more nuanced approach to the absolute enforceability of arbitration agreements. This approach is manifested in the inclusion of various enumerated exceptions to the presumptive enforceability of arbitration agreements, which invite courts to scrutinize the conduct of a defendant that delays in moving for a stay of proceedings, or to consider the substance of a claim to determine whether the matter is a proper one for default or summary judgment.[53]

38. Section 7(5) and the interpretation adopted by the Court of Appeal are consistent with this nuanced approach. Section 7(5) is a discretionary provision that operates where an arbitration agreement covers some, but not all, claims or "matters" that are advanced in an

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[49] *Briones* Appeal Decision at para 42.
[50] Memorandum of Argument of the Applicants at para. 40.
[51] *Ibid* at para. 8.
[52] *Ibid* at para. 37.
[53] *Arbitration Act*, s. 7(2)(4) and (5).

action. The court is permitted to grant a partial stay of the claims subject to arbitration where "it is reasonable to separate the matters dealt with in the agreement from the other matters".[54] Conversely, the court has discretion not to grant a stay where it considers that it is not reasonable to separate matters that are subject to arbitration agreements from matters that are not. This provision is cast broadly, not restrictively. Accordingly, the words "other matters" in s. 7(5) have been interpreted to include claims involving multiple parties and multiple claims involving the same parties.

39. The discretion conferred by s. 7(5) is broad and largely unfettered. The legislature referred only to the issue of whether the court considers it "reasonable" to separate matters dealt with in the arbitration agreement from "the other matters". The plain and ordinary meaning of the words "the other matters" and "the proceeding" does not preclude class proceedings. Further, where the court exercises its discretion not to stay certain "matters" in a proceeding, in this case, in the context of a class proceeding, the decision of the court is not appealable pursuant to s. 7(6) of the *Arbitration Act, 1991*.[55]

40. It is worth noting that the *Arbitration Act, 1991* is based on a model law created by the Uniform Law Conference of Canada in 1990.[56] Section 7 of the *Uniform Arbitration Act (1990)*, which addresses stays of court proceedings, was amended in 2002 to narrow the court's discretion to intervene in the enforcement of arbitration clauses, including the circumstances in which a partial stay of court proceedings can be granted.[57] In particular, the current iteration of the *Uniform Arbitration Act* no longer includes a discretionary provision that would permit the court to refuse a stay where "it is reasonable to separate the matters dealt with in the agreement from the other matters."[58]

41. The absence of parallel amendments to the *Arbitration Act, 1991* signifies the Ontario legislature's intention not to remove or restrict the court's discretion to refuse a stay of arbitrable claims both generally and in the context of class proceedings.

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[54] Appeal Decision at para. 72.
[55] *Radewych* at para. 4.
[56] Appeal Decision at para. 70.
[57] *Ibid* at para 62.
[58] Uniform Law Conference of Canada, *Uniform Arbitration Act (2016)*, s. 7 available online <www.ulcc.ca>.

c) There are no conflicting appellate authorities on the issue raised by the Applicants

42. Contrary to the Applicants' suggestion, there is no inconsistency or discord among appellate authorities with respect to the interpretation and application of s. 7(5) (and equivalent provincial provisions) in the context of class proceedings.

43. Aside from *Griffin* and this case, only the decision of the Manitoba Court of Appeal in *Briones*[59] involves an interpretative analysis of s. 7(5) in the context of class proceedings. In *Briones*,[60] the Manitoba Court of Queen's Bench considered the effect of *Seidel* on the analysis of "reasonableness" in stay applications brought in the context of class proceedings, where some claims are subject to arbitration agreements while others are not. The court denied the defendant's motion for a partial stay of proceedings pursuant to s. 7(5) of the *Arbitration Act.*[61] The court held that, having regard to the overlapping matters that could not reasonably be separated, the undesirability and inefficiency of multiple proceedings, and the risk of inconsistent results, it would not be reasonable to separate the matters subject to arbitration from other matters in the litigation.[62] The court expressly referred to and followed the approach in *Griffin*. The court also considered this Court's decision in *Seidel* and, similar to the Court of Appeal in this case, concluded that "there was no issue in *Seidel* as to whether a partial stay should be granted as the [B.C. legislation] did not have a provision equivalent to s. 7(5) of the *Arbitration Acts* of Manitoba, Alberta, and Ontario".[63]

44. The Manitoba Court of Appeal upheld this decision as a proper exercise of the motion judge's discretion.[64] The defendant sought, and this Court refused, leave to appeal.[65]

45. The Applicants overreach in maintaining that the decision of the Saskatchewan Court of Appeal in *Alberici* constitutes a conflicting appellate decision. *Alberici* arose in an entirely different context and was not a class proceeding involving hundreds of thousands of virtually

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[59] *Briones* Appeal Decision.
[60] *Briones v. National Money Mart Co.* 2013 MBQB 168 at para 61 [*Briones* Queen's Bench Decision].
[61] *Arbitration Act*, C.C.S.M., c. A120.
[62] *Briones* Queen's Bench Decision at para 61.
[63] *Ibid* at para. 62.
[64] *Briones* Appeal Decision at para. 42.
[65] [2014] S.C.C.A. No. 355.

identical claims, some of which are subject to arbitration clauses while others are not. Further, *Alberici* was not decided pursuant to s. 8(5) of the Saskatchewan *Arbitration Act, 1992*. The Applicants' position that the decision of the Saskatchewan Court of Appeal in *Alberici*[66] is in conflict with appellate authorities from Ontario and Manitoba is therefore misguided.

46. In *Alberici*, the parties were sophisticated actors in the construction industry who had contracted for arbitration.[67] The central question in *Alberici* was whether s. 8 of the *Arbitration Act, 1992* precluded a party from bringing a motion to stay its own action that was commenced in tandem with an enforceable arbitration agreement.[68] The Saskatchewan Court of Queen's Bench held that while s. 8(1) of the *Arbitration Act, 1992* (which is equivalent to s. 7(1) of the Ontario legislation) does not permit a party to the arbitration agreement to move for a stay of its own proceeding, s. 8 does not bar a party to the arbitration agreement from seeking to stay its own action.[69] The court held that such an application could be considered as an application for the court to exercise its discretion in favour of a stay under s. 37 of *The Queen's Bench Act, 1998*.[70] That provision states that "[a]ny person, whether a party or not to an action or matter, may apply to the Court of Queen's Bench for a stay of proceedings".

47. The court further held that the exercise of its discretion pursuant to s. 37 could, and likely should, be informed by the factors set out in section 8 of the *Arbitration Act, 1992*,[71] but rejected the proposition that the prospect of multiplicity of proceedings was sufficient to stay the arbitration. With respect to s. 8(5), the court merely commented that "[a]t most, s. 8(5) contemplates a limited stay where matters can be reasonably separated."[72]

48. The court in *Alberici* did not consider the analysis and findings of the Court of Appeal in *Griffin.* Importantly, contrary to *Griffin* and the present case, the court held that "SaskPower has not presented any evidence, beyond pure speculation, as to matters that may, or may not, be

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[66] *Alberici* Appeal Decision; Memorandum of Argument of the Applicants at paras. 50-53.
[67] *Alberici* Appeal Decision at para 43.
[68] *Alberici* Queen's Bench Decision at para. 21(a).
[69] *Ibid* at para. 41.
[70] *Ibid*. *Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01.
[71] *Alberici* Queen's Bench Decision at para. 48.
[72] *Ibid* at para. 48.

reasonably separated from the matters asserted in the notice of arbitration… As such, SaskPower's argument on this point does not even support a partial or limited stay." [73]

49. On appeal, the Saskatchewan Court of Appeal upheld the motion judge's determination, confirming that the prospect of multiplicity of proceedings is not sufficient to stay the arbitration clause "negotiated by two very sophisticated parties".[74] The focus of the court's analysis, however, was on s. 37 *The Queen's Bench Act, 1998* and section 7(c) of the *Arbitration Act, 1992*, which provides an exception to the enforcement of arbitration clause when doing so would "prevent manifestly unfair or unequal treatment of a party to an arbitration agreement".[75] The Court of Appeal rejected the Alberta Court of Appeal's holding in *New Era Nutrition Inc. v. Balance Bar Co.*,[76] that s. 6(c) (which is equivalent to s. 7(c) of the Saskatchewan legislation) could be interpreted broadly to provide "a remedy to cure unfairness arising from matters not covered by the specific language of the legislation".[77]

50. With respect to s. 8(5), the Saskatchewan Court of Appeal merely stated, in *obiter*, that this provision "specifically contemplates that a court can stay those aspects of a litigation proceeding dealing with matters subject to arbitration and allow the litigation to continue with

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[73] *Ibid* at para. 49.

[74] *Alberici* Appeal Decision at para. 43.

[75] This provision is equivalent to s. 6 of the *Arbitration Act, 1991* which was not considered by the Court of Appeal in this case.

[76] *New Era Nutrition Inc. v. Balance Bar Co*., 2004 ABCA 280 [*New Era*]. New *Era* did not involve the application of s. 7(5) to claims advanced in a class proceeding, and the motion judge's critique of the Alberta Court of Appeal's interpretation of the scope of s. 7(c) of the Alberta arbitration legislation does not give rise to inconsistency among provincial appellate courts. The Saskatchewan Court of Appeal "readily" distinguished *New Era* on its facts and explaining, at para. 47, that "*New Era* is readily distinguishable on its facts. New Era wanted, very unusually, to *both* litigate and arbitrate its dispute with Balance Bar. In the case at hand, AB Western seeks nothing of the sort. It wants *only* to arbitrate in accordance with the terms of its contract with SaskPower".

[77] *Alberici* Appeal Decision at paras. 46-49.

respect to the rest of a claim."[78] The court further commented that while "the Legislature was alert to the possible difficulties posed by a multiplicity of proceedings, [it] chose not to address them by way of giving the courts a residual discretion to prefer the litigation process over arbitration."[79]

51. Taken at its highest, *Alberici* stands for the proposition that s. 8 (5) does not necessarily "preclud[e] arbitration in the face of multiple proceedings, multiple parties or third party actions".[80] However, *Alberici* did not address the discretion of the court to grant a partial stay of arbitration proceedings or arbitrable claims in the context of a class proceeding involving potentially hundreds of thousands of class members, each with relatively small claims that raise identical legal issues.

52. Further, the determination in *Alberici* does not conflict with the Court of Appeal's determination in this case and in *Griffin*; nor does it conflict with the Manitoba Court of Appeal's decision in *Briones.* Multiplicity of proceedings was but one factor which was considered by the Ontario and Manitoba courts in determining whether the non-consumer claims in these particular class proceedings should be stayed in favour of arbitration. Moreover, the present case, *Griffin*, and *Briones* were not decided pursuant to s. 6 (3) and s. 6(c) of the Ontario and Manitoba arbitration statutes, respectively, which are substantially similar and equivalent to s. 6(c) and s. 7(c) of the Alberta and Saskatchewan statutes, respectively.

d) The Applicants' interpretation contorts the purpose of s. 7(5)

53. The Applicants' narrow reading of s. 7(5) does not withstand scrutiny. The Applicants maintain that s. 7(5) does not authorize a court to refuse a stay of proceedings that are dealt with in the arbitration agreement; rather, it merely permits the court to allow a proceeding to continue with respect to other matters.[81]

54. The Applicants' selective reading of s. 7(5) is inconsistent with a purposive and contextual interpretation of the provision. Such an interpretation would require this court to

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[78] *Ibid* at para. 50.
[79] *Ibid*.
[80] *Alberici* Queen's Bench Decision at para. 48.
[81] Memorandum of Argument of the Applicants at paras. 18, 44.

disregard the first part of s. 7(5), such that the provision states nothing more than: "[t]he court may…allow [the proceeding] to continue to respect to other matters [not dealt with in the arbitration agreement] if the agreement deals with only some aspects of the proceeding and it is reasonable to separate the matters subject to the arbitration from the other matters".

55. This interpretation, if accepted, would erode the existing rights of litigants by imposing a threshold obstacle, namely obtaining leave of court, to pursue non-arbitrable claims in court, when no such an impediment currently exists to commencing proceedings with respect to non-arbitrable proceedings. This interpretation is inconsistent with the textual, contextual and purposive approach to the interpretation of the *Arbitration Act, 1991*, which does not govern non-arbitrable claims or court proceedings.

PARTY IV and V – ORDER REQUESTED AND SUBMISSIONS CONCERNING COSTS

56. For the foregoing reasons, the Respondent requests that this application for leave to appeal be dismissed with costs.

ALL OF WHICH IS REPECTFULLY SUBMITTED this 2nd day of October 2017.

Joel P. Rochon

Peter R. Jervis

Golnaz Nayerahmadi

"Eli Karp" per

Eli Karp

Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

Jurisprudence ***at Para.***

PART VII - LEGISLATION

Business Practices and Consumer Protection Act **S.B.C. 2004, c. 2 S.B.C. 2004, c. 2**

Court actions respecting consumer transactions

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.

(2) If the director brings an action under subsection (1), the director may sue on the director's own behalf and, at the director's option, on behalf of consumers generally or a designated class of consumers.

(3) If the court grants relief under subsection (1), the court may order one or more of the following:

(a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;

(b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;

(c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.

(4) The director may apply, without notice to anyone, for an interim injunction under subsection (1) (b).

(5) In an application for an interim injunction under subsection (1) (b),

(a) the court must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier,

(b) the applicant is not required to post a bond or give an undertaking as to damages, and

(c) the applicant is not required to establish that irreparable harm will be done to the applicant, consumers generally or any class of

consumers if the interim injunction is not granted.

(6) If the director applies, without notice to anyone, for an interim injunction under subsection (1) (b), the court must grant the interim injunction, on the terms and conditions it considers just, if the court is satisfied that there are reasonable grounds for believing there is an immediate threat to the interests of consumers dealing with the supplier because of an alleged contravention of this Act or the regulations in respect of a consumer transaction.

(7) In an action brought under subsection (1), or an appeal from it, the plaintiff is not required to provide security for costs.

***Consumer Protection Act*. S.O. 2002, c. 30, Sched. A**

Alberta *Arbitration Act*, RSA 2000, c A-43

COURT INTERVENTION

Court intervention limited

6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:

(a) to assist the arbitration process;

(b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;

(c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;

(d) to enforce awards.

Stay

7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the application of another party to the arbitration agreement, stay the proceeding.

(2) The court may refuse to stay the proceeding in only the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;

(d) the application to stay the proceeding was brought with undue delay;

(e) the matter in dispute is a proper one for default or summary judgment.

(3) An arbitration of the matter in dispute may be commenced or continued while the application is before the court.

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the matter in 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's refusal is without effect.

(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that

(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and

(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17

COURT INTERVENTION

Court intervention limited

6 No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
3. To prevent unequal or unfair treatment of parties to arbitration agreements.
4. To enforce awards.

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

INTERVENTION LIMITÉE DU TRIBUNAL JUDICIAIRE

6 Aucun tribunal judiciaire ne doit intervenir dans les questions régies par la présente loi, sauf dans les cas prévus par celle-ci et pour les objets suivants :

1. Faciliter la conduite des arbitrages.
2. Veiller à ce que les arbitrages soient effectués conformément aux conventions d'arbitrage.
3. Empêcher que des parties aux conventions d'arbitrage soient traitées autrement que sur un pied d'égalité et avec équité.
4. Exécuter les sentences. 1991, chap. 17, art. 6.

Sursis

7 (1) Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention oblige à soumettre à

Exceptions

7(2) However, the court may refuse to stay the proceeding in only the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Manitoba law;

(d) the motion was brought with undue delay;

(e) the matter in dispute is a proper one for default or summary judgment.

Agreement covering part of dispute

7(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

No appeal

(6) There is no appeal from the court's decision.

l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance. 1991, chap. 17, par. 7 (1).

Exceptions

(2) Cependant, le tribunal judiciaire peut refuser de surseoir à l'instance dans l'un ou l'autre des cas suivants :

1. Une partie a conclu la convention d'arbitrage alors qu'elle était frappée d'incapacité juridique.
2. La convention d'arbitrage est nulle.
3. L'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario.
4. La motion a été présentée avec un retard indu.
5. La question est propre à un jugement par défaut ou à un jugement sommaire. 1991, chap. 17, par. 7 (2).

Convention s'appliquant à une partie du différend

(5) Le tribunal judiciaire peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions, s'il constate :

a) d'une part, que la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite;

b) d'autre part, qu'il est raisonnable de dissocier les questions traitées dans la convention des autres questions. 1991, chap. 17, par. 7 (5).

Décision sans appel

(6) La décision du tribunal judiciaire n'est pas

susceptible d’appel. 1991, chap. 17, par. 7 (6).

Manitoba *The Arbitration Act,* C.C.S.M. c. A120

COURT INTERVENTION

Court intervention limited

6 No court may intervene in matters governed by this Act, except for the following purposes, as provided by this Act:

(a) to assist the arbitration process;

(b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;

(c) to prevent unfair or unequal treatment of a party to an arbitration agreement;

(d) to enforce awards.

Stay

7(1) Subject to subsection (2), if a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Refusal to stay

7(2) The court may refuse to stay the proceeding in only the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Manitoba law;

(d) the motion was brought with undue delay;

(e) the matter in dispute is a proper one for default or summary judgment.

INTERVENTION LIMITÉE DU TRIBUNAL JUDICIAIRE

6 Aucun tribunal judiciaire ne peut intervenir dans les questions régies par la présente loi, sauf dans la mesure prévue par celle-ci pour les objets suivants :

a) faciliter le processus d'arbitrage;

b) veiller à ce qu'un arbitrage soit effectué conformément à la convention d'arbitrage;

c) empêcher que des parties aux conventions d'arbitrage soient traitées de façon injuste ou inéquitable;

d) exécuter les sentences arbitrales.

Sursis

7(1) Sous réserve du paragraphe (2), si une partie à une convention d'arbitrage introduit une instance devant un tribunal judiciaire à l'égard d'une question en litige que la convention oblige à soumettre à l'arbitrage, le tribunal sursoit à l'instance sur motion d'une autre partie à la convention d'arbitrage.

Refus de surseoir

7(2) Le tribunal judiciaire peut refuser de surseoir à l'instance seulement dans les cas suivants :

a) une partie a conclu la convention d'arbitrage alors qu'elle était frappée d'incapacité juridique;

b) la convention d'arbitrage est nulle;

c) l'objet de la question en litige ne peut être soumis à un arbitrage en vertu du

Partial stay

7(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

No appeal

7(6) There is no appeal from the court's decision under this section.

droit manitobain;

d) la motion a été présentée avec un retard indu;

e) la question en litige est de nature à faire l'objet d'un jugement par défaut ou d'un jugement sommaire.

Sursis partiel

7(5) Le tribunal judiciaire peut surseoir à l'instance en ce qui touche les questions en litige traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions, s'il constate :

a) d'une part, que la convention ne traite que de certaines des questions en litige à l'égard desquelles l'instance a été introduite;

b) d'autre part, qu'il est raisonnable de dissocier les questions en litige traitées dans la convention des autres questions.

Appel

7(6) Les décisions du tribunal judiciaire rendues en vertu du présent article ne sont pas susceptibles d'appel.

Saskatchewan *Arbitration Act,* 1992, S.S. 1992, c. A-24.1.

COURT INTERVENTION

Court intervention limited

7 No court shall intervene in matters governed by this Act, except for the following purposes, as provided by this Act:

(a) to assist the conducting of arbitrations;

(b) to ensure that arbitrations are conducted in accordance with arbitration agreements;

(b) to prevent unequal or unfair treatment of parties to arbitration agreements;

(c) to enforce awards.

Stay

8(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 with respect to which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

(6) There is no appeal from the court's decision pursuant to this section.

***Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01, s. 37(2)**

Stay of proceedings	**Suspension de l'instance**
37 (2) Any person, whether a party or not to an action or matter, may apply to the court for a stay of proceedings, either generally or to the extent that may be necessary for the purposes of justice, if the person may be entitled to enforce a judgment, rule or order, and the proceedings in the action or matter or a part of the proceedings may have been taken contrary to that judgment, rule or order.	**37** (2) Toute personne, partie ou non à une action ou à une affaire, peut demander à la Cour de suspendre l'instance, de façon générale ou dans la mesure necessaire que l'intérêt de la justice l'exige, si elle est en droit de faire exécuter un jugement, une règle ou une ordonnance et que tout ou partie de l'instance a pu être intenté en violation de ce jugement, de cette règle ou de cette ordonnance.

Uniform Arbitration Act (1990)

Uniform Arbitration Act (2016)

(http://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0017.pdf)