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By Email

Roger Bilodeau, Q.C., Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1
Registry-greffe@scc-csc.ca

Dear Mr. Bilodeau:

Re: Reply of TELUS Communication Company, Tele-Mobile Company and TELUS Communications Inc. to Application for Leave to Appeal; SCC #37722 - TELUS Communications Company, Tele-Mobile Company and TELUS Communications Inc. v. Avraham Wellman

As counsel for the applicants (collectively, "TELUS Mobility") we file the following reply to the response to the application for leave to appeal served by the respondent Mr. Wellman on October 2, 2017. We file this reply pursuant to Rule 28(2) of the Rules of the Supreme Court of Canada.

The respondent's principal submission is that the applicants are wrong to submit there is a conflict in the appellate jurisprudence concerning the "partial stay" power. In reply, TELUS Mobility submits that this conflict is not manufactured and is evident on the face of the Saskatchewan Court of Appeal's reasons , which clearly rejected the interpretation of the "partial stay" power adopted by the Ontario courts. Scholars share this view. These conflicting interpretations are manifest in the case law and commentary. The overlay of a consumer class proceeding in the Ontario cases does not eliminate the appellate conflict over this 'basic question'.

The respondent submits that sub. 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)". This statement is incorrect. The Ontario Court of Appeal has repeatedly confirmed that subs. 7(6) does not bar an appeal where a judge has refused to stay court proceedings in favour of arbitration. In particular, in Griffin v. Dell the Ontario Court of Appeal specifically

rejected a preliminary objection that there could be no appeal: "As the motion judge found that the matter was not subject to arbitration, on the authority of these cases, it follows that s. 7(6) does not bar an appeal to this court." In any case, subs. 7(6) did not figure in the decision sought to be appealed. If the respondent implies that there can be no further appeal to this Court, that submission would offend this Court's jurisdiction to hear appeals pursuant to s. 40 of the Supreme Court Act.

At paras. 40-41 of his memorandum, the respondent refers to amendments to the Uniform Arbitration Act. The importance of the basic question at hand is supported by the fact the Uniform Law Conference of Canada has further amended the uniform act to delete subss. 7(5) and 7(6). Its explanation of the change is additional evidence of the importance of the question sought to be appealed: "[t]he requirement that courts stay court proceedings concerning matters that are the subject of an arbitration agreement is central to preserving the integrity of the arbitral process".

The applicant agrees with the respondent's correction that Blair J.A. formally concurred in the result in the court below (para. 24 of respondent's memorandum). Nonetheless, the reasons of Blair J.A. express cogent and substantial concerns with the approach taken by the Ontario Court of Appeal to the "partial stay" power in subs. 7(5).

The respondent's submission concerning the correct interpretation, arguing that the interpretation urged by TELUS Mobility would "erode the existing rights of litigants … to pursue non-arbitrable claims in court", illustrates the importance of the question raised in this application. This case does not concern "non-arbitrable claims". Consumer claims, which are not arbitrable, are unaffected and may continue in the courts. What is not permitted, and what subs. 7(5) does not authorize, is that the courts take jurisdiction over arbitrable claims.

All of which is respectfully submitted.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

D. Geoffrey Cowper, Q.C.

GC/cj

Cc: Agent for the respondent: Marie-France Major, Supreme Advocacy LLP, mfmajor@supremeadvocacy.ca