Understanding Arbitration Clauses in Class Actions: Have the Sands Shifted Once Again?

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I. INTRODUCTION

Over the past two decades, law reform in Canada has attempted to redefine traditional litigation. As part of these efforts, jurisdictions across Canada promulgated legislation to encourage alternative dispute resolution, such as arbitration, and to create class proceedings. What these initiatives failed to address was the conflict that could arise between the policy rationales underlying arbitration legislation (respect for private agreements; alternative dispute resolution) and class proceeding legislation (access to justice; judicial economy).

The task of reconciling these two public policy initiatives has, until recently, been left entirely to the courts. Not surprisingly, with little legislative guidance, Canadian courts have provided different responses to this conflict. Many academics had hoped that the Supreme Court of Canada in *Dell*[2] would resolve the conflict between arbitration legislation and class proceedings legislation on a broad national policy basis.[3] To these writers, *Dell* may be seen as a disappointment. Read narrowly, *Dell* can be argued to be little more than a specific interpretation of certain provisions of the *Quebec Civil Code*. However, read broadly, *Dell* may have shifted the sands of this debate back in favour of respect for the enforcement of arbitration agreements.

This paper will first review the history of the conflict between class proceedings and arbitration in Canada. Following that discussion, this paper will address whether *Dell* has provided guidance that arbitration agreements should, in general, be respected and that class proceeding legislation should not be regarded as providing a substantive ground to negate an arbitrator's jurisdiction.

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[2] *Union des consommateurs v. Dell Computer Corp.*, 2007 SCC 34 ("*Dell*").

[3] S. McGill, "The Conflict between Consumer Class Actions and Contractual Arbitration Clauses" (2006) 43 Canadian Business Law Journal 362.

II. PUBLIC POLICY - ARBITRATION AND CLASS PROCEEDINGS

The policies rationales underlying arbitration legislation and class proceedings legislation are well-known and laudable. Arbitration is said to be based on the parties' freedom to contract a dispute resolution mechanism of their choice. It is believed to expedite the resolution of disputes, save the costs of court actions, and provide certainty and predictability for contracting parties in the resolution of the disputes.[4] These goals have led the courts to interpret arbitration legislation as requiring the courts to defer to an arbitrator's jurisdiction.

In *Hollick v. Metropolitan Toronto (Municipality)*[5] the Supreme Court of Canada set out the public policy goals of class proceedings legislation as follows:

> … class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.[6]

Both arbitration and class proceedings are based upon well-meaning public policy goals. However, until recently, legislators have not attempted to resolve how these public policy goals should be reconciled when they collide. As will be seen, even the legislative responses to this conflict have been limited in scope. Post-*Dell* this conflict is likely to continue to arise. In particular, where an intended class action is commenced and the court is faced with a stay of proceedings based upon a

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[4] *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473 at para. 32 ("*MacKinnon*" or "*MacKinnon v. Money Mart*"); McGill, *supra* at p. 364; J.W. Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006) 51 McGill L.J. 693 at p.694.

[5] [2001] 3 SCR 158 ("*Hollick*").

[6] *Hollick, supra,* at para. 15.

prima facie enforceable arbitration agreement, how is that conflict to be resolved? Are class proceedings a means to trump mandatory arbitration clauses[7] or are the rights of contracting parties to be respected?

III. THE CANADIAN EXPERIENCE - PRE-*DELL*

Prior to the Supreme Court of Canada decisions in *Dell* and *Bisaillon,*[8] there were six key decisions in Canada[9] seeking to resolve the conflict between arbitration agreements and class proceedings. Not only did these decisions often result in different conclusions, they also reached the result based upon different legal theories. These decisions led to legislative intervention in Ontario and Alberta, as well as most recently in Quebec, which restricts, in varying degrees, the ability of a defendant to obtain a stay of intended class proceedings in "consumer" litigation.

a. *Huras v. Primerica Financial Services Ltd.*[10]

Huras was a claim for damages under the *Employment Standards Act* (Ontario).[11] The proposed class members were persons who attended mandatory employment training session, but did not receive minimum wage for their attendance. The parties had signed an employment contract which included an arbitration clause. An intended, but not certified, class proceeding was commenced

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[7] D.T. Neave and J. M. Spencer, "Class Proceedings: The New Way to Trump Mandatory Arbitration Clauses?" (2005) 63 The Advocate 495.

[8] *Bisaillon v. Concordia University*, 2006 SCC 19 ("*Bisaillon*").

[9] In the body of my paper, I have referred to the leading cases on this topic. In the Index, I have listed all the cases of which I am aware where the conflict between arbitration agreements and class proceedings has been considered by a court in Canada.

[10] *Huras v. Primerica Financial Services Ltd.* (2001), 55 O.R. (3d) 449 (Ont. C.A.) ("*Huras*").

[11] R.S.O. 1990, c. E-14.

against *Primerica* seeking compensation for the employees' attendance at the mandatory employment training session.

Mr. Justice Cumming in chambers[12] disposed of the issue by strictly interpreting the employment agreement to find that the arbitration clause did not apply to the training period. This was sufficient to dispose of the application. However, in *obiter,* he discussed whether the arbitration provision was "unconscionable". Under Ontario arbitration legislation,[13] a stay would not be granted in favour of arbitration if the arbitration agreement was invalid. It was argued that the arbitration provision in issue was invalid due to unconscionability.

Mr. Justice Cumming found that the sole and real purpose of the arbitration clause was to prevent resolution of disputes between *Primerica* and its sales representatives and, as a result, found the clause unconscionable and void. As a result, he would have also agreed to not enforce the arbitration agreement on that basis.

In the Ontario Court of Appeal,[14] Mr. Justice Borins dismissed the appeal but limited the decision to the strict interpretation of the arbitration clause (i.e., it did not apply to the training period). With respect to the finding that the arbitration agreement was invalid as being unconscionable, he wrote that those reasons had no precedential value:

> There is no doubt that it was unnecessary for the motion judges to decide these issues in order to determine whether to stay the respondents action under S.7 (1) of the *Arbitration Act, 1991*. These findings are clearly over the *obiter dicta* and, therefore,

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[12] [2000] O.J. No. 1424 (S.C.J.).

[13] *Arbitration Act, 1991*, S.O. 1991, s. 7.

[14] 55 O.R. (3d) 449 (C.A.).

> not binding as a precedent. Because these findings are *obiter dicta* it is not necessary to review their correctness as requested by counsel for *Primerica.* [15]

Huras, therefore, resulted in a fact specific decision with little precedential value in later cases.

b. *Kanitz v. Rogers Cable Inc.*[16]

In *Kanitz*, the defendant applied to stay the proposed class action on the ground that the internet user agreement between the parties provided for arbitration of all claims. The arbitration agreement was included as an amendment to the rogers@home user agreement for internet service. The claim was for losses caused by regular interruptions in home internet service.

After finding that the amendment was part of the home user agreement, Mr. Justice Nordheimer went on to consider whether the arbitration agreement could be avoided on the basis of unconscionabilty. The clause was attacked on its face as well as on the basis that it prohibited class arbitrations. In the end, Mr. Justice Nordheimer presented a standard contractual analysis of unconscionability:

> Without deciding the point, it would appear that s. 20 (1) would permit an arbitrator, at the very least, to consolidate a number of arbitrations which raise the same issues. Therefore, it appears at least arguable that if each of the five named representative Plaintiffs here chose to seek arbitration of their claims, an arbitrator might well decide that those arbitrations could be dealt with together thereby saving time and expense for all parties. Such possibilities serve to militate against the central assertion of the Plaintiffs that the arbitration clause operates so as to erect an economic wall barring customers of the defendant effectively seeking relief.
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> In the end result, however, whatever concerns the Plaintiffs had with respect to the prospect of having to arbitrate their claims rather than proceed with the class action,

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[15] *Huras*, *supra* at para. 20 (Ont. C.A.).

[16] *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.) ("*Kanitz*").

> those concerns cannot be elevated to the level necessary to conclude that arbitration clause in the user agreement is "sufficiently divergent from community standards of commercial morality" as to be unconscionable and therefore unenforceable. [17]

c. *MacKinnon v. National Money Mart Co.*[18]

The British Columbia Court of Appeal was the next to speak on this issue. The *Commercial Arbitration Act*[19] contains broader provisions than its Ontario equivalent for the non-enforceability of an arbitration agreement. In particular, the court is authorized to refuse a stay if an arbitration agreement is "void, inoperative or incapable of being performed".[20]

In chambers, the application came before Madam Justice Brown. She ruled that the public policy goals of class proceeding legislation rendered an arbitration agreement "inoperative" in the face of an intended class proceeding.[21]

The British Columbia Court of Appeal followed much the same approach as the chambers judge although in a more procedurally nuanced manner. Still, the British Columbia courts dealt with this issue as a matter of statutory interpretation and not on a broad policy basis. Therefore, their findings are not necessarily persuasive in the resolution of the same or a similar statutory conflict in other jurisdictions. Madam Justice Levine who delivered the decision of the British Columbia Court of Appeal described the statutory conundrum before the court as follows:

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[17] *Kanitz, supra* at paras. 55 and 56.

[18] 2004 BCCA 473.

[19] R.S.B.C. 1996, c. 55 (the "*Commercial Arbitration Act* (British Columbia)").

[20] *Commercial Arbitration Act* (British Columbia), s. 15(2).

[21] 2004 BCSC 136.

> These appeals raise an important issue not previously considered by this Court: is an arbitration clause in a contract "inoperative" where an action challenging the contract is brought as an intended class proceeding? Madam Justice Brown found that it was. The appellants, whose contracts include an arbitration clause, appealed her order dismissing their application for stay of the action by Mr. MacKinnon.
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> The issue arises from two seemingly incompatible provisions of two Acts of the British Columbia legislature. Section 15 of the *Commercial Arbitration Act* R.S.B.C. 1996, c. 55, requires a court to stay legal proceedings where the preconditions for arbitrations are met, unless it determines that the arbitration agreement is "void, inoperative, or incapable of being performed". Section 4 of the *Class Proceedings Act,* R.S.B.C. 1996 c. 50, requires the court to certify a proceeding as a class proceeding where the requirements of that section are met.[22]

Madame Justice Levine first rejected the sequential approach to the issue. This approach suggested that the legislature intended a stay application be decided before an application for certification. Madame Justice Levine held this to represent a narrow analysis of the words and of the policies of only one of the Acts in issue.[23]

Madame Justice Levine agreed substantially with the chambers judge but altered the procedure necessary to arrive at this conclusion. She wrote:

> The case management judge also correctly interpreted the word "inoperative" in the context of a class proceeding when she said at (para.32.) "…where a proceeding meets the requirements of s.4 of the *Class Proceedings Act,* the court *must* certify it as a class proceeding; the arbitration clause is, therefore, inoperative." [Emphasis in original]
>
> There is a gap in her reasoning, however, between the *prima facie* conclusion that a class proceeding would be the preferable procedure and the order refusing the stay on the ground that the arbitration agreement is "inoperative". As the case management judge acknowledged, it is because certification is mandatory that the

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[22] *MacKinnon*, *supra*, at paras. 1-2.

[23] *MacKinnon*, *supra*, at para. 24.

> arbitration agreement is 'inoperative'. Her decision to refuse the stay before deciding whether the proceeding would be certified was therefore premature. [24]

Madam Justice Levine decided that an application for a stay and the certification application must be heard at the same time. If the court determines that a class proceeding is the preferable procedure (one of the requirements for certification under section 4 of the *Class Proceedings Act*) then the arbitration agreement is inoperative and the matter is certified. In essence, the Court of Appeal left it open to each judge to determine whether class proceedings or arbitration are "preferable" in each case. As will be seen from the chambers decision in *Ruddell,* [25] this became *carte blanche* for the courts to override mandatory arbitration clauses in the context of class proceedings.[26]

d. *Smith v. National Money Mart Co.*[27]

MacKinnon could have been taken to be a "British Columbia" decision. The decision relied heavily on the wording of the *Commercial Arbitration Act* (British Columbia), and it was an open question as to whether other jurisdictions in Canada would adopt a similar position. This question was answered in *Smith v. National Money Mart Co.*

In chambers, Madam Justice Macdonald followed *McKinnon*. She did so without giving weight to the differences between arbitration legislation in British Columbia and Ontario. She wrote:

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[24] *MacKinnon*, *supra*, at para. 49.

[25] *Ruddell v. B.C. Rail Ltd.,* 2005 BCSC 1504.

[26] *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2006 BCSC 1018; leave to appeal allowed 2006 BCCA 373, followed *MacKinnon* with respect to the preferability analysis. This also appears to have been raised earlier but not decided in *McDougall v. Collinson,* 2000 BCSC 398; *MacKinnon* was followed by the Saskatchewan Queens Bench in *Frey v. BCE Inc.,* 2006 SKQB 331 which held that the arbitration agreement would not be enforced because it would be "unfair".

[27] (2005), 20 C.P.C. (6th) 345 (Ont. C.A.); affirming [2005] O.J. No. 2660 (S.C.J.) ("*Smith*"), leave to appeal refused, (2006), 223 O.A.C. 394 (S.C.C.).

> I agree that the question of whether or not there is an enforceable arbitration clause is a matter that was not relevant to the *Arbitration Act*, *1991* but is relevant to the preferable procedural determinations that will eventually be made under s. 5 of the *Class Proceeding Act, 1992*. The court routinely looks to other dispute resolution procedures in the context of the preferable procedure analysis. This question has been decided by a five member panel of the British Columbia Court of Appeal in *MacKinnon v. National Money Mart Co.* In referring to *MacKinnon* I point out that I am aware that the British Columbia Court of Appeal recognizes that B.C. arbitration legislation is distinguishable from Ontario's *Arbitration Act, 1991*. I note as well that in the reasons for judgment released March 1, 2005 by Madam Justice Brown… certification of the proposed class proceeding was dismissed. I did not see this decision as directly relevant to the questions that are before the court at this stage of the proceeding here in Ontario.
>
> Pursuant to the *Class Proceeding Act, 1992* it is only the Superior Court of Justice that has jurisdiction over class proceedings. Arbitrators therefore do not have jurisdiction over such matters. The arbitration clauses contained in Margaret Smith's agreements with *Money Mart* cannot be construed to exclude class action claims. Arbitrators cannot assume jurisdiction in light of the *Class Proceeding Act, 1992*. [28]

The Court of Appeal endorsed Madam Justice Macdonald's decision.

As will be discussed further below, the Ontario legislature intervened in the debate and enacted a legislative provision which prohibits the enforcement of private agreements requiring arbitration of "consumer" class actions. However, *Smith* remains the governing authority in Ontario for all class proceedings that fall outside of the consumer context. By essentially adopting the *MacKinnon* analysis requiring the conflict to be resolved in the context of the preferability test on a certification application, the status of non-consumer arbitration agreements where class proceedings are proposed is uncertain.

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[28] *Smith, supra*, at paras. 26 and 27; *Smith* has been followed to require arbitration to be considered as part of the certification motion, see *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*,[2007] O.J. No. 1136 (S.C.J.).

e. *Ruddell v. B.C. Rail Ltd.*[29]

Ruddell is the next decision of interest. This was not a consumer class action case but rather a pension dispute. Certification was sought of a claim for an alleged breach of *BC Rail's* duty of impartiality in granting itself and active members of a pension plan contribution holiday without providing a commensurate benefit to retired plan members.

Mr. Justice Holmes heard the stay application and the certification application at the same time. He followed the procedural analysis provided by the Court of Appeal in *MacKinnon* and found that a class proceeding was preferable. The policies reasons relied upon by Mr. Justice Holmes in preferring class proceedings to arbitration were general and non-specific. It was doubtful that arbitration would ever, except in the most unusual circumstances, have been preferable to a class proceeding if the policy based reasoning of Mr. Justice Holmes was followed.[30] *Ruddell* was overturned on appeal. A discussion of the appeal decision follows in the next section.

f. *Dell Computer Corp. v. Union des consommateurs* (Court of Appeal)[31]

The final case in this progression was the Quebec Court of Appeal decision in *Dell*. In this case, a customer had been advised of a pricing error on Dell's website. Dell had sought to correct the problem but the customer had been provided with the link that allowed him to access the incorrect pricing page through a direct link. The evidence was that over normal weekends Dell would sell approximately three computers of this type in Quebec. Over the weekend in issue, where the error

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[29] 2005 BCSC 1504.

[30] *Ruddell, supra,* at paras. 104 to 125.

[31] 2005 QCCA 570.

was included in the website, Dell sold over 500. Dell refused to sales resulting from the pricing error leading to the intended class proceedings.

Dell sought a stay of the intended class action on the basis of an arbitration agreement. To a large extent, the decision is an interpretation of certain specific provisions of the *Quebec Civil Code*. The court was concerned with whether the arbitration agreement contained a "foreign element" and was, therefore, unenforceable. In addition, there was a question as to whether the arbitration agreement, which could only be accessed by a hyperlink in the website, was a formal part of the consumer contract.

The Quebec Court of Appeal dismissed Dell's appeal from the trial judgement dismissing its application for a stay. The trial judge determined that because the arbitration agreement was to be governed by the National Arbitration Forum Rules, a body located in the United States, the agreement contained a foreign element. As a result, the Civil Code prohibited enforcement of the arbitration agreement.

The Court of Appeal did not agree with the "foreign element" reasoning, but held that the arbitration clause was external to the contract as it was not brought to the attention of the customer by Dell. Therefore, the arbitration clause could not be enforced. As will be discussed further below, this result was overturned by the Supreme Court of Canada.

g. *Summary*

Prior to the Supreme Court of Canada decision in *Dell,* the courts in Canada had utilised a number of different legal constructs (statutory interpretation, contractual interpretation, or broad policy decisions), to avoid the application of arbitration agreements when faced with an intended class

proceeding. In light of the struggles of the courts to adopt a coherent response to this issue, two responses have been noteworthy in Canada. First, Ontario, Quebec and Alberta, fashioned a legislative response to this issue. Second, it appears that the Supreme Court of Canada in *Dell* has shifted the sands back in favour of the enforcement of arbitration agreements.

IV. THE LEGISLATIVE RESOLUTIONS – ONTARIO, QUEBEC AND ALBERTA

The legislatures of Ontario, Alberta and Quebec responded to the potential abuse of pre-dispute arbitration clauses and standard form consumer agreements by enacting legislation banning or regulating their use.

The *Ontario Consumer Protection Act,* which came into force as of July 30, 2005, is an example of the legislative response.[32] The Ontario provisions are comprehensive. Section 7 nullifies any pre-dispute arbitration clause that prevents a consumer from commencing an action in the Superior Court of Justice to enforce rights under that Act. Section 8 nullifies pre-dispute arbitration clauses that prevent consumers from commencing or participating in class proceedings.[33]

Alberta legislated a more limited form of consumer protection.[34] Alberta's legislation applies only to "unfair practices" (i.e., misrepresentation) and does not override arbitration in all consumer class

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[32] *Consumer Protection Act, 2002*, ss. 7, 8, being Schedule A of the *Consumer Protection Statute Law Amendment Act, 2002*, S.O. 2002, c. 30.

[33] Hamilton, *supra* at footnote 2.

[34] *Fair Trading Act*, R.S.A. 2000, c. F-2.

proceedings.[35] The legislation also does not prohibit arbitration agreements that have been approved by the government.[36]

Quebec has also enacted consumer protection legislation similar to Ontario. Section 11.1 of the *Consumer Protection Act* [37] now provides:

> Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of the group bringing a class action is prohibited.
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> If a dispute arises after the contract has been entered into, the consumer may then agree for further dispute to arbitration.

These provisions had the effect of adding to the patchwork quilt of Canadian responses to the conflict between arbitration and class proceedings legislation. The legislation has the effect of denying the applicability of an arbitration clause in a consumer class action in Ontario, Quebec and, in more limited circumstances, in Alberta. To date, no other province in Canada has enacted similar legislation. This patchwork response to the conflict between arbitration and class proceeding legislation is especially important given the national scope of many class proceedings. Given that only three provinces have prohibitions on the enforcement of arbitration agreements in intended consumer class proceedings and the fact that the jurisprudence to date has been so uneven, we do not have a coherent national jurisprudential answer to this conflict. It was hoped that *Dell* would provide that answer.

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[35] Hamilton, *supra*, at p. 725.

[36] *Fair Trading Act*, *supra*, s. 16; Alberta courts have stayed proceedings where the arbitration was arguably against some of the defendants but not others, see *Hammer Pizza Ltd. v. Domino's Pizza of Canada Ltd.,* [1997] A.J. No. 67 (Q.B.).

[37] *Protection du consommateur et la Loi sur le recouvrement de certaines creances, Loi Modificant la Loi sur la*, L.Q. 2006, c. 56.

V. THE CANADIAN POSITION – POST-*DELL*

The growing trend towards avoiding the enforcement of arbitration agreements through class proceedings was first stymied by the Supreme Court of Canada decision in *Bisaillon v. Concordia University*.[38]

Bisaillon deals with labour arbitration. Concordia University has a pension plan for its employees, the majority of which were unionized under one of its nine collective agreements. Bisaillon, a unionised employee, sought to institute a class action against the University in order to contest a number of decisions made with respect to the administration and use of the pension fund. The University opposed certification on the basis that the matter should be referred to labour arbitration. The Quebec Superior Court agreed with the University and stayed the proceeding in favour of labour arbitration. The Quebec Court of Appeal reversed that decision.

In a four to three decision, the Supreme Court of Canada reversed the Quebec Court of Appeal and ordered that the matter proceed by way of labour arbitration. Mr. Justice LeBel wrote the majority decision. The key statements are found in paragraphs 17 and 22:

> The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights… It cannot serve as a basis for legal proceedings that the various claims that it covers, taken individually, would not do so….
>
> …

[38] *Bisaillon*, *supra.*

> In short, the class action procedure cannot have the effect of conferring jurisdiction of the Superior Court over a group of cases that would otherwise fall within the subject-matter of another court or tribunal. Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals. Nor does it create new substantive rights. Determining whether such a proceeding lies in respect of issues relating *prima facie* to the law of collective labour relations thus requires a careful review of the institutions and fundamental rules specific to this branch of law…[39]

Mr. Justice LeBel also rejected that the argument that procedural chaos would result from multiple labour arbitrations over the same pension issues. He wrote:

> … despite the fear that procedural difficulties- which, I might add, would not be instrumental – might result from a decision in favour of arbitration, the class action option cannot be accepted. To authorize a class action in the case at bar would be to deny the principles of the exclusivity of the grievance arbitrator's jurisdiction and the union's monopoly on employer's representation. [40]

To a great extent, it was the procedural difficulties which caused the minority opinion to decide that the dispute should be determined by way of class proceedings.

The British Columbia Court of Appeal in *Ruddell v. B.C. Rail Ltd.* relied upon the reasoning of *Bisaillon* to allow B.C. Rail's appeal and to stay the proceeding in favour of arbitration.[41] The Court of Appeal overturned the chambers judge because it found that he had failed to take into account the British Columbia legislature's preference for arbitration of certain enumerated pensions disputes.

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[39] *Bisaillon*, *supra*, at paras. 17 and 22.

[40] *Bisaillon*, *supra*, at para. 64.

[41] *Ruddell,* 2007 BCCA 269, leave to appeal has been sought to the Supreme Court of Canada.

This legislative intent was evidenced by the requirement for a mandatory arbitration clause in British Columbia-based pension plans found in section 62 of the *Pension Benefits Standards Act*.[42]

Madam Justice Saunders, writing for the Court of Appeal, made two important statements concerning the applicability of *Bisaillon* to the broader issue of the conflict between class proceedings and arbitration legislation. First, she determined that, unlike *Bisaillon*, the issue before her was not one of whether the arbitrator's jurisdiction should be enforced. Rather, she held that the Court of Appeal was bound to follow *MacKinnon v. Money Mart* and determine the issue on the basis of the preferability analysis required by the *Class Proceedings Act*. She found that given the unique wording of the *Commercial Arbitration Act* (British Columbia), this question cannot be considered on the basis of exclusive arbitral jurisdiction in British Columbia. She wrote:

> The problem of multiple claimants arbitrating the same issue was addressed, albeit in a different context, in *Bisaillon v. Concordia University*, 2006 S.C.C. 19, [2006] 1 S.C.R. 666. There the Supreme Court of Canada considered the dual possibilities of a class proceeding and arbitrations under collective agreements. The dispute concerned pension disputes under several agreements, raising the potentiality of several arbitration awards in the event the matter did not proceed in court as a class proceeding. The court concluded that arbitration was the appropriate route. *Bisaillon* dealt with the question as one of jurisdiction. That is a different approach from the one here advanced and, in my view, is an approach not open to BC Rail given the language of our *Commercial Arbitration Act* that contemplates the matter being withdrawn from arbitration if the arbitration agreement is void, inoperative or incapable of being performed, and given the decision in *MacKinnon*. Yet *Bisaillon* is instructive in that it adopts a position, ***tolerant of some procedural difficulties***, in favour of arbitration as required by the legislative scheme[43] [Emphasis added]

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[42] *Pension Benefits Standards Act,* R.S.B.C. 1996, c. 352.

[43] *Ruddell, supra*, at para. 40.

The second important point arising from *Ruddell* is also encapsulated in the quotation above. Courts below should be "tolerant of some procedural difficulties" with respect to arbitration. Given that *Ruddell* endorsed the approach taken in *MacKinnon v. Money Mart*, this statement will be useful in determining the preferability of arbitration as weighed against class proceedings. Procedural difficulties have been relied upon heavily by lower courts to favour class proceedings over arbitration.

After *Ruddell*, the resolution of the conflict between class proceedings and arbitration appeared to have become more defined:

(a) In situations of exclusive jurisdiction, arbitration agreements will be enforced *(Bisaillon)*;

(b) In situations where there is legislative intention to prefer arbitration of a class proceedings, this will indicate the preferability of that procedure and arbitration agreements should be enforced *(Ruddell);* and

(c) In other factual contexts, other than when prohibited by legislation, the conflict will be determined on the basis of preferability *(MacKinnon; Smith).*

Does this progression remain post-*Dell?* The answer to this question will depend upon how broadly *Dell* is construed.

Dell dealt with a consumer contract made on the internet. It is a classic conflict between class proceedings legislation and arbitration legislation. As is normally the case, however, Quebec arbitration legislation is somewhat distinct from arbitration legislation in the other Canadian provinces (which also have distinctions from each other). Although *Dell* represents a classic example of a consumer class action, it is possible to rely upon the peculiarities of the Quebec arbitration legislation to limit its applicability. One can argue that *Dell* is an interpretation of the

Quebec Civil Code and does not provide a policy based answer to the conflict in common law provinces.

However, it is also equally plausible to read the decision broadly. The Supreme Court of Canada was not dealing with an exclusive jurisdiction model as found in the labour relations field. Rather, it was dealing with consumer class actions and reviewed a number of provisions upon which the court could have declined to enforce the arbitration agreement. In the end, the majority enforced the arbitration agreement and, in doing so, reinforced its comments from *Bisaillon*.

Madam Justice Deschamps wrote for the majority. She determined that jurisdiction should generally be determined first by the arbitrator:

> 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.
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> 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.
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> Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not

> unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.[44] [Emphasis Added]

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She then turned to the issue of whether the arbitration clause should be enforced:

> The notion that the class action procedure does not create new rights has been reiterated on numerous occasions, including recently by this Court in *Bisaillon*, at paras. 17 and 22.
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> In the case at bar, the parties agreed to submit their disputes to binding arbitration. The effect of an arbitration agreement is recognized in Quebec law: art. 2638 C.C.Q. Obviously, if Mr. Dumoulin had brought the same action solely as an individual, the Union's argument based on the class action being of public order could not have been advanced to prevent the court hearing the action from referring the parties to arbitration. Does the mere fact that Mr. Dumoulin instead decided to bring the matter before the courts by instituting a class action affect the admissibility of his action? In light of the reasons of LeBel J., writing for the majority in *Bisaillon*, at para. 17, the answer is no: "[the class action] cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so".
>
> Moreover, the Union's argument that the class action is a matter of public order that may not be submitted to arbitration has lost its force as a result of this Court's decision in *Desputeaux*. In that case, one of the parties had invoked the same provision, art. 2639 C.C.Q., to argue that the dispute over ownership of the copyright in a fictitious character, Caillou, was a question of public order that could not be submitted to arbitration. The Court held that the concept of public order referred to in art. 2639 C.C.Q. must be interpreted narrowly and is limited to matters analogous to those enumerated in that provision: paras. 53-55. In the case at bar, neither Mr. Dumoulin's hypothetical individual action nor the class action is a dispute over the status and capacity of persons, family law matters or analogous matters.
>
> Consequently, the Union's argument relating to the public order nature of the class action must fail. [45]

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[44] *Dell*, *supra*, at paras. 84 to 86: A companion decision, *Muroff v. Rogers Wireless Inc.*, 2007 SCC 35, was released concurrently with *Dell*.

[45] *Dell*, *supra*, paras. 107 to 110.

What is clear from *Dell* is that the sand has shifted. The question is how much.

VI. THE POST-*DELL* DEBATE

Before *Dell*, it was clear that the courts were favouring, especially in consumer class actions, the preferability of a class proceeding over the enforcement of arbitration agreements. The question that arises is whether *Dell*, being a consumer class action, has shifted the sands of this debate. The answer to this question depends on how broadly one interprets *Dell*.

Taking a broad interpretation, *Dell* stands from the proposition that class proceedings legislation cannot create new substantive rights. Specifically, class proceedings legislation does not create a substantive right to avoid an arbitration agreement. This means that the court needs to look at an intended class action as if it were an ordinary class action brought by an individual. In those circumstances, if the arbitration agreement is enforceable, class proceedings legislation cannot provide additional rights to a plaintiff to avoid arbitration. Read broadly *Dell* stands for this proposition and, arguably, overturns *MacKinnon* and *Smith*. Further, it can be read as being contrary to one of the key statements from *Ruddell* that provides that a mandatory arbitration is not a matter of "jurisdiction."

Read narrowly, *Dell* can stand for a much simpler proposition. In Quebec, the exemptions from the enforcement of an arbitration agreement are more limited than in other provinces. The exceptions that are available are most closely akin to the "void" exception found in Ontario as originally interpreted in *Kanitz*. If one adopts this interpretation, then the *Dell* case becomes one where the arbitrator is granted something akin to exclusive jurisdiction under the *Quebec Civil Code*. In those

circumstances, the court is not provided with the necessary legislative discretion to allow it to choose when to enforce arbitration agreements. In an exclusive jurisdiction model, the issue of preferability does not arise because a court is without jurisdiction in the first instance.

The lower courts in Canada are going to have to grapple with this debate for the foreseeable future. Given the decision in *Dell,* there will likely be further efforts to stay class proceedings in favour of arbitration. Even in Quebec, Ontario and Alberta where consumer class actions are now protected, arbitration agreements will likely be relied upon in other contexts in an effort to halt class proceedings. *Dell* has provided neither the clarity sought by some nor the result sought by others.[46]

VII. A SHORT PRIMER ON THE AMERICAN EXPERIENCE.

The American experience dealing with the conflict between class proceedings and arbitration may be instructive. It also provided a glimpse of where Canadian courts may end up. Not surprisingly, the enforcement of arbitration agreements has been uneven in the context of an intended class proceeding in the United States.[47]

Where courts have upheld arbitration agreements in the United States, one of the reasons has often been the availability of class arbitrations. The class arbitration model has been endorsed by

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[46] Hamilton, *supra*, at p. 694*;* McGill, *supra.*

[47] D. Bisson and S. Finn*,* "A Disputed Alternative To Alternative Dispute Resolution - A Discussion Of Class-Wide Arbitration And Its Relevance For Quebec Class Action Litigants And Practitioners" (2004) 83 Canadian Bar Review 309; Randy A. Pepper, "When Will Online Arbitration Agreements Be Enforced in a Class Action Context? "It Depends" Says the Quebec Court of Appeal in Dell Computers" (2006) 21 B.F.L.R. 323.

American courts since the mid 1980's. This endorsement led the American Arbitration Association to develop a set of rules to better guide arbitrators in the matter of a class wide arbitration.

This development led to the use of arbitration agreements in the United States which sought to compel arbitration but prohibit class arbitration. This development is especially important because the Supreme Court of the United States has held that it was up to arbitrators to decide if the arbitration clauses under which they were appointed provided them with jurisdiction for class arbitrations.[48]

To the extent that Canadian courts seek to enforce arbitration agreements, it is highly likely that Canadian litigants will be met with the prospect of class arbitration. In fact, this process was, in *obiter*, said to be available to litigants in both *Kanitz* and *Ruddell.*[49]

Class wide arbitration seeks to meld the benefits of arbitration (quickness, procedural flexibility and privacy) with the advantages of class proceedings (judicial economy and access to justice). Class wide arbitration has been endorsed by many levels of courts in the United States.[50] However, it has also been seen in a negative light due to the lack procedural safeguards available in arbitration; including the lack of appeal rights, the flexibility of the evidence being produced and difficulty in obtaining interim relief.

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[48] *Bazzle v. Green Tree Financial Corp.*, 539 U.S. 444 (U.S.S.C. 2003).

[49] *Ruddell, supra,* at para. 39 (B.C.C.A.).

[50] Bisson and Finn, *supra*, at pps. 311 to 313.

Given the Canadian courts varying levels of enforcement of arbitration agreements, and the apparent endorsement of class wide arbitrations, Canadian litigants should prepare themselves for this possibility and draft their arbitration agreements accordingly.

VIII. CONCLUSION

The resolution of the conflict between class proceedings legislation and arbitration legislation remains on unsteady ground. The continuing uncertainty with respect to how the courts will ultimately resolve this conflict will likely lead to more litigation over this issue. In the end, if we are to follow the American experience, we will continue on this unsteady ground in Canada for some time and, potentially, throw a new procedure into the mix – class wide arbitrations.

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