Pension Arbitration Trumped by Class Proceeding Legislation

By
Craig Ferris and Murray Campbell

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PENSION ARBITRATION TRUMPED BY CLASS PROCEEDING LEGISLATION

Over the past few years, courts in Canada have faced the apparent conflict between competing statutory mandates with respect to class proceedings and arbitrations. In *Ruddell v. BC Rail Ltd.,* 2005 BCSC 1504, Mr. Justice Holmes of the British Columbia Supreme Court reviewed this conflict in the context of pension litigation. This is the first time this issue has been decided in this context in Canada.

Class action legislation requires the court to certify a proceeding as a class proceeding if certain statutory requirements are met. On the other hand, arbitration legislation generally requires a court to stay all court proceedings in favour of arbitration if there is an agreement to arbitrate between the parties. This apparent statutory conflict has been the topic of much judicial debate over the last few years.

Historically, the case law emanating from Ontario displayed a clear preference for the enforcement of arbitration agreements even where the legal proceeding was commenced as an intended class action. The leading decisions in this trend were both intended consumer class proceedings; *Kanitz v. Rogers Cable Inc.*, (2002), 58 O.R. (3d) 299 (S.C.J.) and *Rudder v. Microsoft Corp.* (1999), 40 CPC (4th) 394 (S.C.J.). In particular, in *Kanitz*, the Court applied a standard contractual analysis to the arbitration agreement and determined that it governed provided it was not unconscionable. The effect of this decision was tempered somewhat by the introduction of the *Consumer Protection Statute Amendment Act*, which expressly resolved the statutory conflict in consumer cases.

The trend toward preference for the enforcement of arbitration agreements was put in doubt in British Columbia in 2004. In *Mackinnon v. Money Mart*, 2004 BCCA 473, the British Columbia Court of Appeal, sitting as a bench of five, found a conflict existed between the *Commercial Arbitration Act*, which requires the court to stay proceedings in favour of arbitration where there is a valid arbitration agreement, and the *Class Proceedings Act* which requires a court to certify a proceeding as a class proceeding where the requirements of the Act are met.

In order to resolve the statutory conflict, the British Columbia Court of Appeal ruled that where a court finds that a class proceeding must be certified by meeting the statutory test set out in the applicable legislation the court must find that the arbitration agreement is 'inoperative'. One of the key tests in determining whether the requirements for certification are met is the requirement that a class proceeding be determined to be the "preferable procedure". In essence, the British Columbia Court of Appeal in *Mackinnon* resolved the statutory conflict by requiring a court to weigh the circumstances of each case to determine whether a class proceeding or arbitration is the preferable procedure. If a class proceeding is preferable, the requirements of certification are met and the arbitration agreement is inoperative. If arbitration is preferable, the requirements of certification are not met and the action will be stayed in favour of arbitration.

Mackinnon was decided in the context of an arbitration clause imposed in a private, standard form consumer agreement by a party in a position of unequal bargaining power. It remained an open question whether *Mackinnon* would be applied to other disputes, including pension disputes.

In pension disputes it appeared that the analysis would be distinct from *Mackinnon*. Section 62 of the *Pension Benefits Standards Act* ("*PBSA*"), requires a British Columbia pension plan to

contain a provision for arbitration of disputes involving certain specified matters such as the taking of a contribution holiday, the allocation of surplus assets on a winding up of a plan, and the payment or transfer of any surplus assets. Until *Ruddell*, the courts had not commented on whether the *Mackinnon* analysis would extend to arbitration elected pursuant to an arbitration agreement mandated by the *PBSA*.

Mr. Justice Holmes of the British Columbia Supreme Court in *Ruddell* ruled that the *Mackinnon* analysis applies to pension disputes notwithstanding the mandatory requirement to include an arbitration agreement in British Columbia pension plans under the *PBSA*. Even though he determined that the Defendant has established a *prima facie* right to have the proceeding stayed in favour of arbitration, he determined that the Legislature's preference for arbitration of pension disputes as evinced by Section 62 of the *PBSA* should not cause the court to alter the approach as determined in *Mackinnon*. In short, he determined that the *PBSA* did not answer the apparent statutory conflict between class proceeding legislation and arbitration legislation.

As a result of his determination that the *PBSA* should not impact on his analysis, he went on to determine that a class proceeding was "preferable" and that the certification requirements were, therefore, met. As a result, he ruled the statutorily mandated arbitration provision was "inoperative" and allowed the case to proceed by class proceeding.

The reasoning in *Ruddell* is extremely broad. Based on this decision, it is extremely difficult, if not impossible, to discern any pension dispute where class proceedings would not be preferable to arbitration. The weighing of factors envisioned by *Mackinnon* has, in the writers' view, been turned into a general rule that class proceedings will always be preferable to arbitration of pension disputes.

The *Mackinnon* analysis has now been followed by the Ontario Court of Appeal in *Smith v. National Money Mart Co.*, (2005) O.J. No. 4269. Accordingly, the earlier trend from Ontario indicating a preference for the enforcement of arbitration agreements is now significantly in doubt.

Ruddell has significant implications for pension and benefit litigation where arbitration of disputes has been encouraged as a public policy initiative for a number of years. At present, *Ruddell* indicates a clear preference for the public policy envisioned by class proceeding legislation over the initiatives to encourage alternate dispute resolution.

Ruddell is currently under appeal. It is expected the appeal will be heard in 2006. It remains an open question as to whether the Courts of Appeal in this country will take the same approach in pension and benefits litigation as the British Columbia Supreme Court took in *Ruddell*.

Craig Ferris is a partner and practices commercial litigation with Lawson Lundell LLP with a specialty in pension and benefit litigation. Murray Campbell is a partner with Lawson Lundell LLP and is one of Canada's leading pension and benefits lawyers. Mr. Ferris and Mr. Campbell are counsel to BC Rail Ltd. in *Ruddell v. BC Rail.*

Vancouver
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

Calgary
3700, 205-5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

Yellowknife
P.O. Box 818
200, 4915 – 48 Street
YK Centre East
Yellowknife, Northwest Territories
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

genmail@lawsonlundell.com
www.lawsonlundell.com