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Why franchise class actions cannot be ousted by arbitration clauses

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For a number of years, Canadian courts have struggled with whether class actions can be ousted by arbitration clauses.

The most recent debate began in 2007 with the Supreme Court of Canada's decision in *Dell v. Union des consommateurs*,[1] in which a class proceeding in Quebec was stayed due to the existence of an arbitration clause. A series of conflicting decisions from provincial appellate courts followed, in which courts sought to determine whether the civil law principles in *Dell* applied more generally to common law provinces with different statutory schemes.

The Supreme Court resolved some of the confusion in 2011 in its decision in *Seidel v. Telus Communications Inc.*[2] The Court held that because the British Columbia *Business Practices and Consumer Protection Act*[3] contained a statutory remedy that allowed consumers to bring a court action to enforce consumer protection standards, and because the Act also prohibited the waiver or release of any "rights, benefits or protections" conferred by the Act, any remedies sought in respect of the B.C. consumer legislation could not be arbitrated. To do so would be contrary to the intention of the *Business Practices and Consumer Protection Act*, which expressly allows for a court action to be brought.

The Supreme Court of Canada's decision in *Seidel* does not mean that all class action claims may proceed to court even if there is an arbitration clause. The majority concluded that "absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause."[4] Therefore, in *Seidel*, all claims that were not sheltered by the *Business Practices and Consumer Protection Act* were stayed.[5]

In Ontario, section 8 of the *Consumer Protection Act, 2002*[6] provides similar protection to consumers.

Having brought some measure of certainty to the arbitration versus class action debate with respect to consumer claims, the next frontier in the debate may be whether franchise class action claims can be effectively stopped in their tracks through arbitration clauses.

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1 2007 SCC 34.
2 2011 SCC 15.
3 S.B.C. 2004, c. 2.
4 *Seidel, supra* at para. 2.
5 *Ibid*., para. 50 ("[...] I would uphold the stay in relation to [Seidel's] other claims which may, if she pursues them, go to arbitration.")
6 S.O. 2002, c. 30, Sch. A.

It is clear law that franchise disputes may be required to be arbitrated. This is the effect of the Ontario Court of Appeal's decision in *MDG Kingston Inc. v. MDG Computers Canada Inc.*,[7] in which a franchisee sought to rescind its franchise agreement and claim damages in a court action. The Court of Appeal held the action should be stayed in favour of arbitration, concluding that "[...] the legislature intended that the normal rules regarding arbitration clauses [...] would apply under the *Arthur Wishart Act*."[8]

The effect of the *MDG* decision is that if an arbitration clause is worded sufficiently broadly, all disputes related to the franchise agreement and all issues related to alleged breaches of the *Arthur Wishart Act* could be sent to arbitration.

The Supreme Court of Canada's decision in *Seidel v. Telus Communications Inc.* confirms this interpretation, in which the majority held that "absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause."[9]

Therefore, if a franchisee sought to bring a class action to allege a common breach of the franchise agreement, or a common breach of the *Arthur Wishart Act* arising from failure to give a proper disclosure document, a franchisor could simply rely on the *MDG* decision to submit the dispute should be sent to arbitration. Applying the language of the *MDG* decision, supported by the analysis of the Supreme Court of Canada in *Seidel*, the "normal rules regarding arbitration clauses [...] would apply under the *Arthur Wishart Act*."[10]

Once a claim is required to be arbitrated, there is relatively little scope to obtain a collective determination of arbitration claims. Although some arbitration clauses expressly specify that any disputes will be limited solely to the dispute between the two parties,[11] this may not even be necessary in Ontario to provide protection against class arbitrations. Subsection 8(4) of the *Arbitration Act, 1991* permits a court to order consolidated or simultaneous arbitrations, but only "on the application of all the parties." Courts have held that the language of s. 8(4) requires the consent of all parties before a court can order a consolidated arbitration.[12]

Obviously, any franchisor facing the prospect of multi-million dollar claims is unlikely to agree to class arbitration.[13]

Therefore, so long as the arbitration clause is worded sufficiently broadly, the combined effect of *MDG, Seidel* and s. 8(4) of the *Arbitration Act* could effectively neuter any attempt to bring a class action on behalf of franchisees. Any dispute related to the franchise agreement would be sent to arbitration.

Against this background is section 4 of the *Arthur Wishart Act*, which gives franchisees the right to "associate with other franchisees."

Although Justice Cullity held in *405341 Ontario Ltd. v. Midas Canada Inc.*[14] that "the right of association in section 4 does encompass the right of franchisees to participate in a class action for the purpose of

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7 2008 ONCA 656.

8 *Ibid.*, para. 32.

9 *Seidel, supra* at para. 2.

10 *Ibid.*, para. 32.

11 See *e.g. Griffin v. Dell Canada Inc.*, 2010 ONCA 29 at para. 60.

12 See *e.g. Adlakha v. Meehan*, 2011 ONSC 444 at para. 19.

13 It may well be permissible to draft an arbitration provision that would permit the consolidation or simultaneous arbitration of disputes at the request of more than one franchisee.

14 [2009] O.J. No. 4354 (SCJ).

enforcing their rights against the franchisor under the statute or otherwise,"[15] a franchisor in the future is likely to take the position that the issue is not a settled point of law, arguing that the franchisor in *Midas* did not take the position that any franchisee was "prevented from commencing a class proceeding or becoming a member of the class."[16] The issue in *Midas* was whether the requirement in a franchise agreement to provide a release upon extension or assignment of the franchise agreement violated rights of association under section 4 of the Act.[17]

If the combined effect of *MDG*, *Seidel* and s. 8(4) of the *Arbitration Act* is that all franchise class actions in Ontario can be effectively neutered by requiring individual claims to proceed to arbitration, the next key battleground will be whether section 4 of the *Arthur Wishart Act* provides franchisees with the statutory right to seek class action relief.

Subsection 4(1) of the *Arthur Wishart Act* is simply worded: it states that "a franchisee may associate with other franchisees and may form or join an organization of franchisees." Subsection 4(4) states that any "provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void."

Even though the Act is now twelve years old, there has been relatively little judicial analysis of the meaning of section 4.

In *1176560 Ontario Limited v. The Great Atlantic and Pacific Company of Canada Limited*,[18] Justice Winkler (as he then was) referred to a franchise relationship having an "inherent vulnerability in the dependent ongoing nature of the relationship between franchisor and franchisee."[19] And in *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.*,[20] the Ontario Court of Appeal held that "this case involving a dispute between a franchisor and several hundred franchisees is exactly the kind of case for a class proceeding."[21]

Against this background of franchisee vulnerability and the Court of Appeal concluding that a dispute between a franchisor and franchisee is "exactly the kind of case for a class proceeding," it is difficult to imagine that all franchise class actions in Ontario could theoretically be neutered by a cleverly drafted arbitration clause.

The Court of Appeal has held that the focus of the Act is on protecting the interests of franchisees and the provisions of the Act should be interpreted in that light.[22] It has also held that the Act deserves a "broad and generous interpretation [...] to redress the imbalance of power as between franchisor and franchisee."[23]

In the few cases that have considered the scope of the right to associate under the *Arthur Wishart Act*, the debate has largely looked to whether insight can be obtained from cases that have considered the right to associate under section 2(d) of the *Canadian Charter of Rights and Freedoms*. In *2038724 Ontario Ltd. v.*

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15 *Ibid.*, para. 17.

16 *405341 Ontario Ltd. v. Midas Canada Inc.*, 2010 ONCA 478.

17 *Ibid.*, para. 39.

18 (2002), 62 O.R. (3d) 535 (SCJ).

19 *Ibid.*, para. 41.

20 2010 ONCA 466.

21 *Ibid.*, para. 62.

22 See *e.g. Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at para. 26; *404341 Ontario Ltd. v. Midas Canada Inc.* 2010 ONCA 478 at para. 30, *6792341 Canada Inc. v. Dollar It Ltd.* 2009 ONCA 385 at paras. 12, 13, and 72; *Beer v. Personal Service Coffee Corp.*, [2005] O.J. No. 3043 (C.A.) at para. 28*; MDG Kingston Inc. v. MDG Computers Canada*, 2008 ONCA 656 at para. 1.

23 *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at para. 26.

Quizno's Canada Restaurant Corp.,[24] where the right to associate under the *Wishart Act* was raised but not decided, Justice Perell referred to "extraordinarily difficult problems about the nature of the right to associate under the franchise legislation [...] and in very short order these arguments move the debate into very difficult jurisprudence about the nature of the right to associate under the *Charter of Rights and Freedoms*."[25]

The analysis should actually be quite simple. The dictionary definition of "associate" includes the concepts of "to join or connect together," or "to unite; combine."

That is the very nature of a class proceeding: a class of two or more persons with common issues. It is the most powerful of civil tools available to aggrieved, vulnerable persons.

Put simply, if franchise class actions can theoretically be defeated by including a broadly-worded arbitration clause, the right to associate under the *Arthur Wishart Act* must also include a right for franchisees to seek collective action in Ontario's courts. Any provision in a franchise agreement that would seek to preclude a class action would be void. To conclude otherwise would turn the purpose of the Act on its head. Far from having the *Arthur Wishart Act* redress "the imbalance of power as between franchisor and franchisee," franchisees would be precluded from obtaining collective relief of any kind. Hundreds of individual franchisees could be required to seek individual relief in individual arbitrations, even if common issues permeated each aspect of their claim.

The issue is sure to arise in a future case.

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[24] [2008] O.J. No. 833 (SCJ).
[25] *Ibid.*, para. 66.