Revisiting Class Arbitration in Canada – Still not Ready?

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For almost twenty years, jurisprudence around, and on class arbitration itself, has seen a healthy development – in the United States of America. Despite some writings[1] intended to stimulate a similar discussion in Canada, we, in the "True North", have not followed our American colleagues' lead. Through this short article, we will once again ask why this is so and offer some possible explanations.

What is class arbitration?

Class arbitration, or "class-wide arbitration", is a hybrid involving a traditional judicial class action and a contractual bilateral private arbitration. It is different from a regular class action because it welcomes many traditional characteristics of arbitration, including choice of decision-maker, customized procedures, and confidentiality. The arbitral class in a class arbitration is restricted to parties governed by similar relevant arbitration agreements. On the other hand, class arbitration may involve hundreds of thousands of parties in a single proceeding, while the classic arbitration setting is much more intimate, typically confined to one claimant and one respondent.

The idea of a class arbitration gained attention in 2003, when the United States Supreme Court implicitly approved the procedure in *Green Tree Financial Corp. v. Bazzle*[2] ("***Bazzle***"). Since then, American parties have been using class arbitrations in consumer, employment, and health care contexts. Canada's experience has been markedly different. Indeed, at its 2013 annual conference, the ADR Institute of Canada (**ADRIC**) debated whether Canada was ready for consumer class arbitration and concluded that, absent legislative reform, it was probably not.[3]

New developments in class arbitration in the US

In *Bazzle*, the US Supreme Court held that, where an arbitration agreement was silent regarding whether class wide relief is available, an arbitrator may decide whether class relief is appropriate. That decision represented a significant shift – before *Bazzle*, most Federal Courts had held that class arbitrations were precluded when an arbitration clause was silent on the issue. Following *Bazzle*, class arbitrations unsurprisingly gained popularity in the US.

Since then, class arbitrations have been administered either on an *ad hoc* basis or by arbitral institutions, such as the American Arbitration Association (**AAA**) or Judicial Arbitration and Mediation Services (**JAMS**).

The AAA was the first institution to release a set of rules for the administration of class arbitration. The *Supplementary Rules for Class Arbitration* were a response to the US Supreme Court decision in *Bazzle*. The AAA will administer a class arbitration if either the relevant agreement specifies that such a dispute will be resolved in accordance with the AAA rules, or a party submits the dispute to arbitration on behalf of or against a class or purported class. Some years later, JAMS followed the AAA's lead and published its own JAMS *Class Action Procedures*.

American jurisprudence continued to evolve. In 2010, the US Supreme Court in *Stolt-Nielsen S.A. et al. v*

AnimalFeeds International Corp[4], held that class claims could not be compelled to be arbitrated when the parties had only agreed to arbitrate their *individual* claims. The Court found that because class arbitration "changes the nature of arbitration to such a degree […] it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[5]

In 2012, the US Supreme Court added another nuance to class arbitration law. In *AT&T Mobility LLC v Concepcion*[6], the Court held that the *Federal Arbitration Act* pre-empted state laws invalidating contractual class action waver clauses. Consequently, unlike the general situation in Canada (discussed below), class action waver clauses are enforceable in the US.

In 2018, the Supreme Court considered a trio of consolidated cases: *Epic Systems Corporation v Lewis; Ernst & Young, LLP v Morris;* and *NLRB v. Murphy Oil USA Inc*.[7] In a 5-4 decision, the Court reaffirmed that class action waivers in employment-related arbitration agreements were enforceable. Accordingly, employees are not always permitted to bring their claims in a class setting but rather must abide by the terms of their contract.

The most recent US Supreme Court case on class arbitration is *Lamps Plus Inc. v. Varela*[8] ("***Lamps Plus***"). In this employment case involving a data breach, Lamps Plus moved to compel arbitration. In another 5-4 decision, the Supreme Court ruled that the *Federal Arbitration Act* did not permit a court to order class arbitration when the agreement does not clearly provide for it. In other words, a contract must expressly allow for a class arbitration and any ambiguity will be construed against a class-wide procedure.

Even in the light of *Lamps Plus*, class arbitration in the United States has flourished. In the last five years, the AAA has administered seven consumer class arbitrations and 124 employment class arbitrations.[9]

The Canadian Landscape

To date, there has not been a single class arbitration in Canada. Canadian statutes do not provide for class arbitration, nor is there domestic jurisprudence on the subject. In addition, no Canadian court has ever ordered a class arbitration, and there are no class arbitration rules[10].

It is clear that on the basis of the current statutory framework, Canada is not ready for class arbitration. In part, this is due to Canada's constitutional framework, which differs significantly to that of the United States'. Canadian class proceedings are mostly based on statutory provisions enacted by the provincial and territorial legislatures[11]. Currently, nine of the ten Canadian provinces have enacted comprehensive class proceedings legislation, and Prince Edward Island is expected to proclaim its legislation in 2022. In the jurisdictions without class proceedings legislation, courts have the ability to structure class proceedings using the applicable rules of civil practice. However, national (or "multi-jurisdictional") class actions in Canada are faced with significant obstacles because of jurisdictional issues, discussed below, which create uncertainty as to the size and composition of class membership.

Provincial courts in Canada may assert jurisdiction over a party only if the party is present in the jurisdiction, if the party consents to the jurisdiction, or if the court can assume jurisdiction. Unlike the US, Canada does not have a multi-district litigation (**MDL**) mechanism for dealing with cases involving inter-provincial claims, and provincial courts experience difficulties when attempting to assert jurisdiction over non-residents in class actions. Yet, many national class actions have been certified by various provincial superior courts in Canada[12]; and, on the basis of the assumed jurisdiction test (the real and substantial connection test[13]), Canada's legal system alone should not present an impediment to national class arbitrations.

Practically speaking, however, there is no room for class arbitration in Canada. Provincial legislation has effectively precluded class-wide arbitration in the consumer context, unlike in the US[14]. Many provincial consumer protection

legislations[15] expressly prohibit mandatory arbitration clauses in consumer agreements. Thus, a consumer's right to access the courts, including by way of judicial class action, is expressly protected. For example, the Ontario *Consumer Protection Act* (**CPA**) allows class actions to start even in the face of arbitration clauses, as mandatory arbitration clauses are not enforceable[16]. Therefore, the potential for class arbitration in these provinces would automatically be precluded for consumer claims if the consumers wished to seek a remedy in court.

In *Griffin v Dell Canada Inc*,[17] the Ontario Court of Appeal applied the CPA regime in affirming the certification of a class action in which the consumer contracts contained arbitration clauses. In 2019, the Supreme Court of Canada (**SCC**) established in *Telus Communications Inc. v Wellman*[18] ("***Telus***") that the arbitration clause applied to business customers, but not the customers protected by the CPA.

In the 2020 *Uber Technologies Inc. v. Heller*[19] ("***Heller***") decision, the SCC held that Uber's arbitration agreement with its drivers was unenforceable, citing in part concerns over unconscionability. The majority of the SCC relied on a two-part test to determine whether a contract is unconscionable: (i) proof of inequality in the positions of the parties; and (ii) proof of an improvident bargain. The arbitration agreement was held unenforceable by being unconscionable and, therefore, preventing access to justice.

The general trend thus seems to suggest to class arbitration in the consumer context in Canada is "dead". Why is this? First, the Canadian consumer protection legislation constitutes a major barrier to class arbitration of consumer claims. Second, as *Heller* demonstrated, there seems to be an attitude in Canada that views arbitration as a procedure generally reserved for larger commercial disputes where the cost of participating is not a real concern and compelling arbitration doesn't give rise to notions of unconscionability. Finally, there simply does not seem to be an appetite to embrace class arbitration like in the US.

Looking ahead

Telus did seem to leave open the idea of class arbitration, at least in the non-consumer context. So far, no one has tried to open that door completely, leaving it marginally ajar. The prospect of class arbitration only for equally positioned non-consumers (such as among franchisees) is still open and unexplored. Such form of agreement would not necessarily be unconscionable and would not preclude access to justice – a seemingly significant concern among Canadian courts. In addition, the Ontario *Arbitration Act, 1991*[20] already indirectly addresses class arbitrations by contemplating the consolidation of individual arbitrations upon agreement of the parties. In that regard, a Canadian arbitration organization, such as ADRIC, could like its American counterparties adopt class arbitration rules, providing the procedural foundation that might incent parties to pursue this route. Maybe, all that is currently missing for non-consumer class arbitrations to kick off in Canada is someone willing to take the lead or test the waters.

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[1] Michael Schafler, Amer Pasalic, "Is Canada Ready for Class Arbitration?", ADRIC, 2013; Barbara Capes, Michael Schafler, "Is Canada Ready for Class Arbitration?", ADRIC Journal, 2017.

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

[3] See https://adric.ca/adr-institute-of-canada-inc-responds-to-consumer-arbitration-criticism/, in which ADRIC's then Executive Director, Janet McKay, summarized matters as at late 2015, and referred to the 2013 ADRIC discussion in particular.

[4] *Stolt-Nielsen S.A. et al. v AnimalFeeds International Corp*, 559 US 662.

[5] *Ibid*.

[6] *AT&T Mobility LLC v Concepcion*, 563 US 333.

[7] *Epic Systems Corporation v Lewis; Ernst & Young, LLP v Morris; and NLRB v. Murphy Oil USA Inc*., 138 S. Ct. 1612 (2018).

[8] *Lamps Plus Inc. v. Varela*, 139 US 1407 (2019).

[9] AAA 2021 Consumer and Employment Arbitration Statistics report, available at https://www.adr.org/sites/default/files/document_repository/ConsumerReport_Q1_2022.xlsx

[10] That is not to say that arbitration and other ADR tools have not been used within a judicial class action in Canada – however such procedures have been confined to deal with individual hearings within the class action, for example to determine whether class members have claims and if so their entitlement to any damages.

[11] Federal courts have limited jurisdiction and can only hear class actions against the federal government, federal ministry, Crown agency or claims related to specific federal legislation, such as the Competition Act. Federal class actions are regulated by Part 5.1 of the Federal Courts Rules (SOR/98-106).

[12] *Endean v. British Columbia*, 2016 SCC 42; Parsons v The Canadian Red Cross Society, 2015 ONCA 158.

[13] *Option Consommateurs v. Nippon Yusen Kabushiki Kaisha (NYK)*, 2022 QCCS 1338.

[14] AT&T, *supra* note 6.

[15] Such as Ontario, Quebec and Alberta. Saskatchewan, the Maritimes Provinces and the Territories implicitly prohibit such clauses.
[16] Consumer Protection Act, S.O. 2002, c. 30, Sched A, at s. 8.
[17] *Griffin v. Dell Canada Inc*., 2010 ONCA 29.
[18] *Telus Communications Inc. v Wellman*, 2019 SCC 19.
[19] *Uber Technologies Inc. v. Heller*, 2020 SCC 16.
[20] *Arbitration Act*, 1991, S.O. 1991, c. 17, at section 84.