



SUPREME COURT OF CANADA

CITATION: Seidel v. TELUS Communications Inc., 2011 SCC 15,
[2011] 1 S.C.R. 531

DATE: 20110318
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BETWEEN:

Michelle Seidel
Appellant
and
TELUS Communications Inc.
Respondent
- and -
Barreau du Québec, Canadian Arbitration Congress
and ADR Chambers Inc.
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,
Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 51)

Binnie J. (McLachlin C.J. and Fish, Rothstein and Cromwell
JJ. concurring)

JOINT DISSENTING REASONS:
(paras. 52 to 176)

LeBel and Deschamps JJ. (Abella and Charron JJ.
concurring)

Seidel v. TELUS Communications Inc., 2011 SCC 15, [2011] 1 S.C.R. 531

Michelle Seidel

Appellant

v.

TELUS Communications Inc.

Respondent

and

**Barreau du Québec, Canadian Arbitration Congress
and ADR Chambers Inc.**

Interveners

Indexed as: Seidel v. TELUS Communications Inc.

2011 SCC 15

File No.: 33154.

2010: May 12; 2011: March 18.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,
Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Consumer protection — Contracts — Arbitration — Class actions — Stay of proceedings — Cell phone service contract containing private and confidential mediation and arbitration and class action waiver clause — Customer filing claim in B.C. Supreme Court for declaratory and injunctive relief alleging cell phone service provider engaged in deceptive and unconscionable practices — Customer seeking relief as individual and as representative of class — Cell phone company obtaining stay of proceedings under Commercial Arbitration Act — British Columbia Business Practices and Consumer Protection Act (BPCPA) stating agreements waiving or releasing rights, benefits or protections under the Act are void — Whether BPCPA renders arbitration clause void such that the stay of the court proceedings should be lifted — Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, ss. 3, 171, 172 — Commercial Arbitration Act, R.S.B.C. 1996, c. 55, s. 15.

Arbitration — Competence-competence principle — Effect of arbitration clause on jurisdiction of court — Customer signing contract with mobile phone service provider containing mandatory mediation and arbitration clause — Customer filing claim in B.C. Supreme Court for declaratory and injunctive relief under the Business Practices and Consumer Protection Act — Whether question of jurisdiction should be determined by court or arbitrator — Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, ss. 3, 171, 172 — Commercial Arbitration Act, R.S.B.C. 1996, c. 55, s. 22.

TELUS and S entered into a written cellular phone services contract in 2000. The standard form contract included a clause referring disputes to private and confidential mediation and arbitration. It further purported to waive any right to commence or participate in a class action. By statement of claim filed in the Supreme Court of British Columbia, S asserted a variety of claims, including (but not limited to) statutory causes of action under the *Business Practices and Consumer Protection Act (BPCPA)*, alleging that TELUS falsely represented to her and other consumers how it calculates air time for billing purposes. She sought remedial relief under ss. 171 and 172 of the *BPCPA* in respect of what she contends are deceptive and unconscionable practices, as well as certification to act on her own behalf and as representative of a class of allegedly overcharged customers.

In the course of S's application to have her claim certified as a class action, TELUS applied for a stay of all proceedings on the basis of the arbitration clause, pursuant to s. 15 of the *Commercial Arbitration Act*. The trial judge denied TELUS's application finding it was premature to determine whether the action should be stayed until the certification application had been decided. Applying the competence-competence principle, the Court of Appeal held that S was bound by the arbitration clause contained in the contract of adhesion in respect of all claims. In the result, the Court of Appeal allowed the appeal and entered a stay of S's action in its entirety, holding that it is for the arbitrator to determine which claims are subject to arbitration and which should go before a court.

Held (LeBel, Deschamps, Abella and Charron JJ. dissenting): The appeal should be allowed in part, and the stay lifted in relation to the s. 172 claims.

Per McLachlin C.J. and Binnie, Fish, Rothstein and Cromwell JJ.: The purpose of the *BPCPA* is consumer protection. As such, its terms should be interpreted generously in favour of consumers. Section 172 of the *BPCPA* contains a statutory remedy whereby a person other than a supplier may bring an action in the Supreme Court of British Columbia to enforce the statute's consumer protection standards whether or not the person bringing the action has a special interest or is affected by the consumer transaction that gives rise to the action. Such a plaintiff is properly characterized as a public interest plaintiff. This conclusion is reinforced by s. 3 of the *BPCPA* which provides that any agreement between parties that would waive or release "rights, benefits or protections" conferred by the *BPCPA* is void. To the extent S's claim in the Supreme Court invokes s. 172 remedies in respect of rights, benefits or protections conferred by the *BPCPA*, her court action must be allowed to proceed notwithstanding the mediation/arbitration clause.

The choice to restrict or not restrict arbitration clauses in consumer contracts is a matter for the legislature. 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. Section 172 is clearly designed to encourage private enforcement in the public interest. It was open to the legislature to prefer the vindication and denunciation available through a

well-publicized court action to promote adherence to consumer standards. The legislature understood that the policy objectives of s. 172 would not be well served by a series of isolated low-profile, private and confidential arbitrations.

A proper interpretation of s. 172 of the *BPCPA* must be approached textually, contextually and purposively. Whether characterized as procedural or substantive, a s. 172 right is indubitably a “right” conferred by the statute and cannot be waived by contract. S therefore possesses a statutory “right” to take her action invoking s. 172 remedies to the Supreme Court.

As to her alternative complaints, however, whether under other sections of the *BPCPA*, the now repealed *Trade Practice Act*, or at common law, the TELUS arbitration clause is valid and enforceable. Accordingly, S’s court action in these respects should be stayed pursuant to s. 15 of the *Commercial Arbitration Act*.

The class action waiver is not severable from the arbitration clause as a whole. Accordingly, it is also rendered void by s. 3 of the *BPCPA*. If there is any ambiguity in the TELUS clause, it must be resolved in favour of S’s right of access to the court by the principles of *contra proferentum*. Accordingly, S is not barred from continuing to seek certification of her s. 172 claims as a class action.

As for the procedural issues raised in this appeal, British Columbia has adopted the competence-competence principle through the combined operation of

s. 22 of the *Commercial Arbitration Act* and Rule 20(2) of the Rules of the British Columbia International Commercial Arbitration Centre (“BCICAC Rules”). Absent legislated exception, any challenge to an arbitrator’s jurisdiction over S’s dispute with TELUS should first be determined by the arbitrator, unless the challenge were to involve a pure question of law, or one of mixed fact and law that requires for its disposition “only superficial consideration of the documentary evidence in the record”. Whether or not s. 172 of the *BPCPA* has the legal effect claimed for it by S was a question of law to be determined on undisputed facts. This matter was properly entertained by the Supreme Court in the first instance, and the competence-competence principle was not violated.

Per LeBel, Deschamps, Abella and Charron JJ. (dissenting): Absent a clear statement by the legislature of an intention to the contrary, a consumer claim that could potentially proceed either by way of arbitration or class action must first be submitted to arbitration. The *BPCPA* does not manifest explicit legislative intent to foreclose the use of arbitration as a vehicle for the resolution of disputes under that Act in British Columbia. As such, a clause in a standard form consumer contract for the supply of mobile phone services, which mandates that all disputes with the service provider be resolved by way of arbitration displaces the availability of class proceedings in the province of British Columbia.

Canadian courts, both in Quebec and in the common law jurisdictions, have endorsed the use of arbitration as a dispute resolution mechanism and now

encourage its use. Lower courts across Canada swiftly followed this Court's lead in accepting and endorsing arbitration as a legitimate dispute resolution mechanism, and this shift in attitude where there is no longer hostility towards arbitration clearly took root. It is now settled that if a legislature intends to exclude arbitration as a vehicle for resolving a particular category of legal disputes, it must do so explicitly. In British Columbia, the current approach to arbitration was adopted with the enactment of the *Commercial Arbitration Act*. British Columbia's modern commercial arbitration legislation was influenced in part by the *UNCITRAL Model Law on International Commercial Arbitration* and the legislature clearly intended to incorporate the competence-competence principle into the province's domestic arbitration legislation. Challenges to the arbitrator's jurisdiction — namely arguments that an agreement is void, inoperative or incapable of being performed — should be resolved first by the arbitrator. A court should depart from this general rule only if the challenge is based on a question of law, or on questions of mixed fact and law that require only superficial consideration of the documentary evidence in the record, and is not merely a delaying tactic. This requirement of deference to the arbitrator's jurisdiction is related directly to the role of the court that must, in considering an application for a stay of proceedings, determine whether the agreement is “void, inoperative or incapable of being performed”, which must be narrowly construed. Courts should therefore be mindful to avoid an interpretation that makes it possible to sidestep the competence-competence principle and turns the “inoperative” exception into a back door for a party wanting to “escape” the agreement. The British Columbia Court of Appeal recognized that the

competence-competence principle is part of the province's law. It did not err in doing so. Therefore, absent a challenge to the arbitrator's jurisdiction based solely on a question of law or on one of mixed fact and law requiring only superficial consideration of the evidence in the record, the existence or validity of an arbitration agreement to which the *Commercial Arbitration Act* applies must be considered first by the arbitrator and the court should grant the stay.

S argues that the effect of the arbitration clause is to deny her the exercise of her rights under the *BPCPA*. The purpose of consumer protection legislation like the *BPCPA* is to protect consumers from losses suffered when they purchase goods and services that do not meet existing standards. Class actions have a significant social and legal role in Canadian law. However, since a class action is only a way to group together a number of individual claims, it concerns the procedure for bringing an action. As this Court has put it, the certification of a class action confers a procedural right. It does not change either the substantive law or the substantive rights of the parties. Where a court would, because of an arbitration agreement, not have jurisdiction over a dispute, that jurisdiction cannot be conferred on it by commencing a class proceeding.

In British Columbia, no explicit legislative direction has been enacted which would remove consumer disputes from the reach of arbitration legislation. S nevertheless argues that an arbitrator lacks the jurisdiction to grant either of the specific remedies contemplated in s. 172 of the *BPCPA*. She submits that these

remedies can be granted only by the Supreme Court and, therefore, that s. 172(1) itself creates a substantive right to have a dispute resolved in the public court system. As a result, the agreement to submit this dispute to arbitration constitutes a waiver — in violation of s. 3 of the *BPCPA* — of the substantive right to those particular remedies. In light of ss. 171 and 172 and of the powers conferred on arbitrators in British Columbia, it is evident that the legislature has not barred the submission of such claims to arbitration. The remedy sought by a claimant under s. 172 is a declaration or an injunction. Either an arbitrator or a court can adjudicate a monetary claim under s. 171. What is important here is that the adjudicator has jurisdiction to make a declaration or order an injunction, which are the same remedies as are contemplated in s. 172. Arbitrators exercising their jurisdiction under arbitration legislation are generally understood to have jurisdiction to make any award a court could make. But the British Columbia legislation goes further, as it explicitly grants arbitrators broad remedial powers. An arbitrator deriving his or her authority from the *Commercial Arbitration Act*, and by extension from the BCICAC Rules, also has broad remedial powers including injunctions and other equitable remedies and the arbitrator can therefore, unless the parties have agreed otherwise, grant the declaratory and injunctive relief sought by S under ss. 172(1)(a) and (b) of the *BPCPA*.

Access to justice is protected both by the broad powers given to arbitrators and by the representative action provided for in the *BPCPA*. Although third party consumers would not be bound by the arbitrator's order, TELUS would be

bound by it. There is no requirement that the arbitral award itself, which would incorporate the remedy S seeks, be private and confidential. Therefore, an arbitrator could order a supplier, in this case TELUS, to advertise the particulars of any order or award granted against it to the public at large. This would fulfill a public purpose. Given their broad remedial powers, arbitrators are authorized to grant this very public remedy.

The reference in s. 172 to the Supreme Court as the forum in which claims may be brought does not confer exclusive jurisdiction on that court to adjudicate claims under that section. The purpose of that reference is to clarify that the Supreme Court, not the Provincial Court, may grant declaratory and injunctive relief. Further, the use of the word “may” makes it even clearer that the Supreme Court is not intended to be the only forum in which these remedies can be sought. By enacting s. 172, the legislature provided a means not only to have claims dealt with by the director or any person, both of whom seek orders on behalf of consumers, but also to have the arbitration rules apply. In doing so, it provided a way to use the private dispute resolution system to obtain the same declaratory or injunctive relief against a supplier as can be obtained by means of a class action. Access to justice can only be enhanced by this approach.

Any argument based on the view that access to justice requires claims based on s. 172 of the *BPCPA* to be made by way of a class proceeding is without merit. Access to justice is fully preserved by arbitration, and there is no need to resort

to a class proceeding to so ensure. The arbitrator can grant the remedies contemplated in s. 172 of the *BPCPA* against TELUS. The arbitration agreement between S and TELUS does not therefore constitute an improper waiver of S's rights, benefits or protections for the purposes of s. 3 of that Act. Section 172 of the *BPCPA* merely identifies the procedural forum in which an action with respect to the rights, benefits and protections provided for in s. 3 may be brought in the public court system. It does not explicitly exclude alternate fora, such as an arbitration tribunal, from acquiring jurisdiction.

Whether an arbitration clause in a consumer contract is unfair or unconscionable must always be determined on a case-by-case basis in light of the relevant facts. In Canada, the courts have left the question whether arbitration is appropriate for particular categories of disputes to the discretion of the legislatures. The British Columbia legislature remains free to address any unfairness or harshness that might be perceived to be imposed as a result of the inclusion of arbitration clauses in commercial contracts. The legislatures of Quebec, Ontario and Alberta have seen fit to amend their consumer protection legislation to prohibit or limit waivers of class proceedings and arbitration clauses in agreements to which their consumer protection legislation applies. The British Columbia legislature made a choice both by incorporating the provisions of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and the *UNCITRAL Model Law on International Commercial Arbitration* and by refraining from enacting provisions expressly limiting arbitration clauses and waivers of class proceedings in the

consumer context. It also made another choice: to confer broad remedial jurisdiction on arbitrators. These choices are ones to which this Court must defer.

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By Binnie J.

Referred to: *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291; *MacKinnon v. National Money Mart Co.*, 2009 BCCA 103, 89 B.C.L.R. (4th) 1; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63; *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129; *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.*, 2005 BCCA 605, 48 B.C.L.R. (4th) 328; *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605; *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102.

By LeBel and Deschamps JJ. (dissenting)

MacKinnon v. National Money Mart Co., 2004 BCCA 473, 50 B.L.R. (3d) 291; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666; *MacKinnon v. National Money Mart Co.*, 2009 BCCA 103, 89 B.C.L.R. (4th) 1; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178; *Horton v. Sayer* (1859), 4 H. & N. 643, 157 E.R. 993; *Lee v. Page* (1861), 30 L.J. Ch. (N.S.) 857; *Edwards v. Aberayron Mutual Ship Insurance Society Ltd.* (1876), 1 Q.B.D. 563; *Doleman & Sons v. Ossett Corp.*, [1912] 3 K.B. 257; *Scott v. Avery* (1856), 5 H.L.C. 811, 10 E.R. 1121; *Johnston v. Western Assurance Co.* (1879), 4 O.A.R. 281; *Nolan v. Ocean, Accident and Guarantee Corp.* (1903), 5 O.L.R. 544; *Cayzer, Irvine and Co. v. Board of Trade*, [1927] 1 K.B. 269; *Brand v. National Life Assurance Co.* (1918), 44 D.L.R. 412; *Altwasser v. Home Insurance Co. of New York*, [1933] 2 W.W.R. 46; *Re Rootes Motors (Canada) Ltd. and Wm. Halliday Contracting Co.*, [1952] 4 D.L.R. 300; *Deuterium of Canada Ltd. v. Burns & Roe of Canada Ltd.* (1970), 15 D.L.R. (3d) 568, rev'd (1971), 21 D.L.R. (3d) 568, aff'd [1975] 2 S.C.R. 124; *Procon (Great Britain) Ltd. v. Golden Eagle Co.*, [1976] C.A. 565; *Vancouver v. Brandram-Henderson of B.C. Ltd.* (1959), 18 D.L.R. (2d) 700; *National Gypsum Co. v. Northern Sales Ltd.*, [1964] S.C.R. 144; *Vinette Construction Ltée v. Dobrinsky*, [1962] B.R. 62; *Gordon and Gotch (Australasia) Ltd. v. Montreal Australia New Zealand Line Ltd.* (1940), 68 B.R. 428; *Zodiak International Productions Inc. v.*

Polish People's Republic, [1983] 1 S.C.R. 529; *Ville de Granby v. Désourdy Construction Ltée*, [1973] C.A. 971; *Sport Maska Inc. v. Zitrer*, [1988] 1 S.C.R. 564; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Boart Sweden AB v. NYA Stromnes AB* (1988), 41 B.L.R. 295; *Automatic Systems Inc. v. Bracknell Corp.* (1994), 12 B.L.R. (2d) 132; *BWV Investments Ltd. v. Saskferco Products Inc.* (1994), 125 Sask. R. 286; *Quintette Coal Ltd. v. Nippon Steel Corp.*, [1991] 1 W.W.R. 219; *Burlington Northern Railroad Co. v. Canadian National Railway Co.* (1995), 59 B.C.A.C. 97, rev'd [1997] 1 S.C.R. 5; *Condominiums Mont St-Sauveur Inc. v. Constructions Serge Sauvé Ltée*, [1990] R.J.Q. 2783; *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113; *R. v. Collins*, 2000 BCCA 437, 140 B.C.A.C. 311; *R. v. St. Lawrence Cement Inc.* (2002), 60 O.R. (3d) 712; *British Columbia Government and Service Employees' Union v. British Columbia (Minister of Health Services)*, 2007 BCCA 379, 245 B.C.A.C. 39; *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737; *Dawson (City) v. TSL Contractors Ltd.*, 2003 YKCA 3, 180 B.C.A.C. 205; *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135, 246 O.A.C. 226; *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339, 96 O.R. (3d) 171; *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.* (1993), 81 B.C.L.R. (2d) 359; *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129; *Mind Star Toys Inc. v. Samsung Co.* (1992), 9 O.R. (3d) 374; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate*

(2005), 2 B.L.R. (4th) 151, aff'd (2006), 80 O.R. (3d) 533, aff'd 2007 SCC 55, [2007] 3 S.C.R. 679; *Ting v. AT&T*, 319 F.3d 1126 (2003); *Szetela v. Discover Bank*, 118 Cal.Rptr.2d 862 (2002).

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Rowles, Newbury, Tysoe and Neilson JJ.A.), 2009 BCCA 104, 88 B.C.L.R. (4th) 212, [2009] 5 W.W.R. 466, 68 C.P.C. (6th) 57, 267 B.C.A.C. 266,

450 W.A.C. 266, 304 D.L.R. (4th) 564, [2009] B.C.J. No. 469 (QL), 2009 CarswellBC 608, reversing a decision of Masuhara J., 2008 BCSC 933, 85 B.C.L.R. (4th) 372, 295 D.L.R. (4th) 511, [2008] B.C.J. No. 1347 (QL), 2008 CarswellBC 1490. Appeal allowed in part, LeBel, Deschamps, Abella and Charron JJ. dissenting.

Arthur M. Grant and Bruce W. Lemer, for the appellant.

Robert S. Anderson, Q.C., Sean Hern and Nicholas T. Hooge, for the respondent.

Babak Barin, Gaston Gauthier and Frédéric Côté, for the intervener Barreau du Québec.

Ivan G. Whitehall, Q.C., and Alejandro Manevich, for the intervener the Canadian Arbitration Congress.

Barry Leon, Andrew de Lotbinière McDougall and Daniel Taylor, for the intervener ADR Chambers Inc.

The judgment of McLachlin C.J. and Binnie, Fish, Rothstein and Cromwell JJ. was delivered by

[1] BINNIE J. — This appeal concerns a dispute between TELUS Communications Inc. (“TELUS”) and one of its customers, the appellant Ms. Seidel,

arising out of a cell phone contract. The contract, drawn up by TELUS, provided that “[a]ny claim, dispute or controversy” shall be referred to “private and confidential mediation” and thereafter, if unresolved, to “private, confidential and binding arbitration”. TELUS says that mediation and arbitration offer a low-cost, quick, private and effective means of sorting out disputes according to rules the parties themselves have agreed to. Notwithstanding these provisions, Ms. Seidel filed a statement of claim in the Supreme Court of British Columbia setting out a variety of complaints including some that invoke rights, benefits or protections under the British Columbia *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (“*BPCPA*”). This consumer legislation is designed, it is contended, to remedy the mischief described by Sharpe J.A. of the Ontario Court of Appeal:

The seller’s stated preference for arbitration is often nothing more than a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually but when aggregated form the subject of a viable class proceeding When consumer disputes are in fact arbitrated through bodies such as NAF that sell their services to corporate suppliers, consumers are often disadvantaged by arbitrator bias in favour of the dominant and repeat-player corporate client

(*Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481, at para. 30)

[2] The choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. 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. The important question raised by this appeal, however, is whether the *BPCPA* manifests a legislative intent to

intervene in the marketplace to relieve consumers of their contractual commitment to “private and confidential” mediation/arbitration and, if so, under what circumstances.

[3] My colleagues LeBel and Deschamps JJ. attempt to cast the appeal in terms of whether or not arbitrators should be seen as “second-class adjudicators” (para. 55) and paint those with whom they disagree as exhibiting an “undercurrent of hostility towards arbitration” (para. 101). Respectfully, I believe the Court’s job is neither to promote nor detract from private and confidential arbitration. The Court’s job is to give effect to the intent of the legislature as manifested in the provisions of its statutes.

[4] The *BPCPA* issue was rightly entertained by the courts below rather than in the first instance by an arbitrator notwithstanding the adoption of the competence-competence principle in British Columbia, because it raised an issue of jurisdiction on undisputed facts on which an authoritative judicial interpretation was appropriate (see *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 84-86).

[5] Section 172 of the *BPCPA* contains a remedy whereby “a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court” to enforce the statute’s consumer protection standards. Under s. 3 of the *BPCPA*, any agreement between the parties

that would waive or release “rights, benefits or protections” conferred by the *BPCPA* is “void”. My opinion is that to the extent Ms. Seidel’s claim in the Supreme Court invokes s. 172 remedies in respect of “rights, benefits or protections” conferred by the *BPCPA*, her court action must be allowed to proceed notwithstanding the mediation/arbitration clause. This includes her claims for declaratory and injunctive relief and, if granted, ancillary relief in the form of restoration to consumers of any money acquired by TELUS in contravention of the *BPCPA*.

[6] The reason for this conclusion is simple. Section 172 provides a mandate for consumer activists or others, whether or not they are personally “affected” in any way by any “consumer transaction”. Section 172 contemplates such a person “bringing the action”. The action is specified to be brought “in Supreme Court”. The clear intention of the legislature is to supplement and multiply the efforts of the director under the *BPCPA* to implement province-wide standards of fair consumer practices by enlisting the efforts of a whole host of self-appointed private enforcers. In an era of tight government budgets and increasingly sophisticated supplier contracts, this is understandable legislative policy. An action in the Supreme Court will generate a measure of notoriety and, where successful, public denunciation, neither of which would be achieved to nearly the same extent by “private, confidential and binding arbitration”.

[7] Private arbitral justice, because of its contractual origins, is necessarily limited. As the *BPCPA* recognizes, some types of relief can only be made available

from a superior court. Accordingly, to the extent Ms. Seidel's complaints shelter under s. 172 of the *BPCPA* (and only to that extent), they cannot be waived by an arbitration clause and her court action may continue, in my opinion. As to her alternative complaints, whether under other sections of the *BPCPA*, the now repealed *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*"), or at common law, the TELUS arbitration clause is valid and enforceable. As to those claims, her court action should be stayed pursuant to s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 ("*CAA*").

[8] I should flag at the outset two issues that this appeal does *not* decide. Firstly, of course, Ms. Seidel's complaints against TELUS are taken to be capable of proof only for the purposes of this application. We are not assuming the allegations will be proven, let alone deciding that TELUS did in fact engage in the conduct complained of. Secondly, Ms. Seidel's action is framed as a class proceeding, for which she is seeking certification. The present appeal concerns only her individual action. Whether or not the s. 172 claims should be certified as a class action is a matter that will have to be determined by the courts of British Columbia, which have yet to address the issue.

[9] The British Columbia Court of Appeal stayed all of Ms. Seidel's claims — both under the *BPCPA* and otherwise. I would therefore partly grant the appeal to allow her claims under s. 172 of the *BPCPA* to go forward as candidates for certification. In other respects, the appeal should be dismissed.

I. Facts

[10] TELUS and Ms. Seidel entered into a written cellular phone services contract in 2000. By a statement of claim dated January 21, 2005, she claims that TELUS falsely represented to her and other consumers how it calculates air time for billing purposes. She seeks redress against what she contends are deceptive and unconscionable practices contrary to ss. 3, 4(3)(b) and 4(3)(e) of the *TPA* and ss. 4, 5, 8(3)(b) and 9 of the *BPCPA* (statement of claim, at paras. 11-12). She invokes both s. 171 and s. 172 remedies. Further, as stated, she seeks certification to act on her own behalf and as representative of a class of allegedly overcharged customers, pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (“*CPA*”).

[11] I leave aside her claims under the *TPA* which are clearly subject to the arbitration agreement, and therefore not before the court. With respect to s. 172 of the *BPCPA*, however, she seeks a declaration that TELUS engaged in deceptive and unconscionable trade acts and practices under s. 172(1)(a). She also seeks an interim and permanent injunction under s. 172(1)(b), prohibiting TELUS from engaging in such acts and practices, and an order under s. 172(3)(a) restoring monies that TELUS acquired, she says, by contravening the *BPCPA*, including a proper accounting.

[12] In 2007, in the course of Ms. Seidel’s application to have her claim certified as a class action, TELUS applied for a stay on the basis of the arbitration clause pursuant to s. 15 of the *CAA*. In doing so, it relied on this Court’s decisions in

Dell and Rogers Wireless Inc. v. Muroff, 2007 SCC 35, [2007] 2 S.C.R. 921, in which Quebec class certification proceedings were stayed pending the arbitration of consumer disputes. Ms. Seidel is obliged in the first instance, TELUS says, to have her entire complaint, including the *BPCPA* claims, dealt with by arbitration, as provided for in their service contract. Under the competence-competence principle, the arbitrator will determine what, if anything, is excluded from his or her jurisdiction and can thus be taken to the courts (R.F., at para. 30).

[13] Unfortunately, the initial 2000 contract containing the original arbitration clause on which TELUS relies cannot be found. However, the 2003 contract is in evidence and contains the following arbitration clause (an almost identical clause is found in the 2004 renewed contract):

15. **ARBITRATION:** Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise and whether pre-existing, present or future — except for the collection from you of any amount by TELUS Mobility) arising out of or relating to: (a) this agreement; (b) a phone or the service; (c) oral or written statements, or advertisements or promotions relating to this agreement or to a product or service; or (d) the relationships which result from this agreement (including relationships with third parties who are not parties to this agreement), (each, a “Claim”) will be referred to and determined by private and confidential mediation before a single mediator chosen by the parties and at their joint cost. Should the parties after mediation in good faith fail to reach a settlement, the issue between them shall then be determined by private, confidential and binding arbitration by the same person originally chosen as mediator. Either party may commence court proceedings to enforce the arbitration result when an arbitration decision shall have been rendered and thirty (30) days have passed from the date of such decision. By so agreeing, you waive any right you may have to commence or participate in any class action against TELUS Mobility related to any Claim and, where applicable, you hereby agree to opt out

of any class proceeding against TELUS Mobility otherwise commenced. . . . [Emphasis added; A.R., at p. 83.]

The last sentence of the arbitration clause quoted above purports to waive any right Ms. Seidel may have to commence or participate in a class action. It is suggested on behalf of TELUS that that last sentence constitutes a separate bargain — distinct from the arbitration provision that precedes it — that survives any invalidity of the rest of the clause in relation to s. 172 proceedings. On this alternative submission, Ms. Seidel could still proceed in court with her individual s. 172 action but would be contractually barred from seeking its certification as a class proceeding. As will be seen, I would reject this submission of TELUS as well.

II. Judicial History

A. *Supreme Court of British Columbia (2008 BCSC 933, 85 B.C.L.R. (4th) 372; Masuhara J.)*

[14] The applications judge concluded that *Dell* could not be said to have set out a test of general application. In his view, it rested on provisions specific to Quebec law and should not be taken to have overruled earlier B.C. precedent, including in particular, *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291 (“*MacKinnon 2004*”). In *MacKinnon 2004*, the B.C. Court of Appeal had found that an arbitration agreement should be considered “inoperative” within the meaning of s. 15 of the *CAA* only if a class proceeding is certified under the *CPA*

because it is the “preferable procedure” (s. 4(1)(d)), and that it is premature to determine whether the action should be stayed until the court has dealt with the certification application. The court therefore remitted the stay application back to the case management judge for reconsideration with the application for certification. Applying the *MacKinnon 2004* reasoning, Masuhara J. denied TELUS’s application for a stay of the certification proceedings (para. 84).

B. *British Columbia Court of Appeal (2009 BCCA 104, 88 B.C.L.R. (4th) 212; Tysoe J.A. (Finch C.J.B.C. and Rowles, Newbury and Neilson J.J.A. concurring))*

[15] The Court of Appeal considered *Seidel* with a companion case, *MacKinnon v. National Money Mart Co.*, 2009 BCCA 103, 89 B.C.L.R. (4th) 1 (“*MacKinnon 2009*”). The appeal in *Seidel* was allowed. The appeal in *MacKinnon 2009* would also have been allowed but for the court’s conclusion that issue estoppel applied. The appeal in that case was dismissed accordingly.

[16] The central issue was whether this Court’s decision in *Dell* had effectively overruled the earlier B.C. Court of Appeal decision in *MacKinnon 2004*.

[17] For this purpose, in *MacKinnon 2009*, the court considered whether the legislative provisions governing arbitration in Quebec could be distinguished from the British Columbia CAA. It concluded that, since both pieces of legislation stemmed from the *Convention on the Recognition and Enforcement of Foreign Arbitral*

Awards, 330 U.N.T.S. 3 (the “New York Convention”), and the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985), Ann. I (“Model Law”), any differences were technical rather than substantive.

[18] As to the provisions of the *BPCPA* forbidding waivers of “rights, benefits or protections”, the court considered that to the extent the arbitration clause is a waiver of anything, it is a waiver of forum, but forum (as such) is not included in the protection offered by s. 3 of the *BPCPA*, which only covers substantive consumer rights. Accordingly, the court applied *Dell* and held that the plaintiff was bound by the arbitration clause contained in the contract of adhesion in respect of all claims (*MacKinnon 2009*, at paras. 69-72).

[19] In *Seidel*, the Court of Appeal also held, having regard to the competence-competence principle as it is incorporated in B.C. law, that it is for the arbitrator to consider whether the arbitration agreement existed in the original contract, and to determine which claims are subject to arbitration and which should go before a court (paras. 28-34).

[20] In the result, the B.C. Court of Appeal entered a stay of Ms. Seidel’s action in its entirety.

III. Relevant Legislation

[21] *Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2*

Waiver or release void except as permitted

- 3 Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.

...

Unconscionable acts or practices

- 8 (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.
- (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
- (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
- (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
 - (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
 - (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
 - (d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

- (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
- (f) a prescribed circumstance.

...

Damages recoverable

171 (1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

- (a) supplier,
- (b) reporting agency, as defined in section 106 [*definitions*],
- (c) collector, as defined in section 113 [*definitions*],
- (d) bailiff, collection agent or debt pooler, as defined in section 125 [*definitions*], or
- (e) a person required to hold a licence under Part 9 [*Licences*]

who engaged in or acquiesced in the contravention that caused the damage or loss.

...

Court actions respecting consumer transactions

172 (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
- (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

...

- (3) If the court grants relief under subsection (1), the court may order one or more of the following:
- (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
 - (b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
 - (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.

Commercial Arbitration Act, R.S.B.C. 1996, c. 55

- 15** (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.
- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

...

- 22** (1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration.

- (2) If the rules referred to in subsection (1) are inconsistent with or contrary to the provisions in an enactment governing an arbitration to which this Act applies, the provisions of that enactment prevail.
- (3) If the rules referred to in subsection (1) are inconsistent with or contrary to this Act, this Act prevails.

Class Proceedings Act, R.S.B.C. 1996, c. 50

- 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
 - (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of 2 or more persons;
 - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
 - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
 - (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

...

- 13** The court may at any time stay any proceeding related to the class proceeding on the terms the court considers appropriate.

British Columbia International Commercial Arbitration Centre's *Domestic Commercial Arbitration Rules of Procedure*, as amended June 1, 1998 ("BCICAC Rules")

20. Jurisdiction

- (1) The arbitration tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.
- (2) A decision by the arbitration tribunal that the contract is null and void shall not entail the invalidity of the arbitration clause unless specifically found to be so by the arbitration tribunal.
- (3) Any objection to the jurisdiction of the arbitration tribunal to consider a claim or counter-claim shall be raised in the statement of defense or statement of defense to counter-claim. The tribunal may consider a late objection if it regards the delay justified.

- (4) A party is not precluded from raising a jurisdictional plea by the fact that it has appointed or participated in the appointment of an arbitrator.

IV. Analysis

[22] The underlying issue in this appeal is access to justice. Each of the disputants claims to be its supporter. Mediation and arbitration, TELUS says, reflect the values of freedom of contract and the autonomy of individuals to order their affairs as they see fit. A consumer can press an individual complaint which would not be worthwhile to pursue under the more costly proceedings of a court.

[23] The virtues of commercial arbitration have been recognized and indeed welcomed by our Court in a series of recent decisions mainly from Quebec, including not only *Dell* and *Rogers Wireless*, but also *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; and *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178. See also, S. Thuilleaux, *L'arbitrage commercial au Québec: Droit interne — Droit international privé* (1991), at p. 5, and F. Bachand, “Should No-Class Action Arbitration Clauses Be Enforced?”, in A. W. Rovine, ed., *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008* (2009), 153, at p. 162.

[24] Nevertheless, from the perspective of the *BPCPA*, “private, confidential and binding arbitration” will almost certainly inhibit rather than promote wide publicity (and thus deterrence) of deceptive and/or unconscionable commercial conduct. It is clearly open to a legislature to utilize private consumers as effective enforcement partners operating independently of the formal enforcement bureaucracy and to conclude that the most effective form is not a “private and confidential” alternative dispute resolution behind closed doors, but very public and well-publicized proceedings in a court of law.

[25] Leaving aside British Columbia for a moment, a number of other provincial legislatures have intervened in the marketplace with greater or lesser limitations on arbitration clauses in consumer contracts. See, e.g.: in Quebec, *An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts*, S.Q. 2006, c. 56, s. 2; in Ontario, the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, ss. 7, 8 and 100; and in Alberta, the *Fair Trading Act*, R.S.A. 2000, c. F-2, which in s. 16 subjects consumer arbitration clauses to ministerial approval.

[26] This case requires the Court to determine, in short, whether, as a matter of statutory interpretation, s. 172 of the *BPCPA* contains such a limitation and, if so, its extent and effect on Ms. Seidel’s action. In addition, we need to address the procedural issue of whether these questions ought to be decided in the first instance by the court or an arbitrator.

A. *The Principle of Competence-Competence Must Be Respected*

[27] It is convenient to deal first with the procedural issue.

[28] British Columbia has adopted the competence-competence principle through the combined operation of s. 22 of the *CAA* and Rule 20(2) of the *BCICAC* Rules which in turn reflect the provisions of the New York Convention and Model Law. As such, “[t]he jurisdiction to determine jurisdiction is given to the arbitral tribunal by statute, as well as by the rules of arbitration used by most institutions”: see J. B. Casey and J. Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), at p. 147.

[29] I agree with my colleagues LeBel and Deschamps JJ. (at para. 114) that in these circumstances, absent legislated exception, any challenge to an arbitrator’s jurisdiction over Ms. Seidel’s dispute with TELUS should first be determined by the arbitrator, unless the challenge involves a pure question of law, or one of mixed fact and law that requires for its disposition “only superficial consideration of the documentary evidence in the record” (*Dell*, at para. 85). See also, *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63, at paras. 37-38.

[30] Whether or not s. 172 of the *BPCPA* has the legal effect claimed for it by Ms. Seidel was a question of law to be determined on undisputed facts. Accordingly,

it was properly entertained by the Supreme Court of British Columbia in the first instance. The competence-competence principle was not violated.

B. *The Substantive Issue: Does Section 172 of the BPCPA Override the Mediation/Arbitration Provision in a Consumer Contract?*

[31] For practical purposes, the answer to this question turns on whether the waiver contained in the TELUS arbitration clause is rendered null and void by s. 3 of the *BPCPA*, which, for convenience, I reproduce again:

- 3 Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.

I interpret this clause to mean that to the extent the arbitration clause purports to take away a right, benefit or protection conferred by the *BPCPA*, it will be invalid, and to that extent, Ms. Seidel will retain her individual cause of action under the *BPCPA* in the Supreme Court of British Columbia. If the arbitration clause is thus rendered invalid, the stay provisions of the *CAA* will not assist TELUS. However, the statutory right to bring an action in the Supreme Court of British Columbia appears only in s. 172. As explained earlier, Ms. Seidel's statement of claim contains a variety of different assertions and claims invoking different statutes and causes of action. It is only to the extent that she can bring her case within s. 172 of the *BPCPA* that the legislative override in s. 3 will extricate her from the arbitration clause to which she agreed in the TELUS contract.

(1) The “Rights, Benefits or Protections” Conferred by Section 172

[32] For ease of reference, I reproduce again the language of s. 172. It is headed “Court actions respecting consumer transactions”. It is clearly framed to encourage *private* enforcement in the *public* interest:

Court actions respecting consumer transactions

172 (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
- (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

...

(3) If the court grants relief under subsection (1), the court may order one or more of the following:

- (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
- (b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
- (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment,

declaration, order or injunction granted against the supplier under this section.

It will be noted that whereas s. 171 damages may only be sought by “the person who suffered damage”, a s. 172 claim may be initiated by virtually anyone (“a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action”). The fact that such persons do not necessarily act in their personal interest (as they don’t need to have any) emphasizes the *public* interest nature of the s. 172 remedy. Opening the door to private enforcement in the public interest vastly increases the potential effectiveness of the Act and thereby promotes adherence to the consumer standards set out therein. The legislature clearly intended the Supreme Court to be able to enjoin a supplier guilty of infractions of the *BPCPA* from practicing the offending conduct against any consumer (orders which only courts can issue), rather than just in relation to a particular complainant (as in a “private” and “confidential” arbitration created by private contract).

(2) A Proper Interpretation of Section 172 of the *BPCPA* Must Be Approached Textually, Contextually and Purposively

[33] The text of the statute favours Ms. Seidel’s interpretation. The operative language of s. 3 (“rights, benefits or protections”) is all-encompassing. TELUS argues (and my colleagues LeBel and Deschamps JJ. agree, at para. 136) that the s. 172 right to “bring an action in Supreme Court” is merely procedural. With respect,

this characterization is of no assistance to TELUS. Whether procedural or substantive, it is indubitably a “righ[t]” or “benefi[t]” conferred by the statute. If the legislature had intended to draw distinctions between procedural and substantive “rights, benefits or protections” in s. 3 of the *BPCPA*, it could easily have done so, but it chose not to. Ms. Seidel possesses a statutory “right” to take her complaint to the Supreme Court. My colleagues LeBel and Deschamps JJ. read down the expression “rights, benefits or protections” to exclude procedural rights. I can find no justification for modifying the legislation in this way.

[34] My colleagues then focus on the word “may” appearing in s. 172 where it provides that an individual “may bring an action in Supreme Court”. This shows, they say, that “the Supreme Court is not intended to be the only forum in which these remedies can be sought” (para. 154). With respect, the word “may” simply indicates the obvious intention that an individual (particularly one without “any interest” in a consumer transaction) has the option to complain or not to complain. How could it be mandatory? However, the statutory point is that *if* a s. 172 action is taken, it must be taken in the Supreme Court.

[35] The internal structure of s. 172 also shows that the B.C. legislature was well aware that, in the consumer context, declarations and injunctions are the most efficient remedies in terms of protection of the interest of the broader public of consumers and deterrence of wrongful supplier conduct. Damages are often a less important form of relief considering the small amounts of money at stake. Thus, in s.

172, an order to “restore” money or property is framed as secondary relief that is contingent on the plaintiff first obtaining a declaration or injunction that, unlike an arbitral award, would be broadcast to the marketplace generally with full supporting reasons. On this point, my colleagues argue (at para. 152) that an arbitrator could make an order that “would fulfill the public purpose” of the *BPCPA* provision authorizing a superior court to order the supplier to

advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section. [s. 172(3)(c)]

While the validity of such a hypothetical order is not before us, I think that TELUS would have a legitimate objection. It is true that arbitrators in B.C. have fairly broad remedial powers, but it is equally true that in the exercise of those powers the arbitrator would have to respect the parties’ contractual agreement that the arbitration be “private” and “confidential”. (Indeed my colleagues’ entire argument is said to be based on respect for the intention of the parties.) I doubt that Ms. Seidel or TELUS would be free to turn a private and confidential arbitration into a public denunciation of the other under the guise of enforcement proceedings. The arbitrator is not a court and the parties are constrained by contract not to treat it like one.

[36] As to the statutory context, s. 172 stands out as a public interest remedy (i.e. it is available whether or not the self-appointed plaintiff “is affected by a consumer transaction that gives rise to the action”) as compared with s. 171 (where

the plaintiff must be “the person who suffered damage or loss”). The difference in the personal stake (or lack of it) required of a plaintiff is scarcely accidental. Section 171 confers a private cause of action. Section 172 treats the plaintiff as a public interest plaintiff intended to shine a spotlight on allegations of shabby corporate conduct, and the legislative intent thereby manifested should be respected by the court. This appeal falls to be determined on the meaning of s. 172 of the *BPCPA*, not on general theories of the desirability of commercial arbitration.

[37] As to statutory purpose, the *BPCPA* is all about consumer protection. As such, its terms should be interpreted generously in favour of consumers: *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129, and *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.*, 2005 BCCA 605, 48 B.C.L.R. (4th) 328. The policy objectives of s. 172 would not be well served by low-profile, private and confidential arbitrations where consumers of a particular product may have little opportunity to connect with other consumers who may share their experience and complaints and seek vindication through a well-publicized court action.

(3) Private Arbitration Is Antithetical to Achievement of the Purposes of Section 172

[38] Casting the legislative purpose still more broadly, the usual rationales for private arbitration are quite incompatible with achieving s. 172’s objective. At the same time, private arbitration would be of considerable benefit to TELUS, i.e.,

“[t]here are real advantages to be gleaned from an arbitration agreement which guarantees confidentiality of the proceeding, avoids the dispute getting into the public domain, and ensures that sensitive information or harmful precedents remain confidential” (W. J. Earle, *Drafting ADR and Arbitration Clauses for Commercial Contracts* (loose-leaf), at pp. 2-13 to 2-14). Each one of these objectives — confidentiality, lack of precedential value and avoiding “the dispute getting into the public domain” — makes perfect sense from the perspective of TELUS, but equally each of them undermines the effectiveness of s. 172 of the *BPCPA*.

(4) Private Arbitration Cannot Offer the Remedies Set Out in Section 172

[39] Rule 29(1)(k) of the BCICAC Rules provides that an arbitrator may order “injunctions and other equitable remedies”. On this basis, my colleagues LeBel and Deschamps JJ. conclude that “[t]he arbitrator can therefore . . . grant the declaratory and injunctive relief sought by Ms. Seidel under ss. 172(1)(a) and (b) of the *BPCPA*” (para. 148). Yet it can hardly be denied that arbitrators, who derive their jurisdiction by virtue of the parties’ contract, cannot order relief that would bind third parties, or that only superior courts have the authority to grant declarations and injunctions enforceable against the whole world. Ms. Seidel does not seek remedies applicable only between her and TELUS but between TELUS and the whole world. Provided TELUS complied with any order in relation to Ms. Seidel, it could carry on as before in relation to TELUS customers who are not parties to the arbitration and are

therefore unaffected by its outcome, just as a successful defence by TELUS against Ms. Seidel's complaint would not create in its favour a precedent in future arbitrations raising the same or similar complaints.

[40] In summary, s. 172 offers remedies different in scope and quality from those available from an arbitrator and constitutes a legislative override of the parties' freedom to choose arbitration. Unlike Quebec and Ontario, which have decided to ban arbitration of consumer claims altogether, or Alberta, which subjects consumer arbitration clauses to ministerial approval, the B.C. legislature sought to ensure only that certain claims proceed to the court system, leaving others to be resolved according to the agreement of the parties. It is incumbent on the courts to give effect to that legislative choice, in my view.

C. *This Outcome Is Not in Conflict With the Dell or Rogers Wireless Decisions of This Court*

[41] In *Dell* and its companion case *Rogers Wireless*, our Court rejected an attempt by consumers to pursue class actions in Quebec in disputes arising out of product supply contracts in the face of arbitration clauses. The outcome turned on the terms of the Quebec legislation. In *Dell*, Deschamps J. wrote for the majority: "This appeal relates to the debate over the place of arbitration in Quebec's civil justice system" (para. 2 (emphasis added)). In particular, the issue was whether arbitration clauses in the consumer contracts were avoided by art. 3149 of the *Civil Code of Québec*, S.Q. 1991, c. 64. The majority concluded that art. 3149 did not assist the

consumers because it only applies “where there is a relevant foreign element that justifies resorting to the rules of Quebec private international law” (para. 12). The minority contended that art. 3149 did allow consumers to avoid arbitration because “[p]rivate arbitration proceedings, even those located in Quebec, are just as removed from Quebec’s judicial and quasi-judicial systems — and hence ‘international’ — as legal proceedings taking place in another province or country” (para. 202). *Rogers Wireless* (another Quebec case) was disposed of in accordance with *Dell*. The intricacies of the *Civil Code of Québec* are far removed from the issue in British Columbia. The Quebec legislation at the time contained no provision similar to s. 172 of the *BPCPA* directing specific statutory claims to a specific forum.

[42] For present purposes, the relevant teaching of *Dell* and *Rogers Wireless* is simply that whether and to what extent the parties’ freedom to arbitrate is limited or curtailed by legislation will depend on a close examination of the law of the forum where the irate consumers have commenced their court case. *Dell* and *Rogers Wireless* stand, as did *Desputeaux*, for the enforcement of arbitration clauses *absent legislative language to the contrary*.

D. *May Ms. Seidel’s Section 172 Claims Proceed as a Class Action?*

[43] I have concluded that Ms. Seidel has a statutory right to assert her s. 172 right before the Supreme Court of British Columbia. The next question is whether she can proceed by way of class action, as she would like, or whether she may only

proceed on an individual basis. The British Columbia courts did not reach this issue as the TELUS application for a stay was their exclusive focus, whether to deny it (as did the applications judge) or to grant it (as did the Court of Appeal).

[44] The arbitration clause, it will be remembered, speaks not only of having claims “determined by private, confidential and binding arbitration” but goes on to say that “[b]y so agreeing, [the signatories] waive any right [they] may have to commence or participate in any class action against TELUS”. An argument was raised that even if the *arbitration* aspect is invalidated by s. 3, the *concurrent waiver* of class action proceedings in the same clause remains valid and enforceable.

[45] Ms. Seidel argues that class action waivers are unconscionable in any event. Picking up on some U.S. jurisprudence, she notes that “an important number of courts, principally state courts from California and Illinois, as well as the 9th Circuit, consider pre-dispute arbitration agreements to be unconscionable, especially when they are coupled with waiver of class proceeding rights” (A.F., at para. 88). It is not necessary on this appeal to determine whether class action waivers are unconscionable (and I do not purport to do so) because in my view, as a matter of interpretation, the TELUS class action waiver is not severable from the arbitration clause as a whole, and as a whole it is rendered void by s. 3 of the *BPCPA*.

[46] The TELUS clause is structured internally to make the class action waiver dependent on the arbitration provision. The wording makes it clear that it is only by

virtue of their agreement to arbitrate that consumers bar themselves from a class action. The undertakings are linked by the term “[b]y so agreeing”. What precedes (the arbitration clause) is the foundation for what follows (the class action waiver). If the arbitration provision is rendered invalid by s. 3 of the *BPCPA*, as I believe to be the case, the dependent class action waiver falls with it. The unitary nature of the clause is reinforced to some extent by its title, which is “Arbitration”, not “Arbitration and Class Action Waiver”.

[47] I take this language to be clear. However, if there is any ambiguity in the TELUS clause, it is resolved in favour of Ms. Seidel’s right of access to the court by the principles of *contra proferentum*. “Whoever holds the pen creates the ambiguity and must live with the consequences”: *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 25; see also, *ACS Public Sector Solutions*, at para. 50, *per* Donald J.A. This, the Court said in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, “is particularly true where the clause is found in a standard printed form of contract, frequently termed a contract of adhesion, which is presented by one party to the other as the basis of their transaction” (p. 108).

[48] Accordingly, Ms. Seidel is not contractually barred from continuing to seek certification of her s. 172 claims as a class action.

[49] Reference was made to s. 41(a) of the *CPA* which provides that no class action can be instituted where a representative action is available. However, under

the *BPCPA*, only the director may bring a representative action. Ms. Seidel may not do so. While consumer activists may bring actions despite the fact that they have not personally suffered any damage, such actions cannot be brought as representative actions under the *BPCPA*. This is to be contrasted with the situation under the now repealed *TPA*, where s. 18(3) allowed consumer-brought representative actions. Accordingly, s. 41(a) of the *CPA* is not a bar to Ms. Seidel's application for certification.

V. Disposition

[50] I would allow the appeal in part and lift the stay as regards the s. 172 claims made by Ms. Seidel. She may in that respect pursue the certification proceedings. On the other hand, I would uphold the stay in relation to her other claims which may, if she pursues them, go to arbitration. This may lead, if the arbitration is proceeded with, to bifurcated proceedings. Such an outcome, however, is consistent with the legislative choice made by British Columbia in drawing the boundaries of s. 172 as narrowly as it did.

[51] As Ms. Seidel has enjoyed substantial success, she should have her costs in this Court and in the courts below, including costs on the application for leave to appeal to this Court. The stay proceedings raise quite distinct issues unrelated to the merits of her claim. The costs are therefore awarded to her in any event of the ultimate outcome of the litigation.

The reasons of LeBel, Deschamps, Abella and Charron JJ. were delivered by

[52] LEBEL AND DESCHAMPS JJ. (dissenting) — In an effort to promote and improve access to justice, and to make more efficient use of scarce judicial resources, legislatures have adopted new procedural vehicles designed to modify or provide alternatives to the traditional court action. These alternatives include class actions and arbitration, both of which have been endorsed by this Court. Consumers in British Columbia, depending on the contractual arrangements they make, already have access to either arbitration or the courts to resolve their disputes. In this case, the consumer’s contract provides that in the event of a dispute, the exclusive adjudicative forum is arbitration. This is a forum our courts have long accepted as an efficient and effective access to justice mechanism. Thus, the question in this case is instead whether access to justice means — and requires — access to a judge.

[53] This appeal specifically calls upon this Court to determine whether a clause in a standard form consumer contract for the supply of mobile phone services which mandates that all disputes with the service provider be resolved by way of arbitration, displaces the availability of class proceedings in the province of British Columbia. In our view, the British Columbia legislature has, by incorporating the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 U.N.T.S. 3 (the “New York Convention”), and the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc A/40/17 (1985), Ann. I (“Model

Law”), into its domestic arbitration legislation, made a clear choice. Absent a clear statement by the legislature of an intention to the contrary, a consumer claim that could potentially proceed either by way of arbitration or class action must first be submitted to arbitration.

[54] Access to justice in Canada no longer means access just to the public court system. Historically, judges were reluctant to relinquish their grasp on dispute resolution, and they even viewed alternative dispute resolution as antithetical to the parties’ interests. This era is gone. It is the role of the legislature, not the courts, to limit access to alternative dispute resolution mechanisms. Unlike several other provinces, British Columbia has not limited the resolution of consumer disputes to a single procedural regime. On the contrary, it has left room for arbitration and allowed arbitrators to exercise broad remedial powers, subject to the agreement of parties to a dispute. Given the current structure of consumer protection legislation in British Columbia, submitting a consumer’s dispute with their mobile phone service provider to arbitration is entirely consistent with the important public purposes of protecting consumers, vindicating their rights and promoting access to justice.

[55] Our colleague Binnie J. frames this case somewhat differently than the parties. He focusses first not on whether the arbitration clause agreed to by the parties to this dispute is inoperative — the issue on which the British Columbia courts focussed their decisions, and on which leave was granted — but rather on the interpretation of ss. 3 and 172 of the *Business Practices and Consumer Protection*

Act, S.B.C. 2004, c. 2 (“*BPCPA*”). He considers s. 172 to be the result of a legislative decision to confer exclusive jurisdiction on the British Columbia Supreme Court to issue declaratory, injunctive and other equitable orders, the waiver of which is prohibited by s. 3. In our view, this interpretation represents an inexplicable throwback to a time when courts monopolized decision making and arbitrators were treated as second-class adjudicators. This approach completely disregards the modern state of the law in British Columbia, in which arbitrators have expanded powers comparable to those of the courts to hear representative proceedings and to issue equitable orders.

[56] We disagree that the *BPCPA* manifests explicit legislative intent to foreclose the use of arbitration as a vehicle for the resolution of disputes under that Act in British Columbia. We would dismiss the appeal, thereby upholding the stay of court proceedings to allow the arbitration process contractually agreed to by the parties to run its course.

I. Factual Background

[57] The appellant, Michelle Seidel, became a customer of the respondent TELUS Communications Inc.’s mobile phone services in 2000. The parties have been unable to locate her original contract with TELUS, if one was in fact signed. Whether the original contract contained an arbitration clause cannot therefore be conclusively determined.

[58] When Ms. Seidel renewed her cell phone service with TELUS in 2003, however, she did sign a contract. It included the following arbitration clause:

15. ARBITRATION: Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise and whether pre-existing, present or future — except for the collection from you of any amount by TELUS Mobility) arising out of or relating to: (a) this agreement; (b) a phone or the service; (c) oral or written statements, or advertisements or promotions relating to this agreement or to a product or service; or (d) the relationships which result from this agreement (including relationships with third parties who are not parties to this agreement), (each, a “Claim”) will be referred to and determined by private and confidential mediation before a single mediator chosen by the parties and at their joint cost. Should the parties after mediation in good faith fail to reach a settlement, the issue between them shall then be determined by private, confidential and binding arbitration by the same person originally chosen as mediator. Either party may commence court proceedings to enforce the arbitration result when an arbitration decision shall have been rendered and thirty (30) days have passed from the date of such decision. By so agreeing, you waive any right you may have to commence or participate in any class action against TELUS Mobility related to any Claim and, where applicable, you hereby agree to opt out of any class proceeding against TELUS Mobility otherwise commenced. . . . [A.R., at p. 83]

Ms. Seidel renewed her TELUS service once again in 2004. The renewal form included a notification that the terms of the 2004 renewal supplemented the terms of her existing TELUS service contract, which continued to apply.

[59] On January 21, 2005, Ms. Seidel commenced a class proceeding against TELUS, alleging breach of contract and deceptive and unconscionable practices contrary to the *BPCPA*. The essence of Ms. Seidel’s allegations is that TELUS unlawfully charges its customers for incoming calls based upon when the caller

connects to TELUS's network, but before the customer answers the call. This is said to include connection time and ring time. In her view, TELUS can lawfully charge only for "air time", or what is otherwise known as "actual talking time". To date, no certification hearing has taken place.

[60] Ms. Seidel seeks the following remedies: a declaration that TELUS engaged in deceptive and unconscionable trade acts and practices; damages, including both punitive and exemplary damages; an order restoring the monies acquired by TELUS in contravention of the *BPCPA*; an accounting of amounts due; and both interim and permanent injunctions prohibiting the allegedly deceptive and unconscionable acts and practices. All these remedies are sought pursuant to the *BPCPA*.

II. Judicial History

[61] In order to place the decisions of the courts below in their proper context, it is important to begin by briefly reviewing the legal environment in place when they were rendered. The courts have in fact ruled a number of times on the issue of whether the certification of a class action should take precedence over contractual agreements to arbitrate.

- A. *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291 ("MacKinnon 2004")

[62] In *MacKinnon 2004*, a five-member panel of the British Columbia Court of Appeal was asked to decide whether an arbitration clause in a consumer contract is “inoperative” where an action for breach of that contract is brought as an intended class proceeding.

[63] Levine J.A., writing for a unanimous court, found that an operational conflict exists between the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (“CPA”), and the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (“CAA”): under the CPA, the court must certify a class proceeding if all the statutory criteria are met, but must also refer a matter to arbitration pursuant to the CAA unless the agreement to arbitrate is null or inoperative. In other words, the mandatory terms of the two Acts “mean that arbitration and class proceedings cannot operate at the same time with respect to the same dispute” (para. 53).

[64] Levine J.A. rejected the sequential approach to interpretation advanced by *Money Mart*, according to which the stay application under the CAA had to be considered before the certification application under the CPA. Instead, relying in part on policy concerns associated with standard form agreements and the use of arbitration to resolve consumer disputes, Levine J.A. crafted an approach that would give meaning to and recognize the importance of both statutory schemes. She concluded that an arbitration agreement becomes inoperative when, upon certification, a class proceeding is considered the “preferable procedure” (s. 4(1)(d) CPA) for resolving the dispute.

- B. *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801

[65] In July 2007, this Court released its decisions in *Dell* and *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921. These decisions dealt with the relationship between arbitration clauses and class actions under the *Civil Code of Québec*, S.Q. 1991, c. 64 (“CCQ”), and the *Code of Civil Procedure*, R.S.Q., c. C-25 (“CCP”). In TELUS’s view, *Dell* and *Rogers* cast doubt on the validity of *MacKinnon 2004*. On July 23, 2007, TELUS accordingly applied for a stay under s. 15 of the CAA, arguing that the arbitration clause should prevail over the proposed class proceeding. In support of this application, TELUS filed an affidavit of a Quebec lawyer, who stated that there was no substantive difference between Quebec’s legislation dealing with arbitration and class proceedings and that of British Columbia.

[66] Decided against the backdrop of an application to certify a class action, *Dell* addressed the question of who, between the courts or an arbitrator, should first consider the validity and applicability of an arbitration agreement. After canvassing the international and domestic authorities, the majority confirmed the primacy of the competence-competence principle and set out the applicable general test:

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.

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. [paras. 84-85]

Thus, a challenge to the jurisdiction of the arbitrator will be determined by the court only if it concerns either a question of law or one of mixed fact and law that requires only superficial consideration of the evidence in the record and can be dealt with expeditiously.

[67] As to the interaction between an arbitration clause and a class action, the majority in *Dell* focussed on the procedural nature of the class action. The possibility of using a particular procedural vehicle cannot alter substantive rights agreed to by the parties to a contract. Therefore, when contracting parties agree to refer to arbitration any dispute arising under their contract, they create a substantive right. Relying on *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, the majority held that the choice to initiate a class action cannot serve as the basis for a court's jurisdiction to hear a dispute if the claims raised in that action, taken

individually, would not do so. This is because the parties have, by virtue of their contractual agreement to arbitrate these claims, created a substantive right that ousts a court's jurisdiction.

[68] Though the judges of the minority dissented in *Dell*, they did so on other grounds. They agreed, in respect of the competence-competence principle, with the “rule of chronological priority under which the arbitrators must have the first opportunity to rule on their jurisdiction” (para. 163). They also agreed “that a discretionary approach favouring resort to the arbitrator in most instances would best serve the legislator’s clear intention to promote the arbitral process and its efficiency, while preserving the core supervisory jurisdiction of the Superior Court” (para. 176). Similarly, the minority agreed that a court that lacks jurisdiction over a dispute in the first place — because the parties have chosen to have disputes resolved through arbitration, for example — cannot acquire jurisdiction over it as a result of an application for certification of a class action (para. 150).

[69] In oral argument in the instant case, emphasis was put on the fact that *Dell* was based on the interpretation of the provisions of the *CCQ* and the *CCP* on arbitration and class actions. It was submitted on this basis that the *ratio* of that case does not apply outside Quebec. While it is true that *Dell* involved the interpretation of Quebec legislation, the subject matter of that legislation was domestic commercial arbitration, and the key issue was the relationship between arbitration and individual court actions. Quebec’s arbitration legislation is not unique to the civil law tradition,

but was based on two international texts relating to arbitration: the Model Law and the New York Convention. The general test adopted in *Dell* for dealing with challenges to an arbitrator's jurisdiction in this context was based on the interpretation of these international documents. The approach in that case to determining the jurisdiction of the arbitrator, and more specifically the application of the competence-competence principle, is not unique to Quebec.

C. *British Columbia Supreme Court (2008 BCSC 933, 85 B.C.L.R. (4th) 372; Masuhara J.)*

[70] Returning to the present appeal, the stay application brought by TELUS was argued before the case management judge, Masuhara J. The key question he had to address was whether the legal tests for certification of a class proceeding and for establishing the jurisdiction of an arbitrator in Quebec are, for all intents and purposes, the same as those in British Columbia. The answer to this question would ultimately determine the reach of both *Dell* and *Rogers* in the province. In Masuhara J.'s opinion, *Dell* requires an arbitrator to determine if the arbitration clause is valid before the court considers whether the class action should be certified. If this *ratio* extended to the common law provinces, he reasoned, it would call *MacKinnon 2004* into question.

[71] Masuhara J. concluded that there was no substantial difference between the two provinces' approaches to class proceedings. However, he observed three main differences between the arbitration regimes that, in his view, precluded a finding that

the “Quebec test” (at para. 75) set out in *Dell* applies in British Columbia. First, s. 15(2) of the *CAA* provides for broader exceptions from the automatic referral to arbitration than art. 940.1 of the *CCP* does in Quebec. Second, the *CAA* does not expressly grant arbitrators the authority to decide questions with regard to their own jurisdiction. The plain language of s. 15 of the *CAA* indicates that this jurisdiction resides exclusively with the court. Third, the *CAA* is not based on the New York Convention and the Model Law, and does not contain the provisions found in the Quebec legislation that expressly oust the jurisdiction of the courts.

[72] In the event that he was wrong, and that *Dell* does in fact apply in British Columbia, Masuhara J. went on to consider the effect of that case on TELUS’s stay application. He was not convinced that *Dell* had the effect of overturning *MacKinnon 2004*. First, *Dell*’s “Quebec test” had no bearing on the actual issue raised by TELUS’s application: whether the court had jurisdiction to grant a stay of proceedings under the *CAA*. Second, two exceptions to the competence-competence principle were identified in *Dell*: where the challenge to the arbitrator’s jurisdiction involves a question of law, or questions of mixed fact and law that require only a superficial examination of the evidence. Whether an action ought to be certified as a class proceeding is a question of law that falls within the exclusive jurisdiction of the court. Masuhara J. therefore dismissed TELUS’s application for a stay of proceedings.

D. *British Columbia Court of Appeal*

- (1) *MacKinnon v. National Money Mart Co.*, 2009 BCCA 103, 89 B.C.L.R. (4th) 1 (“*MacKinnon 2009*”)

[73] The Court of Appeal’s decision in the case at bar (2009 BCCA 104, 88 B.C.L.R. (4th) 212, *per* Tysoe J.A. (Finch C.J.B.C. and Rowles, Newbury and Neilson JJ.A. concurring)) was released concurrently with *MacKinnon 2009*. Because Tysoe J.A. simply applied the reasoning in *MacKinnon 2009* to the facts of Ms. Seidel’s case, we will discuss both sets of reasons.

[74] In *MacKinnon 2009* and in the case at bar, the Court of Appeal again sat as a five-judge panel, because it was being explicitly asked to overturn its decision in *MacKinnon 2004* on the basis that that decision had been overtaken by *Dell*. Newbury J.A., writing for a unanimous court in *MacKinnon 2009*, concluded that the reasoning in *Dell* applied in British Columbia and therefore that *MacKinnon 2004* should no longer be followed. However, she focussed not so much on the alleged conflict of purposes between the statutory scheme for commercial arbitration and the one for class proceedings as on the legal status of class proceedings themselves.

[75] After reviewing this Court’s recent jurisprudence on class actions, Newbury J.A. began by observing that the commencement of a class proceeding cannot affect the substantive rights of the parties. A class proceeding is a procedural vehicle only: when contracting parties create a substantive contractual right to have their disputes resolved by way of arbitration, the class proceeding cannot be certified and “the court must generally respect the parties’ choice of arbitration instead of

judicial determination” (para. 66). The class proceeding cannot therefore be used either to circumvent the exclusive jurisdiction of the arbitrator or to modify the substantive rights of the parties to an arbitration agreement (para. 70).

[76] Newbury J.A. also held that the differences in statutory language identified by Masuhara J. were not material to the question of whether the reasoning in *Dell* extends to British Columbia. The arbitration schemes of both provinces provide essentially for the same thing. Moreover, the question raised in the appeal logically paralleled the question considered by this Court in *Dell*:

[I]f Mr. MacKinnon had brought his action solely as an individual, he could not have prevented the court in either province from staying the action and referring it to arbitration. [para. 69]

[77] Newbury J.A. therefore decided that the approach taken in *Dell* also applies in British Columbia. However, having found no basis for interfering with the case management judge’s exercise of discretion in *MacKinnon 2009* in refusing to grant the stay on the basis of issue estoppel, she dismissed the appeal (para. 84). For this reason, the dispute was not referred to arbitration.

(2) *Seidel v. TELUS Communications Inc.*

[78] Tysoe J.A., writing for the Court of Appeal in the case at bar, applied the reasoning of his colleague in *MacKinnon 2009* to the issue of whether the stay should

be granted on the basis of *Dell*. However, he then went on to consider three residual issues decided neither by Newbury J.A. in *MacKinnon 2009* nor by Masuhara J. that were specific to the case at bar: (1) whether the arbitration agreement was inoperative by virtue of s. 3 of the *BPCPA* (which renders void any waiver or release of rights, benefits or protections under that Act); (2) whether issue estoppel was available; and (3) whether the arbitration clause covered those of Ms. Seidel's claims that arose before February 2003, since no contract between the parties could be located from before that time.

[79] Tysoe J.A. rejected the argument that the *BPCPA* conferred rights on members of the proposed class and that, by virtue of s. 3, those rights could not be waived. Specifically, s. 10(2) confers rights, benefits or protections applicable only to mortgage loans, and s. 172(1) simply identifies the British Columbia Supreme Court as the court in which the remedies provided for in that section can be sought. Section 172(1) does not explicitly exclude arbitral jurisdiction and cannot therefore render the arbitration agreement between Ms. Seidel and TELUS inoperative.

[80] Regarding the availability of issue estoppel, Tysoe J.A. noted that there was no evidence that TELUS had ever promised not to apply for a stay of proceedings. Nor had it done anything in the course of the proceedings that would constitute a "step in the proceedings" within the meaning of s. 15(1) of the *CAA* and would accordingly bar it from applying for a stay. Moreover, TELUS applied for a

stay only after *Dell* and *Rogers* had cast doubt on the correctness of *MacKinnon 2004*. And it did so promptly after their release.

[81] Finally, in considering whether the arbitration agreement covered the pre-February 2003 claims, Tysoe J.A. noted that this issue involved the determination of a number of factual matters. As a result, it did not fall within either of the exceptions to the applicability of the competence-competence principle identified in *Dell* and therefore had to be resolved at first instance by the arbitrator. Tysoe J.A. therefore allowed TELUS's appeal and stayed Ms. Seidel's proposed class action in its entirety.

III. Analysis

A. *The Issues*

[82] In the courts below, the parties' arguments were firmly focussed on one main issue, namely:

- (1) whether the competence-competence principle is incorporated into the law of British Columbia by virtue of the stay provision — s. 15 of the CAA — and if so, whether judicial proceedings, including class proceedings, should be stayed where the parties have signed an agreement to arbitrate unless the narrow exceptions in *Dell* apply.

A second issue was raised almost incidentally:

- (2) whether an arbitration clause in an agreement for mobile phone services constitutes an impermissible waiver of rights, benefits or protections provided for in the *BPCPA*.

In this Court, it is this second issue that has come to the forefront. It constitutes a question of law that, pursuant to the exception in *Dell*, should be considered in the first instance by a court rather than the arbitrator. Consequently, it will be necessary to resolve both these issues in these reasons.

B. *Positions of the Parties*

(1) The Appellant, Ms. Seidel

[83] Ms. Seidel argues that the *CAA* was never intended to apply to consumer disputes; rather, its purpose was to regulate domestic commercial relationships between business persons operating at arm's length in the province. By contrast, the *CPA* is intended to make class proceedings available in situations in which actions are ordinarily brought only on an individual basis, and its express purpose is to foster access to justice.

[84] Ms. Seidel argues that the Court of Appeal's approach in *MacKinnon 2004* establishes the proper framework, as it allows both statutes to operate and to achieve their objectives. If the British Columbia legislature had intended to exclude

arbitration proceedings from the “preferable procedure” analysis required by s. 4(1)(d) of the *CPA*, it would surely have done so expressly. In comparison with the provinces that have explicitly legislated against the inclusion in consumer agreements of arbitration clauses and clauses prohibiting participation in class proceedings, British Columbia has simply taken a different approach. But the effect of the Court of Appeal’s decision in *MacKinnon 2009* was to exclude, from the outset, the possibility of certifying a proceeding as a class proceeding if it concerns a dispute subject to an arbitration agreement. The Court of Appeal has also disregarded some significant policy arguments which suggest that arbitration is not an effective forum for remedying consumer claims, particularly when there are a large number of claims of low or nominal value.

[85] Furthermore, Ms. Seidel argues, the Court of Appeal’s conclusion that *Dell* applies is premised on two false assumptions. The first is that the laws of Quebec and British Columbia respecting arbitration and class proceedings are sufficiently similar. The second is that legislation dealing with procedural rights is subordinate to legislation dealing with substantive rights. Finally, on the issue of the waiver of rights under the *BPCPA*, Ms. Seidel argues that a person’s rights under the Act include the substantive right to bring an action in the British Columbia Supreme Court under s. 172 for declarations and for injunctive relief. These are remedies that only a court can grant. An approach pursuant to which a consumer subject to an arbitration agreement would be required to have an arbitrator determine whether the *BPCPA* has been breached before being entitled to proceed to court to obtain declaratory or

injunctive relief would strip the *BPCPA* of its legislative force, and achieving its objectives would become impossible.

(2) The Respondent, TELUS

[86] TELUS asks this Court to adopt the reasoning in *MacKinnon 2009* as a correct statement of the law in British Columbia. The overarching principle from *Dell*, that a court may rule first on the arbitrator's jurisdiction only if there is a pure legal issue or an issue of mixed fact and law that can be expeditiously decided by the court on a minimal evidentiary record, also applies in British Columbia. The presence of an arbitration agreement precludes a court from considering the certification of the proposed class action and mandates the granting of the stay under s. 15 of the *CAA*, provided that the narrow exception from *Dell* does not apply. Unless this Court were to hold that a standard form contract cannot establish a substantive right to arbitration or that arbitration clauses are inherently unfair to consumers, an agreement to arbitrate cannot be supplanted by the procedural right to commence a class action. Taking any necessary action and assessing Ms. Seidel's policy concerns with respect to the use of arbitration clauses in consumer agreements are matters best left to the legislature, which is in a better position to balance competing policies and objectives.

[87] TELUS argues that the arbitration clause does not constitute a waiver of rights, benefits or protections under the *BPCPA* and therefore does not offend s. 3 of the Act. The clause simply provides that it is an arbitrator, and not the court, who

determines in the first instance whether the *BPCPA* has been breached. Moreover, the arbitrator has the authority to order the same relief as could a court. Ms. Seidel therefore does not lose any of the substantive rights, benefits or protections provided for in the *BPCPA* by having her dispute with TELUS resolved by way of arbitration. If the legislature intends to exclude arbitration as an appropriate forum for dispute resolution in a particular case, it must do so expressly.

[88] Before we deal with this last argument, it will be necessary to resolve the issue that was the primary focus of argument in the courts below: whether the competence-competence principle applies in British Columbia law.

C. *Evolution of Arbitration in British Columbia and the Competence-Competence Principle*

[89] Canadian courts, both in Quebec and in the common law jurisdictions, have endorsed the use of arbitration as a dispute resolution mechanism and now encourage its use (*Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, at para. 38). This was not always the case, however, as the courts originally displayed overt hostility to arbitration, effectively treating it as a second-class method of dispute resolution. As J. B. Casey and J. Mills observe in *Arbitration Law of Canada: Practice and Procedure* (2005):

Judicial hostility to “lesser” tribunals, and the lack of a modern legislative framework, inhibited the growth of arbitration in Canada, particularly relative to European countries. Until the 1990’s, commercial

arbitration in Canada was not regarded as a real substitute for the courts and the provinces were slow to recognize any distinction between domestic arbitration and international arbitration. [pp. 2-3]

This hostility originated in the English common law (see, e.g., *Horton v. Sayer* (1859), 4 H. & N. 643, 157 E.R. 993; *Lee v. Page* (1861), 30 L.J. Ch. (N.S.) 857; *Edwards v. Aberayron Mutual Ship Insurance Society Ltd.* (1876), 1 Q.B.D. 563; *Doleman & Sons v. Ossett Corp.*, [1912] 3 K.B. 257).

[90] In the early cases on arbitration, the courts displayed a distinct attitude that arbitration agreements, the purported effect of which was to oust the jurisdiction of the courts, were void on grounds of public policy. If, however, the agreement merely stipulated — in what became known as a *Scott v. Avery* clause — that arbitration was a condition precedent to bringing a court action, the court's jurisdiction was not ousted and the agreement would be valid (*Scott v. Avery* (1856), 5 H.L.C. 811, 10 E.R. 1121; see also, e.g., *Johnston v. Western Assurance Co.* (1879), 4 O.A.R. 281; *Nolan v. Ocean, Accident and Guarantee Corp.* (1903), 5 O.L.R. 544 (Div. Ct.); *Cayzer, Irvine and Co. v. Board of Trade*, [1927] 1 K.B. 269, at p. 293; *Brand v. National Life Assurance Co.* (1918), 44 D.L.R. 412 (Man. K.B.); *Altwasser v. Home Insurance Co. of New York*, [1933] 2 W.W.R. 46 (Sask. C.A.); *Re Rootes Motors (Canada) Ltd. and Wm. Halliday Contracting Co.*, [1952] 4 D.L.R. 300 (Ont. H.C.J.); *Deuterium of Canada Ltd. v. Burns & Roe of Canada Ltd.* (1970), 15 D.L.R. (3d) 568 (N.S.S.C.), rev'd (1971), 21 D.L.R. (3d) 568 (N.S.S.C. App. Div.), aff'd

[1975] 2 S.C.R. 124; *Procon (Great Britain) Ltd. v. Golden Eagle Co.*, [1976] C.A. 565, at p. 567).

[91] The clearest articulation of why the courts considered arbitration agreements to be contrary to public policy is found in the following passage from *Brand*:

From the earliest times both common law and equity courts have recognized and given effect to the principle that parties cannot, by contract, oust the courts of their jurisdiction, and that a provision to refer any dispute which might arise, not to the ordinary tribunals, but to some forum of their own selection, could not be pleaded in bar to an action upon the contract. . . .

At one time it was supposed that the principle underlying these decisions was that an agreement to prevent the enforcement of a cause of action through the medium of the ordinary tribunals of the country was void as contrary to public policy, and indeed expressions to that effect may be found in the reports of cases of comparatively recent date

. . .

The true ground for holding that the jurisdiction of the courts cannot be ousted by an agreement between parties is that the courts derive their jurisdiction either from the statute or common law, and no mere contract *inter partes* can take away that which the law has conferred. [pp. 414-15]

[92] This hostility towards arbitration animated the courts' approach in applications to stay proceedings in the face of arbitration agreements:

While the Courts are guided by the principle that persons who make an agreement for arbitration should be bound by its terms, they do not lose sight of the principle that the jurisdiction of the Courts is not to be ousted by agreement between the parties; and in cases where it is thought better

that the matters at issue should be decided by the Courts rather than by arbitration, the action is allowed to proceed and a stay of proceedings is refused.

(*Altwasser*, at p. 50)

[93] Not only were the courts overtly hostile to any mechanism that would oust their jurisdiction to hear and resolve disputes, they were also sceptical that arbitration was really more efficient or effective than a traditional judicial proceeding:

One cannot but wonder about the efficacy of arbitration as a means of settling disputes of this kind. The present case occupied a great deal of time before the Board and before the two Courts. Costs are bound to be heavy. It would appear that the *Arbitration Act*, R.S.B.C. 1948, c. 16 instead of affording a quick, easy and cheap method of settlement provides one longer, more difficult and more expensive in the elucidation of matters such as these.

(*Vancouver v. Brandram-Henderson of B.C. Ltd.* (1959), 18 D.L.R. (2d) 700 (B.C.C.A.), at p. 705, *per* Sidney Smith J.A.)

In short, in the early cases on arbitration, the courts were “very jealous of their jurisdiction” and did not look “with favour upon efforts of the parties to oust it by agreement” (*Re Rootes*, at p. 304).

[94] The best example of this hostility can perhaps be found in this Court’s decision in *National Gypsum Co. v. Northern Sales Ltd.*, [1964] S.C.R. 144. In an agreement signed in New York, National Gypsum had undertaken that its vessel would travel to Montreal to pick up a load of wheat. The vessel failed to do so, and Northern Sales alleged that, as a result, it was unable to ship wheat it had contracted

to deliver. Northern Sales sued for breach of contract. The agreement provided that any disputes were to be resolved by way of arbitration in New York. The issue before the Court was whether the agreement to arbitrate could be enforced under Quebec law.

[95] The current provisions of the *CCP* were not in force at the time, and the rules regarding the jurisdiction of the courts in arbitration matters had not been codified. In cases in which the jurisdiction of the courts was challenged, that jurisdiction was defined on the basis of art. 13 of the *Civil Code of Lower Canada*, which provided that “[n]o one can by private agreement, validly contravene the laws of public order and good morals”, and what was then art. 94 of the *CCP*, which governed the place where an action to claim a sum of money could be instituted. The Court endorsed the Quebec jurisprudence on this subject, as established in *Vinette Construction Ltée. v. Dobrinsky*, [1962] B.R. 62, and *Gordon and Gotch (Australasia) Ltd. v. Montreal Australia New Zealand Line Ltd.* (1940), 68 B.R. 428, and held that the undertaking to arbitrate was contrary to public policy.

[96] These decisions reflected the view that only courts were capable of granting remedies for legal disputes and that, as a result, any effort by the parties to a dispute to contract in such a way as to oust the courts’ jurisdiction was, in itself, contrary to public policy, regardless of the nature of the substantive legal issues in a given case.

[97] In *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529, the Court, in reasons written by Chouinard J., distanced itself from the approach taken in *National Gypsum* and *Vinette* and, in so doing, advanced a more positive view of arbitration. Rather than viewing arbitration as a potential threat to the administration of justice, and therefore contrary to public order, the Court was starting to see that it could be beneficial to the administration of justice.

[98] After *National Gypsum*, the Quebec legislature enacted art. 951 of the *CCP*:

951. An undertaking to arbitrate must be set out in writing.

When the dispute contemplated has arisen, the parties must execute a submission. If one of them refuses, and does not appoint an arbitrator, a judge of the court having jurisdiction makes such appointment and states the objects in dispute, unless the agreement itself otherwise provides.

Chouinard J. found in *Zodiak* that the effect of enacting art. 951 had been to overtake *Vinette* and *National Gypsum*:

The prevailing opinion since the coming into effect of the new *Code of Civil Procedure* is that the adoption of art. 951 in its present form sufficed to render the complete undertaking to arbitrate valid. The old *Code of Procedure* was silent as to the undertaking to arbitrate: it was not mentioned. The present situation is accordingly quite different from that prevailing when *Vinette Construction (supra)* and *National Gypsum (supra)* were rendered, decisions which some have suggested have become obsolete. [p. 538]

Citing with approval Gagnon J.A. in *Ville de Granby v. Désourdy Construction Ltée*, [1973] C.A. 971, Chouinard J. concluded that the enactment of art. 951 indicated an intention “to make a step forward” and that “it is the legislature, when it takes a position, who is the final arbiter in the matter” (p. 542).

[99] Recognizing how harmful the hostility shown by the courts might be to the modern development and maturation of arbitration in Canadian law, this Court stressed the value of commercial arbitration as a dispute resolution mechanism once again in *Sport Maska Inc. v. Zittreer*, [1988] 1 S.C.R. 564:

This lack of interest by our courts and academic commentators may be explained by the importance at the time of the debate on the validity of the undertaking to arbitrate, a matter settled by this Court in *Zodiak*, *supra*. This long period of legal uncertainty did nothing to encourage the use of this method of settling disputes. [p. 598]

More recently, the Court again recognized “the existence and legitimacy of the private justice system” of arbitration in *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 38.

[100] Lower courts across Canada swiftly followed this Court’s lead in accepting and endorsing arbitration as a legitimate dispute resolution mechanism, and this shift in attitude clearly took root. The following passage from the reasons of Campbell J. in *Boart Sweden AB v. NYA Stromnes AB* (1988), 41 B.L.R. 295 (Ont. H.C.J.), is often cited as an example of this shift:

Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract. [pp. 302-3]

See also, *Automatic Systems Inc. v. Bracknell Corp.* (1994), 12 B.L.R. (2d) 132 (Ont. C.A.), *per* Austin J.A. (international arbitration); *BWV Investments Ltd. v. Saskferco Products Inc.* (1994), 125 Sask. R. 286 (C.A.), *per* Gerwing J.A. (international arbitration); *Quintette Coal Ltd. v. Nippon Steel Corp.*, [1991] 1 W.W.R. 219 (B.C.C.A.), *per* Hutcheon J.A., concurring (international arbitration); *Burlington Northern Railroad Co. v. Canadian National Railway Co.* (1995), 59 B.C.A.C. 97, *per* Cumming J.A., dissenting, whose view was upheld by this Court ([1997] 1 S.C.R. 5) (domestic arbitration); *Condominiums Mont St-Sauveur Inc. v. Constructions Serge Sauvé Ltée*, [1990] R.J.Q. 2783 (C.A.), *per* Monet J.A. (domestic arbitration).

[101] In the instant case, our colleague's reasons appear to embrace the pre-*Zodiak* undercurrent of hostility towards arbitration. Though Binnie J. does not take issue with our approach to the competence-competence principle, his reading of the relevant provisions of the *BPCPA* exhibits the same reluctance to fully accept arbitration as a legitimate form of dispute resolution that permeated the older jurisprudence. His hostility towards arbitration is now couched as an exercise in statutory interpretation of the *BPCPA*. Although Chouinard J. pointed out in *Zodiak* that the statutory interpretations adopted in *Vinette* and *National Gypsum* were

misguided, our colleague's view appears to revive this outdated approach exemplified by the comment of Casey J.A. of the Quebec Court of Appeal in *Vinette*:

The right to apply to the Courts for relief is one of the cornerstones of our legal system. Its importance cannot be exaggerated nor can any threat to its existence be tolerated If this be allowed to happen those who accept the clause today will have it imposed on them tomorrow. For this reason its use is contrary to the public interest: and this is why it offends against art. 13 C.C. [pp. 68-69]

Respectfully, Binnie J.'s approach to interpreting the *BPCPA* neglects the broader contextual backdrop in which legislatures and courts have progressively come to encourage the use of alternative dispute resolution, including arbitration.

[102] Since *Zodiak*, there is a consistent trend that leads in one direction only: “. . . Canadian courts have indicated their willingness to stay court proceedings in favour of arbitrations where either the domestic or international Acts apply, and will no longer ‘jealously guard its jurisdiction against encroachment by arbitration’” (Casey and Mills, at pp. 228-29). See also the comments of L. Yves Fortier, in “Delimiting the Spheres of Judicial and Arbitral Power: ‘Beware, My Lord, of Jealousy’” (2001), 80 *Can. Bar Rev.* 143, at pp. 143-45. More importantly, the courts have gone from avoiding arbitration, and seeing it as contrary to public order and the proper administration of justice, to embracing it as a legitimate vehicle for fostering access to justice.

[103] It is now settled that if a legislature intends to exclude arbitration as a vehicle for resolving a particular category of legal disputes, it must do so explicitly (*Desputeaux*, at para. 42). Arbitration in and of itself is no longer considered contrary to public order, and courts ought not to read in the exclusion of arbitration if the legislature has not clearly provided that it is to be excluded. Yet this is exactly the effect of the approach adopted by Binnie J.

[104] In British Columbia, the current approach to arbitration was adopted in 1986 with the enactment of the *Commercial Arbitration Act*, S.B.C. 1986, c. 3 (“1986 CAA”). The 1986 CAA replaced the *Arbitration Act*, R.S.B.C. 1979, c. 18, which had essentially remained unchanged since 1893. The new legislation was modelled primarily on the recommendations of a 1982 Law Reform Commission of British Columbia *Report on Arbitration* (“LRC Report”). In enacting it, British Columbia took a “leadership role” by being the first common law province to modernize its approach to arbitration (J. K. McEwan and L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at p. 1-10). However, the 1986 CAA stopped short of adopting the New York Convention and Model Law approaches to recognition and enforcement of arbitral awards that had been gaining prominence on the international stage, particularly the enumerated grounds on which a court could refuse to recognize and refuse to enforce arbitral awards.

[105] The 1986 version of s. 15 of the *CAA*, the stay provision, even incorporated the LRC Report's preference for giving the court broad jurisdiction to refuse to grant a stay. Section 15 provided that court proceedings should continue in place of arbitration if the court was satisfied that there was a "good reason" for doing so. "[G]ood reason" was defined expansively, as the court was authorized to consider: whether the matters in dispute were factually or legally complex; the comparative expense and delay associated with the two proceedings; whether other parties were affected by the dispute; and "any other matter the court considers significant".

[106] Despite the fact that the LRC Report was based on a broad public consultation, "s. 15 had a rough landing" in British Columbia (C. J. Mingie, *British Columbia Commercial Arbitration — An Annotated Guide* (2004), at p. 37). Court decisions that addressed the issue of the s. 15 stay were inconsistent either with the Act itself or with each other (p. 37). Although this Court had begun to show support for arbitration legislation, the British Columbia courts did not always take a similar approach in considering the 1986 *CAA*.

[107] As a result, just two years after the 1986 *CAA* was first enacted, the legislature amended it to limit the power of the courts to intervene where the parties have agreed that a matter should be submitted to arbitration (*Miscellaneous Statutes Amendment Act (No. 2)*, 1988, S.B.C. 1988, c. 46, s. 11). More specifically, the legislature amended s. 15 to more closely reflect the wording of the New York Convention and art. 8 of the Model Law, and thereby limit the grounds upon which a

court could refuse to grant a stay of proceedings (see Mingie, at p. 37; *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.), *per* Hinkson J.A.).

[108] Masuhara J. in the B.C. Supreme Court below accepted the argument that although the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, was modelled on the New York Convention and the Model Law, the CAA was not. And it was partly on this basis that he held that the competence-competence principle, according to which it is the arbitrator who must first consider the existence, validity and scope of the arbitration agreement, does not form part of the domestic arbitration law of British Columbia. The Court of Appeal rejected this argument in *MacKinnon 2009* and in the case at bar, but Ms. Seidel hopes to revive it in this Court.

[109] However, it is clear from a review of the current CAA that British Columbia's modern commercial arbitration legislation was in fact "influenced in part by the Model Law" (McEwan and Herbst, at p. 1-10, citing *Lawyers' Arbitration Letters: 1980-1989* (1990), at pp. 218-19). This review shows that the legislature intended to incorporate the competence-competence principle into the province's domestic arbitration legislation.

[110] Section 15 of the CAA, as amended in 1996, provides that a court must, if the parties have agreed that a matter should be submitted to arbitration, stay any legal proceeding brought in respect of that matter:

- 15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.
- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

The language used is virtually identical to that of art. 8 of the Model Law:

Article 8. . . .

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

We see no meaningful difference between saying that the court must refer the parties to arbitration and saying that it must order a stay of proceedings.

[111] It is true that the CAA does not itself include a provision that ousts the jurisdiction of the courts. However, the British Columbia International Commercial Arbitration Centre's *Domestic Commercial Arbitration Rules of Procedure* (1998) ("BCICAC Rules") apply, as they have been incorporated by reference (*R. v. Collins*,

2000 BCCA 437, 140 B.C.A.C. 311; *R. v. St. Lawrence Cement Inc.* (2002), 60 O.R. (3d) 712 (C.A.); *British Columbia Government and Service Employees' Union v. British Columbia (Minister of Health Services)*, 2007 BCCA 379, 245 B.C.A.C. 39; P.-A. Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at paras. 286 ff.; see also, s. 44(h) of the *Interpretation Act*, R.S.C. 1985, c. I-21). Section 22(1) of the *CAA* reads as follows:

- 22 (1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration.

Rule 20 of the BCICAC Rules addresses the arbitrator's jurisdiction:

20. Jurisdiction

- (1) The arbitration tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.
- (2) A decision by the arbitration tribunal that the contract is null and void shall not entail the invalidity of the arbitration clause unless specifically found to be so by the arbitration tribunal.
- (3) Any objection to the jurisdiction of the arbitration tribunal to consider a claim or counter-claim shall be raised in the statement of defense or statement of defense to counter-claim. . . .
- (4) A party is not precluded from raising a jurisdictional plea by the fact that it has appointed or participated in the appointment of an arbitrator.

[112] We observe that the language used in Rule 20 is essentially identical to that of arts. 943, 943.1 and 943.2 of the *CCP* — which were at issue in *Dell* — and of art. 16 of the Model Law:

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

[113] A British Columbia court must grant a stay of proceedings unless it concludes that the arbitration agreement is “void, inoperative or incapable of being performed”. However, the fact that a court can rule on its jurisdiction does not mean that it is required to do so. An argument that an arbitration agreement is void, inoperative or incapable of being performed constitutes a direct challenge to the

arbitrator’s authority to consider and resolve the dispute. In *Dell*, both the majority and the minority had to decide whether the arbitrator or the court should rule first on the validity and applicability of the agreement, and they also discussed, by extension, the type of review the court should conduct to determine whether the agreement is “void, inoperative or incapable of being performed”.

[114] The majority recognized that there were two schools of thought on this point — one being that the court must rule first on the issue, and the other that the arbitrator should do so — and that the debate was not conclusively resolved by either the New York Convention or the Model Law. However, a consensus was building in the international community that a court should engage in only a *prima facie* analysis and intervene only if the test of manifest nullity was met (*Dell*, at paras. 75-76). From this, a general rule was identified. Challenges to the arbitrator’s jurisdiction — namely arguments that an agreement is void, inoperative or incapable of being performed — should be resolved first by the arbitrator. A court should depart from this general rule only if the challenge is based on a question of law, or on questions of mixed fact and law that require only superficial consideration of the documentary evidence in the record, and is not merely a delaying tactic (see *Dell*, at paras. 84-86).

[115] This general approach is consistent with the one — developed by the British Columbia Court of Appeal in its 1992 decision in *Gulf Canada* — that many provincial appellate courts were following across Canada before *Dell*. According to the test from *Gulf Canada*, the court was to grant the stay unless it was “clear” that

the dispute fell outside the scope of the agreement. If it was “arguable” that the agreement applied to the dispute, the question was to be left to the arbitrator:

Considering s. 8(1) in relation to the provisions of s. 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal. [paras. 39-40]

[116] In *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737, *per* Charron J.A. (as she then was), the Ontario Court of Appeal endorsed the *Gulf Canada* approach. It concluded that if “it is at least arguable that the disputes . . . fall within the scope of the arbitration agreement”, the “preferable approach is to leave any definitive pronouncement on the scope of the agreement to be determined by the arbitral tribunal as decision-maker of first instance” (para. 3) (see also, *Dawson (City) v. TSL Contractors Ltd.*, 2003 YKCA 3, 180 B.C.A.C. 205, at para. 14). In *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135, 246 O.A.C. 226, *per* Sharpe J.A., the Ontario Court of Appeal held that “[i]t is now well-established in Ontario” that a court should grant a stay of proceedings where it is “‘arguable’ that

the dispute falls within the terms of an arbitration agreement” (para. 32), and that the motion judge had therefore erred in ruling on the scope of the arbitration agreement. See also, *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339, 96 O.R. (3d) 171, *per* Weiler J.A.; *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.* (1993), 81 B.C.L.R. (2d) 359 (C.A.), *per* Hollinrake J.A.

[117] This requirement of deference to the arbitrator’s jurisdiction is related directly to the role of the court that must, in considering an application for a stay of proceedings, determine whether the agreement is “void, inoperative or incapable of being performed”. Given that the general rule is that arbitrators should be the first to consider challenges to their jurisdiction, the expressions “void”, “inoperative” and “incapable of being performed” should be interpreted narrowly. There appears in fact to be a consensus to this effect in the authorities on all three of these criteria. See, e.g., *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129 (Alta. C.A.), *per* Kerans J.A. (in which it was held, at p. 138, that an arbitration agreement is not “inoperative” merely because a reference to arbitration might be “inconvenient”); *Mind Star Toys Inc. v. Samsung Co.* (1992), 9 O.R. (3d) 374 (Gen. Div.) (in which it was held that an arbitration agreement is not null and void merely because a claim of fundamental breach is made); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), *per* Stewart J. (in which it was held that if the *forum conveniens* test for jurisdiction were to be considered in determining whether an arbitration agreement was valid, it would almost always result in a finding against arbitration); M. J. Mustill and S. C. Boyd, *The Law and Practice of Commercial Arbitration in*

England (2nd ed. 1989), at p. 465 (in which the authors write that “[i]ncapable of being performed’ connotes something more than mere difficulty or inconvenience or delay in performing the arbitration”); and McEwan and Herbst, at pp. 3-63 ff.). The British Columbia Court of Appeal even appeared to endorse this view in *MacKinnon 2004* (para. 36).

[118] It is clear that the task of the court responsible for considering whether the agreement is “void, inoperative or incapable of being performed” cannot properly be construed so broadly as to authorize it to determine whether a class action would be a “preferable procedure”. Not only would such an approach require a degree of judicial scrutiny inconsistent with the competence-competence principle and with the superficial consideration on the basis of which a court can decide whether to grant a stay of proceedings, but the arbitration agreement would as a result be subject to the whim of the party wanting to avoid its application. More specifically, the word “inoperative” cannot be interpreted so broadly that a mere procedural decision of a party seeking to certify a class proceeding would suffice for that party to avoid the operation of the agreement to arbitrate.

[119] In *Dell*, this Court interpreted an express legislative direction that arbitrators are to consider the scope of their own jurisdiction, coupled with the use of language similar to that of the New York Convention and the Model Law, as amounting to incorporation of the competence-competence principle into Quebec law. As the Court concluded in *Dell*, at para. 83, the actual words of the provision in

question were not so important as the conclusion that they were based on those of the New York Convention and the Model Law:

Article 940.1 C.C.P. refers only to cases where the arbitration agreement is null. However, since this provision was adopted in the context of the implementation of the New York Convention (the words of which, in art. II(3), are “null and void, inoperative or incapable of being performed”), I do not consider a literal interpretation to be appropriate. It is possible to develop, in a manner consistent with the empirical data from the Quebec case law, a test for reviewing an application to refer a dispute to arbitration that is faithful to art. 943 C.C.P. and to the *prima facie* analysis test that is increasingly gaining acceptance around the world.

Courts should therefore be mindful to avoid an interpretation that makes it possible to sidestep the competence-competence principle and turns the Convention’s “inoperative” exception into a back door for a party wanting to “escape” the agreement.

[120] In considering a statutory provision containing the language contemplated by *Dell* and based on that of the New York Convention and the Model Law, the British Columbia Court of Appeal accepted and endorsed the modern approach according to which arbitration is acceptable in commercial matters. It recognized that the competence-competence principle is part of the province’s law. It did not err in doing so.

[121] Therefore, absent a challenge to the arbitrator’s jurisdiction based solely on a question of law or on one of mixed fact and law requiring only superficial

consideration of the evidence in the record, the existence or validity of an arbitration agreement to which the *CAA* applies must be considered first by the arbitrator. The court should grant the stay.

D. *British Columbia Business Practices and Consumer Protection Act*

[122] Because Ms. Seidel argues in part that the effect of the arbitration clause is to deny her the ability to exercise her rights under the *BPCPA*, it is important to discuss in some detail the rights and procedures provided for in that Act.

[123] The purpose of consumer protection legislation like the *BPCPA* is to protect consumers from losses suffered when they purchase goods and services that do not meet existing standards. Thus, the *BPCPA* applies to a “consumer” — an individual, whether in British Columbia or not — who participates in a “consumer transaction”. The term “consumer transaction” is defined as follows:

1 (1) . . .

“**consumer transaction**” means

- (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
- (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a).

A “supplier” is “a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction” either by supplying goods or services, or by soliciting, offering, advertising or promoting the supply of goods or services. The definition of “supplier” applies regardless of whether any privity of contract exists between the supplier and the consumer. See, generally, s. 1(1) of the *BPCPA*.

[124] The provision of mobile phone services for personal use clearly falls within the definition of “consumer transaction”, and Ms. Seidel and TELUS clearly fit the statutory definitions of “consumer” and “supplier”, respectively.

[125] Ms. Seidel alleges that TELUS, by unlawfully charging for the time after a cellular phone connects with the TELUS network but before the recipient answers the call, has breached its obligations under the *BPCPA*. More specifically, Ms. Seidel alleges breach of contract, and deceptive and/or unconscionable practices. The *BPCPA* defines a “deceptive act or practice”, in the context of a consumer transaction, as “an oral, written, visual, descriptive or other representation by a supplier” or “any conduct by a supplier” “that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor” (s. 4(1)). Subsection 4(3) provides specific examples — without limiting the generality of s. 4(1) — of what constitutes a deceptive act or practice, which “may occur before, during or after the consumer transaction” (s. 4(2)).

[126] Section 8 of the *BPCPA* also provides that an “unconscionable act or practice by a supplier may occur before, during or after the consumer transaction” (s. 8(1)), and that in determining whether an act or a practice is unconscionable, a court must consider “all of the surrounding circumstances of which the supplier knew or ought to have known” (s. 8(2)). Section 8(3) contains a list — again without limiting the generality of s. 8(2) — of specific circumstances that must be considered in this regard.

[127] In the event that a supplier contravenes the *BPCPA*, a number of avenues of redress are available. First, s. 189 creates an offence, for which any person who contravenes the provisions listed in the section can be prosecuted. An individual convicted under s. 189 is liable to a fine of not more than \$10,000, to imprisonment for not more than 12 months, or to both. A corporation convicted under s. 189 is liable to a fine of up to \$100,000. See, generally, the penalties provided for in s. 190.

[128] Second, in the event of a contravention, the Act authorizes a consumer to bring an action for compensatory damages:

Damages recoverable

171 (1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

(a) supplier,

...

who engaged in or acquiesced in the contravention that caused the damage or loss.

- (2) A person must not bring an action under this section if an application has been made, on the person's behalf, to the court in respect of the same defendant and transaction under section 192
- (3) The Provincial Court has jurisdiction for the purposes of this section, even though a contravention of this Act or the regulations may also constitute a libel or slander.

We note, however, that because a person convicted of an offence may already be required to compensate an aggrieved consumer for pecuniary losses pursuant to s. 192, s. 171(2) operates to prevent double recovery.

[129] The *BPCPA* also provides for declaratory and injunctive relief:

Court actions respecting consumer transactions

- 172** (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:
- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
 - (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
- (2) If the director brings an action under subsection (1), the director may sue on the director's own behalf and, at the director's option, on behalf of consumers generally or a designated class of consumers.

We emphasize that the relief available under s. 172(1) is not restricted to consumers directly affected by a particular consumer transaction.

[130] If relief is granted under s. 172(1), s. 172(3) authorizes the following remedial orders:

- (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
- (b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
- (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.

[131] Moreover, by virtue of s. 3, rights under the Act, and remedies for the violation of those rights, cannot be waived, through an arbitration clause or otherwise:

- 3** Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.

[132] The final aspect of the *BPCPA* that we must discuss is the nature of the action provided for in s. 172(1). Subsection 172(1) authorizes the director to bring an action for declaratory or injunctive relief, but it also authorizes any person other than a supplier to do so. In this sense, s. 172(1) creates a representative action. In the case

of an action brought by the director, any ambiguity in this respect is removed by s. 172(2). As for an action brought by a person other than the director, the fact that the person need not have been affected by the consumer transaction, together with the potentially representative nature of the available remedies — declaratory and injunctive relief — makes his or her representative capacity just as evident.

[133] The director is entitled to notice — by service of a copy of the writ of summons or notice of claim — of any action brought under either s. 171 or s. 172 (s. 173(1)). Upon being served, the director may apply to intervene in the action as a party, on any terms or conditions the court considers just (s. 173(2)). Since the scope of s. 172 and the conditions for applying it were not discussed in the courts below, the record does not reveal whether the director was in fact served with a notice of claim.

[134] Having outlined the statutory schemes governing arbitration and consumer protection in British Columbia, we will now review the types of proceedings at issue in this appeal.

E. *Nature of the Class Action*

[135] This Court has endorsed the class action as a means of facilitating access to justice, promoting efficiency in and reducing costs associated with civil litigation, and deterring or modifying dangerous or risky behaviour (see, e.g., *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at

para. 28; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 15; *Bisaillon*, at para. 16). The class action therefore has “a significant social and legal role” in Canadian law (*Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at para. 43).

[136] However, since a class action is only a way to group together a number of individual claims, it concerns the procedure for bringing an action. As this Court has put it, the certification of a class action confers a procedural right. It does not change either the substantive law or the substantive rights of the parties. A proposed class action “cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so” (*Bisaillon*, at para. 17). The majority in *Bisaillon* explained how the procedural nature of a class action affects the jurisdiction of a court:

In short, the class action procedure cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction 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. [para. 22]

See also, the reasons of both the majority and the dissenting judges in *Dell* (paras. 105-6, 108 and 224), and of the dissenting judges in *Marcotte*, at para. 125, citing *Bisaillon* and *Dell*.

[137] It bears repeating that an arbitration clause has always been understood as going to the court's jurisdiction to hear a claim. As we saw in our review of the historical development of arbitration, agreements to arbitrate were once seen to be contrary to public order on the basis that they constituted an improper attempt to oust the jurisdiction of the courts. Arbitration clauses are no longer seen to be contrary to public order, but the fact remains that they constitute a jurisdictional choice made by the parties to the agreement. Indeed, in *Dell*, both the majority and the minority considered an agreement to arbitrate to constitute such a choice. The minority characterized this choice in favour of arbitration as conveying a substantive contractual right (para. 160). See also, *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate* (2005), 2 B.L.R. (4th) 151 (Ont. S.C.J.), at para. 9, affirmed both by the Court of Appeal ((2006), 80 O.R. (3d) 533) and by this Court (2007 SCC 55, [2007] 3 S.C.R. 679, *per* McLachlin C.J.), although neither commented on this legal principle.

[138] The dissenting judges in *Dell* emphasized “that jurisdiction over the individual actions that form the basis of a class action is a prerequisite to the exercise of jurisdiction over the proceedings”. They added that there is “no question that, if the arbitration agreement is valid and relates to the dispute, the Superior Court has no jurisdiction to hear the case and must refer the parties to arbitration” (para. 150). The substantive right to arbitration created in the agreement effectively ousts the jurisdiction of a superior court to hear the case as a court action. Therefore, merely commencing a class action cannot vest the court with jurisdiction that it would not otherwise have over the individual claims of members of the proposed class.

F. *Impact of the CAA on the Procedural Right Being Claimed and on the Validity of the Waiver*

[139] As we concluded above, the competence-competence principle forms part of the domestic arbitration law of British Columbia. Absent a challenge to the arbitrator's jurisdiction based on a question of law or on a mixed question of law and fact that requires only superficial consideration of the evidence in the record, the arbitrator has jurisdiction to entertain, in the first instance, a challenge to the existence, validity and scope of an arbitration agreement.

[140] As we also mentioned, where, because of an arbitration agreement, a court would not have jurisdiction over a dispute, that jurisdiction cannot be conferred on it by commencing a class proceeding. This Court has made it clear that arbitration, as a legitimate private dispute resolution mechanism, applies to all kinds of disputes, except where the legislature has expressly provided that it intends to remove the subject matter from the reach of arbitration legislation. In British Columbia, no such explicit legislative direction has been enacted, and consumer disputes may be resolved by way of arbitration.

[141] Ms. Seidel nevertheless argues that an arbitrator lacks the jurisdiction to grant either of the specific remedies contemplated in s. 172 of the *BPCPA*: a declaration (s. 172(1)(a)), or an interim or permanent injunction (s. 172(1)(b)). She submits that these remedies can be granted only by the British Columbia Supreme Court and, therefore, that s. 172(1) itself creates a substantive right to have a dispute

resolved in the public court system. As a result, the agreement to submit this dispute to arbitration constitutes a waiver — in violation of s. 3 of the *BPCPA* — of the substantive right to those particular remedies. In effect, Ms. Seidel argues that the prospective arbitrator lacks jurisdiction to grant the remedy being sought and therefore lacks jurisdiction over the subject matter of her claim (see, e.g., *Bisaillon*, at para. 29). This argument raises a question of law which, pursuant to the exception in *Dell*, may be considered in the first instance by a court rather than the arbitrator. In light of ss. 171 and 172 of the *BPCPA* and of the powers conferred on arbitrators in British Columbia, we are of the view that the legislature has not barred the submission of such claims to arbitration.

[142] Ms. Seidel's argument is grounded in s. 3 of the *BPCPA*, which provides that any waiver of rights, benefits or protections under that Act is void. The real question here is whether the identification in s. 172(1) of the Supreme Court as the forum where an action may be brought constitutes a right, benefit or protection that cannot — by virtue of s. 3 — be waived. To answer this question, it must be determined, as a matter of law, what rights, benefits and protections are found in s. 172. In other words, when s. 3 operates to prevent a waiver of rights, benefits or protections, does it apply only to the remedy sought by the claimant or does it also encompass the choice of the forum in which the remedy can be obtained? In answering this question of law, we are of the view that means are just a way to attain an end. The remedy is the end, and the same remedies, and perhaps others as well, can be obtained through the arbitration process as they can through the public court

system. The remedy sought by a claimant under s. 172 is a declaration or an injunction. Either an arbitrator or a court can adjudicate a monetary claim under s. 171. What is important here is that the adjudicator has jurisdiction to make a declaration or order an injunction, which are the same remedies as are contemplated in s. 172.

[143] These comments foreshadow our views on the question whether arbitrators lack the specific jurisdiction to grant the declaratory relief and order the interim or permanent injunctions contemplated in ss. 172(1)(a) and (b), and to grant the ancillary remedies provided for in s. 172(3). If they do not have authority to do this, then to the extent that Ms. Seidel's claims include a request for declaratory and injunctive relief, the agreement to arbitrate would constitute a waiver contrary to s. 3 of the *BPCPA*, because recourse to arbitration would result in the loss of a right, benefit or protection within the meaning of s. 3 of the *BPCPA*.

[144] In adjudicating disputes that are submitted to them, arbitrators are required to apply the law. Section 23 of the *CAA* provides:

23 An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.

Similarly, Rule 33 of the *BCICAC Rules* provides:

33. . . .

An arbitration tribunal shall decide the dispute in accordance with the law unless the parties agree in writing in accordance with section 23 of the *Commercial Arbitration Act* that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.

[145] Arbitrators exercising their jurisdiction under arbitration legislation are generally understood, provided that the arbitration agreement is broadly drafted, to have “jurisdiction to make any award a court could make, whether sounding in contract, tort, equity or by statute” (Casey and Mills, at p. 151).

[146] But the British Columbia legislation goes further, as it explicitly grants arbitrators broad remedial powers. As we noted above, s. 22 of the *CAA* provides that, unless the parties agree otherwise, the *BCICAC Rules* apply to all arbitrations conducted under that Act. Rule 29 of the *BCICAC Rules* addresses the arbitrator’s remedial jurisdiction:

29. General Powers of the Arbitration Tribunal

- (1) Without limiting the generality of Rule 19 or any other Rule which confers jurisdiction or powers on the arbitration tribunal, and unless the parties at any time agree otherwise, the tribunal may:
 - (a) order an adjournment of the proceedings from time to time;
 - (b) make a partial award;
 - (c) make an interim order or award on any matter with respect to which it may make a final award, including an order for costs, or any order for the protection or preservation of property that is the subject matter of the dispute;

- (d) order inspection of documents, exhibits or other property, including a view or physical inspection of property;
- (e) order the recording of any oral hearing;
- (f) at any time extend or abridge a period of time fixed or determined by it, or any period of time required in these Rules;
- (g) empower one member of the arbitration tribunal to make interim and other orders, including settling of matters at the pre-hearing meeting, that do not deal with the issues in dispute;
- (h) order any party to provide security for the legal or other costs of any other party by way of a deposit or bank guarantee or in any other manner the arbitration tribunal thinks fit;
- (i) order any party to provide security for all or part of any amount in dispute in the arbitration;
- (j) order that any party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation;
- (k) make an award ordering specific performance, rectification, injunctions and other equitable remedies.

[147] In *Automatic Systems Inc.* and in *Wires Jolley*, the Ontario Court of Appeal drew a helpful distinction between the designation, at the procedural level, of a particular forum and the substantive protections provided by a particular legislative scheme. So long as the choice of a particular forum does not result in a loss of the substantive right to a remedy provided for in the legislation, the dispute can properly be resolved in the designated forum.

[148] An arbitrator deriving his or her authority from the CAA, and by extension from the BCICAC Rules, also has broad remedial powers. Rule 29(1)(k) specifically authorizes the arbitrator to order “injunctions and other equitable remedies”. The arbitrator can therefore, unless the parties have agreed otherwise, grant the declaratory and injunctive relief sought by Ms. Seidel under ss. 172(1)(a) and (b) of the *BPCPA*.

[149] Our colleague argues that in the consumer context, the principles of access to justice require a public form of relief that is not limited to the parties to the consumer transaction in issue, and also require that the claims themselves be adjudicated in only one public forum: the courts. We would respond to this argument by observing that access to justice is protected both by the broad powers given to arbitrators and by the representative action provided for in the *BPCPA*.

[150] Although third party consumers benefiting from a declaration or injunction issued by an arbitrator against TELUS would not be bound by the arbitrator’s order, TELUS would be bound by it. Since no undertaking is sought from third party consumers, there is no detriment to them in an order that is not binding on them. The arbitrator has the authority to order the relief being sought as it relates to Ms. Seidel’s claim against TELUS. Ms. Seidel and TELUS are both parties to the arbitration agreement.

[151] Our colleague emphasizes the fact that the arbitration proceedings themselves take place in a private and confidential setting. However, what Ms. Seidel seeks is a result. There is no requirement that the arbitral award itself, which would incorporate the remedy she seeks, be private and confidential. First, a party is always free to submit an arbitral award to the court for enforcement pursuant to s. 29 of the *CAA*:

29 With leave of the court, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in the terms of the award.

The procedure for enforcing an award is provided for in the arbitration clause agreed to by the parties to this dispute, which reads, in part, that “[e]ither party may commence court proceedings to enforce the arbitration result when an arbitration decision shall have been rendered and thirty (30) days have passed from the date of such decision.”

[152] Second, we reiterate that arbitrators who derive their authority from the *CAA* have broad remedial powers at their disposal, including the authority to grant “injunctions and other equitable remedies” (r. 29(1)(k), *BCICAC Rules*). They also must apply the law (s. 23, *CAA*; r. 33, *BCICAC Rules*). There is nothing in the record that would suggest that they cannot issue the same kind of injunctive relief as is contemplated in s. 172(1)(b) of the *BPCPA*. Therefore, an arbitrator could order a supplier, in this case TELUS, to advertise the particulars of any order or award

granted against it to the public at large (s. 172(3)(c)). An order that the supplier do so would fulfill the public purpose that our colleague considers to be necessary if the broader goals of the *BPCPA* are to be attained. Given their broad remedial powers, arbitrators are authorized to grant this very public remedy.

[153] This brings us to another aspect of the question: Does the reference in s. 172 to the British Columbia Supreme Court as the forum in which claims *may* be brought show that the legislature intended to confer exclusive jurisdiction on that court to adjudicate claims under the *BPCPA*? In our view, in light of the context, the words of the provision, and the authorities, this question must be answered in the negative.

[154] Section 171 of the *BPCPA*, as we saw above, mainly concerns the recovery of damages. Our colleague Binnie J. agrees that the general rules for jurisdiction apply to such claims and that they can validly be adjudicated in the first instance by an arbitrator. Section 171 is relevant because it refers specifically to the Provincial Court, providing that that court has jurisdiction even though the contravention of the *BPCPA* may also constitute a libel or slander, which is a matter over which it would not otherwise have jurisdiction (see, for the general rules: *Supreme Court Act*, R.S.B.C. 1996, c. 443, s. 15; *Provincial Court Act*, R.S.B.C. 1996, c. 379; *Small Claims Act*, R.S.B.C. 1996, c. 430, s. 3). This can be compared with the reference in s. 172 to the British Columbia Supreme Court. There is no departure from the general rules in s. 172, and its purpose is to clarify that the

Supreme Court, not the Provincial Court, may grant declaratory and injunctive relief. This reference does not, on its own, indicate that the Supreme Court's jurisdiction over the remedies provided for in s. 172 is exclusive. The use of the word "may" makes it even clearer that the Supreme Court is not intended to be the only forum in which these remedies can be sought. Here once again is the text of s. 172(1):

- 172** (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:
- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
 - (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

[155] Confirmation of this interpretation respecting jurisdiction can be found in cases concerning similar references to superior or statutory courts in the context of arbitration clauses. The argument made by Ms. Seidel was in fact raised in *Desputeaux*. In that case, the Court was asked to determine, *inter alia*, whether an agreement to refer a dispute over copyright to arbitration was enforceable in light of s. 37 of the *Copyright Act*, R.S.C. 1985, c. C-42, which read as follows:

37. The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under section 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.

It was argued that the effect of s. 37 was to prevent disputes under the *Copyright Act* from being heard and resolved in any forum other than a court — either the Federal Court or the Quebec Superior Court in that case.

[156] This Court disagreed, concluding that the purpose of s. 37 was merely to designate a forum:

The purpose of enacting a provision like s. 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. Arbitral jurisdiction is now part of the justice system of Quebec, and subject to the arrangements made by Quebec pursuant to its constitutional powers. [*Desputeaux*, at para. 42]

[157] The Ontario Court of Appeal applied and elaborated upon *Desputeaux* in *Wires Jolley*, in which the issue was whether s. 23 of the *Solicitors Act*, R.S.O. 1990, c. S.15, conferred exclusive jurisdiction on the Superior Court of Justice. Section 23 provided:

23. No action shall be brought upon any such agreement, but every question respecting the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements, in respect of which the agreement is made, by the court, not being the Small Claims Court, in which the business or any part of it was done or a judge thereof, or, if the business was not done in any court, by the Superior Court of Justice.

Applying *Desputeaux*, the Ontario Court of Appeal concluded that s. 23 was simply a forum designation provision:

. . . simply because the *Solicitors Act* refers to a Superior Court judge as having the jurisdiction to protect clients' rights, this does not mean that disputes arising between a solicitor and a client may not be submitted to arbitration. The Act simply identifies the person within the judicial system empowered to make a decision. The right to have an independent decision maker who can interpret the agreement and make a decision respecting a contingency fee dispute is preserved through arbitration and hence the public policy of the Act, the provision of a forum for legitimate dispute resolution, is not undermined. [para. 73]

Satisfied that the statutory rights going to the merits of the dispute would not be affected by the enforcement of the arbitration clause, the court held that the dispute could properly be submitted to arbitration.

[158] This approach to determining whether a dispute can be submitted to arbitration rather than having a court resolve it appears to have existed before *Desputeaux*. For example, in *Automatic Systems Inc.*, the issue before the Ontario Court of Appeal was whether a construction lien claim could be resolved by arbitration, as stipulated in an agreement that was subject to legislation respecting international arbitrations. Austin J.A. considered whether the lien claimant would lose any right if the dispute was submitted to arbitration. He concluded that it was not apparent that the party seeking to resist arbitration “will lose any right it presently has” (para. 17).

[159] In the instant case, s. 172(1) of the *BPCPA* designates the British Columbia Supreme Court as a forum in which an action *may* be brought. It is not nearly specific enough to indicate that the legislature intended to exclude arbitration as a mechanism for resolving disputes concerning claims under the *BPCPA*. The conclusion of the Ontario Court of Appeal in *Wires Jolley* with respect to s. 23 of the *Solicitors Act* — that it identifies the person within the judicial system empowered to make a decision — also applies here to s. 172(1) of the *BPCPA*. Subsection 172(1) identifies the appropriate forum in the judicial system, but it does not exclude the jurisdiction of other fora, such as an arbitral tribunal.

[160] We endorse the view that a clear statement of legislative intent is necessary for a court to conclude that a particular category of disputes cannot be submitted to arbitration. To hold otherwise would be to revert to the former judicial hostility towards arbitration, and to the pre-*Zodiak* view that there is a right to bring an action in the public court system that cannot be waived. Despite his assertion that “[a]bsent 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” (at para. 2), we see our colleague Binnie J.’s reasons as an example of such a reversion.

[161] The facts that the *BPCPA* addresses a public purpose and that it designates the Supreme Court as a forum for declaratory or injunctive relief in pursuit of that purpose are not nearly sufficient for us to conclude that s. 172 “constitutes a

legislative override of the parties' freedom to choose arbitration" (reasons of Binnie J., at para. 40). We agree with our colleague that the legislature is free to rely on the initiative of private litigants to achieve the public purpose of remedying breaches of the *BPCPA* and that in these times of budgetary constraints it may not have much choice. By enacting s. 172, the legislature provided a means not only to have claims dealt with by the director or any person, both of whom seek orders on behalf of consumers, but also to have the arbitration rules apply. In doing so, it provided a way to use the private dispute resolution system to obtain the same declaratory or injunctive relief against a supplier as can be obtained by means of a class action. Access to justice can only be enhanced by this approach.

[162] Finally, we note that our colleague's approach would result in bifurcated proceedings. He concludes that the arbitration clause applies to Ms. Seidel's claim for damages under either the common law or s. 171 of the *BPCPA*, but that her claims for declaratory and injunctive relief under s. 172(1) fall within the jurisdiction of the British Columbia Supreme Court. We question whether the additional time and costs inherent in bifurcated claims — and particularly claims split between two different fora — are likely to facilitate access to justice in this context.

[163] Even if there was any doubt that the arbitration clause ousted the jurisdiction of the British Columbia Supreme Court, an action in which declaratory or injunctive relief is sought under s. 172(1) of the *BPCPA* together with ancillary relief under s. 172(3), could hardly satisfy the "preferable procedure" requirement under

s. 4(1)(d) of the *CPA* for certifying the action as a class proceeding. In *Marcotte*, the majority of this Court concluded that to authorize a class action for an action in nullity would serve no purpose, because “[a]n individual action in nullity could have resulted in a declaration of nullity that would have applied in respect of all citizens and ratepayers of the municipality” (para. 27). In other words, a declaration of nullity is an *in rem* remedy. This argument applies with equal force to the effect of declaratory or injunctive relief granted under the *BPCPA*. Since the director or any person can act as a claimant, a class proceeding in which declaratory or injunctive relief is sought could never satisfy the “preferable procedure” requirement under the *CPA*. This is because an individual action for such relief can, in addition to applying to the supplier, have the same effect as an action *in rem* in respect of all consumers in the province who might have the same claim. Moreover, s. 41 of the *CPA* would prevent certification as a class proceeding of a representative action such as this. Therefore, any argument based on the view that access to justice requires claims based on s. 172 of the *BPCPA* to be made by way of a class proceeding is without merit. Access to justice is fully preserved by arbitration, and there is no need to resort to a class proceeding to so preserve that access.

[164] An arbitrator can grant the remedies contemplated in s. 172 of the *BPCPA* against TELUS. The arbitration agreement between Ms. Seidel and TELUS does not therefore constitute an improper waiver of Ms. Seidel’s rights, benefits or protections for the purposes of s. 3 of that Act. Consequently, the *BPCPA*, in its current form, does not provide a court considering a stay application under s. 15 of the *CAA* with a

reason for refusing to grant it. Section 3 of the *BPCPA* does not prohibit agreements under which consumer disputes are to be submitted to arbitration or that otherwise limit the possibility of having a proceeding certified as a class proceeding, since s. 172 of the *BPCPA* merely identifies the procedural forum in which an action with respect to the rights, benefits and protections provided for in s. 3 may be brought in the public court system. However, s. 172 does not explicitly exclude alternate fora, such as an arbitration tribunal from acquiring jurisdiction.

[165] Nevertheless, Ms. Seidel raises a number of policy considerations that, in her opinion, preclude a finding that arbitration agreements can apply to consumer disputes. These include the following: (1) arbitration clauses in consumer contracts are a means of denying consumers access to justice; (2) some courts, mostly American, have concluded that arbitration clauses in consumer agreements are unconscionable, particularly when coupled with a waiver of class proceeding rights; (3) arbitration agreements in consumer contracts have the effect of inhibiting the development of the common law in this area; and (4) arbitration clauses in consumer agreements have the effect of negating the behaviour modification objective of class proceedings (see A.F., at para. 88).

[166] These same concerns have been raised by certain commentators. See, e.g., H. Bromfield, “The Denial of Relief: The Enforcement of Class Action Waivers in Arbitration Agreements” (2009), 43 *U.C. Davis L. Rev.* 315; J. R. Sternlight and E. J. Jensen, “Using Arbitration to Eliminate Consumer Class Actions: Efficient

Business Practice or Unconscionable Abuse?” (2004), 67 *Law & Contemp. Probs.* 75; J. M. Glover, “Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements” (2006), 59 *Vand. L. Rev.* 1735; G. Saumier, “Consumer Arbitration in the Evolving Canadian Landscape” (2009), 113 *Penn. St. L. Rev.* 1203.

[167] However, the belief that arbitration clauses in consumer agreements have the effect of preventing or denying access to justice is not unanimous. See, e.g., A. D. Little, “Canadian Arbitration Law After *Dell Computer Corp. v. Union des consommateurs*” (2007), 45 *Can. Bus. L.J.* 356, at pp. 378-79. And none of the discussions of jurisdiction have concerned situations in which the arbitrator’s powers are as broad as in British Columbia.

[168] We cannot agree with Ms. Seidel’s argument that to have the dispute resolved by arbitration would negate the behaviour modification objective of the class proceeding. As we noted above, the parties have agreed in their contract that any arbitration award, which would include any declaratory or injunctive relief granted by the arbitrator, can be enforced by a court. Section 15 of the CAA empowers the court to do so upon granting leave. Moreover, as we mentioned above, the arbitrator would be free to grant the ancillary remedy provided for in s. 172(3)(c): to compel TELUS to advertise the particulars of any order or judgment issued against it to the public at large. Consequently, the potential for modifying TELUS’s behaviour would not be negated by having this dispute resolved by arbitration.

[169] This Court has held that standard form contracts or contracts of adhesion are valid and enforceable. While we acknowledge that the arbitration clauses applicable to consumer disputes that are included in standard form contracts may be more problematic from a public policy standpoint, they are not *per se* invalid on the ground that they are contrary to public policy (see, e.g., *Dell*, at para. 228). Nor are they inherently unfair to consumers. To accept this argument, as our colleague Binnie J. implicitly appears to do, would be to return to the former view that arbitration is, in itself, contrary to public policy. Moreover, it would constitute a departure from the *ratio* of *Dell*.

[170] As we mentioned above, this hostility to arbitration is no longer the norm, and the change in attitude was assisted in large part by legislative action. As the Court stated in *Desputeaux*, for example, the purpose of clarifying the meaning of “public order” in the arbitration context “was clearly to put an end to an earlier tendency by the courts to exclude any matter relating to public order from arbitral jurisdiction” (para. 53).

[171] The courts have endorsed the view that for the purpose of determining whether a particular category of disputes can be submitted to arbitration, “public policy” does not require recourse to a different forum so long as the arbitration is conducted in accordance with the statutory regime. For example, in *Wires Jolley*, in which the legislature had not expressly excluded arbitration, the Ontario Court of Appeal rejected the application judge’s conclusion that the relationship between

members of the legal profession — who have a professional monopoly — and a vulnerable public must, as a matter of public policy, be resolved by the courts.

[172] Furthermore, whether an arbitration clause in a consumer contract is unfair or unconscionable must always be determined on a case-by-case basis in light of the relevant facts. This Court has in fact acknowledged that, “under certain circumstances, arbitration may actually be an appropriate or preferable forum for the adjudication of consumer disputes” (*Dell*, at para. 223, *per* Bastarache and LeBel JJ., dissenting, but not on this point). Ms. Seidel nevertheless urges the Court to follow the decisions of a number of American courts, which have held that pre-dispute arbitration agreements, particularly when coupled with a class action waiver, are void by virtue of the unconscionability doctrine in contract law (see, e.g., *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Szetela v. Discover Bank*, 118 Cal.Rptr.2d 862 (Ct. App. 2002)). In Canada, an approach to this issue based on the unconscionability doctrine has not been adopted, however, and this Court has accepted the reality of standard form contracts in the consumer context. The courts have instead left the question whether arbitration is appropriate for particular categories of disputes to the discretion of the legislatures.

[173] It is important to bear in mind that the British Columbia legislature remains free to address any unfairness or harshness that might be perceived to be the result of the inclusion of arbitration clauses in consumer contracts. In fact, the Court’s decision in *Dell* is no longer relevant in the consumer context in Quebec, as

the Quebec legislature had already amended the *Consumer Protection Act*, R.S.Q., c. P-40.1, before *Dell* was even argued (see, e.g., *An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts*, S.Q. 2006, c. 56, s. 2). Those amendments were about to come into force at the time *Dell* was heard.

[174] Ontario and Alberta have also seen fit to amend their consumer protection legislation to prohibit both waivers of class proceedings and arbitration clauses in agreements to which their consumer protection legislation applies (see, e.g., *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, ss. 7(1), 7(5), 8(1) and 8(4); see also the *Fair Trading Act*, R.S.A. 2000, c. F-2, s. 16, which states an action may not be commenced or maintained where the consumer has agreed in writing to submit the dispute to arbitration, and the arbitration agreement has been approved by the Minister). More importantly, these legislative choices too were made well before the Court heard and decided *Dell* and *Rogers*.

[175] Thus, even before *Dell*, there was evidence of a trend in certain provinces to prohibit arbitration clauses and class action waivers in the consumer context. This is a choice for the legislatures, not for the courts. The British Columbia legislature made a choice both by incorporating the provisions of the New York Convention and the Model Law and by refraining from enacting provisions expressly limiting arbitration clauses and waivers of class proceedings in the consumer context. It also made another choice: to confer broad remedial jurisdiction on arbitrators. These

choices are ones to which this Court must defer. None of Ms. Seidel's policy concerns suffice to overcome this reality.

IV. Disposition

[176] For these reasons, we would dismiss the appeal. The parties should bear their own costs.

Appeal allowed in part, with costs throughout, LEBEL, DESCHAMPS, ABELLA and CHARRON JJ. dissenting.

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