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Enforcing Alberta's Restrictions on Consumer Arbitration

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Case commented on:

Young v National Money Mart Company, 2013 ABCA 264 (CanLII).

This decision by the Alberta Court of Appeal is a welcome addition to the body of consumer arbitration case law. It is the first Court of Appeal decision to give effect to section 16 of the *Fair Trading Act*, RSA 2000, c F-2, and only the second reported decision considering that provision despite the fact it has been around since 1998. The decision also offers a glimpse into the basis on which Service Alberta decides to approve or disapprove of consumer arbitration agreements under section 16.

Facts and Law

Young v National Money Mart Company involves two representative plaintiffs, Gareth Young and Craig Day, both customers of Money Mart, a financial services company founded in Edmonton in 1982. The plaintiffs each used a number of Money Mart services, including short term loans called "fast cash advances" and more familiarly known as payday loans. In order to obtain those loans, both plaintiffs agreed in writing to be bound by the arbitration clause in Money Mart's standard form contracts:

> *Arbitration* - In the event the parties are unable to resolve any such Claim by mediation, the parties agree to have the Claim determined by private and confidential arbitration before a single arbitrator jointly appointed by the parties and the cost of the arbitrator will be paid by Money Mart. The parties may elect to proceed with the arbitration in person, in writing only, or electronically using an Internet or online arbitration service jointly appointed by the parties.

The same documents also contained their agreement not to commence or participate in any class action against Money Mart:

> Each party also agrees not to commence or participate in any class action either as a representative Plaintiff or as a member of a Plaintiff class, and to opt out of any class action, if the class action involves, directly or indirectly, any Claim.

The substantive claim in both the Young and Day cases is that Money Mart charged a criminal rate of interest on their short term loans. As happened in other similar cases elsewhere in Canada — *MacKinnon v National Money Mart Co*, 2009 BCCA 103 and *Smith Estate v National Money Mart Co*, 2008 ONCA 746 — Money Mart applied to dismiss or stay the court actions brought by the plaintiffs, relying on their arbitration and class action waiver clauses.

Section 13 of the *Fair Trading Act* gives consumers remedies in the Court of Queen's Bench if they have suffered damage due to an "unfair practice" by a supplier of consumer goods and services, as that phrase is defined in section 6 of the Act (and charging illegal interest rates would fall within that definition). However, in certain circumstances, the section 13 remedies are not available to consumers. Section 16 of the *Fair Trading Act* provides:

> 16. Despite any provision of this Act, neither a consumer nor the Director may commence or maintain an action or appeal under sections 13 to 15 if the consumer's cause of action under those sections is based on a matter that the consumer has agreed in writing to submit to arbitration and the arbitration agreement governing the arbitration has been approved by the Minister. (Emphasis added)

It appears that Money Mart has twice applied for the approval of the Minister for Service Alberta of the arbitration clause in their standard form contracts. These applications were denied on August 12, 2009 and June 29, 2011. In response to the second application, the Minister stated:

> It is my ministry's position that such an exemption would limit consumers' ability to take court action, including class-action, when they have suffered a loss arising from an unfair practice. As Service Alberta indicated in the response to Mr. Norman Bishop, Q.C., on this matter in 2009, the intent of section 13 and 15 of the FTA is to give consumers the option of initiating a court action if they believe unfair practices have taken place and not to prevent them from accessing arbitration when the dispute arises. On this basis, the government of Alberta is not prepared to grant an exemption under section 16 of the FTA. (*Young* at para 8)

Queen's Bench Decision

In the decision appealed from (*Young v Dollar Financial Group Inc.*, 2012 ABQB 601 (CanLII)), Justice Alan D. Macleod had determined that section 13 of the *Fair Trading Act* applied to Money Mart's fast cash advances, a matter that Money Mart had disputed. He also concluded that, when the Minister has not approved the arbitration clause, that clause cannot be relied upon to prevent or stay an action under section 7 of the *Arbitration Act*, RSA 2000, c A-43. Section 7 requires a court to stay an action in favour of arbitration except in a very limited number of circumstances. Justice Macleod relied upon Justice Binnie's acknowledgement in *Seidel v TELUS Communications Inc*, 2011 SCC 15 at para 25, that some provincial legislatures, such as Alberta's, "have intervened in the marketplace with greater or lesser limitations on arbitration clauses in consumer contracts" and those legislative interventions are to be respected. Justice Macleod read the *Arbitration Act* as being subject to the *Fair Trading Act*. In doing so, he followed the decision of Justice LoVecchio in *Ayrton v PRL Financial (Alta.) Ltd*, 2004 ABQB 787 (CanLII), the only other reported decision considering section 16.

Justice Macleod also refused to stay the plaintiffs' actions based on Money Mart's mediation clause, given his conclusion on the ineffectiveness of their arbitration clause. He also declined to enforce the waiver of class actions in Money Mart's agreements, finding it would be unjust to allow Money Mart to avoid the possibility of a class action.

Court of Appeal Decision

Justices Ronald Berger, Peter Martin, and Karen Horner of the Court of Appeal agreed that section 13 of the *Fair Trading Act* applied to Money Mart's fast cash advances and that section 16 applied to their arbitration clauses. They also agreed (at paras 16-18) that the pro-consumer arbitration decision of the Supreme Court of Canada in *Seidel* was not incompatible with Justice Macleod's conclusion that the plaintiffs' claims were not arbitrable given Justice Binnie's emphasis on the paramountcy of legislation to restrict arbitration clauses in consumer contracts:

> 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. ... (*Seidel* at para 2)

The Court of Appeal also agreed (at para 20) with Justice Macleod that the intent of the legislature under section 16 of the *Fair Trading Act* was to confer upon the Minister an ability to monitor consumer contracts and to approve only those which did not bar class actions and did not frustrate consumer protection legislation. The result of the Minister's refusal to approve Money Mart's arbitration agreements was that Money Mart's applications to dismiss or stay the plaintiffs' actions were dismissed. Nothing was said about costs.

Comments

The Court of Appeal's decision is a clear endorsement of the primacy of section 16 of the *Fair Trading Act* when compared to section 7 of the *Arbitration Act*, which would otherwise bar the plaintiffs' class action. The Court's clear message is welcome and hopefully this decision will become well-known throughout the province. It has always been my impression that very few lawyers and consumers are aware of section 16 of the *Fair Trading Act* and its import.

Restrictions (in Alberta) and bans (in Quebec and Ontario) on consumer arbitration should be well publicized. Money Mart's arbitration clauses and waivers of class actions, coupled with Money Mart's aggressive attempts to enforce both, are examples of a strategy designed to insulate a business and its products and services from class actions which make uneconomical but valid claims by consumers possible. As Justice Sharpe stated in *Griffin v Dell Canada Inc*, 2010 ONCA 29 (CanLII) at para 30:

> 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.

Section 16 is a very odd little piece of consumer protection legislation. It is worded as a denial of access to the courts. It prevents consumers from suing in court to enforce their rights under the *Fair Trading Act* if they have agreed in writing to submit their claims to arbitration and the arbitration agreement has been approved by the Minister responsible for the Act. A provision that protects consumers by depriving them of access to the courts and the remedies that courts can give seems to be a backwards, if not bizarre, approach. The consumer protection only comes into play because the ability to contract out is conditioned on the Minister's approval of the arbitration agreement.

One of the consequences of section 16's odd approach to consumer arbitration is that Money Mart can continue to use the disapproved arbitration clause in its standard form contracts. There is no need for Money Mart to note that the clause is ineffective at depriving consumers of their

remedies for unfair practices under section 13 of the *Fair Trading Act*. This absence of notice is compounded by the fact that Service Alberta does not make the information about which arbitration agreements it has approved and which it has disapproved readily available. There is nothing on its web site that I can find. It is true that Service Alberta does (or at least used to) respond to inquiries about which arbitration agreements have been approved. Section 16 would be a more effective piece of consumer protection if a list of submitted and approved and disapproved consumer arbitration agreements was readily available on the Service Alberta web site.

Lack of notice of approvals and disapprovals is not the only problem with the implementation of section 16. Nothing in the statute or its regulations indicates the basis on which the Minister of Service Alberta will approve or disapprove an arbitration agreement. The quotation from the Minister's June 29, 2011 letter (at para 8) is a rare glimpse of what considerations factor into the Minister's decision. The reasons quoted in this case, however, suggest that the Minister will never approve a pre-dispute consumer arbitration agreement. The basis for denial of approval for Money Mart's agreement was that approval would "limit consumers' ability to take court action, including class-action, when they have suffered a loss arising from an unfair practice", contrary to "the intent of section 13 and 15 of the FTA [which] is to give consumers the option of initiating a court action." Pre-dispute arbitration agreements, by definition, deny access to courts. Parties do not have options; section 7 of the *Arbitration Act* is intended to force parties to an arbitration agreement to abide by their agreement. Arbitration agreements are only optional when they are entered into after a dispute has arisen; then parties get to choose their dispute resolution forum.

Nevertheless, Alberta's approach — if it is still that quoted in *Young* — does brings this province's stance in line with those in Ontario and Quebec. Both of those provinces forbid the use of arbitration clauses in consumer contracts. In Quebec, see *Consumer Protection Act*, RSQ, c P-40.1, section 11.1, which was amended in 2006 to provide very simply that:

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

In Ontario, see the *Consumer Protection Act*, 2002, SO 2002, c 30, Schedule A, section 7(2), another only slightly less straight-forward provision:

> 7 (2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.

Both of these blanket prohibitions are considerably easier to understand than Alberta's section 16. Just which pre-dispute consumer arbitration agreements are banned is easy to figure out; they all are. Both provisions are found in statutes called "Consumer Protection Act", not something called the *Fair Trading Act*. Ease of comprehension and access to information about consumers' rights are two hallmarks of effective consumer protection legislation. They are lacking in the case of section 16 in Alberta but the decision of the Court of Appeal in *Young v National Money Mart Company* is one of those proverbial steps in the right direction.

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