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Staying Arbitration Proceedings under Section 7(5) of the Arbitration Act

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Cases Considered:

Lamb v. AlanRidge Homes Ltd., 2009 ABCA 343

Lamb v. AlanRidge Homes Ltd. is an interesting case, in part because the Alberta Court of Appeal calls upon the Alberta legislature to review and amend section 7 of the *Arbitration Act*, R.S.A. 2000, c. A-43, a section the court criticizes (at para. 16) as "far from a model of clarity." Calls for legislative action by the courts are not that common. The case is also interesting because section 7 is perhaps the provision most often used by the courts, as it is the provision that requires a court to stay a court action when asked to do so by a party to an agreement to arbitrate.It is, however, a section rarely considered by the Court of Appeal because subsection 7(6) provides that there is no appeal from an order of the Court of Queens' Bench staying an action or refusing a stay under section 7. The case is also interesting because Alberta's *Arbitration Act* is based upon the *Uniform Arbitration Act* which was prepared by the Uniform Law Conference of Canada in 1989, as were the arbitration statutes in six other provinces. Section 7 was carefully drafted and debated by the Commissioners. It seems somewhat odd to think that, twenty years later, there are basic problems with interpreting and applying that provision.

Facts and Law

The Lambs entered into a construction agreement with AlanRidge in January 2004. The agreement was in a form standard to the building industry. It contained a mandatory and binding arbitration agreement in clause 24:

> 24. If any dispute arises between the Parties with respect to any matter in relation to this Agreement, the dispute shall be settled through binding arbitration in accordance with the arbitration rules adopted by the [Alberta New Home Warranty] Program. . . .

The Lambs took possession of the home in January 2005 and immediately identified a number of problems, the most serious of which was mould and moisture in the undeveloped basement. The Lambs began arbitration proceedings in accordance with their arbitration agreement in May 2006 and AlanRidge responded, but nothing further was done with respect to the arbitration. In December 2007, the Lambs commenced a court action, naming three defendants in addition to

AlanRidge: the parent company of AlanRidge and two sub-contractors. The court action alleged negligence against all of the defendants and breach of the construction agreement by AlanRidge and its parent company. AlanRidge brought an application for a stay of the Lamb's court action under section 7 of the *Arbitration Act*.

In applications brought under section 7 of the *Arbitration Act* to stay court proceedings, the party to the arbitration agreement eager to enforce that agreement relies upon subsection 7(1):

> 7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Subsection 7(1) appears mandatory, but subsection 7(2) creates exceptions — specific listed circumstances which render an arbitration void - none of which was applicable in this case.

Subsection 7(4) provides that if the court refuses to stay the court action, then an arbitration cannot be commenced or continued.

The Lambs resisted the stay application by raising subsection 7(5):

> 7(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that
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> > (a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and
> >
> > (b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

In typical cases raising subsection 7(5), the party who resists arbitration - the Lambs in this case - argue either that some of the issues raised in their court action are not within the scope of the agreement to arbitrate or that some of the parties to their court action are not parties to the agreement to arbitrate. In this case, the Lambs argued both extra issues - negligence - and extra parties - the parent company and the sub-contractors. When only some of the issues or parties are covered by the arbitration agreement, subsection 7(5) stipulates that, if the issues in the court case can reasonably be separated, the court may stay the portion of the court action that is within the agreement to arbitrate. But what happens when only some of the issues or parties are covered by the arbitration agreement and the issues cannot reasonably be separated?

That was the question the Alberta Court of Appeal turned its mind to in *New Era Nutrition Inc. v. Balance Bar Co*., 2004 ABCA 280. In that case, the Court of Appeal decided that when only some of the matters or parties in the court case were within the scope of the arbitration agreement and the matters could not be reasonably separated, the court has the authority to stay

the arbitration. This is a controversial holding for two reasons. First, subsection 7(5), on its face, gives the court discretion to stay a portion of the court action, not the whole of the arbitration. Second, it gives the court that discretion when only some of the matters in the court case are within the scope of the arbitration agreement, and not when only some of the parties named in the action are parties to the arbitration agreement. In *Lamb v. AlanRidge Homes Ltd*., counsel for Alan Ridge asked the Court of Appeal to reconsider its decision in *New Era*. Also relevant to the *New Era* holding is section 5(3)(f) of the *Judicature Act*, R.S.A. 2000, c. J-2, which provides that the court has the power to prevent multiplicity of actions.

The last provision in section 7 relevant to this case is subsection 7(6) which, as already noted, provides that there is no appeal from an order of the court staying an action or refusing the stay:

> 7(6) There is no appeal from the court's decision under this section.

The Court of Queen's Bench Decision

The main issue at the Queen's Bench level was whether subsection 7(5) applied so as to allow a stay of the arbitration. In deciding this issue, Justice A.D. Macleod, in *Lamb v. AlanRidge Homes Ltd*., 2009 ABQB 170, first considered whether all of the Lamb's claims in their court case fell within the scope of the agreement to arbitrate. The exact wording of clause 24 of the construction agreement was therefore key. That clause provided for arbitration if the dispute between the parties was "with respect to any matter in relation to this Agreement." The particular question was whether the Lambs' claims in negligence and vicarious liability were within this wording. The courts have previously considered wording such as "in relation to" and "in connection with" and determined that such wording applies to a wider category of disputes than just those about the rights and duties created by the contract: see *Kaverit Steel & Crane Ltd. v. Kone Corp*. (1992), 120 A.R. 346 (C.A.) at paras. 28-30. Justice Macleod found that the negligence alleged by the Lambs arose out of performance of the construction agreement. Therefore, the parties' arbitration agreement dealt with all of the matters in dispute in respect of which the Lamb's court action was commenced, making subsection 7(5)(a) seemingly inapplicable.

The second issue was whether subsection 7(5) applied because some of the parties to the court case were not parties to the arbitration agreement. Subsection 7(5)(a) states it applies when the agreement to arbitrate deals with only some of the matters in dispute, but *New Era* applied that provision when the agreement to arbitrate was signed by only some of the parties.

In *New Era*, the Court of Appeal approached the issue as one of deciding the appropriate forum and considered the legislative intent behind section 7. Madam Justice Conrad found that the Act was intended to "discourage duplicative proceedings where there are overlapping matters that cannot be reasonably divided" (*New Era* at para. 6). So, which forum to prefer? She decided that, "[i]f the matters in dispute cannot be reasonably separated, then the litigation continues and the arbitration is stayed by virtue of s. 7(4)" (*New Era* at para. 37). Justice Macleod noted (at para. 26) that *New Era* had been followed in at least one Alberta case, *Olymel S.E.C. v. Premium Brands Inc*., 2005 ABQB 312, where the emphasis was placed on avoiding multiple proceedings.

Justice Macleod also noted (at para. 29) that the Ontario Court of Appeal had applied their equivalent of subsection 7(5) in a manner similar to *New Era* in the case of *Radewych v. Brookfield Homes (Ontario) Ltd.*, [2007] O.J. No. 2483 (Ont. S.C.J.), aff'd 2007 ONCA 721. *Radewych* was also factually similar to *Lamb v. AlanRidge Homes Ltd.* In *Radewych*, the plaintiffs had purchased a home from Brookfield and alleged that it was improperly constructed. They brought a court action, claiming breach of contract and breach of statutory warranty against Brookfield and negligence against Brookfield and its co-defendants. Their agreement was subject to an arbitration clause contained in the *Ontario New Home Warranties Plan A*ct, R.S.O. 1990, c. O.31. That arbitration clause was different from the one in *Lamb v. AlanRidge Homes Ltd*. It applied only to the arbitration of differences "arising out of the contract". Gray J. found that the action in negligence was a separate cause of action that did not arise out of the agreement and therefore s. 7(5) of the *Arbitration Act* applied. However, Gray J. held that it would not be appropriate to grant a partial stay of the court action because allowing both the court action and the arbitration to proceed when the claims were overlapping could delay resolution of the disputes, could require a duplication of resources and could produce inconsistent findings (*Radewych*, para. 23). As a result, the plaintiff's court action was allowed to proceed.

After this review of the authorities, Justice Macleod noted that neither the parent company nor either of the subcontractors were parties to the arbitration agreement and therefore the arbitration agreement dealt with only some of the matters in dispute. Section 7(5) of the *Arbitration Act* therefore applied.

This finding led to the third issue: whether the issues could be reasonably separated as required by subsection 7(5)(b). Justice Macleod found (at para. 34) that the claims against AlanRidge, its parent company and the subcontractors were inextricably linked to one another and could not be reasonably separated. Subsection 7(5) did not therefore apply to allow a partial stay of the court action. The claims were linked and allowing two proceedings to go ahead would risk delay, a duplication of resources and inconsistent findings. Justice Macleod thus turned to section 5(3)(f) of the *Judicature Act*, preserving the power of the court to prevent the multiplicity of actions. In a straightforward application of the decision in *New Era*, he ordered that the Lamb's action proceed and the arbitration be stayed.

Justice Macleod did note (at para. 31) that when these issues arose in the context of international commercial arbitrations, the Alberta courts had taken a different approach. In *Kaverit Steel*, a case to which the *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6 applied, the Court of Appeal stayed the court action claims against parties who were not subject to the arbitration agreement pending the outcome of the arbitration. The court had acknowledged that there was a possibility of contradictory findings (*Kaverit Steel* at para. 21). Nevertheless, the arbitration was allowed to proceed and the court case was stayed pending that arbitration. Of course, the legislation governing stays in *Kaverit Steel* is very different from the legislation governing stays in domestic arbitrations. There is something similar to subsections 7(1) and (2) in the *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5, but nothing which is similar to subsection 7(5).

The Court of Appeal Decision

In this memorandum of judgment by Justices Jean Côté, Clifton O'Brien and Jack Watson, AlanRidge's appeal and application to reconsider *New Era* both failed due to subsection 7(6) of the Arbitration Act, the subsection providing "[t]here is no appeal from the court's decision under this section." The Court of Appeal was, however, clearly unhappy with the state of affairs, as it continued for a further seventeen paragraphs and commented on substantive aspects of the appeal.

It is true that AlanRidge argued that Justice Macleod's decision was not made under section 7 of the *Arbitration Act*, but under subsection 5(3)(f) of the *Judicature Act* instead. This argument was quickly dismissed, as AlanRidge had applied for a stay of the court action under section 7 and Justice Macleod had stayed the arbitration proceedings ancillary to section 7(4) of the Act.

AlanRidge also argued that subsection 7(6) should be narrowly construed so that there would be an appeal when the grounds of appeal alleged an erroneous interpretation of section 7. The Court of Appeal noted, however, that subsection 7(6) fulfilled an important policy consideration by promoting an "expeditious determination of the forum to hear the disputes" and preventing the dispute from becoming "bogged down by resort to the appeal process" (at para. 14). The Court of Appeal also noted (at para. 15) that the Ontario Court of Appeal took the same approach to subsection 7(6) in *Radewych*.

On the substantive matter that AlanRidge wanted to argue, however, the Court of Appeal said only that "as an appeal from the chambers judgment is foreclosed, we make no determination of its correctness." Instead of saying something substantive about the applicability of subsection 7(5) when there are extra parties to the court action and the issue in that court action and the arbitration cannot reasonably be separated, the Court of Appeal noted (at para. 16) that section 7 is "far from a model of clarity" and that the intended scope of subsection 7(5) "is far from clear", thereby arguably casting doubt on the correctness of their decision in *New Era*.

Further doubts on the correctness of *New Era* were cast when the Court of Appeal referred to two recent decisions of the British Columbia Court of Appeal that supported the position taken by the Alberta Court of Appeal in *Kaverit Steel*: *Seidel v. Telus Communications Inc.*, 2009 BCCA 104 and *MacKinnon v. Money Mart*, 2009 BCCA 103. The legislation in British Columbia is not based on the *Uniform Arbitration Act* and so that province's legislative language is very different from that in Alberta and Ontario. The Supreme Court of Canada has granted leave to appeal in *Seidel* and a tentative hearing date of May 12, 2010 has just been set.

The Court of Appeal concludes by noting the lack of clarity in section 7 demonstrated by this case, and suggesting that "legislative review and amendment may be appropriate, especially in circumstances in which appellate review of decisions under section 7 is precluded" (at para. 18).

Comment

Might the forthcoming Supreme Court of Canada decision in *Seidel* resolve the difference in the approach to stays of court actions in Alberta between applications under the *Arbitration Act* and

those under the *International Commercial Arbitration Act*? *Seidel* dealt with the interplay between class actions and arbitration. Seidel was a Telus customer who commenced a class action against Telus for breach of contract and for deceptive and unconscionable practice contrary to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. The British Columbia Court of Appeal had held in *MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd*., 2004 BCCA 473, 50 B.C.L.R. (3d) 291 ("*MacKinnon* (2004)") that an arbitration agreement applicable to a dispute is "inoperative" if the court certifies an action dealing with the dispute as a class proceeding under the *Class Proceedings Act*, R.S.B.C 1996, c. 50. That is the rough equivalent of an Alberta court refusing a stay under subsection 7(2) of our legislation. Telus therefore went along with the class action and did not insist on the arbitration agreement in its standard Telus Mobility service contracts.

On July 13, 2007, the Supreme Court of Canada issued its decisions in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, and *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921, dealing with arbitration clauses and class proceedings under the laws of Quebec. Telus took the position that these decisions in effect overruled *MacKinnon* (2004) and applied for a stay of the class action.

The main issue before the British Columbia Court of Appeal in *Seidel* was whether the Supreme Court of Canada decisions in *Dell* and *Rogers Wireless* had overruled *MacKinnon* (2004). The Court of Appeal held (at para. 16) that it had. The Court also held that *Dell* and *Rogers Wireless* were authorities that compelled the court to grant a stay of proceedings in respect of the claims in the class action that are covered by an arbitration agreement between the parties. When there was a dispute as to whether or not the claims were covered by the arbitration agreement, the Court of Appeal further held that *Dell* and *Rogers Wireless* required the issue be determined first by the arbitrator.

I am on record as being opposed to the approach to consumer arbitration adopted by the Supreme Court of Canada in *Dell* and *Rogers Wireless*. See Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006) 51 McGill Law Review 693 and "Common law courts interpret *Dell* broadly" Vol. 28, No. 7 The Lawyers Weekly (June 13, 2008) page 9. As I've said, too often corporate insistence on arbitration agreements in their standard form contracts is a strategy designed to insulate the business and its products or services from class actions which make uneconomical but valid claims by consumers possible, and from small claims courts. In my opinion, it would be a shame if the Supreme Court of Canada expanded its pro-business approach any further in *Seidel*. One-sided, take-it-or-leave-it, standard form contracts are not the sort of bargain consumer parties should be held to at all costs.