
CANADA / JUDGMENT

TELUS Communications Inc. v. Wellman

2019 SCC 19

COURT

Supreme Court of Canada

DECIDED

4 April 2019

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TELUS Communications Inc. v. Wellman

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Supreme Court Judgments

Date

2019-04-04

Neutral citation

2019 SCC 19

Report

[2019] 2 SCR 144

Case number

37722

Judges

Wagner, Richard; Abella, Rosalie Silberman; Moldaver, Michael J.; Karakatsanis, Andromache; Gascon, Clément; Côté, Suzanne; Brown, Russell; Rowe, Malcolm; Martin, Sheilah

On appeal from

Ontario

Subjects

Civil procedure

Notes

Case in brief SCC Case Information

Decision Content

SUPREME COURT OF CANADA

Citation: TELUS Communications Inc. v. Wellman, 2019 SCC 19, [2019] 2 S.C.R. 144

Appeal Heard: November 6, 2018

Judgment Rendered: April 4, 2019

Docket: 37722

Between:

TELUS Communications Inc.

Appellant

and

Avraham Wellman

Respondent

- and -

Attorney General of British Columbia, ADR Chambers Inc., Canadian Chamber of Commerce, Public Interest Advocacy Centre, Consumers Council of Canada, Canadian Federation of Independent Business, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic and Consumers' Association of Canada

Interveners

Coram: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

Reasons for Judgment:

(paras. 1 to 105)

Moldaver J. (Gascon, Côté, Brown and Rowe JJ. concurring)

Dissenting Reasons:

(paras. 106 to 172)

Abella and Karakatsanis JJ. (Wagner C.J. and Martin J. concurring)

TELUS Communications Inc. v. Wellman, 2019 SCC 19, [2019] 2 S.C.R. 144

TELUS Communications Inc. Appellant

v.

Avraham Wellman Respondent

and

Attorney General of British Columbia,

ADR Chambers Inc., Canadian Chamber

of Commerce, Public Interest Advocacy Centre,

Consumers Council of Canada, Canadian

Federation of Independent Business, Samuelson-Glushko

Canadian Internet Policy and Public Interest Clinic and

Consumers' Association of Canada Interveners

Indexed as: TELUS Communications Inc. v. Wellman

2019 SCC 19

File No.: 37722.

2018: November 6; 2019: April 4.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

on appeal from the court of appeal for ontario

Civil procedure — Stay — Class actions — Consumer and non-consumer claims — Arbitration clause — Customer filing class action for damages alleging cell phone service provider engaged in deceptive practices — Class consisting of both consumers and non-consumers — Cell phone service provider's standard terms and conditions containing mandatory arbitration clause — Arbitration clause invalidated by provincial consumer protection legislation with respect to claims by consumers — Cell phone service provider relying on arbitration clause to seek stay of proceedings with respect to non-consumers' claims — Whether provincial statute governing arbitration grants court discretion to refuse to stay non-consumers' claims — Arbitration Act, 1991, S.O. 1991, c. 17, s. 7 — Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A.

W filed a proposed class action for damages against TELUS on behalf of about two million Ontario residents who entered into mobile phone service contracts with TELUS during a specified timeframe. The class consists of both consumers and non-consumers (business customers). W alleges that TELUS engaged in an undisclosed practice of rounding up calls to the next minute such that customers were overcharged and were not provided the number of minutes to which they were entitled. The standard terms and conditions of the service contracts included an arbitration clause stipulating that all claims arising out of or in relation to the contract, apart from the collection of accounts, must be determined through mediation and, failing that, arbitration. This clause was invalidated by the Consumer Protection Act to the extent that it

would otherwise prevent class members who qualify as consumers from pursuing their claims in court. However, since the business customers do not benefit from this protection, TELUS sought to have the proceeding stayed with respect to the business customer claims, relying on the arbitration clause. The motions judge dismissed TELUS's motion for a stay and certified the action. She held that s. 7(5) of the Arbitration Act, 1991 grants the courts discretion to refuse a stay where it would not be reasonable to separate the matters dealt with in the arbitration agreement from the other matters, thereby allowing all of the matters to proceed in court. She was of the view that this discretion may be exercised to allow non-consumer claims that are otherwise subject to an arbitration clause to participate in a class action, where it is reasonable to do so. The Court of Appeal dismissed TELUS's appeal.

Held (Wagner C.J. and Abella, Karakatsanis and Martin JJ. dissenting): The appeal should be allowed and the claims of the business customers stayed.

Per Moldaver, Gascon, Côté, Brown and Rowe JJ.: Section 7(5) of the Arbitration Act, 1991 does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement. The protections afforded by the Consumer Protection Act allow the consumers to pursue their claims in court, but the business customers remain bound by the arbitration agreements into which they entered. Accordingly, the latter are exposed to a stay under s. 7(1) of the Arbitration Act, 1991. Since the only potential exception to the general rule under s. 7(1) relied on by W does not apply, the business customer claims should be stayed.

In keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts, s. 6 of the Arbitration Act, 1991 signals that courts are generally to take a hands off approach to matters governed by that statute. Section 7(1) of the Arbitration Act, 1991 establishes the general rule that where a party to an arbitration agreement commences a proceeding in respect of a matter dealt with in the agreement, the court shall, on the motion of another party to the agreement, stay the court proceeding in favour of arbitration. This general rule reaffirms the concept of party autonomy and upholds the policy underlying the Arbitration Act, 1991 that parties to a valid arbitration agreement should abide by their agreement. Section 7(2) lists five exceptions to the general rule under s. 7(1) where it would be either unfair or impractical to refer the matter to arbitration. Section 7(5) provides a further exception to the general rule under s. 7(1) and consists of two main components. First, s. 7(5)(a) and (b) set out two preconditions. The first precondition is met if the agreement deals with only some of the matters in respect of which the proceeding was commenced. That is, the proceeding must involve at least one matter that is dealt with in the arbitration agreement and at least one matter that is not dealt with in the arbitration agreement. The second precondition is met if it is reasonable to separate the matters dealt with in the agreement from the other matters. Second, if both preconditions are satisfied, then instead of ordering a full stay, the court may allow the matters that are not dealt with in the arbitration agreement to proceed in court, though it must nonetheless stay the court proceeding in respect of the matters that are dealt with in the agreement. If the preconditions are not met, then the discretionary exception under s. 7(5) is not

triggered as s. 7(5) can have effect only if the two preconditions are satisfied. At that point, unless one of the exceptions listed in s. 7(2) applies, the general rule under s. 7(1) would apply, meaning that the proceeding must be stayed.

Policy considerations cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make s. 7(5) say something it does not. While policy analysis has a legitimate role in the interpretive process, the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. This is particularly so given that the Ontario legislature has already spoken to some of these policy concerns by shielding consumers from the potentially harsh results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts, through the Consumer Protection Act. The legislature made a careful policy choice to exempt consumers — and only consumers — from the ordinary enforcement of arbitration agreements. That choice must be respected, not undermined by reading s. 7(5) in a way that permits courts to treat consumers and non-consumers as one and the same.

While there can be no doubt as to the importance of promoting access to justice, this objective cannot, absent express direction from the legislature, be permitted to overwhelm the other important objectives pursued by the Arbitration Act, 1991. To do so would undermine the legislature's stated objective of ensuring parties to a valid arbitration agreement abide by their agreement, reduce the degree of certainty and predictability associated with arbitration agreements, and weaken the concept of party autonomy in the commercial setting. It would expand the opportunities for parties to a valid arbitration agreement to avoid their agreement and seek relief in court. Furthermore, this case is not about debating the merits and demerits of enforcing arbitration clauses contained in standard form contracts. Rather, it is about the proper interpretation of s. 7(5) of the Arbitration Act, 1991. And, while distinguishing between consumers and non-consumers may be a difficult exercise in certain cases, that difficulty does not bear on the proper interpretation of s. 7(5). Sorting between consumers and non-consumers may be cumbersome in certain cases, but this inconvenience does not permit the court to recast the legislation as it sees fit in order to avoid such difficulties. Permitting non-consumers to tag along with consumers on the basis that it would be cumbersome to sort between the two would also allow commercial entities to find the inside of a courtroom despite having agreed to arbitration, even where the arbitration agreement was fully negotiated. This would reduce the degree of certainty and predictability associated with arbitration agreements and permit parties to those agreements to piggyback onto the claims of others. Lastly, where the application of an Ontario statute, properly interpreted, leads to a multiplicity of proceedings, the court must give effect to the will of the legislature. Section 7(5) of the Arbitration Act, 1991 expressly contemplates bifurcation of proceedings, as it permits the court to order a partial stay, thereby potentially resulting in concurrent arbitration and court adjudication.

The sole matter at issue in the proceeding commenced by W is alleged overbilling. This matter is dealt with in the arbitration agreements into which the consumers and business customers entered. Therefore, because there is at least one matter in the proceeding that is dealt with in the arbitration agreements, the general rule under s. 7(1) of the Arbitration Act, 1991 would ordinarily require a stay of the proceeding as a whole, leaving both consumers and business customers locked out of court. But, s. 7(5) of the Consumer Protection Act renders the arbitration agreements entered into by the consumers invalid to the extent that they would otherwise prevent the consumers from commencing or joining a class action of the kind commenced by W. The business customers, however, do not qualify as consumers and as such they cannot invoke the protections that the consumers enjoy.

The only potential exception to s. 7(1) of the Arbitration Act, 1991 sought to be invoked on behalf of the business customers in this case, the partial stay provision under s. 7(5), offers no assistance. This is because the sole matter at issue in the proceeding is dealt with in the arbitration agreements into which the consumers and business customers entered, such that the first precondition set out in s. 7(5)(a) is not met. Consequently, the general rule under s. 7(1) is left intact insofar as the business customers are concerned and the proceeding must be stayed. However, this stay must be restricted to the parties who are legally bound by an arbitration agreement — namely, TELUS and the business customers. In sum, the motions judge and the Court of Appeal erred in law by interpreting s. 7(5) of the Arbitration Act, 1991 incorrectly and refusing to order a stay that, under s. 7(1), was mandatory. Section 7(5) of the Arbitration Act, 1991 does not permit the court to ignore a valid and binding arbitration agreement.

Per Wagner C.J. and Abella, Karakatsanis and Martin JJ. (dissenting): The appeal should be dismissed. Where a proceeding includes matters covered by an arbitration agreement and other matters that are not, s. 7(5) of the Arbitration Act, 1991 gives a judge discretion to allow the entire proceeding to continue in court, even if some parties would otherwise be subject to an arbitration clause.

Section 7(5) of the Arbitration Act, 1991 reflects an explicit legislative intention to override an otherwise applicable arbitration clause. The words of the provision state that “the court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters”. This means that the court can either stay the arbitrable matters before it or allow them to proceed. Logically, a discretionary ability to grant a partial stay also includes the power to refuse a partial stay. The only interpretation that gives meaningful effect to the discretionary language of s. 7(5) is one that confers on judges the ability to allow both arbitrable and non-arbitrable disputes to proceed in court. An assertion that a court can never stay arbitrable matters under s. 7(5) renders the opening phrase — “may stay the proceeding with respect to the matters dealt with in the arbitration agreement” — superfluous. By interpreting the provision to apply only to non-arbitrable matters, s. 7(5) adds nothing to a judge’s existing discretion.

Ontario's Arbitration Act, 1991 was enacted to allow parties to design their own settlement processes and resolve their disputes outside the courts. It anticipated two or more parties freely negotiating their arbitral process. To ensure expedient resolution and lower litigation costs, the Arbitration Act, 1991 limited court intervention in arbitrable disputes. But it also gave judges discretion to permit court proceedings in certain limited circumstances, such as where the arbitration agreement was manifestly unfair. Where a proceeding includes both matters covered by an arbitration agreement and other matters that are not, s. 7(5) gives a judge discretion to allow the entire proceeding to continue in court, even if some parties would otherwise be subject to an arbitration clause. Since 2002, the Ontario Court of Appeal has interpreted s. 7(5) as granting the discretion to stay matters that would otherwise be subject to arbitration. Similarly, for nearly a decade, the Ontario Court of Appeal has interpreted s. 7(5) as permitting otherwise arbitrable matters to be joined with class actions in the public interests of avoiding duplicative proceedings, increased costs, and the risk of inconsistent results. This interpretation aligns with the text and scheme of the provisions and is consistent not only with the purposes motivating the enactment of the Arbitration Act, 1991 but also with the purpose of s. 7(5) itself.

The overall purpose of the Arbitration Act, 1991 was to promote access to justice. Its chosen means of achieving that goal was to promote accessibility by giving parties the choice of resolving disputes outside the court system. The reason for creating this option was a recognition that the court system could be costly and slow. The courts' discretion to intervene in arbitrable matters was therefore narrowed to further the goals of expedient dispute resolution.

Arbitration was intended to be a means by which parties on a relatively equal bargaining footing chose to design an alternative dispute mechanism. One cannot talk about "equal bargaining power" and "party autonomy" if the very nature of the contract reveals that one party has exclusive contractual authority. Parties to mandatory individual arbitration clauses cannot reasonably be said to have "come to the table" and bargained, since there is no bargaining table. That individuals and companies sign these contracts is a function not of bargaining choices, but of an absence of choice. All of TELUS's clients — both business and consumer — signed the same, non-negotiable standard form agreement. TELUS's individualized arbitration clause effectively precludes access to justice for business clients when a low-value claim does not justify the expense. And its mandatory nature illustrates that the animating rationales of party autonomy and freedom of contract are nowhere to be seen.

By inserting the reasonableness requirement in s. 7(5)(b) of the Arbitration Act, 1991, the provincial legislature clearly contemplated that in certain circumstances, it would be unreasonable to separate the matters dealt with in the arbitration agreement from the other matters. The availability of judicial discretion in s. 7(5) does not require judges to allow a class action including arbitrable claims to proceed: it simply lets them decide when it is reasonable to do so. Eliminating judicial discretion, on the other hand, effectively eliminates access to justice. In this light, s. 7(5) must be interpreted to give judges the discretion to refuse to stay arbitrable claims if it is unreasonable to separate them from non-arbitrable claims. This interpretation applies with equal force whether the proceeding is between two or more named parties, or is a

class action. An interpretation of s. 7(5) of the Arbitration Act, 1991 which permits otherwise arbitrable matters to be joined with class actions in the public interest of avoiding duplicative proceedings, increased costs, and the risk of inconsistent results aligns with the text and scheme of the provisions and is consistent not only with the purposes motivating the enactment of the Arbitration Act, 1991 but also with the purpose of s. 7(5) itself.

TELUS's interpretation would result in costly and time-consuming factual inquiries on how to divide the arbitrable and non-arbitrable claims even where the substance of both claims is identical, as in this case. Both parties acknowledged the potential difficulties associated with drawing the line between a "consumer" as defined by the Consumer Protection Act, who is exempt from arbitration, and a business customer, who is not. This distinction may be especially difficult to determine for those individuals who use their cell phone for both personal and business purposes. For these individuals, determining whether they fall within the scope of the exception in the Consumer Protection Act adds unnecessary complexity.

The purpose of the Arbitration Act, 1991, was to facilitate the ability of parties to negotiate their own process for resolving disputes outside of the courts, on the premise that access to justice had as much to do with access to a result as with access to a judge. To impose arbitration on unwilling parties violates the spirit of the Arbitration Act, 1991 and the arbitral process. This operates as an invisible but formidable barrier to a remedy and presumptively immunizes wrongdoing from accountability contrary to our most fundamental notions of civil justice. Section 7(5)(b) of the Arbitration Act, 1991 gave the motions judge discretion to consider whether it was reasonable to separate the matters dealt with in the agreement (claims of business customers) from the other matters (the consumer claims). The discretion was properly exercised in this case to allow the business claims to be joined with the consumer class action dealing with the same issues.

Cases Cited

By Moldaver J.

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Co., [1952] 4 D.L.R. 300; Ontario Hydro v. Denison Mines Ltd., 1992 CarswellOnt 3497; Astoria Medical Group v. Health Insurance Plan of Greater New York, 182 N.E.2d 85 (1962); Re Arbitration Act (1964), 47 W.W.R. 544; Haas v. Gunasekaram, 2016 ONCA 744, 62 B.L.R. (5th) 1; Inforica Inc. v. CGI Information Systems and Management Consultants Inc., 2009 ONCA 642, 97 O.R. (3d) 161; Alberici Western Constructors Ltd. v. Saskatchewan Power Corp., 2016 SKCA 46, 476 Sask. R. 255; Briones v. National Money Mart Co., 2013 MBQB 168, 295 Man. R. (2d) 101, aff'd 2014 MBCA 57, 306 Man. R. (2d) 129; MDG Kingston Inc. v. MDG Computers Canada Inc., 2008 ONCA 656, 92 O.R. (3d) 4; Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87; Heller v. Uber Technologies Inc., 2019 ONCA 1.

By Abella and Karakatsanis JJ. (dissenting)

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; Griffin v. Dell Canada Inc., 2010 ONCA 29, 98 O.R. (3d) 481; Griffin v. Dell Canada Inc. (2009), 72 C.P.C. (6th) 158; Radewych v. Brookfield Homes (Ontario) Ltd., 2007 CanLII 23358, aff'd 2007 ONCA 721; Johnston v. Goudie (2006), 212 O.A.C. 79; Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation (2007), 66 C.L.R. (3d) 78, aff'd 2008 ONCA 768, 76 C.L.R. (3d) 1; Frambordeaux Developments Inc. v. Romandale Farms Ltd., 2007 CanLII 55364; New Era Nutrition Inc. v. Balance Bar Co., 2004 ABCA 280, 245 D.L.R. (4th) 107; R. v. Alex, 2017 SCC 37, [2017] 1 S.C.R. 967; Rosedale Motors Inc. v. Petro-Canada Inc. (1998), 42 O.R. (3d) 776; Brown v. Murphy (2002), 59 O.R. (3d) 404; Seidel v. TELUS Communications Inc., 2011 SCC 15, [2011] 1 S.C.R. 531.

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Uniform Law Conference of Canada. Uniform Arbitration Act (1990) (online: https://www.ulcc.ca/images/stories/Uniform_Acts_EN/Arbitrat_En.pdf; archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC19_1_eng.pdf).

APPEAL from a judgment of the Ontario Court of Appeal (Weiler, Blair and van Rensburg JJ.A.), 2017 ONCA 433, 138 O.R. (3d) 413, 413 D.L.R. (4th) 684, 100 C.P.C. (7th) 1, [2017] O.J. No. 2800 (QL), 2017 CarswellOnt 8100 (WL Can.), [2017] AZ-51397363, affirming a decision of Conway J., 2014 ONSC 3318, 63 C.P.C. (7th) 50, [2014] O.J. No. 5613 (QL), 2014 CarswellOnt 16562 (WL Can.). Appeal allowed, Wagner C.J., Abella, Karakatsanis and Martin JJ. dissenting.

D. Geoffrey G. Cowper, Q.C., Andrew D. Borrell, Alexandra Mitretodis and Alan Dabb, for the appellant.

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Brandon Kain, Adam Goldenberg and Ljiljana Stanić, for the intervener the Canadian Chamber of Commerce.

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Anthony Daimsis, for the intervener the Canadian Federation of Independent Business.

Marina Pavlović and Cynthia Khoo, for the intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Daniel E. H. Bach, Tyler J. Planeta and Michael Sobkin, for the intervener the Consumers' Association of Canada.

The judgment of Moldaver, Gascon, Côté, Brown and Rowe JJ. was delivered by
Moldaver J. —

I. Overview

- [1] This appeal requires the Court to decide what happens when a series of arbitration agreements, the Ontario Arbitration Act, 1991, S.O. 1991, c. 17 (“Arbitration Act”),^[1] the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A (“Consumer Protection Act”), and a consumer/non-consumer class action collide.
- [2] This collision occurred when the respondent, Avraham Wellman, filed a proposed class action in Ontario against the appellant, TELUS Communications Inc. (“TELUS”), on behalf of about two million Ontario residents who entered into mobile phone service contracts with the company during a specified timeframe. The class consists of both consumers and non-consumers, the latter being business customers. The action centres on the allegation that TELUS engaged in an undisclosed practice of “rounding up” calls to the next minute such that customers were overcharged and were not provided the number of minutes to which they were entitled.
- [3] The contracts in question, which were not negotiated, contain standard terms and conditions drafted by TELUS, including an arbitration clause which, broadly speaking, stipulates that all claims arising out of or in relation to the contract, apart from the collection of accounts by TELUS, shall be determined through mediation and, failing that, arbitration.
- [4] By virtue of the Consumer Protection Act, however, this arbitration clause is invalid to the extent that it would otherwise prevent class members who qualify as “consumers” from commencing or joining a class action of the kind commenced by Mr. Wellman. Indeed, as we shall see, the Consumer Protection Act expressly shields consumers from a stay of proceedings under the Arbitration Act. Consequently, they are free to pursue their claims in court. The business customers, however, do not benefit from these protections. So where does this leave them?

- [5] The answer, Mr. Wellman says, lies in s. 7(5) of the Arbitration Act which, read alongside s. 7(1), provides as follows:

Stay

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

...

Agreement covering part of dispute

- (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
- (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
- (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.
- [6] In Mr. Wellman's submission, s. 7(5) grants the court discretion to allow all of the class members, consumers and business customers alike, to pursue their claims together in court, provided it would not be reasonable to separate their claims. This is so, Mr. Wellman maintains, despite the fact that the business customers contracted to resolve their claims through arbitration and would otherwise be bound by that agreement. The courts below, following *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481, leave to appeal refused, [2010] 1 S.C.R. viii, agreed with Mr. Wellman.
- [7] TELUS sees things differently. It contends that under s. 7(5), a court has no authority to refuse to stay claims that are subject to an otherwise valid and enforceable arbitration agreement. Rather, it says that the only exceptions to the general stay provision under s. 7(1) are found in s. 7(2), and unless one of those exceptions applies, claims that are subject to arbitration must be stayed — full stop. It submits that since none of these exceptions applies, the business customer claims must be stayed.
- [8] For reasons that follow, I am of the view that s. 7(5) of the Arbitration Act does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement. To borrow the language from this Court's decision in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, it is not "a legislative override of the parties' freedom to choose arbitration" (para. 40). Instead, as I will develop, when the s. 7 framework is considered along with the protections afforded by the Consumer Protection Act, it becomes clear that while the consumers remain free to pursue their claims in court, the business customers do not. Rather, they remain bound by the arbitration agreements into which they entered, thereby leaving them exposed to a stay under s. 7(1) of the Arbitration Act. The only potential exception to s. 7(1) sought to be invoked on behalf of the business customers in

this case, the partial stay provision under s. 7(5), offers no assistance. This is because the sole “matter” at issue in the proceeding — alleged overbilling — is dealt with in the arbitration agreements into which the consumers and business customers entered, such that the first precondition set out in s. 7(5)(a) is not met. Consequently, the general rule under s. 7(1) is left intact insofar as the business customers are concerned.

[9] I would therefore allow the appeal and stay the business customer claims accordingly.

II. Background

A. TELUS Mobile Phone Service Contracts

[10] Mobile phone services arrived in Canada in the mid-1980s. For about a decade, the main service providers, including TELUS, billed customers on a per-minute basis. TELUS then started offering per-second billing but returned to per-minute billing in 2002.

[11] Throughout the relevant period, TELUS’s monthly plans included a fixed number of minutes for a set fee, with additional charges for excess usage. For example, TELUS offered a plan giving customers 50 minutes of service plus 50 local minutes for \$30, with a charge of 30 cents for each additional local minute. Usage was calculated by rounding up call length to the next minute. So, for example, a call lasting one minute and one second was rounded up to two minutes.

[12] Each customer who signed up for a per-minute plan entered into a written contract incorporating TELUS’s standard terms and conditions, including an arbitration clause which, broadly speaking, stipulates that all claims arising out of or in relation to the contract, apart from the collection of accounts by TELUS, must be determined by private and confidential mediation and, failing that, private, confidential, and binding arbitration.

B. Mr. Wellman’s Class Action

[13] In 2006, Mr. Wellman entered into a per-minute plan with TELUS. Years later, he filed a proposed class action in Ontario against TELUS[2] alleging that between 2002 and 2010, TELUS’s standard terms and conditions made no mention of the practice of rounding up. The action consists of some two million Ontario residents who entered into per-minute plans with TELUS between August 2006 and July 2010. Seventy percent of the class members (about 1,400,000) are consumers who purchased plans for personal use, while 30 percent (about 600,000) are non-consumers who purchased plans for business use.

[14] Mr. Wellman, who pleads that he qualifies as a consumer, alleges that TELUS’s undisclosed practice of rounding up accelerated the depletion of the fixed number of minutes class members purchased and prematurely subjected them to excess usage charges. Consequently, he says, class members were overcharged and were not provided the number of minutes to which they were entitled. On this basis, he asserts three causes of action: breach of contract, breach of the Consumer Protection Act, and unjust enrichment. He

claims \$500 million in damages and \$20 million in punitive damages on behalf of the class.

[15] Mr. Wellman brought a motion to have the action certified as a class action under the Class Proceedings Act, 1992, S.O. 1992, c. 6 (“Class Proceedings Act”).[3] In response, TELUS brought a motion to have the proceeding stayed with respect to the non-consumer claims, relying on the arbitration clause contained in its standard terms and conditions.

III. Statutory Provisions

[16] Two statutes lie at the heart of this appeal: the Arbitration Act and the Consumer Protection Act. The key sections of these two pieces of legislation are set out below. As it happens, there is some overlap in terms of section numbers, so care must be taken to keep in mind which statute is being discussed when a section number is referred to in these reasons.

Arbitration Act, 1991, S.O. 1991, c. 17

Definitions

1 In this Act,

“arbitration agreement” means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them;

...

Court Intervention

Court intervention limited

6 No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
3. To prevent unequal or unfair treatment of parties to arbitration agreements.
4. To enforce awards.

Stay

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

Exceptions

- (2) However, the court may refuse to stay the proceeding in any of the following cases:
1. A party entered into the arbitration agreement while under a legal incapacity.

2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

Arbitration may continue

- (3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

Effect of refusal to stay

- (4) If the court refuses to stay the proceeding,
 - (a) no arbitration of the dispute shall be commenced; and
 - (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

Agreement covering part of dispute

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

No appeal

- (6) There is no appeal from the court's decision.

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A

No waiver of substantive and procedural rights

7 (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

Limitation on effect of term requiring arbitration

- (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.

...

Non-application of Arbitration Act, 1991

- (5) Subsection 7 (1) of the Arbitration Act, 1991 does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

Class proceedings

8 (1) A consumer may commence a proceeding on behalf of members of a class under the Class Proceedings Act, 1992 or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

IV. Decisions Below

A. Ontario Superior Court (Conway J.), 2014 ONSC 3318, 63 C.P.C. (7th) 50

- [17] Before the motions judge, Conway J., TELUS conceded that s. 7(2) of the Consumer Protection Act shielded the consumers from the effect of the arbitration clause. It maintained, however, that the claims of the business customers, who enjoy no protection under the Consumer Protection Act, had to be stayed because they were subject to a valid and binding arbitration agreement.
- [18] The motions judge disagreed. Relying on the Ontario Court of Appeal's decision in Griffin, she held that s. 7(5) of the Arbitration Act grants the courts discretion to refuse a stay where it would not be reasonable to separate the matters dealt with in the arbitration agreement from the other matters, thereby allowing all of the matters to proceed in court. She added that pursuant to Griffin, "this discretion may be exercised to allow non-consumer claims (that are otherwise subject to an arbitration clause) to participate in a class action, where it is reasonable to do so" (para. 89). She rejected TELUS's contention that Griffin had been overruled by this Court's decision in Seidel.
- [19] She then turned to the application of s. 7(5) of the Arbitration Act. She found that it would not be reasonable to separate the consumer claims from the business customer claims, observing that:
- the consumer claims represented 70 percent of all claims;
 - the liability and damage issues for both consumers and business customers were the same;
 - group arbitration was not permitted for the business customer claims; and
 - separating the two proceedings could lead to inefficiency, risk inconsistent results, and create a multiplicity of proceedings.

[20] Given her finding that it would not be reasonable to separate the consumer claims from the business customer claims, the motions judge declined to stay the business customer claims. Further, she applied the five-part test for certification and concluded that it had been met, certifying the action accordingly. TELUS appealed her dismissal of the stay application.[4]

B. Ontario Court of Appeal (Weiler, Blair and van Rensburg JJ.A.), 2017 ONCA 433, 138 O.R. (3d) 413

(1) Majority Reasons (van Rensburg J.A., Weiler J.A. Concurring)

[21] Justice van Rensburg, writing for herself and Justice Weiler, stated that the “sole issue” on appeal was whether Griffin had been overtaken by Seidel (para. 97). She answered “no”. She considered that Griffin was “consistent in principle with Seidel but was decided in a different legislative context” (para. 59), adding that “[t]he outcomes in the two cases were driven, not by competing attitudes toward arbitration as a dispute resolution mechanism, but by the specific legislative framework in each jurisdiction respecting arbitration and consumer protection” (para. 60). She reasoned that while Seidel recognizes the value and importance of private arbitration and affirms that arbitration clauses will generally be upheld, Griffin “does not contradict the general principle that contractual arbitration clauses presumptively will be enforced” (para. 62).

[22] Having determined that Griffin remained good law, she described the s. 7 regime as follows:

While s. 7(1) of Ontario’s Arbitration Act provides that a court “shall” stay a court proceeding commenced by a party to an arbitration agreement on the motion of another party to the agreement, this is subject to the exceptions set out in s. 7(2). The exceptions confer a discretion on the court to intervene (1) where a party entered into the agreement while under a legal incapacity, (2) where the arbitration agreement is invalid, (3) where the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law, (4) where the motion was brought with undue delay and (5) where the matter is a proper one for default or summary judgment

Section 7(5) of the Arbitration Act is an extension of the court’s discretion and operates where an action has been commenced and the arbitration agreement covers some, but not all, claims. In such a case, the court may grant a partial stay, but only where it is “reasonable to separate the matters dealt with in the agreement from the other matters”. Section 7(5) anticipates that when an action contains claims that are subject to an arbitration agreement and claims that are not, bifurcated proceedings will result when it is reasonable to impose a partial stay. When a partial stay is not reasonable, the proceedings will not be bifurcated.

In Ontario, accordingly, courts have the discretion to refuse to enforce an arbitration clause that covers some claims in an action when other claims are not subject to domestic arbitration. It is this legislative choice that drives the analysis. [paras. 71-73]

- [23] She went on to consider two further arguments advanced by TELUS. First, relying on this Court's decision in *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, TELUS maintained that the procedural device of a class action proceeding does not alter the parties' substantive right to choose arbitration. Second, TELUS claimed that s. 7(5) cannot be read as conferring jurisdiction over claims that the parties have agreed to submit to arbitration and that such claims are subject to the mandatory stay under s. 7(1).
- [24] Justice van Rensburg rejected both of these arguments. She stated that TELUS had misinterpreted *Seidel* and ignored its main teaching: "... the enforceability of an arbitration clause depends on the legislative context and whether the legislature intended to limit the freedom to arbitrate" (para. 81). She added that *Seidel* did not characterize the issue as one of jurisdiction, nor did it speak in terms of procedural versus substantive rights. Instead, the issue was one of statutory interpretation. She also saw nothing in the Arbitration Act suggesting that an arbitration clause removes or ousts the court's jurisdiction over a dispute, adding that "injecting the question of jurisdiction into the discussion of whether a partial stay of proceedings can be granted under Ontario's Arbitration Act is both unnecessary and misleading" (para. 86).
- [25] In the result, the Court of Appeal dismissed the appeal and upheld the motions judge's decision to refuse a stay.
- (2) Concurring Reasons (Blair J.A.)
- [26] In brief concurring reasons, Blair J.A. agreed in the result but arrived at this outcome "on a more restricted basis" (para. 100). He agreed that *Griffin* had not been overtaken by *Seidel* and that *Griffin* was dispositive of the issue before the court. However, he expressed "reservations about the correctness of the decision in *Griffin* as it relates to a partial stay of the non-consumer claims" (para. 101). In particular, he raised two questions which he said were not addressed in *Griffin* but which "may warrant further consideration" (para. 103).
- [27] First, he asked, "as a matter of statutory interpretation, may the words 'other matters' in s. 7(5) of the Arbitration Act, 1991 — when considered in the context of s. 7 as a whole and the purposes of that Act — be read in a way that cross-pollinates the partial-refusal-to-stay power from a single arbitration agreement context to other arbitration agreements involving different parties and containing arbitration clauses that are otherwise valid and enforceable? Or do 'other matters' refer to other matters arising between the same contracting parties but that are not covered by the arbitration agreement between them?" (para. 104). He observed that s. 7 of the Arbitration Act "appears to address circumstances relating to a single arbitration agreement, and not the interconnection between a number of such agreements involving different parties" (para. 104).
- [28] Second, he asked, "more generally, ought litigants be entitled to sidestep what would otherwise be substantive and statutory impediments to proceeding in court with an arbitral claim by the simple expedient of adding consumer claims (which cannot be stayed, by virtue of the Consumer Protection Act), to non-consumer claims (which generally are subject to a

mandatory stay) and wrapping all claims in the cloak of a class proceeding? Put another way, may the Class Proceedings Act (a procedural rights statute) be used to override the provisions of the Arbitration Act, 1991 affording contractual parties the right to agree to binding arbitration (a substantive right)?” (para. 105).

V. Issue

[29] In the context of a proposed consumer/non-consumer class action where only the non-consumer claims are subject to an otherwise valid and binding arbitration agreement, does s. 7(5) of the Arbitration Act grant the court discretion to refuse to stay the non-consumer claims?

VI. Analysis

A. Standard of Review

[30] The issue on appeal is one of statutory interpretation and is therefore properly characterized as a question of law (see *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 33). As such, the standard of review is correctness (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8).

B. Key Precedents

[31] The two main jurisprudential pillars on which the parties’ arguments rest are *Griffin* and *Seidel*. The relationship between these two decisions was at the heart of the courts’ decisions below. Accordingly, as a preliminary matter, it will be useful to provide a brief overview of these two key decisions.

(1) Griffin

[32] *Griffin* involved a proposed class action brought in Ontario on behalf of purchasers — both consumers and non-consumers[5] — of allegedly defective Dell computers. Dell’s standard form agreement contained a mandatory arbitration clause. The plaintiff brought a motion to certify the action as a class proceeding, to which Dell responded with a motion for a stay under s. 7 of the Arbitration Act. The motions judge refused Dell’s request for a stay and granted certification. Dell appealed.

[33] Justice Sharpe, writing for a unanimous five-member panel, dismissed the appeal. First, he held that s. 7(2) of the Consumer Protection Act applied such that the arbitration clause did not bar the consumer claims from proceeding in court. He then considered whether a stay of the non-consumer claims should be granted. He set out the general approach to the enforceability of arbitration agreements as follows:

Contracting parties often specify that any disputes arising from their relationship are to be arbitrated rather than litigated in the courts. When they do, they are ordinarily entitled to have their chosen method of dispute resolution respected by the courts. The modern approach,

reflected by [Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, [2007] 2 S.C.R. 801], is to require parties to adhere to their choice and to view arbitration as an autonomous, self-contained and self-sufficient process, presumptively immune from judicial intervention:

[Inforica Inc. v. CGI Information Systems and Management Consultants Inc., 2009 ONCA 642, 97 O.R. (3d) 161], at para. 14. [para. 28]

[34] Turning to the relevant statutory provisions, Sharpe J.A. interpreted s. 7(5) of the Arbitration Act as “confer[ring] a discretion to grant a partial stay where an action involves some claims that are subject to an arbitration and some claims that are not” (para. 45). He stated that such an order may be made where it would be reasonable to separate the matters dealt with in the arbitration agreement from the other matters. He also referred to a line of cases in which courts refused a stay and allowed the action to proceed on the basis that only some of the litigants were bound by an arbitration clause and the claims were so closely related that it would be unreasonable to separate them (see *Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 CanLII 23358 (S.C.J.), *aff’d* 2007 ONCA 721; *Johnston v. Goudie* (2006), 212 O.A.C. 79; *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation* (2007), 66 C.L.R. (3d) 78 (S.C.J.), *aff’d* 2008 ONCA 768, 76 C.L.R. (3d) 1; *Frambordeaux Developments Inc. v. Romandale Farms Ltd.*, 2007 CanLII 55364 (Ont. S.C.J.); *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280, 357 A.R. 184 (involving a provision in the corresponding Alberta legislation that is equivalent to s. 7(5) of the Arbitration Act)).

[35] On the facts, he concluded that it would not be reasonable to separate the consumer claims from the non-consumer claims, noting (among other things) that: (1) 70 percent of the claims were consumer claims and would be litigated in the class proceeding; (2) the liability and damages issues were the same for consumers and non-consumers; and (3) group arbitration was not permitted, so the non-consumer claims would have to be arbitrated on an individual basis. He considered that granting a stay would lead to inefficiency, a potential multiplicity of proceedings, and added cost and delay. He also stressed that it was clear on the record that staying any claims would not result in those claims being arbitrated because, as the motions judge put it, it was “fanciful to think that any claimant could pursue an individual claim in a complex products liability case” (para. 1, citing *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (Ont. S.C.J.), at para. 92). Thus, he stated, “[t]he choice is not between arbitration and class proceeding; the real choice is between clothing Dell with immunity from liability for defective goods sold to non-consumers and giving those purchasers the same day in court afforded to consumers by way of the class proceeding” (para. 57).

[36] In the result, the Court of Appeal dismissed the appeal. This Court denied Dell’s application for leave to appeal.

(2) Seidel

- [37] Seidel, which came not long after Griffin, involved a proposed class action filed in British Columbia against TELUS. As in the present case, the dispute arose out of mobile phone service contracts containing an arbitration clause. The representative plaintiff, a consumer, asserted a variety of claims, including (but not limited to) statutory causes of action under the B.C. Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 (“BPCPA”), alleging that TELUS falsely represented to her and other consumers how it calculates air time for billing purposes. Section 172 of the BPCPA contains a remedy whereby a person other than a supplier may bring an action to enforce the statute’s consumer protection standards, while s. 3 stipulates that any agreement between the parties that would waive or release the protections afforded by the BPCPA is void.
- [38] The plaintiff brought an application to have the action certified as a class proceeding. In response, TELUS applied for a stay, relying on the arbitration clause and s. 15 of the B.C. Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (now the Arbitration Act), which provides that if a party to an arbitration agreement commences proceedings against another party to the agreement in respect of a matter to be submitted to arbitration, then a party to the proceeding may apply for a stay, and the court must grant that stay unless the agreement is void, inoperative, or incapable of being performed.
- [39] The application judge denied TELUS’s application for a stay, holding that it would be premature to determine whether the action should be stayed before dealing with the certification application. The B.C. Court of Appeal allowed TELUS’s appeal, staying the action in its entirety. The plaintiff appealed.
- [40] Justice Binnie, writing for a five-justice majority, allowed the appeal in part and lifted the stay in relation to the plaintiff’s claims under s. 172 of the BPCPA. At the outset of his reasons, he described the proper approach to determining the validity and enforceability of arbitration clauses contained in commercial 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. 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.

... 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. [paras. 2-3]

- [41] Justice Binnie acknowledged that “[t]he virtues of commercial arbitration have been recognized and indeed welcomed by our Court” (para. 23, citing *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*; *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). He noted, however, that from the perspective of the BPCPA, private, confidential, and binding arbitration would “almost certainly inhibit rather than promote wide publicity (and thus deterrence) of deceptive and/or unconscionable commercial conduct” (para. 24), and several provincial legislatures had intervened by placing limitations on arbitration clauses contained in consumer contracts. Accordingly, he stated, the substantive question on appeal was “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” (para. 26).

- [42] After performing a textual, contextual, and purposive interpretation of s. 172 of the BPCPA, Binnie J. concluded that the provision “constitutes a legislative override of the parties’ freedom to choose arbitration” (para. 40), emphasizing that it “stands out as a public interest remedy” (para. 36). He observed, however, that this “legislative override” was incomplete — unlike in certain other provinces, “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” (para. 40). He stressed that it was “incumbent on the courts to give effect to that legislative choice” (para. 40).
- [43] He further clarified that this result was not inconsistent with *Dell and Rogers*, where the Court denied an attempt by consumers in Quebec to pursue class actions arising out of product supply contracts in the face of arbitration clauses. In those cases, he said, “[t]he outcome turned on the terms of the Quebec legislation” (para. 41); the B.C. legislation was different and supported a different result. In this regard, he stated that “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 . . . for the enforcement of arbitration clauses absent legislative language to the contrary” (para. 42 (emphasis in original)).
- [44] In the result, the majority allowed the appeal in part, permitting the plaintiff to pursue her claims under s. 172 of the BPCPA but upholding the stay of her other claims pursuant to s. 15 of the Commercial Arbitration Act. While Binnie J. recognized that this could lead to bifurcated proceedings in the event the claims falling outside the scope of s. 172 proceed to arbitration, he noted that “[s]uch an outcome . . . is consistent with the legislative choice made by British Columbia in drawing the boundaries of s. 172 as narrowly as it did” (para. 50).
- [45] Justices LeBel and Deschamps, writing on behalf of four dissenting justices, were not persuaded that s. 172 of the BPCPA constituted a legislative override of the parties’ freedom to choose arbitration (para. 161).
- [46] The central theme emerging from *Seidel*, consistent with its predecessors *Dell and Rogers*, is that arbitration clauses, even those contained in adhesion contracts (at para. 2), will generally be enforced “absent legislative language to the contrary” (para. 42 (emphasis

deleted)). Accordingly, this Court's task is to apply the relevant principles of statutory interpretation and determine whether s. 7(5) of the Arbitration Act, which has no equivalent in the B.C. legislation at issue in Seidel, contains language overriding the principle that arbitration clauses will generally be enforced.

C. Interpretation of Section 7 of the Arbitration Act

[47] The proper interpretation of s. 7 of the Arbitration Act falls to be determined by applying the modern approach to statutory interpretation: “. . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Parliament” (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26). To be clear, while my colleagues Abella and Karakatsanis JJ. maintain that the following analysis “represents the return of textualism” (para. 109), I respectfully disagree. Rather, the approach set out below starts with the purpose and scheme of the Arbitration Act and reads the text of s. 7 in light of its full context, in a way that is both conscious of and consistent with the policy choices made by the legislature in the Arbitration Act itself and in other relevant statutes such as the Consumer Protection Act and the Class Proceedings Act. This is no “return to textualism”; instead, it is a careful reading of the statute, considered in its full context. With that in mind, I turn to the purpose and scheme of the Act.

(1) Purpose and Scheme of the Arbitration Act

[48] Throughout the better part of the 20th century, Canadian courts displayed “overt hostility” to arbitration, treating it as a “second-class method of dispute resolution” (Seidel, at para. 89, per LeBel and Deschamps JJ., dissenting (but not on this point)). Courts guarded their jurisdiction jealously and “did not look with favour upon efforts of the parties to oust it by agreement” (Seidel, at para. 93, citing *Re Rootes Motors (Canada) Ltd. and Wm. Halliday Contracting Co.*, [1952] 4 D.L.R. 300 (Ont. H.C.J.), at p. 304). The prevailing view was that only the courts were capable of granting remedies for legal disputes and that, as a result, any agreement by the parties to oust the courts' jurisdiction was contrary to public policy, regardless of the nature of the substantive legal issues (see Seidel, at para. 96). This judicial hostility, coupled with a lack of modern legislation supporting arbitration, inhibited the growth of arbitration in Canada (see Seidel, at para. 89, citing J. B. Casey and J. Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), at pp. 2-3).

[49] It was against this backdrop that, in 1991, the Ontario legislature enacted the Arbitration Act, which was based on the Uniform Arbitration Act adopted by the Uniform Law Conference of Canada a year earlier (online) (see J. K. McEwan and L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at pp. 1-9 to 1-15). The purpose and underlying philosophy of the Arbitration Act was discussed by Blair J. (as he then was) in *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497 (WL Can.) (Gen. Div.):

The Arbitration Act, 1991 came into effect on January 1, 1992. It repealed the former Arbitrations Act, R.S.O. 1980 c. 25, and enacted a new regime for the conduct of arbitrations in Ontario It is designed, in my view, to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so.

In this latter respect, the new Act entrenches the primacy of arbitration proceedings over judicial proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene, and by establishing a “presumptive” stay of court proceedings in favour of arbitration. [paras. 8-9]

[50] During legislative debate on the bill that later became the Arbitration Act, the Attorney General of Ontario stated that one of the “guiding principles” of the Arbitration Act is that “the parties to a valid arbitration agreement should abide by their agreements” (Legislative Assembly of Ontario, Official Report of Debates (Hansard), 1st Sess., 35th Parl., March 27, 1991, at p. 256). He later emphasized that under the new legislation, “the law and the courts will ensure that the parties stick to their agreement to arbitrate” (Legislative Assembly of Ontario, Official Report of Debates (Hansard), 1st Sess., 35th Parl., November 5, 1991, at p. 3384).

[51] Issuing a stay of court proceedings is one of the ways in which courts may give effect to the policy that the parties to a valid arbitration agreement should abide by their agreement. As the authors of *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* explain, a stay of court proceedings is simply “an indirect method of enforcing an arbitration agreement” (McEwan and Herbst, at p. 3-29). They continue:

Traditionally it has been said that the courts will not order specific performance of arbitration agreements, in the sense that they will not order parties to proceed to arbitration. Courts do not compel arbitration; enforcement is negative in that they stay the court proceedings in specified circumstances A party is refused the alternative of having the disputes settled by a court of law, i.e., that party is left in the position of having no remedy other than to proceed by arbitration. [Footnotes omitted; p. 3-29.]

[52] The policy that parties to a valid arbitration agreement should abide by their agreement gives effect to the concept of party autonomy — which, in the arbitration context, stands for the principle that parties should generally be allowed to craft their own dispute resolution mechanism through consensual agreement (see J. B. Casey, *Arbitration Law of Canada: Practice and Procedure* (3rd ed. 2017), at pp. 49, 51 and 195; Alberta Law Reform Institute, Final Report No. 103, *Arbitration Act: Stay and Appeal Issues* (2013), at para. 10). Consensual arbitration and party autonomy are inseparable — an arbitration agreement is “a product of party autonomy . . . [and] crystallizes the parties’ consent” to private dispute resolution (M. Pavlović and A. Daimsis, “Arbitration”, in J. C. Kleefeld et al., eds., *Dispute Resolution: Readings and Case Studies* (4th ed. 2016), at p. 485). It “is essentially a creature of contract, a contract in which the parties themselves charter a private tribunal for the resolution of their

disputes” (*Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), at p. 87, as quoted in *Re Arbitration Act* (1964), 47 W.W.R. 544 (Alta. S.C.), at p. 555).

- [53] Of course, the concept of party autonomy, which is always engaged to at least some extent where arbitration agreements are involved, may speak more or less forcefully depending on the context. For example, party autonomy has weaker force in the context of non-negotiated, “take it or leave it” contracts than it does in the context of fully negotiated agreements. It is not surprising, therefore, that legislatures across Canada have put in place various statutes shielding consumers — the weakest and most vulnerable contracting parties (Dell, at para. 90) — from the potentially harsh results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts.
- [54] That said, in the years since the Arbitration Act was passed, the jurisprudence — both from this Court and from the courts of Ontario — has consistently reaffirmed that courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting. For example, in *Desputeaux*, LeBel J. observed “the trend in the case law and legislation . . . to accept and even encourage the use of civil and commercial arbitration” (para. 38). In *Seidel*, Binnie J. noted that “[t]he virtues of commercial arbitration have been recognized and indeed welcomed by our Court” (para. 23), and he stated that “absent legislative language to the contrary” (para. 42 (emphasis deleted)), “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” (para. 2). More recently, the Ontario Court of Appeal observed that “[t]he law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence” (*Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1, at para. 10).
- [55] The policy that parties to a valid arbitration agreement should abide by their agreement goes hand in hand with the principle of limited court intervention in arbitration matters. This latter principle finds expression throughout modern Canadian arbitration legislation (see *McEwan and Herbst*, at pp. 10-7 to 10-11; *Casey*, at p. 319) and has been described as a “fundamental principle underlying modern arbitration law” (Alberta Law Reform Institute, at para. 19). This principle is embedded most visibly in ss. 6 and 7 of the Arbitration Act, which are both contained in the part of the Act labelled “Court Intervention”. Section 6 reads:

Court intervention limited

6 No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.

3. To prevent unequal or unfair treatment of parties to arbitration agreements.
4. To enforce awards.

[56] Stated succinctly, s. 6 signals that courts are generally to take a “hands off” approach to matters governed by the Arbitration Act. This is “in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts” (*Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161, at para. 14).

[57] This brings us to the focal point of this appeal: s. 7 of the Arbitration Act.

(2) Section 7 of the Arbitration Act

(a) Text

[58] The text of s. 7 of the Arbitration Act, which governs stays, is reproduced above in the “Statutory Provisions” section of these reasons. It is also worth noting that the term “arbitration agreement” is defined in s. 1 as “an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them”. The words “matter” and “proceeding” are left undefined, though “proceeding” is defined in r. 1.03(1) of the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as “an action or application”.

(b) Parties’ Positions

[59] TELUS takes the position that s. 7(1) establishes a general rule: if a party to an arbitration agreement commences a proceeding, and one or more of the matters in respect of which the proceeding was commenced is dealt with in the arbitration agreement, then the court shall, on the motion of another party to the agreement, stay the proceeding. TELUS further submits that while s. 7(5) permits the court to allow matters that are not dealt with in the arbitration agreement to proceed in court, it does not grant the court discretion to refuse to stay matters that are dealt with in the agreement — those matters must be stayed. In support of its proposed interpretation, TELUS relies primarily (though not exclusively) on *Seidel and Alberici Western Constructors Ltd v. Saskatchewan Power Corp.*, 2016 SKCA 46, 476 Sask. R. 255 (interpreting an equivalent provision in the corresponding Saskatchewan legislation).

[60] By contrast, Mr. Wellman contends that if the arbitration agreement in question deals with only some of the matters in respect of which the proceeding was commenced, and it would not be reasonable to separate the matters dealt with in the arbitration agreement from the other matters, then s. 7(5) grants the court an independent, freestanding discretion that is entirely separate from s. 7(1) and (2) to refuse to stay the matters dealt with in the arbitration agreement. In a nutshell, Mr. Wellman submits that s. 7(5) offers a choice between staying some of the matters (i.e., ordering a partial stay) and staying none of the matters (i.e., refusing to order any stay). In support of his proposed interpretation, he relies

primarily (though not exclusively) on Griffin, New Era Nutrition (interpreting an equivalent provision in the corresponding Alberta legislation), and Briones v. National Money Mart Co., 2013 MBQB 168, 295 Man R. (2d) 101, aff'd 2014 MBCA 57, 306 Man. R. (2d) 129, leave to appeal refused, [2014] 3 S.C.R. ix (interpreting an equivalent provision in the corresponding Manitoba legislation).

[61] Although the parties lock horns over whether s. 7(5) of the Arbitration Act grants the court discretion to refuse to stay claims that are otherwise subject to a valid and binding arbitration agreement, they agree on several key points, including the following:

- (1) arbitration clauses contained in commercial agreements will generally be enforced absent legislative override;
- (2) the business customer claims are dealt with in an arbitration agreement;
- (3) by virtue of the Consumer Protection Act, the consumers are entitled to pursue their claims in court; and
- (4) if the two conditions identified in s. 7(5) of the Arbitration Act are satisfied, then the court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters.

[62] These points of agreement narrow the focus of this appeal, placing it squarely on the following issue: Does s. 7(5) of the Arbitration Act grant the court discretion to refuse to stay the business customer claims? With that in mind, I would interpret s. 7 as follows.

(c) Section 7 Framework

(i) Section 7(1) — General Rule

[63] First, s. 7(1) establishes a general rule: where a party to an arbitration agreement commences a proceeding in respect of a matter dealt with in the agreement — that is, at least one matter in the proceeding is dealt with in the arbitration agreement — the court “shall”, on the motion of another party to the agreement, stay the court proceeding in favour of arbitration. The use of the word “shall” in s. 7(1) indicates a mandatory obligation (see Haas, at paras. 10-12; see also R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 90). This general rule reaffirms the concept of party autonomy and upholds the policy underlying the Arbitration Act that parties to a valid arbitration agreement should abide by their agreement.

[64] However, as I will explain, this general rule is not absolute.

(ii) Section 7(2) — List of Five Exceptions

[65] Section 7(2) lists five exceptions to the general rule under s. 7(1). Where any of the following conditions are met, the court “may” refuse to stay the proceeding: (1) a party entered into the arbitration agreement while under a legal incapacity; (2) the arbitration agreement is invalid; (3) the subject-matter of the dispute is not capable of being the subject of arbitration

under Ontario law; (4) the motion was brought with undue delay; or (5) the matter is a proper one for default or summary judgment. These are “all cases where it would be either unfair or impractical to refer the matter to arbitration” (MDG Kingston Inc. v. MDG Computers Canada Inc., 2008 ONCA 656, 92 O.R. (3d) 4, at para. 36).

(iii) Section 7(5) — Partial Stay Provision

[66] Section 7(5) provides a further exception to the general rule under s. 7(1). Structurally, s. 7(5) consists of two main components:

- (1) Preconditions — Section 7(5)(a) and (b) set out two preconditions: (a) “the agreement deals with only some of the matters in respect of which the proceeding was commenced” and (b) “it is reasonable to separate the matters dealt with in the agreement from the other matters”.
- (2) Discretionary exception — If both of these preconditions are satisfied, then the court “may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters”.

[67] Starting with the two preconditions, the first precondition is met if “the agreement deals with only some of the matters in respect of which the proceeding was commenced”. Put differently, the proceeding must involve both (1) at least one matter that is dealt with in the arbitration agreement and (2) at least one matter that is not dealt with in the arbitration agreement.

[68] The second precondition is met if “it is reasonable to separate the matters dealt with in the agreement from the other matters”. Naturally, the “other matters” to which this precondition refers are the matters that are not dealt with in the arbitration agreement, as there are only two categories of “matters” contemplated by s. 7(5): those that are dealt with in the arbitration agreement, and those that are not.

[69] If both preconditions are satisfied, then instead of ordering a full stay, the court “may” allow the matters that are not dealt with in the arbitration agreement to proceed in court, though it must nonetheless stay the court proceeding in respect of the matters that are dealt with in the agreement. To illustrate, where the parties to an arbitration agreement have chosen to include “A” but not “B” in their agreement, s. 7(5) allows the court, where the two preconditions are met, to hear a court proceeding in respect of “B”, despite the fact that the proceeding must be stayed in respect of “A”. Because it gives effect to the parties’ agreement to submit only certain types of disputes to arbitration, this interpretation reaffirms the concept of party autonomy and upholds the policy underlying the Arbitration Act that parties to a valid arbitration agreement should abide by their agreement.

[70] However, if the preconditions are not met, then the discretionary exception under s. 7(5) is not triggered. This follows as a matter of logic: s. 7(5) can have effect only “if” the two preconditions are satisfied, so if those preconditions are not met, then s. 7(5) has nothing to say. In those circumstances, unless one of the five exceptions listed in s. 7(2) applies, the general rule under s. 7(1) would apply, meaning that the proceeding must be stayed.

[71] This interpretation finds support in the academic/practitioner commentary. In *Arbitration Law of Canada: Practice and Procedure*, J. B. Casey, commenting on equivalent provisions in the relevant Alberta statute, writes:

Section 7(1) sets out the basic provision that if a party proceeds with the court action with respect to matters governed by an arbitration agreement the court “shall” stay the proceeding. Section 7(5) then grants a partial exception to this general provision by providing that the court may allow proceedings to continue with respect to matters not covered by the arbitration agreement provided it is reasonable to separate those matters from the matters that are covered by the arbitration agreement. Nothing in the words of section 7(5) appears to give the court jurisdiction to allow the entire action to proceed where it is not reasonable to separate the matters in dispute and then say section 7(4) permits a stay of the arbitration.

Section 7(5) provides that the court may permit those matters not covered by the arbitration agreement to continue to be litigated if it is reasonable to separate those matters from those which are being arbitrated. It does not deal with the reverse situation; that is where the court finds that the matters cannot reasonably be separated. In such a case, it is submitted, the court would stay its own proceedings to await the outcome of the arbitration, and then determine if the court action needed to proceed. [pp. 349-50]

[72] The author goes on to state that “[s]ection 7(5) does not permit a court action to proceed and allow a valid arbitration to be stayed simply because the court claims appear to overlap with the arbitration claims and cannot reasonably be separated”, adding that “[s]ection 7(5) deals with whether or not to permit separate claims not covered by the arbitration agreement to proceed by court action. It does not deal with whether or not the claims covered by the arbitration agreement should be stayed” (pp. 352-53).

[73] Mr. Wellman resists this logic. In effect, he submits that s. 7(5) must be read as meaning “may stay, [or may refuse to stay,] the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters”, and s. 7(5) (b) must be understood as authorizing this refusal where “it is [not] reasonable to separate the matters dealt with in the agreement from the other matters”. Respectfully, I cannot accede to this submission. Mr. Wellman’s interpretation reads language into s. 7(5) that simply is not there. Not only that, it reads language into s. 7(5) that is contained elsewhere in the statute — namely, in s. 7(2), which provides that “the court may refuse to stay the proceeding in any of the following cases”. Section 7(2) thus demonstrates that where the legislature intended to authorize the court to refuse a stay, it did so through the words “may refuse to stay”.

- [74] In addition, I am respectfully of the view that Mr. Wellman's contention that s. 7(5) is an independent, standalone provision to be read and applied in isolation from s. 7(1) and (2) cannot be sustained. Grammatically, s. 7(5) uses the definite article "the" in referring to "the proceeding", "the matters", and "the arbitration agreement". The only way of identifying "the proceeding", "the matters", and "the arbitration agreement" referred to in s. 7(5) is to look to s. 7(1), which uses indefinite articles in referring to "a proceeding", "a matter", and "an arbitration agreement". Hence, there is a logical and necessary link between the two provisions, which belies the argument that s. 7(5) stands on its own.
- [75] Furthermore, while I agree that s. 7(5) should be read in the context of the statutory scheme as a whole and that s. 6-3 permits the court to intervene "[t]o prevent unequal or unfair treatment of parties to arbitration agreements", I also note that s. 6 allows such intervention only "in accordance with this Act". Therefore, even though Mr. Wellman's interpretation of s. 7(5) would ostensibly give the court greater scope to intervene in an effort to prevent perceived unequal or unfair treatment of parties to arbitration agreements, the words "in accordance with this Act" indicate that s. 6 was not intended to override or change the meaning of other sections of the Arbitration Act.
- [76] More fundamentally, Mr. Wellman's interpretation sits at odds with the policy underlying the Arbitration Act that parties to a valid arbitration agreement should abide by their agreement. If accepted, Mr. Wellman's interpretation would reduce the degree of certainty and predictability associated with arbitration agreements and permit persons who are party to an arbitration agreement to "piggyback" onto the claims of others. Ultimately, this would reduce confidence in the enforcement of arbitration agreements and potentially discourage parties from using arbitration as an efficient, cost-effective means of resolving disputes. Clearly, this was not what the legislature had in mind when it passed the Arbitration Act.
- [77] Mr. Wellman and various interveners also raise a number of policy concerns that, they say, support their proposed interpretation, including the following:
- Access to justice and the courts — Griffin improves access to justice by removing barriers to seeking relief in court.
 - Abuse of arbitration clauses in adhesion contracts — Large companies with overwhelming bargaining power should not be permitted to include unfair arbitration clauses in their standard form customer contracts and thereby shield themselves from liability by requiring private, individual arbitration for all disputes, even low-value claims that would be uneconomical to pursue through arbitration.
 - Shrinking class sizes — The interpretation of s. 7(5) outlined above would cut non-consumers out of consumer/non-consumer class actions where an arbitration agreement is present. Consequently, these class actions will shrink in size, making them less economically viable and decreasing the likelihood that they will be brought in the first place.

- Multiplicity of proceedings — Griffin enhances the courts' ability to avoid a multiplicity of proceedings, which raises the risk of inconsistent results, decreases efficiency, and increases overall costs. Further, s. 138 of the Ontario Courts of Justice Act, R.S.O. 1990, c. C.43 stipulates that courts shall, as far as possible, avoid a multiplicity of proceedings.
 - Difficulty distinguishing between consumers and non-consumers — Distinguishing between consumers and non-consumers can be challenging, particularly given the rise of “hybrid consumers” and “near consumers”, making it preferable to treat consumers and non-consumers alike.
- [78] In their interpretation of s. 7(5), my colleagues Abella and Karakatsanis JJ. rely on many of these policy considerations, placing particular emphasis on the importance of promoting access to justice, the difficulty of distinguishing between consumers and non-consumers, and the potential unfairness caused by enforcing arbitration clauses contained in standard form contracts.
- [79] While I appreciate these concerns, I am respectfully of the view that they cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not. While policy analysis has a legitimate role in the interpretative process (see Sullivan, at pp. 223-50), the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. The primary role of the courts, in my view, is to interpret and apply those laws according to their terms, provided they are lawfully enacted. It is not the role of this Court to rewrite the legislation.
- [80] This is particularly so given that the Ontario legislature has already spoken to some of these policy concerns by shielding consumers from the potentially harsh results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts. The legislature made a careful policy choice to exempt consumers — and only consumers — from the ordinary enforcement of arbitration agreements. That choice must be respected, not undermined by reading s. 7(5) in a way that permits courts to treat consumers and non-consumers as one and the same.
- [81] Moreover, as I will develop, I respectfully cannot agree with a number of specific points raised by my colleagues relating to the policy considerations outlined above.
- [82] First, while my colleagues characterize the “overall purpose” of the Arbitration Act as being to “promote access to justice” (para. 137), it is worth reiterating that this policy objective was by no means the legislature’s sole objective in adopting the Act. As indicated, a number of “guiding principles” inform the Arbitration Act, one of which is that “the parties to a valid arbitration agreement should abide by their agreements” (Legislative Assembly of Ontario, March 27, 1991, at p. 256). Similarly, as Blair J. stated in *Denison Mines*, the Arbitration Act was designed “to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so” (para. 8).

- [83] Hence, while there can be no doubt as to the importance of promoting access to justice (see *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 1), this objective cannot, absent express direction from the legislature, be permitted to overwhelm the other important objectives pursued by the Arbitration Act, including ensuring that parties to a valid arbitration agreement abide by their agreement. Respectfully, my colleagues' approach would undermine the legislature's stated objective of ensuring parties to a valid arbitration agreement abide by their agreement, reduce the degree of certainty and predictability associated with arbitration agreements, and weaken the concept of party autonomy in the commercial setting. It would expand the opportunities for parties to a valid arbitration agreement — even a heavily negotiated one between sophisticated commercial entities — to avoid their agreement and seek relief in court. This would in turn steer parties away from a “good and accessible method of seeking resolution for many kinds of disputes” that “can be more expedient and less costly than going to court” (Legislative Assembly of Ontario, March 27, 1991, at p. 245).
- [84] Second, my colleagues stress that the Arbitration Act was designed with a “freely negotiat[ed]” arbitration agreement in mind (at para. 131), that TELUS's “standard form contract hardly represents a bargain freely entered into” (para. 160), and that “[t]o impose arbitration on unwilling parties violates the spirit of the Arbitration Act, 1991 and the arbitral process” (para. 167). But with respect, my colleagues lose sight of the issue actually before this Court. This case is not about debating the merits and demerits of enforcing arbitration clauses contained in standard form contracts. Rather, it is about the proper interpretation of s. 7(5) of the Arbitration Act. Moreover, while my colleagues maintain that the Act was designed with “freely negotiat[ed]” arbitration agreements in mind, nothing in the Arbitration Act suggests that standard form arbitration agreements, which are characterized by an absence of meaningful negotiation, are per se unenforceable. Indeed, this Court's decision in *Seidel* — as well as its predecessors *Dell*, *Rogers*, and *Desputeaux* — confirm that the starting presumption is the opposite.
- [85] Furthermore, Mr. Wellman has not argued, either before this Court or the courts below, that the standard form arbitration agreement in question was unconscionable, which if proven would render it invalid and thereby provide a basis for refusing a stay pursuant to s. 7(2)2 of the Arbitration Act. In my view, arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with directly through the doctrine of unconscionability, which was the approach taken in *Heller v. Uber Technologies Inc.*, 2019 ONCA 1, rather than indirectly by attempting to stretch the language of s. 7(5) to address a perceived problem it was never designed to address.
- [86] Third, my colleagues underscore the difficulty in distinguishing between consumers and non-consumers, insisting that TELUS's interpretation of s. 7(5) would render the class certification process “cumbersome” and potentially turn the certification stage into “a search by the defendant of the precise status of each member of the class” (para. 158).

- [87] While distinguishing between consumers and non-consumers may be a difficult exercise in certain cases, that difficulty does not, in my view, bear on the proper interpretation of s. 7(5). The challenge identified by my colleagues is a product of two factors: (1) the requirement under the Class Proceedings Act that any person seeking to join a class action must pass through an objective class definition; and (2) the legislature's decision to accord enhanced protections only to "consumers", which it chose to define in a particular way under the Consumer Protection Act — namely, as "an individual acting for personal, family or household purposes" but not including "a person who is acting for business purposes" (s. 1). While sorting between consumers and non-consumers may be "cumbersome" in certain cases, this inconvenience does not permit the court to recast the legislation as it sees fit in order to avoid such difficulties. Instead, the courts must work within the framework established by the legislature, including at the class certification stage.
- [88] Furthermore, reading s. 7(5) of the Arbitration Act in a way that permits non-consumers to "tag along" with consumers on the basis that it would be "cumbersome" to sort between the two would also allow commercial entities to find the inside of a courtroom despite having agreed to arbitration, even where the arbitration agreement was fully negotiated. Again, this would reduce the degree of certainty and predictability associated with arbitration agreements and permit parties to those agreements to "piggyback" onto the claims of others.
- [89] It would, of course, be open to the Ontario legislature to respond to the policy concerns outlined above, should it see fit to do so. While I make no comment on the wisdom of any particular reform, a range of responses are theoretically available. To offer just one example, it could amend the Arbitration Act to grant the courts discretion to refuse to stay the proceeding where the arbitration agreement deals with some but not all of the matters in dispute. In this regard, I note that in 2002, the Uniform Arbitration Act (1990),^[6] the model legislation on which the Arbitration Act was based, was amended to provide as follows:
- 7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter that another party to the arbitration agreement is entitled to submit to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of the other party, stay the proceeding.
- ...
- (3) Despite subsection (1), where an arbitration agreement deals with one or more but not all of the matters in dispute in respect of which the proceeding was commenced, the court may
- (a) refuse to stay the proceeding, or
- (b) 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 the other matters in dispute.

- (4) In making a decision under subsection (3), the court shall have regard to
 - (a) the importance of enforcing arbitration agreements, and
 - (b) whether it is reasonable to separate the matters in dispute dealt with in the arbitration agreement from the other matters in dispute. [Emphasis added.]

(Uniform Law Conference of Canada, Arbitration Amendment Act (2002) (online))

[90] Lastly, while s. 138 of the Courts of Justice Act stipulates that courts “shall” avoid a multiplicity of proceedings, it tempers this language by indicating that the court must do so only “as far as possible”. Accordingly, where the application of an Ontario statute, properly interpreted, leads to a multiplicity of proceedings, the court must give effect to the will of the legislature, even if the consequence is to potentially create a multiplicity of proceedings. This is consistent with *Seidel*, where the Court recognized that even where a multiplicity of proceedings could result, the court must nonetheless give effect to the “legislative choice” embodied in the legislation in question (para. 50). Indeed, here, s. 7(5) of the Arbitration Act expressly contemplates bifurcation of proceedings, as it permits the court to order a partial stay, thereby potentially resulting in concurrent arbitration and court adjudication, where the two preconditions outlined in s. 7(5)(a) and (b) are met. In theory, the Arbitration Act could be amended to grant the courts broad discretion to refuse a stay where doing otherwise could result in a multiplicity of proceedings, but the legislature has not taken this step. For these reasons, while a multiplicity of proceedings can cause practical difficulties, this concern cannot be permitted to trump the language of the statute.

(iv) Section 7(6) — Bar on Appeals

[91] Finally, s. 7(6) provides simply that “[t]here is no appeal from the court’s decision”. Given the absence of any qualifying language, s. 7(6) must be taken as referring to a “decision” made under any subsection contained in s. 7. This would include, for example, a decision to stay the proceeding under s. 7(1), a decision to refuse a stay under s. 7(2), or a decision to order a partial stay under s. 7(5).

[92] I now turn to the application of this framework.

D. Application

(1) The Proceeding

[93] The “proceeding” in this case is simply the class action proceeding commenced by Mr. Wellman, who claims to be a “consumer” under the Consumer Protection Act. This proceeding serves as a procedural vehicle through which multiple parties can pursue their individual claims together (see *Bisaillon*, at para. 17). As indicated, some of these parties are consumers, while others are business customers.

(2) The Arbitration Agreements

- [94] This proceeding involves not a single arbitration “agreement”, but rather a constellation of “agreements”, each taking the form of a standard form arbitration clause incorporated into every individual mobile phone service contract between TELUS and each of its customers, consumers and non-consumers alike. Each agreement contains identical terms regarding the types of matters covered by the agreement. Broadly speaking, they stipulate that all claims arising out of or in relation to the contract, apart from the collection of accounts by TELUS, shall be determined through mediation and, failing that, arbitration. In this way, the agreements identify the “matters” in respect of which arbitration is mandatory, as well as the “matters” in respect of which arbitration is not mandatory: disputes over collections are not subject to mandatory arbitration, whereas disputes over any other matter arising out of or in relation to the contract are.
- [95] This brings us to s. 7 of the Arbitration Act.
- (3) Section 7 of the Arbitration Act
- [96] Beginning with s. 7(1) of the Arbitration Act, the sole “matter” at issue in the proceeding commenced by Mr. Wellman, who is a party to an arbitration agreement, is alleged overbilling. This matter is dealt with in the arbitration agreements into which the consumers and business customers entered. Therefore, because there is at least one matter in the proceeding that is dealt with in the arbitration agreements, the general rule under s. 7(1) would ordinarily require a stay of the proceeding as a whole, leaving both consumers and business customers locked out of court.
- [97] But the Consumer Protection Act offers the consumers a key to the courtroom. Section 7(2) of the Consumer Protection Act renders arbitration clauses contained in a “consumer agreement”, defined in s. 1 as an agreement between a “consumer” and a “supplier”[7] in which “the supplier agrees to supply goods or services for payment”, “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.” Further, s. 8(1) of the Consumer Protection Act gives consumers the right to commence a class action, or become members of a class action, in respect of a dispute arising out of a consumer agreement. Read together, these two provisions render the arbitration agreements entered into by the consumers invalid to the extent that they would otherwise prevent the consumers from commencing or joining a class action of the kind commenced by Mr. Wellman. To this extent, the provisions of the Consumer Protection Act constitute a “legislative override” of the consumer arbitration agreements (Seidel, at para. 40). Moreover, since s. 7(2) of the Consumer Protection Act applies, s. 7(5) of that statute is triggered. That provision stipulates that “[s]ubsection 7 (1) of the Arbitration Act, 1991 does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration”. In this way, s. 7(5) of the Consumer Protection Act shields the consumers in this case from a stay under s. 7(1) of the Arbitration Act.

- [98] The business customers, however, do not qualify as “consumers” under the Consumer Protection Act, and as such they cannot invoke the protections that the consumers enjoy under ss. 7(2), 7(5), and 8 of that statute. To be clear, although s. 7(5) of the Consumer Protection Act refers to “any proceeding to which subsection (2) applies”, I am not persuaded that the use of the word “proceeding” shields non-consumers involved in the proceeding from a mandatory stay under s. 7(1) of the Arbitration Act. To reason otherwise would extend the protections of the Consumer Protection Act to persons who are not “consumers” and, in turn, erode the policy underlying the Arbitration Act that parties to a valid arbitration agreement should abide by their agreement. If non-consumers bound by a valid arbitration agreement could do an end run around s. 7(1) of the Arbitration Act simply by joining their claim with that of a consumer and pointing to s. 7(5) of the Consumer Protection Act, then this provision could become a vehicle for “piggybacking” non-consumer claims onto consumer claims. Indeed, if such an interpretation were accepted, a class action proceeding brought on behalf of millions of non-consumers who are each bound by an arbitration agreement would, if certified, be permitted to proceed in court in its entirety so long as a single consumer joined the class. In this way, the inclusion of a single consumer would be enough to open the courthouse doors to all. By contrast, interpreting s. 7(5) of the Consumer Protection Act in a way that restricts its application to consumers leads to a sound result that upholds the legislative objectives underlying both statutes: it preserves the protections afforded solely to “consumers” under the Consumer Protection Act and gives effect to the policy underlying the Arbitration Act that parties to a valid arbitration agreement should abide by their agreement.
- [99] Having concluded that the business customers cannot avoid a stay under s. 7(1) of the Arbitration Act by turning to the Consumer Protection Act, they are left with only two potential avenues for avoiding a stay: ss. 7(2) and 7(5) of the Arbitration Act. But since Mr. Wellman has not argued that any of the five exceptions listed in s. 7(2) applies, s. 7(5) stands as the business customers’ only possible pathway into court. Yet, as I will explain, that provision has no application on these facts.
- [100] As indicated, s. 7(5) of the Arbitration Act is engaged only where the two preconditions set out in s. 7(5)(a) and (b) are satisfied. The first precondition is that the proceeding must involve both (1) at least one matter that is dealt with in the arbitration agreement and (2) at least one matter that is not. However, that is not the case here. Instead, as I have explained, the proceeding involves a single matter — alleged overbilling — and that matter is dealt with in the arbitration agreements into which the consumers and business customers entered. As such, the first precondition is not met, so s. 7(5) has nothing to say.
- [101] To illustrate how s. 7(5) could apply in a dispute between TELUS and its business customers, consider a hypothetical scenario in which the proceeding involves both (1) a claim advanced by business customers over alleged overbilling and (2) a claim advanced by TELUS for the collection of accounts. The former matter is covered by the arbitration agreements, whereas the latter is not. As such, this hypothetical proceeding would meet the

first precondition. Hence, if the court were to determine that it would be reasonable to separate the two matters such that the second precondition is also met, then s. 7(5) would permit the court to stay the proceeding in respect of the matter dealt with in the arbitration agreements (i.e., alleged overbilling) and allow the proceeding to continue in respect of the matter not dealt with in the arbitration agreements (i.e., the collection of accounts). Alternatively, if the court were to determine that it would not be reasonable to separate the two matters such that the second precondition is not met, then the general rule under s. 7(1) would apply, meaning the court must stay the proceeding.

[102] But since s. 7(5) does not apply in this case, the proceeding must be stayed pursuant to the general rule under s. 7(1). And although the word “proceeding” is used without qualification in s. 7(1), seemingly in the sense of “proceeding as a whole”, I am of the view that the stay in this case must be restricted to the parties who are legally bound by an arbitration agreement — namely, TELUS and the business customers. As indicated, the Consumer Protection Act grants the consumers the right to seek relief in court. The Arbitration Act cannot deprive them of that right. Moreover, taking a purposive approach, a principal object of the s. 7 framework is to ensure parties to a valid arbitration agreement abide by their agreement; it is not to keep parties who either never agreed to or are not bound by an arbitration agreement out of court. The Arbitration Act has no business interfering with these litigants’ procedural or substantive rights, and it certainly has no business denying them the right to seek a remedy in court simply because they happen to be tangentially associated with others who did agree to and are bound by an arbitration agreement.

[103] In sum, I conclude that the motions judge and the Court of Appeal erred in law by interpreting s. 7(5) of the Arbitration Act incorrectly and refusing to order a stay that, under s. 7(1), was mandatory. At the end of the day, s. 7(5) does not, in my view, permit the court to ignore a valid and binding arbitration agreement.

(4) Section 7(6) — Bar on Appeals

[104] Finally, I note that the court below did not address the potential application of s. 7(6) of the Arbitration Act, and the matter was discussed only briefly during oral argument before this Court. Neither of the parties has suggested that the s. 7(6) bar applies. In the absence of full submissions, I do not consider it appropriate to make a final ruling on the matter.

VII. Conclusion

[105] In the result, I would allow the appeal and stay the business customer claims. Given this result, TELUS is entitled to its costs in this Court and in the Court of Appeal. However, since TELUS’s motion for a stay was heard together with Mr. Wellman’s successful application for certification, it would not in my view be appropriate to grant TELUS costs in the Superior Court. I would therefore set aside the costs award made by the Superior Court and order that the parties bear their own costs in that court.

The reasons of Wagner C.J. and Abella, Karakatsanis and Martin JJ. were delivered by

- [106] Abella and Karakatsanis JJ. (dissenting) — This appeal involves a class action against TELUS Communications Inc. The mandatory, non-negotiable contract which all purchasers of TELUS cell phone plans must sign, requires individual arbitration for any claim, and prevents court remedies such as class actions. Legislation in Ontario exempts consumers from the operation of these compulsory arbitration clauses. Businesses, on the other hand, no matter their size, and even if they are pursuing identical claims as consumers, can be caught by the operation of the arbitration clause in the contract. The Ontario courts, however, have recognized the denial of access to justice created by this disparity and have interpreted the Arbitration Act, 1991 in a way that gives a court discretion to redress this anomaly and allow both sets of claimants to access a class action.
- [107] Statutory interpretation is the art of inferring what words mean. Sometimes the meaning is obvious, either because of the clarity of the language or of its relationship to the legislative context. But sometimes interpreting words literally in isolation, undermines the policy objectives of the statutory scheme. The debate between those who are “textualists” and those who are “intentionalists” was resolved in Canada in 1998 when this Court decided that “there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”[8] We do not just look at the words. Moreover, in Ontario all statutes are to be read in accordance with s. 64(1) of the Legislation Act, 2006, S.O. 2006, c. 21, Sched. F., which states that: “An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.”
- [108] In other words, words matter, policy objectives matter, and consequences matter.
- [109] The majority’s approach, with respect, in effect represents the return of textualism. The words have been permitted to dominate and extinguish the contextual policy objectives of both the Arbitration Act, 1991, S.O. 1991, c. 17, and the Class Proceedings Act, 1992, S.O. 1992, c. 6, creating a dispute-resolution universe that has the effect of forcing litigants to spend thousands of dollars to resolve a dispute worth a fraction of that cost; denies others meaningful access to a remedy if they are not prepared, or cannot afford to, engage in a cost-benefit losing proposition; and invites the very proliferation of proceedings a class action was invented to avoid. The result of these disincentives is that business consumers will simply not enforce their rights.
- [110] That is why the Ontario Court of Appeal has consistently interpreted the words of s. 7(5) of the Arbitration Act, 1991 in a way that avoids the unpalatable consequences while invigorating the purposes and effective functioning of the relevant legislative schemes. This aligns with the Court’s modern approach to statutory interpretation and should, as a result, be endorsed by this Court.

- [111] The Ontario Legislature enacted the Arbitration Act, 1991, to allow willing parties to pursue arbitration as an alternate form of dispute resolution. To ensure expedient resolution and lower litigation costs, the Arbitration Act, 1991 limited court intervention in arbitrable disputes. But it also gave judges discretion to permit court proceedings in certain limited circumstances, such as where the arbitration agreement was manifestly unfair.
- [112] The issue in this appeal is how far that judicial discretion extends under the Arbitration Act, 1991. Specifically, the question is whether s. 7(5) gives judges the discretion to hear parties covered by an arbitration agreement when the same issue is the subject of litigation in the courts. Section 7(5) states:

Agreement covering part of dispute

- (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
- (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
- (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.
- [113] Since 2002, the Ontario Court of Appeal has interpreted s. 7(5) as granting the discretion to stay matters that would otherwise be subject to arbitration. Similarly, for nearly a decade, the Ontario Court of Appeal has interpreted s. 7(5) as permitting otherwise arbitrable matters to be joined with class actions in the public interests of avoiding duplicative proceedings, increased costs, and the risk of inconsistent results.
- [114] This interpretation, in our respectful view, aligns with the text and scheme of the provisions and is consistent not only with the purposes motivating the enactment of the Arbitration Act, 1991 but also with the purpose of s. 7(5) itself.
- [115] In our view, where a proceeding includes both matters covered by an arbitration agreement and other matters that are not, s. 7(5) gives a judge discretion to allow the entire proceeding to continue in court, even if some parties would otherwise be subject to an arbitration clause.

Background

- [116] The claim is that TELUS, a Canadian cellular service provider, had for a number of years, and without notifying its customers, rounded the times of cellular phone calls up to the next minute. This resulted in overcharging clients on their monthly bills by small amounts.
- [117] TELUS used the same standard-form contract for business and consumer clients, who initiated a class action together against TELUS. The named plaintiff in this appeal, Avraham Wellman, is a consumer and the class representative.

[118] TELUS's standard-form contract is non-negotiable. It contains a dispute resolution clause requiring mediation, and failing resolution, arbitration of any disputes other than in respect of the collection of accounts by TELUS. This arbitration clause is inapplicable to consumers because Ontario's consumer protection legislation renders an arbitration clause in a consumer contract invalid insofar as it prevents a consumer from initiating court proceedings (Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, s. 7).

[119] On its face, the arbitration clause is valid for business clients. For this reason, TELUS applied to stay the business clients' claims and have them struck from the class proceeding, arguing that those claims had to be resolved by arbitration.

[120] The provisions of the Arbitration Act, 1991 dealing with stays are found in s. 7, which states:

Stay

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

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

Effect of refusal to stay

- (4) If the court refuses to stay the proceeding,
- (a) no arbitration of the dispute shall be commenced; and
 - (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

Agreement covering part of dispute

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

[121] As previously noted, the provision at issue in this appeal is s. 7(5), which Ontario courts have interpreted to allow business clients who would otherwise be bound by an arbitration agreement to join in class proceedings with consumers.

[122] Both the motions judge and the majority of the Court of Appeal in this case relied on *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481, which was decided by a five member panel of the Ontario Court of Appeal. Thaddeus Griffin, who had purchased a Dell notebook computer through his personal business, joined with consumers in a class action alleging deficiencies in Dell's products. Dell's standard-form sales agreement contained a clause requiring that all disputes be submitted to arbitration.

[123] Dell's position at the certification stage was that business clients should not be allowed to join consumers in the class action, and their claims should be stayed and directed to individual arbitration. Lax J. held that it was "fanciful to think that any claimant could pursue an individual claim in a complex products liability case" and that enforcing Dell's arbitration clause would have the effect of immunizing Dell "from accounting to class members for any wrong it may have caused" (*Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (Ont. S.C.J.), at paras. 92-93).

[124] The Ontario Court of Appeal confirmed the decision to allow Griffin's claim to proceed in court. It found that s. 7(5) gives a motions judge the discretion to refuse a partial stay where an action involves some claims that are subject to an arbitration agreement and some that are not, because

... it would not be reasonable to separate the consumer from the non-consumer claims. We should, therefore, refuse a partial stay and allow all the claims to proceed under the umbrella of the class proceeding.

Granting a stay of the non-consumer claims would lead to inefficiency, a potential multiplicity of proceedings, and added cost and delay. This would be contrary to the Courts of Justice Act, s. 138, which provides that "[a]s far as possible, a multiplicity of legal proceedings shall be avoided", and contrary to the jurisprudence on the reasonableness of partial stays under s. 7(5) of the Arbitration Act, 1991. [paras. 46-47]

[125] A number of cases were relied on to support this interpretation (*Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 CanLII 23358 (S.C.J.), *aff'd* 2007 ONCA 721; *Johnston v. Goudie* (2006), 212 O.A.C. 79, at para. 18; *Penn-Co Construction Canada (2003) Ltd. v. Constance*

Lake First Nation (2007), 66 C.L.R. (3d) 78 (S.C.J.), at para. 31, *aff'd* 2008 ONCA 768, 76 C.L.R. (3d) 1; Frambordeaux Developments Inc. v. Romandale Farms Ltd., 2007 CanLII 55364 (Ont. S.C.J.), at para. 34; New Era Nutrition Inc. v. Balance Bar Co., 2004 ABCA 280, 245 D.L.R. (4th) 107, at paras. 37-38.)

[126] In the case before us, TELUS brought a similar motion to stay the proceedings with respect to the business customer claims. Conway J. relied on the Ontario Court of Appeal's decision in *Griffin* in concluding that s. 7(5) of the Arbitration Act, 1991 expressly grants the court the discretion to determine whether it is reasonable to separate the matters dealt with in an arbitration agreement from other matters in the litigation. If the court does not consider it reasonable to separate them and refuses a partial stay, all matters could proceed, notwithstanding the arbitration clause. Pursuant to *Griffin*, she held that this discretion could be exercised to allow non-consumer claims to be joined with a consumer class action, where it is reasonable to do so. Since there is no group arbitration permitted for the non-consumer claims, separating the two proceedings could lead to inefficiency, inconsistent results and a multiplicity of proceedings.

[127] TELUS appealed the decision to the Ontario Court of Appeal. Justice van Rensburg, writing for the majority, agreed with the motions judge.

[128] TELUS appealed, arguing that *Griffin* was wrongly decided.

[129] Unlike our colleagues, we agree with van Rensburg J.A. and would dismiss the appeal.

Analysis

[130] A provision must be assessed in all its textures — language, purpose, effect — to prevent the suffocation of its meaning by a technical literal reading of the words. As Moldaver J. noted in *R. v. Alex*, [2017] 1 S.C.R. 967: “This Court has repeatedly observed that plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms . . .” (para. 31). What is required is an interpretation that is anchored in parliamentary intention, statutory language, jurisprudence, and practice (*Rizzo & Rizzo Shoes*, at paras. 20-41). In other words, the interpretation must be “reasonable and just” (*Ruth Sullivan, Sullivan on the Construction of Statutes* (6th ed. 2014), at § 2.9).

[131] Ontario's Arbitration Act, 1991 was enacted to allow parties to design their own settlement processes and resolve their disputes outside the courts. It anticipated two or more parties freely negotiating their arbitral process. Prior to the 1991 legislation, judges exercised considerable discretion to stay arbitration proceedings — even where all the parties had agreed to submit their differences to arbitration. The courts' use of this power was controversial because it was seen to represent judicial interference with the parties' freedom to contract.

- [132] Ontario's Arbitration Act, 1991 was based on the Uniform Arbitration Act (1990) (online) adopted by the Uniform Law Conference of Canada, which resulted from the Alberta Law Commission's 1989 report on the adoption of uniform arbitration legislation. It was modeled, in part, on the Alberta Institute of Law Research and Reform's 1988 report *Proposals for a New Alberta Arbitration Act* (Report No. 51). In that report, the Institute recommended a substantial overhaul of the existing legislation. Specifically, the Institute proposed limiting the courts' ability to refuse to stay litigation where the parties had agreed to arbitrate. The proposal found expression in s. 7(1) of the Arbitration Act, 1991, which mandates that if a party to an arbitration agreement tries to pursue a remedy to an arbitrable dispute in court, a judge must stay the court proceeding. Limited exceptions to this general rule are found in s. 7(2).
- [133] The proposal also included, without commentary, a provision giving the court discretion to refuse a stay of litigation if the "arbitration agreement upon which the application is based . . . does not cover the dispute, or . . . does not bind all parties to the dispute" (s. 8(2) (emphasis added)). This provision is the progenitor of s. 7(5) of the current Arbitration Act, 1991.
- [134] This second proposed provision suggested that courts have discretion to allow court proceedings to go ahead in two circumstances: (1) where an arbitration does not cover all of the issues raised in the dispute, and (2) where both parties and non-parties to an arbitration agreement commence litigation against the same defendant.
- [135] The policy reasons for these exceptions were the same as those which animated the Arbitration Act, 1991, namely, access to justice, expediency, and limiting the role of the courts to circumstances where their participation would improve efficiency and reduce delay. At the introduction of the Arbitration Act, 1991, the then-Attorney General, Howard Hampton, said:

One of the commitments this government has made to the people of Ontario is to improve access to justice in the province. The fulfilment of this commitment will involve a wide range of programs and policies. It will also include initiatives in law reform to simplify the often intimidating legal system for the use of the public.

In this context I will be introducing today for first reading the Arbitration Act, 1991. Arbitration is a good and accessible method of seeking resolution for many kinds of disputes. It can be more expedient and less costly than going to court. The parties can design their own procedures and select appropriate arbitrators.

...

The new statute will make it easier for people to submit private disputes to resolution by arbitration. It will do so in several ways:

First, when people have agreed to go to arbitration, the act will help ensure that all parties abide by this agreement.

Second, the ability of the courts to intervene in an arbitration is spelled out precisely, and as a result, the role of the courts will be constructive and less likely to be used by reluctant parties to delay the proceedings. [Emphasis added.]

(Legislative Assembly of Ontario, Official Report of Debates (Hansard), 1st Sess., 35th Parl., March 27, 1991, at p. 245)

[136] At First Reading of the Bill the same day, the Attorney General further explained:

The guiding principles of the new Arbitration Act are that the parties to a valid arbitration agreement should abide by their agreements, that they should be free to design the process for their own arbitration as they see fit within the limits of overall fairness, that opportunities for delay should be minimized, and finally that awards made in arbitrations should be readily enforceable and should be reviewable by the courts only for specific defects. [Emphasis added.]

(Legislative Assembly of Ontario, at p. 256)

[137] These statements outline the guiding rationales of the legislation, as well as the means by which they were intended to be effected. The overall purpose of the Arbitration Act, 1991 was to promote access to justice. Its chosen means of achieving that goal was to promote accessibility by giving parties the choice of resolving disputes outside the court system. The reason for creating this option was a recognition that the court system could be costly and slow. The courts' discretion to intervene in arbitrable matters was therefore narrowed to further the goals of expedient dispute resolution.

[138] The Arbitration Act, 1991 provides a scheme for the effective private arbitration of disputes covered by an arbitration agreement. It sets out default rules governing the conduct of arbitrations and the role of courts in relation to private arbitrations. Various provisions address when judicial intervention is warranted, when judicial support is necessary to give effect to private arbitration processes and awards, and when appeals to the court are required. Broadly speaking, the Arbitration Act, 1991 seeks to facilitate timely and efficient dispute resolution.

[139] Ontario courts have, since 1998, consistently highlighted the purposes of the Arbitration Act, 1991 in interpreting s. 7(5) as granting a discretion to override arbitration agreements where it would be unreasonable to separate the arbitrable and non-arbitrable matters. In *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 O.R. (3d) 776 (S.C.J.), *Rosedale Motors* attempted to litigate a number of matters, some of which were governed by an arbitration agreement while others were not. *Petro-Canada Inc.* sought a stay of the arbitrable matters. Sharpe J. concluded that "[t]he language of the Arbitration Act, 1991, S.O. 1991, c. 17, s. 7(5) supports the existence of a discretion to refuse a stay where it is not reasonable to separate the matters dealt with in the agreement from the other matters in dispute between the parties" (pp. 783-84).

- [140] The Ontario Court of Appeal adopted this interpretation in *Brown v. Murphy* (2002), 59 O.R. (3d) 404 (C.A.), and endorsed it in the context of multi-party proceedings in *Radewych*.
- [141] The following year, in *Penn-Co Construction*, the Court of Appeal highlighted the practical necessity of allowing courts to hear broad claims, some of which would otherwise be subject to arbitration proceedings. In that case, Penn-Co had claimed relief against Constance Lake First Nation beyond the scope of what was identified in the agreement as being arbitrable. They had also claimed against several other parties who were not contractually bound by the arbitration clause. Subsequently, Penn-Co tried to enforce the arbitration agreement against some of the parties. The Court of Appeal upheld the motions judge's ruling that permitting arbitration of some claims and staying the other claims would involve duplication of effort, extra cost and inconvenience, and risk inconsistent results (para. 5).
- [142] This decision was followed by *Griffin*, discussed earlier in these reasons, in which the Court of Appeal found that duplication, inefficiency in the litigation process, and correspondingly higher costs — the very problems the Arbitration Act, 1991 sought to solve — were key to determining when the discretion would apply. The court discussed how cumbersome and inefficient it would be to separate the proceedings, pointing out that a consumer class action would take place whether or not the business customers' claims were joined. The liability and damages issues would be identical. Carving out the business customers' claims would mean unnecessary duplication and expense. Moreover, individual arbitration would be inefficient, since
- [a] partial stay would require an examination of each claim and a determination of whether it was a consumer or non-consumer claim. This is bound to be contentious in the case of many purchasers, as laptop computers are portable and regularly used for a variety of purposes. Dividing the claims as between those to be litigated and those to be arbitrated would be costly and time-consuming. [para. 51]
- [143] This interpretation of s. 7(5) has been followed by Ontario courts since the Court of Appeal's decision in *Griffin* in 2010.
- [144] Before this Court, Mr. Wellman argues that the Ontario courts have correctly concluded that s. 7(5) applies whenever a court proceeding includes arbitrable and non-arbitrable matters — whether in circumstances where an arbitration agreement does not cover all of the issues put before the court, or when multiple parties commence proceedings, some of whom are bound by arbitration agreements and others not. In either case, Mr. Wellman says, a court has discretion to either allow the entire matter to proceed in court or stay the arbitrable matters so they can be decided by the arbitrator. In deciding whether to grant a partial stay of the arbitrable matters under s. 7(5), the judge must determine whether the arbitrable and non-arbitrable claims can be reasonably separated.

- [145] TELUS, on the other hand, seeks to overturn Griffin, arguing that s. 7(5) applies only when parties who are bound by an arbitration agreement seek to litigate in the courts and there are some matters that are not specifically referred to in the arbitration agreement. A judge can either allow those specific non-arbitrable matters to continue in court or stay them pending the rest of the arbitration. TELUS submits that s. 7(1) of the Arbitration Act, 1991 entirely precludes courts from hearing any matter covered by an arbitration agreement, and s. 7(5) only gives the court a discretion to decide what to do with the non-arbitrable matters: it can either hold them in abeyance pending the outcome of arbitration or allow them to proceed in court. On TELUS's reading of the provision, therefore, s. 7(5) does not apply to arbitrable matters, but rather gives courts only the discretion to decide whether to stay non-arbitrable matters.
- [146] As noted above, s. 7 of the Arbitration Act, 1991 sets out the statutory rules related to stays. Under the default rule in subs. (1), upon request by another party to the arbitration agreement, any proceeding relating to an arbitrable matter shall be stayed. This rule is qualified by the exceptions set out in subs. (2), which include grounds related to undue delay or a judge's assessment of the merits. If the court refuses to stay the proceeding, subs. (4) renders any arbitration without effect.
- [147] Section 7(5) addresses situations where the proceeding includes both matters subject to an arbitration agreement and non-arbitrable "other matters," which are properly before the court. In such cases, subs. (5) permits a judge to partially stay the arbitrable matters while allowing the non-arbitrable matters to proceed if the court is satisfied that (a) the proceeding is "hybrid"; and (b) it is reasonable to separate the matters. The determination of whether it is reasonable to separate the matters governs this latter exercise of discretion.
- [148] Nothing in the text directs a court to read s. 7(5) (or s. 7 as a whole) on a party-by-party basis, as TELUS urges this Court to do. Rather, the focus of the provision is on "matters in respect of which the proceeding was commenced". Subsection (5) uses "proceeding" and "other matters" generally and without qualification. The motions judge is required, as a result, to consider "the proceeding" as a whole. TELUS correctly notes that "other matters" in s. 7(5) will, in certain circumstances, refer to disputes between the same parties that fall outside their arbitration agreement. But it does not follow that "other matters" must be read restrictively. "Other matters" simply refers to non-arbitrable disputes, whether they involve parties to the arbitration agreement at issue or individuals who are not subject to the arbitration agreement.
- [149] The scheme of the Ontario legislation is markedly different from the British Columbia legislation at issue in *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, a decision TELUS relied on. In that case, Michelle Seidel sought to certify a class action against TELUS for overbilling on cell phone contracts. TELUS sought to stay the proceedings because there was a requirement in the standard form contract that disputes be resolved through individual arbitration. In *Seidel*, this Court stated 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” (para. 2). Therefore, clear legislative intent is required for a court to entertain otherwise arbitrable matters.

[150] Seidel’s direct application to the case before us is blocked by the fact that it involved a completely different legislative framework. Two British Columbia statutes were in issue, the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, and B.C.’s Commercial Arbitration Act, R.S.B.C. 1996, c. 55. The Court permitted a consumer claim to proceed in court pursuant to s. 172 of the Business Practices and Consumer Protection Act, even though it was subject to an arbitration agreement. A stay was granted on all other arbitrable claims, based on the mandatory language in s. 15 of B.C.’s Commercial Arbitration Act, which stated:

15 (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.

[151] The issue in Seidel was whether s. 172 of British Columbia’s consumer protection legislation constituted a legislative override of the arbitration clause at issue. The Court emphasized that the relevant provincial legislation was determinative of whether a court must stay matters covered by an arbitration agreement.

[152] Notably, in the legislation at issue in Seidel, there was no analogous provision to s. 7(5) of Ontario’s Arbitration Act, 1991 permitting the exercise of discretion. In fact, unlike B.C.’s arbitration legislation, Ontario’s statute expressly authorizes a discretionary judicial override of arbitration clauses in several circumstances. Section 7(2) contains exceptions similar to those in B.C. but adds discretionary evaluations to determine whether the motion for a stay “was brought with undue delay” and whether “the matter is a proper one for default or summary judgment.” Under both of these latter exceptions, and unlike B.C.’s legislation, a court may override an arbitration clause for reasons unrelated to the clause’s contractual validity.

[153] Section 7(5) of the Ontario legislation similarly reflects an explicit legislative intention to override an otherwise applicable arbitration clause. The words of the provision state that “[t]he court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters” This means that the court can either stay the arbitrable matters before it or allow them to proceed. Logically, a discretionary ability to grant a partial stay also includes the power to refuse a partial stay. In other words, “may” means “may”.

- [154] Non-arbitrable disputes, by definition, fall outside an arbitrator's jurisdiction. Unless the parties agree to arbitrate after the dispute arises, non-arbitrable claims cannot proceed by arbitration. In addition, statutory language is not required for a court to continue hearing a non-arbitrable matter which is properly before it. Therefore, the only interpretation that gives meaningful effect to the discretionary language of s. 7(5) is one that confers on judges the ability to allow both arbitrable and non-arbitrable disputes to proceed in court.
- [155] TELUS's assertion that a court can never stay arbitrable matters under s. 7(5) renders the opening phrase — "may stay the proceeding with respect to the matters dealt with in the arbitration agreement" — superfluous. And by interpreting the provision to apply only to non-arbitrable matters, s. 7(5) adds nothing to a judge's existing discretion: a court already has the ability to stay proceedings "on its own initiative or on motion by any person, whether or not a party, . . . on such terms as are considered just" (Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106).
- [156] By inserting the reasonableness requirement in s. 7(5)(b), Ontario's legislature clearly contemplated that in certain circumstances, it would be unreasonable "to separate the matters dealt with in the [arbitration] agreement from the other matters". However, TELUS's interpretation would mean that arbitrable and non-arbitrable matters would always be separated, and could never be heard together — hardly an efficient outcome, or one that promotes access to justice.
- [157] Finally, TELUS's interpretation would result in costly and time-consuming factual inquiries on how to divide the arbitrable and non-arbitrable claims even where the substance of both claims is identical, as in this case. Both parties acknowledged the potential difficulties associated with drawing the line between a "consumer" as defined by the Consumer Protection Act, who is exempt from arbitration, and a business customer, who is not. This distinction may be especially difficult to determine for those individuals who use their cell phone for both personal and business purposes. For these individuals, determining whether they fall within the scope of the exception in the Consumer Protection Act adds unnecessary complexity.
- [158] For class actions, the real-world effect of separating out everything subject to an arbitration clause could well turn the certification stage into a search by the defendant of the precise status of each member of the class to determine whether they are in fact business or consumer clients. As the interveners Public Interest Advocacy Centre and Consumers Council of Canada pointed out in their factum, this determination could well result in "an individual fact-finding process", leading to "confusion [that] would further undermine Ontario's class actions regime as a viable, procedural access to justice mechanism for consumers" (para. 25). TELUS's interpretation, in short, not only renders s. 7(5) meaningless, but also undermines the Class Proceedings Act, 1992, by making class certification overly cumbersome.

[159] Thus, when s. 7 is read as a whole, it becomes evident that subs. (1) and (5) are complementary, not incompatible. Both provisions align with the purposes of the Arbitration Act, 1991. They both prevent courts from undermining arbitration agreements. At the same time, the legislature also saw fit to include several exceptions in s. 7, exceptions which allow a court to override arbitration clauses in prescribed circumstances when doing so would promote access to justice and the efficient resolution of disputes.

[160] TELUS argues that while there may be negative consequences associated with mandatory, individualized arbitration, these consequences are the foreseeable results of bargains into which its clients freely entered. Their position is that freedom of contract requires that parties abide by their agreements, and courts should not rewrite bargains. This argument, however, is undermined by the fact that their standard form contract hardly represents a bargain freely entered into — they were non-negotiable compulsory terms that were preconditions to being able to purchase TELUS products.

[161] Arbitration was intended to be a means by which parties on a relatively equal bargaining footing chose to design an alternative dispute mechanism. Respecting parties' autonomy was a key goal of the Arbitration Act, 1991. As Prof. Shelley McGill points out,

The new arbitration policy . . . proceeded from the assumption that sophisticated disputants with relatively equal bargaining power would collaborate to design their own resolution process. Inherent in this policy was the goal of empowering disputants and giving them more control over dispute resolution while facilitating international trade. [Emphasis added.]

(Shelley McGill, "The Conflict Between Consumer Class Actions and Contractual Arbitration Clauses" (2006), 43 Can. Bus. L.J. 359, at p. 365)

[162] The standard terms of TELUS's contract did not permit group arbitration, but required individualized arbitration proceedings for each complaint. The impact of not permitting group proceedings was discussed by the Court of Appeal in Griffin:

It is important to note . . . that Dell's arbitration clause not only requires all claims to be arbitrated, but also provides that "[t]he arbitration will be limited solely to the dispute or controversy between Customer and Dell", thereby precluding the possibility of a class arbitration. I would have found Dell's position much more persuasive had Dell been prepared to submit to an arbitration that would allow for the efficient adjudication of the claims on a group or class basis. . . . In my view, this provides further evidence . . . that Dell does not genuinely seek to have the claims advanced against it determined by way of arbitration. Dell is simply seeking to exploit the inefficiency of arbitrating individual claims. [Emphasis added; para. 60.]

[163] The empirical reality is that the effect of mandatory arbitration clauses is to deny access to justice in the context of low-value claims. As Prof. Cynthia Estlund points out,

... the great bulk of disputes that are subject to mandatory arbitration agreements ... simply evaporate before they are even filed. It is one thing to know that mandatory arbitration draws a thick veil of secrecy over cases that are subject to that process. It is quite another to find that almost nothing lies behind that veil. Mandatory arbitration is less of an “alternative dispute resolution” mechanism than it is a magician’s disappearing trick or a mirage. Metaphors beckon, but I have opted for that of the black hole into which matter collapses and no light escapes.

(Cynthia Estlund, “The Black Hole of Mandatory Arbitration” (2018), 96 N.C. L. Rev. 679, at p. 682)

[164] The Court of Appeal in *Griffin* recognized this reality when it observed:

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: see Theodore Eisenberg, Geoffrey P. Miller and Emily Sherwin, “Mandatory Arbitration for Customers but not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts” (2008), 92 *Judicature* 118. [Emphasis added; para. 30.]

[165] All of TELUS’s clients — both businesses and consumers — signed the same, non-negotiable standard form agreement. TELUS’s individualized arbitration clause effectively precludes access to justice for business clients when a low-value claim does not justify the expense. And its mandatory nature, in turn, illustrates that the animating rationales of party autonomy and freedom of contract are nowhere to be seen. As the court in *Griffin* stated:

Deference to arbitration is largely based on freedom of contract and the value of personal autonomy. How can such values come into play in contracts of adhesion where that autonomy is only exercised by one of the parties? There is no reason to defer to businesses that seek to advance only their own self-interests and evade laws not to their liking. [para. 30]

(Citing Jonnette Watson Hamilton, “Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?” (2006), 51 *McGill L.J.* 693, at p. 734.)

[166] One cannot talk about “equal bargaining power” and “party autonomy” if the very nature of the contract reveals that one party has exclusive contractual authority. Parties to mandatory individual arbitration clauses cannot, therefore, reasonably be said to have “come to the table” and bargained, since there is no bargaining table. That individuals and companies sign these contracts is a function not of bargaining choices, but of an absence of choice.

[167] Perhaps the most ironic contradiction of refusing to acknowledge the discretion embodied in s. 7(5) is its corrosive effect on access to justice. The purpose of the Arbitration Act, 1991, was to facilitate the ability of parties to negotiate their own process for resolving disputes outside of the courts, on the premise that access to justice had as much to do with access to a result as with access to a judge. To impose arbitration on unwilling parties violates the spirit of the Arbitration Act, 1991 and the arbitral process. This operates as an invisible but formidable barrier to a remedy and presumptively immunizes wrongdoing from

accountability contrary to our most fundamental notions of civil justice.

- [168] The concurring judge in the Court of Appeal expressed concern that using s. 7(5) to override otherwise valid arbitration clauses could result in sophisticated parties sidestepping arbitration agreements by including a few consumers in a class action alongside numerous business clients. However, experience teaches us that this is anxiety without a cause. There are no known cases where such a ruse has been attempted in Canadian courts. That does not mean it could never happen, but such gossamer speculation cannot drive statutory interpretation.
- [169] In any event, such concerns are mitigated by the fact that the availability of judicial discretion in s. 7(5) does not require judges to allow a class action including arbitrable claims to proceed: it simply lets them decide when it is reasonable to do so. Eliminating judicial discretion, on the other hand, effectively eliminates access to justice.
- [170] In this light, s. 7(5) must be interpreted to give judges the discretion to refuse to stay arbitrable claims if it is unreasonable to separate them from non-arbitrable claims. This interpretation applies with equal force whether the proceeding is between two or more named parties, or is a class action.
- [171] TELUS's arbitration agreement "deals with only some of the matters in respect of which the proceeding was commenced", namely, the claims of business customers. The consumer claims are "other matters" which are not subject to arbitration. Therefore, s. 7(5)(b) gave the motions judge discretion to consider whether it was "reasonable to separate the matters dealt with in the agreement [the claims of business customers] from the other matters [the consumer claims]".
- [172] In our view, the discretion in this case was properly exercised to allow the business claims to be joined with the consumer class action dealing with the same issues. We would therefore dismiss the appeal.

Appeal allowed, Wagner C.J. and Abella, Karakatsanis and Martin JJ. dissenting.

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- [1] Unless indicated otherwise, all section number references are to the Arbitration Act.
- [2] Mr. Wellman in fact sued three defendants — TELUS, TELUS Communications Company, and Tele-Mobile Company — but TELUS is the only remaining defendant, as the other two have ceased to exist and their assets and liabilities have been transferred to TELUS.
- [3] Another proposed class action, commenced by Jason Corless, advances substantially similar allegations against Bell Mobility Inc., and the certification application in that action was heard together with the application in the TELUS litigation. This appeal does not concern the Bell action.
- [4] TELUS also sought leave to appeal the certification order to the Divisional Court. That motion was dismissed (see *Corless v. Bell Mobility Inc.*, 2015 ONSC 7682). The Divisional Court's decision is not challenged in this appeal, nor are the merits of Mr. Wellman's allegations in the underlying class action.
- [5] The representative plaintiff who qualified as a "consumer" was added only after certification was granted (see *Griffin*, at para. 2).
- [6] As the Alberta Law Reform Institute observes, "the [Uniform Law Conference of Canada] materials do not discuss or even mention section 7(5)'s intended purpose, meaning or effect" (para. 34, citing Uniform Law Conference of Canada, *Proceedings of the Seventy-first Annual Meeting* (August 1989), at pp. 77-78 and Appendix B; Uniform Law Conference of Canada, *Proceedings of the Seventy-second Annual Meeting* (August 1990), at p. 36 and Appendix A).
- [7] "Supplier" is defined in s. 1 as "a person who is in the business of selling, leasing or trading in goods or services".
- [8] Elmer Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87, cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

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Prepared on 26 October 2026 · Esheria