Court File No.: 37722

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

TELUS COMMUNICATIONS INC.

APPELLANT
(Appellant)

- and -

AVRAHAM WELLMAN

RESPONDENT
(Respondent)

ATTORNEY GENERAL OF BRITISH COLUMBIA, ADR CHAMBERS INC., THE CANADIAN CHAMBER OF COMMERCE, THE CONSUMERS COUNCIL OF CANADA, THE PUBLIC INTEREST ADVOCACY CENTRE, THE CANADIAN FEDERATION OF INDEPENDENT BUSINESS, THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC and THE CONSUMERS' ASSOCIATION OF CANADA

INTERVENERS

FACTUM OF THE INTERVENER, CONSUMERS' ASSOCIATION OF CANADA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Daniel Bach
Elizabeth deBoer
Tyler Planeta

SISKINDS LLP
100 Lombard Street, Suite 302
Toronto, Ontario M5C 1M3
Tel: (416) 594-4376
Fax: (416) 594-4377
Email: daniel.bach@siskinds.com

Counsel for the Intervener, Consumers' Association of Canada

Michael Sobkin
331 Somerset Street West
Ottawa, Ontario K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Ottawa Agent for the Intervener, Consumers' Association of Canada

D. Geoffrey Cowper, Q.C.
Gerald L.R. Ranking
Andrew Borrell
Alexandra Mitretodis

FASKEN MARTINEAU DUMOULIN LLP
550 Burrard Street, Suite 2900
Vancouver, BC V6C 0A3
Tel: 604 631 3131
Email: gcowper@fasken.com

Counsel for the Appellant

Sophie Arseneault

FASKEN MARTINEAU DUMOULIN LLP
55 Metcalfe Street, Suite 1300
Ottawa, ON K1P 615
Tel: 613 236 3882
Fax: 613 230 6423
Email: sarseneault@fasken.com

Ottawa Agent for the Appellant

Joel P. Rochon
Peter Jervis
Golnaz Nayerahmadi
Eli Karp

ROCHON GENOVA LLP
Barristers & Solicitors
121 Richmond Street West, Suite 900
Toronto, Ontario M5H 2K1
Tel: 416 548 9874
Fax: 416 363 0263
Email: jrochon@rochongenova.com

Counsel for the Respondent

Marie-France Major

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, Ontario K2P 0R3
Tel: 613 695 8855 Ext: 102
Fax: 613 695 8580
E-mail: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Respondent

Michael A. Eizenga
Andrew Little
Ranjan Agarwal
Charlotte Harman

BENNETT JONES LLP
One First Canadian Place
Suite 3400, PO Box 130
Toronto, Ontario M5X 1A4
Telephone: (416) 863-1200
Fax: (416) 863-1716
E-mail: eizengam@bennettjones.com

Mark Jewett

BENNETT JONES LLP
World Exchange Plaza
1900-45 O'Connor Street
Ottawa, Ontario K1P 1A4
Telephone: (613) 683-2328
Fax: (613) 683-2323
E-mail: jewettm@bennettjones.com

Counsel for the Intervener, ADR Chambers Inc.

Brandon Kain
Adam Goldenberg
Ljiljana Stanic

MCCARTHY TÉTRAULT LLP
Suite 5300
Toronto Dominion Bank Tower
Toronto, Ontario M5K 1E6
Telephone: (416) 601-8200
Fax: (416) 868-0673
E-mail: bkain@mccarthy.ca

Ottawa Agent for the Intervener, ADR Chambers Inc.

Matthew Estabrooks

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-8695
Fax: (613) 563-9869
E-mail:
matthew.estabrooks@gowlingwlg.com

Counsel for the Intervener, Canadian Chamber of Commerce

Mohsen Seddigh
Daniel Hamson

SOTOS LLP
180 Dundas Street West
Suite 1200
Toronto, Ontario M5G 1Z8
Telephone: (416) 572-7320
Fax: (416) 977-0717
E-mail: mseddigh@sotosllp.com

Ottawa Agent for the Intervener, Canadian Chamber of Commerce

Alyssa Tomkins

CAZASAIKALEY LLP
220 avenue Laurier Ouest
Ottawa, Ontario K1P 5Z9
Telephone: (613) 565-2292
Fax: (613) 565-2087
E-mail: atomkins@plaideurs.ca

Counsel for the Interveners, Consumers Council of Canada & Public Interest Advocacy Centre

Anthony Daimsis

CANADIAN FEDERATION OF INDEPENDENT BUSINESS (CFIB)
National Affairs and Partnerships
1202 - 99 Metcalfe Street

Ottawa Agent for the Interveners, Consumers Council of Canada & Public Interest Advocacy Centre

David Fewer

UNIVERSITÉ D'OTTAWA
Common Law Section
57 Louis Pasteur St.
Ottawa, Ontario K1N 6N5

Ottawa, Ontario K1P 6L7
Telephone: (613) 562-5800 Ext: 2558
Fax: (613) 562-5124
E-mail: adaimsis@uottawa.ca

Counsel for the Intervener, Canadian Federation of Independent Business

Telephone: (613) 562-5800 Ext: 2558
Fax: (613) 562-5417
E-mail: david.fewer@uottawa.ca

Ottawa Agent for the Intervener, Canadian Federation of Independent Business

Marina Pavlovic

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC
University of Ottawa, Faculty of Law
57 Louis Pasteur Street
Ottawa, Ontario K1N 6N5
Telephone: (613) 562-5800 Ext: 2675
Fax: (613) 562-5417
E-mail: marina.pavlovic@uottawa.ca

Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

David Fewer

UNIVERSITÉ D'OTTAWA
Common Law Section
57 Louis Pasteur St.
Ottawa, Ontario K1N 6N5
Telephone: (613) 562-5800 Ext: 2558
Fax: (613) 562-5417
E-mail: david.fewer@uottawa.ca

Ottawa Agent for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

Jonathan Eades
James Leo Maxwell

ATTORNEY GENERAL OF BRITISH COLUMBIA
1001 Douglas Street, 3rd floor
Legal Services Branch
Victoria, British Columbia V8W 9J7
Telephone: (250) 387-2789
Fax: (250) 953-3557
E-mail: jonathan.eades@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia

Pierre Landry

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, Quebec J8X 3R1
Telephone: (819) 771-7393
Fax: (819) 771-5397
E-mail: p.landry@noelassocies.com

Ottawa Agent for the Intervener, Attorney General of British Columbia

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PART I. OVERVIEW AND STATEMENT OF FACTS

(A) Overview

1. Far too often, Canadian law does not create a cost-effective procedural path for litigants.[1] This case is an exception: the *Class Proceedings Act, 1992* (the "*CPA*") is working as designed, providing access to the civil justice system. This procedural path, approved by the motion judge and the Court of Appeal for Ontario, is waiting—indeed, it will be utilized, no matter the outcome of this appeal. Access to justice is at hand. The question is if non-consumers will get it.

2. The Appellant advances a technical construction of the *Arbitration Act, 1991* (the "*Act*") that will close this path for non-consumers, diverting their claims to a dispute resolution process that is too expensive and onerous for anybody to use given the amounts at issue here. The goals of our justice system—embodied in the *CPA* and repeatedly expressed by this Court—will not permit this interpretation: access to justice is *always* preferable to the effective waiver of rights.

3. A legislature is presumed to create a consistent and coherent body of laws. The statutory interpretation exercise incorporates this principle by directing courts to examine the words of an act in their 'entire context', determined with reference to the complete body of statute law produced by a legislature. The Consumers' Association of Canada ("CAC") intervenes to set the Appellant's interpretation of section 7(5) of the *Act* against the core functions of the *CPA*: access to justice and behaviour modification.

4. This Court has made clear that the *CPA* serves a regulatory and public law function by encouraging compliance with law.[2] The link between class action lawsuits and deterrence of corporate misbehaviour is well-established. A narrow interpretation of section 7(5) restricts the *CPA* by allowing corporations to devise contractual immunity from liability for small claims. This undermines the behavior modification objective of the *CPA* directly

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[1] *Hryniak v. Mauldin*, 2014 SCC 7 [*Hryniak*] at paras. 23-33.
[2] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 SCR 534 at para. 29.

—by eliminating claims from excluded class members—and indirectly—by creating a system where defendants can reduce class size, and make some cases too small to prosecute at all.

5. There is a clear example of where the Appellant's arguments lead. In recent years, the Supreme Court of the United States permitted the use of arbitration clauses as shields from class action claims. In doing so, they have acknowledged their decisions eliminate an "affordable procedural path" for some claims.[3] This is incompatible with the values of the Canadian civil justice system.

6. Since there is no dispute in this case that the consumer claims will proceed as a class action, the arbitration clause's only function is to bar cost-effective recovery for some class members and allow the Appellant to evade liability for business claims. A fair, affordable, and just procedure to resolve non-consumers' claims in this class action is within reach. The *Act* should never operate to restrain access to justice. Any interpretation of the *Act* that does so should be rejected.

(B) Statement of Facts

7. CAC accepts the facts as set out in the Respondent's factum, and emphasizes that (i) the arbitration clause in question stipulates that the cost of arbitration is to be shared by the parties; and (ii) the Respondent led expert evidence that valued the average claim in this litigation between $103.74 and $143.94 annually.[4]

PART II. STATEMENT OF QUESTION IN ISSUE

8. Did the Court of Appeal for Ontario err in holding that s. 7(5) of the *Act* permits a court to refuse to stay the claims of business customers that are subject to an arbitration agreement?

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[3] *American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 at 2309 (2013) (Scalia J at p. 4).
[4] Factum of the Respondent, Avraham Wellman ("Respondent's Factum") at para. 36.

PART III. STATEMENT OF ARGUMENT

(A) The Statute Book as an Interpretive Guide

9. This appeal turns on the interpretation of the *Act*. "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."[5] The 'entire context' captures the complete body of statute law produced by a legislature.[6] There is a presumption that a legislature has created a consistent and coherent body of law; interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred.[7] In this case, the *Act* and *CPA* can, and should, be read coherently. The goals of the *CPA* include access to justice and behaviour modification.[8] Both are integral to the preferable procedure analysis, a comparative exercise that considers the relative advantages of a class action suit over other forms of dispute resolution that are *realistically available* to the plaintiffs.[9]

(B) Access to Justice

10. This case is about access to justice: should businesses with small-dollar claims have access to a class action or be forced into unaffordable individual arbitration? Should consumers have access to economically-viable remedies for their claims? The Appellant's interpretation moves hundred-dollar business claims into individual arbitration and, because it shrinks the size of the class, makes the consumer class action less economically viable. These questions reverberate beyond this appeal, and implicate the choices

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[5] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at 40-41.
[6] See *R. v. Ulybel Enterprises Ltd*., 2001 SCC 56 at 883-884.
[7] *Ibid*.
[8] See *AIC Limited v. Fischer* (*sub nom Fischer v. IG Investment Management Ltd.*), 2013 SCC 69, [2013] 3 SCR 949 ["*AIC Ltd.*"] at para. 16.
[9] *Ibid* at para. 23 [emphasis added].

underlying our civil justice system. This is particularly true in light of this Court's warning that ensuring access to justice is the single greatest challenge to the rule of law in Canada.[10]

11. The *Act* is also about access to justice, and the legislature consciously drew a line between it and other policies intended to improve access to justice.[11] One such example is the *CPA*, enacted shortly after the *Act*.[12] While class actions and arbitration can address different kinds of disputes and power dynamics,[13] both are designed to foster to access justice.

12. Access to justice captures an array of concepts including equality of outcomes and the right to affordably participate in institutions where law is administered and applied. The Appellant's interpretation of section 7(5) is contrary to these principles. The liability and damages issues for both consumer and non-consumer claims in this matter are the same.[14] Given the low per-claim damages, access to justice for non-consumers is illusory if claims cannot be consolidated. As such, if it stands, the arbitration clause will allow the Appellant to evade liability for business claims. Had the legislature intended that arbitrable claims be excluded from class proceedings, it would have been explicit. Absent such a restriction,

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[10] *Hryniak*, supra note 1 at para. 1.

[11] When introducing the *Act*, the Honourable Howard Hampton, Attorney General of Ontario explained that "[o]ne 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*": Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, March 27, 1991, pp. 1340-50 (First Reading of Bill 42, *An Act to Revise the Arbitrations Act*).

[12] *Western Canadian Shopping Centres*, *supra* note 2 at paras. 27-29.

[13] Lauren Guth Barnes, "How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act" (2015) 9 Harv L & Pol'y Rev 329 at 331.

[14] *Wellman and Corless v. TELUS and Bell*, 2014 ONSC 3318 at para. 90.

the *Act* is subject to a fair, large and liberal construction and interpretation[15] consistent with access to justice.

13. In Canada, courts are "institutions of 'public norm generation and legitimation.'" Adjudication in Court (and access to it) is a public good.[16] Individual arbitration (as it is in this case) provides no mechanism aimed at correcting large-scale wrongs, or modifying undesirable behaviour. Unlike class litigation, arbitration is private adjudication that involves no public filings or legal record, which "stunts both growth of the law and the deterrence effect of holding wrongdoers accountable."[17] Leading scholars have lamented that "privatizing disputes that would otherwise be public may erode public confidence in public institutions and the judicial process", and linked the privatization of dispute resolution to "an erosion of the public realm."[18] Even where an arbitral resolution is known, it will not necessarily effect subsequent proceedings, which weakens the common law:

> "[i]n order for standards or norms to have any influence on behaviour, they must be made public for all to see, to "become known, feed expectations, and breed a common understanding of the legal culture of the country… unlike lawsuits adjudicated in public courts of record, arbitration decisions do not become part of an accessible judicial history or common law; these built-in features of arbitration destroy any deterrent effect of resolving claims in these fora by eliminating the practical means of "forc[ing] information into the public about the kinds of claims that millions of ordinary" people may possess."[19]

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[15] *Legislation Act, 2006*, SO 2006, c 21, Sch F at s. 64.
[16] *Douez v. Facebook, Inc.*, 2017 SCC 33 at para. 25 (per Karakatsanis, Wagner and Gascon JJ.).
[17] Barnes, *supra* note 13 at 338.
[18] See J Maria Glover, "Disappearing Claims and the Erosion of Substantive Law" (2015) 124 Yale LJ 3052.
[19] Myriam Gilles, "The Demise of Deterrence: Mandatory Arbitration and the 'Litigation Reform' Movement" (Paper delivered at the Pound Civil Justice Institute's Annual Forum for State Court Appellate Judges, 2014) [unpublished] at pp. 17-18.

14. As this Court put it, "private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined."[20]

(C) The Goals of the *CPA*

(i) The *CPA* empowers plaintiffs with low-value claims

15. For low-value claims, the *CPA* operates as a sword and a shield: by forcing wrongdoers to risk liability for their misconduct, it makes it less likely misconduct will occur. It does so by harnessing private citizens and agents to regulate social harm by imposing consequence on those who violate law. The modern class action grew out of an American regulatory system that increasingly relied on private enforcement of laws.[21] Canada, like the United States, has grown to rely "heavily and explicitly" on enforcement actions by private parties that achieve public regulatory objectives.[22]

16. The deterrent effect is particularly important in so-called "negative value claims", where the cost of dispute resolution exceeds claim value and no claim is independently viable. In such instances, class certification will typically be the only mechanism that creates an economic incentive to avoid wrongdoing, since the consolidation of claims in a single action creates a case large enough that it can be pursued economically: rational actors will not litigate where the cost of litigation is greater than the potential recovery.

17. It is desirable to force wrongdoers to pay damages that optimally deter them from causing harm; when claims are too small to pursue individually, class actions can force defendants to face the cost of the harm they cause, thereby increasing deterrence. Culling arbitrable claims from consumer class actions both leaves consumers more exposed to misconduct, by removing a deterrent against corporate misconduct, and makes it less likely that

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[20] *Hryniak*, supra note 1 at para. 26.
[21] J. Maria Glover, "The Structural Role of Private Enforcement Mechanism in Public Law", 53 Wm. & Mary L. Rev. 1137 (2012) at 1163.
[22] See *ibid* at 1140.

consumer claims can be brought in the first place, because if the class is too small, it cannot be prosecuted cost effectively. [23] Even contingency fees, which typically facilitate access to justice by removing the need to finance litigation out-of-pocket, cannot facilitate claims that are too small given the complexity of the case. If there are more negative value claims, there are more situations where it is economically rational for wrongdoers to break the law.

(ii) A weakened *CPA* devalues behaviour modification

18. Behaviour modification is a *raison d'etre* of class proceedings legislation.[24] The deterrence power of class actions flows from their ability to equalize power dynamics, either through broad relief, or through substantial class-wide damages or penalties.[25] American scholars have described the link between legal action and deterrence against future wrongdoing as "inarguable": a clear judicial determination of liability forces a litigant—and similarly situated entities—to assess the court's reasons and adjust their behaviour, or risk liability.[26]

19. The collapse of the deterrent effect is particularly noticeable in the United States, where the last three decades have seen a move toward private arbitration for virtually every type of justiciable claim.[27] Scholars are clear that American decisions bolstering arbitral rights have resulted in less deterrence of corporate wrongdoing.[28] Put differently, the proliferation of arbitration clauses has not coincided with a proliferation of arbitrations, and though millions of consumers are obliged to use arbitration, almost none do.[29]

20. The Supreme Court of the United States' decision in *AT&T Mobility LLC v. Concepcion*[30] is apposite. In that case, the Court ruled that AT&T, a major telecommunications company, could require their cell phone customers to bring claims by individual arbitrations rather

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[23] *Berry v. Pulley*, 2011 ONSC 1378 at para 63.
[24] *AIC Ltd.*, supra note 8 at paras. 8, 34.
[25] Barnes, *supra* note 13 at 333.
[26] Gilles, *supra* note 19 at 17.
[27] Glover, *supra* note 18 at 3074.
[28] Barnes, *supra* note 13 at 336-337.
[29] *See*, *e.g.*, Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights", 124 Yale LJ 2804 (2015) at 2812-2813.
[30] 131 S. Ct. 1740 (2011) ["*Concepcion*"].

than in court by way of a class action.[31] The majority noted that arbitration could create efficient, streamlined processes.[32]

21. In dissent, Justice Breyer (joined by Justices Ginsburg, Kagan, and Sotomayor) forecast that "agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate."[33] This was prophetic: a 2015 study found that AT&T only faced 134 individual arbitration claims between 2009 and 2014.[34] During the same period, it had up to 120 million customers, and lawsuits filed by the United States federal government charged it with numerous legal breaches, including systematic overcharging.[35] For small-stakes claimants, though, AT&T's arbitration agreement operated as waiver of liability and an immunity from civil claims.

22. The decision in *Concepcion* was followed by *American Express Co. v. Italian Colors Restaurant*,[36] where the Supreme Court of the United States continued to limit a plaintiffs' right to class-wide dispute resolution mechanisms. Specifically, the Court held that the United States' *Federal Arbitration Act* did not permit courts to invalidate a waiver of class arbitration on the ground that a plaintiff's cost of individually arbitrating a claim would exceed their potential recovery. For the majority, Justice Scalia wrote that the antitrust laws founding the Plaintiffs' action "do not guarantee an affordable procedural path to the vindication of every claim."[37]

23. To paraphrase Justice Kagan's dissent in *Italian Colors*, arbitration should not be a faux method of dispute resolution capable of creating *de facto* immunity from claims. Otherwise, companies will have "every incentive to draft their agreements to extract backdoor waivers of [rights], making arbitration unavailable or pointless."[38] The Court's

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[31] *Ibid*.
[32] *Ibid* at 1749 (Scalia J at p. 10).
[33] *Ibid* at 1760 (Breyer J at p. 9, dissenting).
[34] Resnik, *supra* note 29 at 2812-2813.
[35] *Ibid*.
[36] *Italian Colors*, *supra* note 3.
[37] *Ibid* at 2309 (Scalia J at p. 4)
[38] *Ibid* at 2315 (Kagan J at p. 5, dissenting).

majority decision in *Italian Colors*, as Justice Kagan wrote in her dissenting opinion, permits corporations to contractually deprive their victims of all legal recourse.[39]

24. In sum, U.S. law empowers private parties "to frustrate or altogether eliminate claiming in any forum" by contract, thereby "rewrit[ing] the scope of their obligations under substantive law."[40] The immense power this grants corporate actors is not lost on scholars:

> "[*Italian Colors*] gave private entities a power antecedent to the enforcement of substantive law – a power more akin to lawmaking itself: Corporations, through arbitration provisions in contracts, can render legal obligations virtually inapplicable to any of the primary conduct associated with those contractual arrangements. In short, corporations now have the power, through contract, to effectively negate substantive law."[41]

25. Arbitration is thus divorced from its original, claims-facilitative function,[42] and can be antagonistic to the regulatory goals of the *CPA*. In the event that TELUS' appeal is allowed, but the consumers are eventually successful, non-consumers are still likely to receive nothing: the realistic outcome if this appeal is allowed is not 30% of the class arbitrating their claim, it is 30% of the class forgoing their claim.[43] This is especially true where, as here, those with arbitrable claims have to bear the costs of arbitration.[44] If successful, TELUS will have meaningfully reduced liability for their alleged misconduct by eliminating non-consumers' access to the justice system, not by successfully rebutting the non-consumers' putative claims.

26. Adopting the American approach will also impact consumers. Reducing class size, and thus class-wide liability, will result in fewer cost-justified class actions—meaning that wrongdoers will be less likely to bear the consequences of their actions. This creates a

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[39] *Ibid* at 2313 (Kagan J at p. 1, dissenting).
[40] Glover *supra* note 18 at 3066.
[41] *Ibid* at 3075.
[42] *Ibid* at 3068.
[43] Of the prospective class, approximately 70% are consumers and 30% are business customers: Respondent's Factum at para. 9.
[44] *See* the TELUS Service Terms excerpted at para 23 of the Factum of the Appellant, TELUS Communications Inc.

legal environment unable to fulfill the access to justice and behaviour modification objectives of the *CPA*.

27. CAC's interpretation does not override the *Arbitration Act*, but prevents that legislation from becoming a "foolproof way of killing off valid claims."[45] Canadian law should not allow litigants to control the scope of their legal obligations with the intent of eliminating claims against them, and thereby allow arbitration contracts to become "instruments in the erosion of [the] law"[46] and a barrier to justice.

PART IV. AND V. COSTS AND ORDER SOUGHT

28. CAC does not seek costs, and would ask not to be liable to any party for costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 27TH DAY OF SEPTEMBER, 2018.

Daniel Bach
Elizabeth deBoer
Tyler Planeta

Lawyers for the Intervener, Consumers' Association of Canada

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[45] *Italian Colors*, *supra* note 3 at 2315 (Kagan J at p. 5, dissenting).
[46] Glover, *supra* note 18.

PART VI. TABLE OF AUTHORITIES

16. Myriam Gilles, "The Demise of Deterrence: Mandatory Arbitration and the 'Litigation Reform' Movement" (Paper delivered at the Pound Civil Justice Institute's Annual Forum for State Court Appellate Judges, 2014) [unpublished] 13, 18

PART VII. LEGISLATION RELIED UPON

1. *Arbitration Act, 1991,* S.O. 1991, s 7

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.

2. *Class Proceedings Act,* 1992, SO 1992, c 6, s 5

Certification

5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

3. *Legislation Act, 2006,* SO 2006, c 21, Sch F, s 64

GENERAL RULES OF CONSTRUCTION
Rule of liberal interpretation

64 (1) 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.