THE NEXT CHAPTER: REVISITING THE POLICY IN FAVOR OF ARBITRATION IN THE CONTEXT OF EFFECTIVE VINDICATION OF STATUTORY CLAIMS

Shelley McGill* & Ann Marie Tracey**

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“Sometimes we stare so long at a door that is closing that we see too late the one that is open.”

I. INTRODUCTION

Picture a small Michigan merchant commencing class actions in Canada and the United States against an international company operating multi-level marketing techniques. The suit alleges pyramid selling in violation of both

* Associate Professor of Law and Policy, School of Business & Economics, Wilfrid Laurier University.
** Associate Professor of Legal Studies and Co-Director, Cintas Institute for Business Ethics, Williams College of Business, Xavier University.
Canadian and U.S. competition laws. The choice of law provision in the independent operator contract designates Michigan law; the arbitration clause contained in the umbrella agreement, invokes the Ontario Arbitration Act; an eventual appeal is heard in Quebec. Would it matter if the choice of law provision designated Quebec, or if the case involved a consumer rather than a business, an individual instead of a class, or common law, without statutory claims or public policy implications? Such scenarios send chills down the collective legal spines of litigants, attorneys, and judges trying to ascertain whether mandatory arbitration clauses, some precluding collective action, and all precluding a judicial forum, will be enforced.

Over the last decade, Supreme Courts in both Canada and the United States have addressed a smorgasbord of factual variables, resulting in multiple Supreme Court decisions that restrict collective access to judicial forums when arbitration clauses govern the disputes. With each new twist, the high courts in each country have tried to close the door on a widening array of cases implicating statutory remedies and public policy. In 2013, only two years after its decision in *AT&T Mobility v. Concepcion*, the U.S. Supreme Court weighed in on the controversy again in *American Express v. Italian Colors*. This time the U.S. Supreme Court addressed the scope of federal policy in favor of arbitration in the context of effective vindication of statutory claims. It held that, in the face of mandatory arbitration clauses, only contrary congressional command could preserve access to the courts, even where the claim invoked public policy or the public interest. Further, it both extended and restricted the parameters of its earlier jurisprudence. This case highlights issues relating to statutory rather than

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5 133 S. Ct. 2304 (2013).

common law claims, collective rather than individual redress, business rather than consumer context, and public rather than private interests.

This latest chapter in American jurisprudence invites a comparison with the Canadian experience after Seidel v. TELUS Communications, Inc. Unlike the Court’s approach in American Express, the Canadian Supreme Court in Seidel recognized a special category of public interest statutory causes of action that retain unrestricted access to the public forum, even in the face of a mandatory arbitration clause. The Canadian Court blocked arguments on the relative merits of class action, holding that it was up to the legislature to preserve access to courts. It then found the necessary legislative intent to preserve said access in the text, structure, and context of the subject legislation.

This article compares Canadian and U.S. positions on mandatory arbitration of statutory causes of action, when public interest and policy are implicated. It examines Canada’s experience with “legislative intent” after Seidel, as a forecast of what may lie ahead in the U.S. search for “contrary congressional command.” Section II sets the stage for comparison with an overview of arbitration and class action environments, in each jurisdiction. In Section III, the article examines the U.S. Supreme Court’s policy favoring arbitration, when individual statutory rights and effective vindication are at stake. The assessment of legislative intent by Canadian courts, discussed in Section IV, sheds light on Section V, which concludes with a forecast of the future for American class action arbitration, effective vindication of statutory rights, and contrary congressional command.

II. NATURAL JURISDICTIONAL COMPARATIVE

Rarely is a jurisdictional comparison as natural and relevant as it is for arbitration clause enforcement in Canada and the United States. The similarities between the two regimes create cross-border appeal for their respective jurisprudence. Both jurisdictions have class action protocols, and allow

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7 Seidel, 2011 SCC 15 (Can.).
8 Id. paras. 2, 36.
9 Id. paras. 33-38.
contingency fees. Both jurisdictions have long upheld policies favoring arbitration. American arbitration policy found its origins in the 1925 adoption of the Federal Arbitration Act (FAA), its national uniformity in the federal paramountcy principle, and its wide impact in the expansive interpretation of the Commerce Clause. The Canadian policy developed out of the United Nations’ Model Law on international arbitration, and expanded across the country as individual provinces adopted domestic legislation to conform to it. The resulting positions in both countries are the same: the contractual choice of arbitration is to be honored, unless the agreement is found to be void, invalid, or unenforceable.

The fact that many of the same industries, and even the same big players within industries, do business in both Canada and the United States, takes the comparison from theoretical to applied. The same credit card and computer companies have either initiated or at least been involved in litigation enforcing arbitration clauses in both countries (even over identical clauses). Case facts follow a standard pattern: a dominant party seeks a stay of a class action, commenced by a weaker party with a monetarily small complaint and governed by a contract of adhesion containing a mandatory arbitration clause. Outcomes also follow a predictable path. Initial stay motions are usually denied prompting an appeal, often to the Supreme Court, where a stay is granted, (albeit in a split

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11 Fed. R. Civ. P. 23(h) (authorizing an application for attorney’s fees). It provides: “In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.”


13 See Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984); see also AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (striking down a state law that effectively rendered waivers of class arbitration unenforceable as conflicting with the FAA).


17 In Canada, statutory wording varies by province: Ontario uses the word “invalid,” S.O. 1991, c. 17, § 7(2); B.C. uses the phrase “void, inoperative or incapable of being performed,” R.S.B.C. 1996, c. 55, § 15(2). In the United States, the FAA uses the phrase “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

Arbitration in the Context of Effective Vindication of Statutory Claims

Both Supreme Courts have been extremely busy restricting the availability of the judicial forum. They have upheld policies favoring arbitration over arguments of unequal bargaining power,\(^{19}\) unconscionability,\(^{20}\) absence of individual waiver,\(^{21}\) denial of due process,\(^{22}\) bias,\(^{23}\) lack of neutrality,\(^{24}\) and lack of expertise.\(^{25}\) Rarely are the resulting decisions unanimous in either country. Usually, a sharply worded dissent accuses the majority of extending the policy far beyond its legislative roots, using colorful language such as "to a hammer everything looks like a nail."\(^{26}\)

Where Canada and the United States have differed in the past is in their respective Supreme Court’s approach to arbitration policy enforcement. Canadian courts tend to leave a window of access open, ruling only on the often narrow procedural issue specifically placed before it,\(^{27}\) and setting aside broader policy questions. The Canadian Court feigns neutrality, deferring all questions of policy and public good to the legislature, claiming to be only an interpreter or implementer of the existing legislative policy.\(^{28}\) On the other hand, the highest court in the United States has assumed the role of defending and advocating for the policy in favor of arbitration; in each of its cases, the U.S. Supreme Court more tightly barricades the courthouse door.

American Express v. Italian Colors (American Express) is the latest U.S. Supreme Court decision protecting the FAA policy favoring arbitration, against


\(^{20}\) See AT&T, 131 S. Ct. 1740; Rogers Wireless Inc. v. Muroff, 2007 SCC 35, para. 15 (Can.).

\(^{21}\) See 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009); Bisaillon v. Concordia Univ., 2006 SCC 19 para. 56 (Can.).

\(^{22}\) See 14 Penn Plaza, 556 U.S. 247; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (as to limited discovery); Bisaillon, 2006 SCC 19, paras. 55-58 (Can.).


\(^{24}\) See Mitsubishi Motors Corp., 473 U.S at 634.


\(^{27}\) Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, para. 11 (Can.) (reasoning of majority entirely based of interpretation of the Quebec Civil Code without reference to policy or unconscionability arguments); Rogers Wireless Inc. v. Muroff, 2007 SCC 35, paras. 8-11 (Can.) (determined on competence only without ruling on abusiveness of clause); See also Bisaillon, 2006 SCC 19, paras. 13-14 (the legislative labor regime and the procedural rather than substantive characterization of class actions were the determining factors).

the backdrop of statutory and public interest claims.\textsuperscript{29} It provides an ideal opportunity for a Canada/U.S. comparison, as it considers one of Canada’s remaining open windows to court access: public interest statutory causes of action. Both the United States and Canada take a blended approach to areas of public interest law, using a combination of quasi-criminal regulations and civil statutory causes of action to provide public and private relief.\textsuperscript{30}

However, faced with a similar question, the Canadian Seidel majority held that implicit legislative intent prevailed over an arbitration agreement and allowed public interest statutory causes of action to retain access to the public forum.\textsuperscript{31} Conversely, in American Express, the U.S. Supreme Court rebuffed the opportunity to embrace a more expansive approach that the case’s federal appellate court had adopted three times. The American Express majority noted that while contrary congressional command could preserve access to the courts, none appeared in the subject legislation.\textsuperscript{32} The two years of Canadian experience with post-Seidel interpretation of legislative intent offers valuable foresight for the post-American Express assessment of contrary congressional command.

\textsuperscript{29} Am. Exp. Co., 133 S. Ct. 2304.


\textsuperscript{31} Seidel, 2011 SCC 15, paras. 5-6.

\textsuperscript{32} Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2308 (2013).
III. THE EVOLVING ARBITRATION LANDSCAPE IN THE UNITED STATES

A. The Terrain Through 2011

Several landmark U.S. arbitration cases defined the early procedural landscape for class actions, arbitration, and statutory claims. The U.S. Supreme Court recognized class action lawsuits as appropriate for vindicating statutory rights in *Eisen v. Carlisle & Jacquelin*. It recognized arbitration as an effective vehicle for vindicating statutory rights in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* subject to the caveat that the prospective litigant could “effectively vindicate its statutory cause of action in the arbitral forum.” In *Green Tree Financial Corp.-Alabama v. Randolph*, the Court held that a prospective litigant who argued that prohibitive expense was the reason why a statutory cause of action could not be effectively vindicated in the arbitral forum, bore “the burden of showing the likelihood of incurring such costs.” And, importantly, in *Gilmer v. Interstate/Johnson Lane Corp.* the Court upheld an individual’s waiver of a judicial forum for resolution not just of a claim arising directly under the contract, but of a statutory discrimination claim. The Court did so after it found neither congressional intent to do the opposite, nor barriers to effective vindication. These seminal cases shaped the early arbitration terrain.

In spite of the answers, or at least the direction these cases seemingly provide, in the new century the Supreme Court re-examined the foregoing cases with a fresh eye, ultimately reframing its message in the Court’s latest decision in *American Express*. Three key cases foreshadow this reform of the American arbitration landscape. In 2009, the Court addressed the individual statutory discrimination claim of a unionized employee in *14 Penn Plaza v. Pyett*. In 2010, it examined collective contractual claims of businesses in *Stolt-Nielson S.A. v. Animal Feeds Int’l Corp.* Finally, in 2011, the Court tackled collective claims of consumers in *AT&T Mobility v. Concepcion*. These three cases collectively direct the fate of class arbitration of statutory claims, even where public policy is

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34 *Mitsubishi Motors Corp.*, 473 U.S. 614.
35 *Id.* at 637 (acknowledging that all statutory claims may not be appropriate for arbitration).
37 *Id.* at 92.
39 Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987) (identifying “contrary congressional command” as the only reason why an arbitration agreement should not be enforced according to its terms).
40 *Id.* at 228.
implicated, and even without expressly addressing the elephant in the room, namely, effective vindication of statutory claims.

At issue in 14 Penn Plaza was an individual unionized employee’s right to access the courts to resolve his statutory age discrimination claim. The collective agreement waived all members’ rights to pursue discrimination claims in a judicial forum, and required all disputes be resolved in arbitration. In a departure from the Court’s articulated philosophy and reasoning in Gilmer, the Court held that the waiver precluded an individual from bringing his or her own statutory claim in court, even though the individual was not a party to the agreement. Central to its decision was the role of the union, the already collectivized form of representation, and contractual negotiation in the unionized environment. Although the 14 Penn Plaza majority gave an opinion on the suitability of the arbitral forum for resolution of statutory rights, it did not address either cost as a barrier to effective vindication, or the value of taking collective action.

Nor did the Court address questions of effective vindication or the benefits of class litigation in Stolt-Nielson; instead, the availability of class arbitration itself, was at issue. A commercial business contract contained an arbitration clause that was silent as to collective redress in the form of class arbitration. Drawing upon a previous decision where arbitrator jurisdiction was the central question, the Court held that, absent express agreement to allow class arbitration, the arbitrator exceeded his authority in ordering it. While the Court reviewed fundamental differences between individual and collective redress, it did so to establish that the characteristics of class arbitration were so different from those of individual arbitration, the general definition of arbitration should not be interpreted to implicitly cover both processes. Whether a class approach would address more effectively the claims of class members was not part of the analysis.

44 Id.
46 14 Penn Plaza, 556 U.S. at 265-66.
47 Id.
48 Id. at 274 (declining to address effective vindication under the collective bargaining agreement scenario as, “[r]esolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation”). However, in Am. Express v. Italian Colors Rest., the ‘effective vindication’ dicta in Mitsubishi had no applicability to the case as the concerns in Mitsubishi were absent, 133 S. Ct. 2304, 2310-11 (2013).
50 Id. at 687.
51 See McGill & Tracey, supra note 6, at 28; Tracey & McGill, supra note 6, at 449-50.
Concepcion took the Court back to the consumer context, where the plaintiff sought collective redress involving a disputed $30 tax charge for an allegedly “free” phone. California law characterized mandatory arbitration clauses as unconscionable, and therefore unenforceable, if they did not preserve a class arbitration option. The Court held that this approach violated FAA policy and therefore was pre-empted. Again, this finding was not grounded upon any assessment of the merits, or the need for collective redress, in the consumer context. Rather, it targeted the negative impact of California’s unconscionability law on the enforcement of consumer arbitration clauses. As this law nullified a large proportion of arbitration clauses, the Court reasoned that the rule must conflict with the federal policy in favor of arbitration. The effectiveness and importance of collective redress seemed beside the point.

B. Post Concepcion Developments: The American Express Saga

American Express v. Italian Colors brought together the facts and gaps of 14 Penn Plaza, Stolt-Nielsen, and Concepcion. As in 14 Penn Plaza, a statutory claim was at the heart of the dispute, and as in Stolt-Nielsen and Concepcion, collective redress was central to its resolution. Similar to Concepcion, the express designation of individual arbitration contained in the American Express arbitration clause, was not silent regarding class arbitration, as was the clause in Stolt-Nielsen. Although the case had a business context, it also had the David and Goliath disparity in power between plaintiff and defendant, which was more analogous to the Concepcion framework than either of the business or union contexts in Stolt-Nielsen, or 14 Penn Plaza. American Express focused on a critical gap in the previous jurisprudence: the impact of high individual costs for effective vindication of statutory rights.

If the Supreme Court awarded frequent flyer miles, American Express would have earned thousands in its three round trips between the Second Circuit Court of Appeals, and the Supreme Court. Similar to Concepcion and 14 Penn Plaza, the claims went beyond individual injury and invoked matters of public policy, but this time, within the context of business litigants, and not consumers or employees. The litigation involved antitrust claims brought by small merchants.

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54 AT&T, 131 S. Ct. at 1753. For a discussion of the AT&T case and consumer arbitration requirements see Tracey & McGill, supra note 6, at 463-68.
55 AT&T, 131 S. Ct. at 1746.
56 See Tracey & McGill, supra note 6, at 467-68.
against American Express, and a standard form contract that included an arbitration clause. The merchants claimed that they were required to accept not only American Express “charge cards,” which offered them certain benefits in the form of more affluent customers, and more lucrative purchases, but also credit and debit cards held by more typical credit card holders. The merchants filed suit, alleging that this required linkage was a “tie-in sale,” violating anti-trust laws, and forcing them to accept a less desirable credit card in order to get American Express card privileges, and to pay a higher fee for the privilege. American Express moved to compel arbitration, a motion the district court granted.

On appeal, the Second Circuit Court of Appeals reversed and held unenforceable the contract provision, which required arbitration and precluded class action (Amex I). Not only did such a clause hamper the ability of private parties to supplement federal enforcement efforts, it also conferred “de facto immunity from anti-trust liability by removing the plaintiffs’ only reasonable feasible means of recovery.”

Two additional rounds followed, with the Supreme Court granting certiorari, then remanding the case to the Second Circuit; first, to reconsider its decision in light of the newly-released opinion in Stolt-Neilsen, and then in light of the opinion in Concepcion. The Second Circuit found both cases inapplicable to its view that the prohibitive costs of individual arbitrations effectively deprived the merchants’ statutory protections under antitrust laws. Again certiorari was granted by the Supreme Court.

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57 In re Am. Express Merchants’ Litigation ("Amex III"), 667 F.3d 204, 206 (2d. Cir. 2012). The arbitration clause was added to the contracts in 1999. Id. at 209.
58 Id. at 208. This is referred to as the “Honor All Cards” provision of the contract between merchants and American Express.
61 667 F.3d at 210.
62 In re Am. Express Merchants Litigation ("Amex I"), 554 F.3d 300, 304 (2d. Cir. 2009).
63 Id. at 315-16. The Second Circuit noted the public nature of anti-trust violations: "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the anti-trust laws and deterring violations." Amex I, 554 F.3d at 315-16 (citing Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979)).
64 Id. at 320. The Second Circuit found this was a valid ground for the revocation of the contract, as the FAA permits revocation based on grounds that exist at law or in equity. Id.
65 In re Am. Express Merchants’ Litigation ("Amex II"), 634 F.3d 187, 196 (2d. Cir. 2011).
66 Amex III, 667 F.3d 204 (2d. Cir. 2012) (relating to the FAA’s preemption of California case law that deemed waivers of class arbitration unconscionable and thereby unenforceable).
67 Id. at 197-98; Amex II, 634 F.3d at 197-98.
Arbitration in the Context of Effective Vindication of Statutory Claims

C. The Supreme Court Nails the Door Shut

In American Express, the Supreme Court delivered another split decision with respect to mandatory arbitration. The majority and concurring opinions protected the sanctity of the FAA policy, and rigorously enforced the contractual priority of arbitration at all cost. This time the majority opinion made it clear that the class action waiver applied whether the claim was statutory or common law, in the public interest, or for private remedy raised by a business, or consumer.

In opening remarks, counsel for the Petitioner, American Express, threw down the gauntlet: “The court below thrice refused to enforce the parties’ arbitration agreement because it thought that class procedures were necessary to vindicate the plaintiff’s Sherman Act claim.” That the Second Circuit had painstakingly distinguished both Concepcion and Stolt-Nielsen, failed to impress the Supreme Court majority, who swiftly, resoundingly, and unequivocally endorsed the priority of contractual arbitration, and the validity of class arbitration waivers.

Justice Scalia, writing for the majority, anointed Concepcion as the seminal case on the availability of class redress, saying that the Concepcion Court specifically rejected the argument that class arbitration was necessary to save claims that might otherwise slip through the legal system, a surprising position given that Concepcion dealt with state, rather than federal law, and did not consider the effective vindication principle. The majority’s very narrow framing of the issue, as one about enforcement of a class arbitration waiver, contributed to Concepcion’s control of the outcome. With respect to the Concepcion

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68 Amex III, 667 F.3d 204.
70 Id. at 2313 (Thomas, J., concurring).
72 Amex III, 667 F.3d at 212 (saying “neither one addresses the issue presented here: whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights”).
73 The decision was a 5 to 3 split decision with Justice Scalia writing for himself, Roberts, Kennedy, and Alito; Thomas concurring. Justices Kagan, Ginsburg, and Breyer dissented; Justice Sotomayor took no part in the decision. American Express v. Italian Colors, 133 S. Ct. 2304, 2307 (2013).
74 Id. at 2307, 2312.
75 Id. at 2312.
76 Id. at 2309-10.
77 Id. at 2312.
holding, the American Express Court concluded that statutory anti-trust cases were not exempt from FAA provisions even in the face of assertions that collective redress was necessary.

Justice Thomas concurred with the majority, but provided his own, much narrower reasons. For Justice Thomas, the entire decision came down to whether the effective vindication argument, based upon economic feasibility, fit into an exception articulated in § 2 of the FAA. Since economic feasibility has nothing to do with contractual formation or validity, this ended the matter.

D. Is There Still a Window Open?

In contrast to Justice Thomas, Justice Scalia left two small windows of opportunity open for litigants seeking collective redress. He acknowledged two limitations on the enforcement of a class arbitration waiver—one legislative, and one judge-made. Congress could change the policy in favor of arbitration by amending the statute, an exception Scalia described as “contrary congressional command.” The courts provided the second limitation: judges could override the policy if a statutory right could not be “effectively vindicated.” However, in Scalia’s view, the scope of these exceptions was extremely narrow.

1. Effective Vindication

Justice Scalia made short work of the “cost” effective vindication argument, reinforcing the priority of the substantive right to contractual arbitration over the procedural efficiencies offered by Rule 23 class actions. He referenced the Court’s earlier positions expressed in the Gilmer, Randolph, and Mitsubishi decisions. He eliminated arguments that expanded their scope and contained exceptions developed in hindsight.

Gilmer accepted the existence of effective vindication in theory, but declined to apply it, as did the Court in 14 Penn Plaza. Justice Scalia felt that this demonstrated the rareness of the effective vindication exception. According to the majority, effective vindication originated only as dictum in Mitsubishi, and although often referenced, had never been applied. Still, it existed in theory, so

78 9 U.S.C. § 2 (2006) (providing that a contract to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”).
the Court provided two examples of where effective vindication might be applied, to override an arbitration clause banning collective action. The first was an arbitration agreement “forbidding the assertion of certain statutory rights.” The second, “perhaps” existed, if costs such as arbitration filing and administrative fees were “so high as to make access to the forum impracticable.”

Justice Scalia acknowledged, as expressed in Randolph, “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”

The majority found that the case at hand fit neither of these examples; for the majority the distinction seemed to be between fees charged, as opposed to costs incurred. According to Justice Scalia, effective vindication certainly did not mean “cost” effective vindication—claims so expensive to prove that the cost exceeds any possible recovery were not within this exception. The majority distinguished between a right precluded, and a right not worth the expense of pursuing. The former was protected, while the latter was sacrificed, for the greater good of arbitration. By labeling the Mitsubishi discussion of effective vindication as dictum, the Court minimized its import, thus leaving it free to re-interpret its scope. The narrow interpretation of the Mitsubishi and Randolph cases operated to preserve only the actual right to pursue an action and did not stretch to reach the cost of proving it.

The majority also emphasized the age of the statutory right, relative to the creation of class action procedures. If the statutory right pre-dated class actions, it must have been capable of effective vindication by way of individual action (at least in Congress’s mind): “It did not suddenly become ineffective vindication upon their [Rule 23] adoption.” For the Court, this reasoning suggested that none of the statutory rights Congress created before the adoption of class actions could be saved by an effective vindication argument.

2. Contrary Congressional Command

Contrary congressional command was the second exception that the majority identified as capable of curtailing the enforcement of a class arbitration waiver. In Mitsubishi, the Court said it must look to “the congressional intention
expressed in some other statute on which the courts must rely to identify any
category of claims as to which agreements to arbitrate will be held
unenforceable.”90 The party opposing arbitration bore the burden of
demonstrating that “Congress intended to preclude a waiver of judicial remedies
for the statutory rights at issue.”91

The Court resurrected this concept in Compu-Credit v. Greenwood,92
where it refused to find a contrary congressional command in a section of the
Credit Repair Organizations Act.93 This Act required that consumers be advised
of their right to sue the credit organization, and expressly stated that requirements
of the Act could not be waived. The Court held that it was the disclosure
requirement, and not the right to sue, that could not be waived.94 The right to sue
was considered broader than a judicial forum, and reference to court and class
actions was insufficient to demonstrate the needed contrary congressional
command to exclude arbitration.95

E. The Dissenting Opinion: “To a Hammer, Everything Looks Like a Nail”

According to Justice Kagan, who wrote for the dissenting justices,96 the
majority erred when it nailed the effective vindication door tightly shut, with
flawed, narrow, and brief reasoning. The dissenting opinion took a wider view of
almost everything in this case than did the majority: a wider view that the issue
was more than just the availability of class arbitration; a wider view of the
arbitration agreement as more than just the class arbitration waiver; a wider view
of effective vindication and claims implicating public policy; a wider view of the
Mitsubishi and Randolph decisions; and a wider view of congressional intent.
Only the application of Concepcion,97 and of FAA policy,98 were construed more
narrowly in the dissenting rather than the majority opinion.

Justice Kagan classified the American Express arbitration agreement as
an exculpatory clause that insulated the defendant from anti-trust liability.99
Relying on Mitsubishi and Randolph, the dissent determined that the clause should
not be enforced because it was akin to a “prospective waiver of a right to gain

90 Id. at 627.
93 Id.
94 Id.
95 Id.
96 Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013) (writing
for Justices Ginsberg and Breyer).
97 Id. at 2319-20.
98 Id.
99 Id. at 2313.
redress for an anti-trust injury.”

Much like the Canadian Supreme Court in *Seidel*, Justice Kagan described the statutory anti-trust cause of action as one in the “public interest.” As such, it preserved access to cost-effective (not necessarily collective) redress, and a full range of judicial remedies. Unlike the majority, the dissent was not fixated on collective redress, but rather on any form of cost-effective resolution.

The minority criticized the majority opinion for its brevity and unduly narrow consideration, of both the effective vindication principle, and of the class action waiver. The minority accused the majority of misinterpreting both *Mitsubishi* and *Randolph*, and misapplying *Concepcion*. Rather than dictum, the minority styled the effective vindication principle as an essential condition to the holding in *Mitsubishi*. In *Randolph*, the Court confirmed the existence of the principle, and developed the standard for its application. According to *Randolph*, cost could be a barrier amounting to a prospective waiver; the plaintiff had simply failed to meet the burden of proof to establish it in that case, a burden the Second Circuit found met in *Amex I*.

The dissent focused its analysis on prohibitive cost, not high cost, and considered the arbitration agreement as a whole, not just its class arbitration waiver. Taking that comprehensive approach, it seemed clear that the entire agreement made cost-effective vindication impossible. The agreement was comprehensive in precluding collaboration among merchants. It not only blocked class claims, but also any joinder or consolidation. The confidentiality provision prohibited informal sharing of expert reports, and a win would not shift the burden of the costs. In this light the dissent saw the clause as not one of forum selection, but one designed to prevent cost-effective vindication by any means. This fit exactly into the *Mitsubishi* principle, as defined in *Randolph*. The dissenting opinion dismissed the majority’s fixation on the relative dates of enactment of antitrust and class action provisions as irrelevant, saying “the effective-vindication rule asks about the world today.”

Finally, in a colorful attack, the dissent accused the majority of being blinded to the issues by its obsession with destroying class actions: “To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”

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100 *Id.* at 2313-14.
102 *Id.*
103 *Id.*
104 *Id.* at 2319-20.
105 In re. Am. Exp. Merchants’ Litigation (“*Amex I*”), 554 F.3d 300 (2d. Cir. 2009).
107 *Id.* at 2320.
IV. CANADA’S EVOLVING ARBITRATION LANDSCAPE

Like its U.S. counterpart, the Canadian Supreme Court accepted arbitration as an appropriate forum for resolving individual statutory claims. Similarly, class actions were made available to advance statutory claims collectively. However, the centerpiece of the U.S. struggle, effective vindication of claims, has no parallel in Canadian jurisprudence. Although access to justice, benefits, and economies of scale associated with collective redress are recognized public policy goals of class actions, they are irrelevant when raised in opposition to arbitration. These arguments are considered policy issues, more suited to the legislature than the courts. The now consistent characterization of class actions as procedural vehicles, incapable of trumping a substantive contractual right to arbitration, locks the already closed courtroom door.


109 See, e.g., Chadha et al. v. Bayer Inc. [1999] 45 O.R. (3d) 29, 36 (Ont. Gen. Div) (Can.) (involving many small price-fixing claims under the Competition Act). Class actions may not be available to advance a statutory claim when a regulatory tribunal divests the judicial forum. See McGill & Tracey, supra note 6, at 43-44.

110 The Canadian Supreme Court has never considered effective vindication as justification for refusing enforcement of an arbitration clause containing a class action waiver.


115 There is some precedent for consideration of cost as a factor in access to civil justice from the cases involving fee waivers in small claims court. In Polewsky v. Home Hardware Stores Ltd., (2003), 66 O.R. (3d) 600 (Can.), the Ontario Divisional Court recognized a constitutional right to access to civil justice but it does not focus on the size of the claim or disproportionate cost of proving it, rather on the lack of resources of the specific plaintiff. The judicial declaration of entitlement to access small claims court led to legislative amendments authorizing the waiver of fees for impoverished parties. See O. Reg. 2/05. Access to civil justice is wider than access to the courts, so it is doubtful whether this line of cases could do anything other than alter the fee structure for consumer
Alternatively, arguments invoking “legislative intent,” the Canadian equivalent to the U.S. principle of contrary congressional command, resonate well with Canadian judges. To this point, most of the Canadian Supreme Court’s decisions on arbitration clause enforcement have been based on statutory interpretation, not policy priorities. Provincial and federal legislatures have the power to override the general policy in favor of arbitration, and several provinces have used this power in the consumer context. Establishing that the override power has been exercised typically involves analyzing the legislative intent behind the statute. Litigants undertaking the search for evidence of intent received valuable direction from the Canadian Supreme Court in 2011.

A. The Canadian Class Action and Arbitration Landscape of 2011

In 2011, *Seidel v. TELUS Communications Ltd.*, became the third case in four years in which the Canadian Supreme Court shut down a putative consumer class action, by enforcing an arbitration clause. The facts bore a striking resemblance to *Concepcion*—multiple consumers with monetarily small billing complaints, against a major cell phone provider, with a pro forma pre-dispute arbitration clause and class action waiver buried in the fine print of an online consumer contract of adhesion. The outcome was familiar too—a split arbitration, something already accomplished in the United States. See *Costs of Arbitration*, AM. ARB. ASS’N., www.adr.org (last visited Oct. 2, 2014) (no cost to consumers for consumer arbitrations).

The intention of parliament is part of modern statutory interpretation: Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, para. 21 (Can.). In addition to the words used in the statute, the context, scheme, and object of the legislation must also be considered. See *Seidel*, 2011 SCC 15, para. 2; *Dell Computer Corp.*, 2007 SCC 34, para. 11; *Briones*, 295 Man. R. (2d), paras. 22, 35.

See *Dell Computer Corp.*, 2007 SCC 34 para. 11; *Seidel*, 2011 SCC 15, paras. 2, 26. Prior to *Seidel*, *Dell* was the seminal case on consumer class action and arbitration and the reasoning of the majority was based entirely on the construction and interpretation of the Quebec Civil Code.


Statutory interpretation involves more than the words used in the statute, the context, scheme and object of the legislation, as well as, the intention of parliament must be considered. *Rizzo*, 1 S.C.R. para. 21. See, e.g., *Seidel*, 2011 SCC 15, para. 2; *Dell Computer Corp.*, 2007 SCC 34, para. 11; *Briones*, 295 Man. R. (2d) paras. 22, 35.

The other two cases were *Dell Computer Corp.*, 2007 SCC 34, and Rogers Wireless Inc. v. Muroff, 2007 SCC 35. Neither case resolved the consumer arbitration question nationally because Quebec law and legislation are different from common law provinces.
decision where a slim majority of the Court severely restricted access to collective redress, and abdicated responsibility for ensuring access to civil justice to the legislature, without regard for policy, natural justice, unconscionability, or equality of bargaining power arguments.\textsuperscript{123} Although it appeared that the door to Canadian class actions had been slammed tightly shut, a window of opportunity remained open.

The multi-faceted nature of the \textit{Seidel} claim produced the opening. Mrs. Seidel was a TELUS cellphone customer who objected to the manner in which her bill was calculated. She did not believe that she should be charged for the time it took to form a connection with another phone. She commenced a class action on behalf of herself and all TELUS customers, claiming common law breach of contract, and unfair and deceptive business practices pursuant to several statutory public interest causes of action, available under the British Columbia Business Practices and Consumer Protection Act\textsuperscript{124} (BPCPA). While considering the application of the contractual arbitration clause to the statutory causes of action, the Court found that some statutory causes of action had a public interest purpose, and a consumer activism mandate.\textsuperscript{125} The Court determined that access to the public forum was integral to the fulfillment of this public purpose, and therefore the legislature must have intended to preserve access to it when it designated the B.C. Supreme Court as the forum for resolution of section 172 BPCPA statutory claims.

The majority’s finding on legislative intent was due in part to Justice Binnie’s declaration that consumer protection legislation should receive liberal interpretation in favor of the consumer\textsuperscript{126} and also that legislative intent necessary to preserve access to the courts could be explicitly or “implicitly revealed in the text, context and purpose of the respective province’s consumer protection legislation.”\textsuperscript{127} In arriving at its conclusion, the majority considered not just the language, but also the structural, theoretical, and conceptual underpinnings of section 172 of the BPCPA.\textsuperscript{128} Access to the judicial forum was considered necessary to deliver the broad range of equitable remedies contemplated by the legislation. The majority’s assessment of legislative intent behind the language of the BPCPA preserved the consumer’s access to the courts for only some of the statutory causes of action; it stayed the remaining statutory and common law

\textsuperscript{125} \textit{Seidel}, 2011 SCC 15, paras. 6, 32, 36.
\textsuperscript{126} \textit{Id.} para. 37.
claims in favor of arbitration. As a result, the dispute proceeded in multiple forums.

Still, in the immediate wake of the Seidel decision, the class action implications seemed dire, with uniformity and certainty of the forum being casualties of the decision. Legislative approaches would differ across the provinces, as would judicial interpretation. Even within a jurisdiction, differing language in various pieces of legislation would lead to uncertainty of forum. Courts would construe non-consumer legislation less generously than consumer protection statutes, leading to divergent results for business plaintiffs. Multiplicity of actions with the corresponding risk of inconsistent results would be likely, as statutory claims were separated from contract claims, and changes to wording of contracts of adhesion would direct consumers with the same problems, to different forums. The general policy in favor of arbitration and arbitral subject-matter jurisdiction would mean increased privatization of consumer protection law, and the private, confidential nature of arbitration would eventually lead to a dearth of consumer protection jurisprudence.

By the fall of 2013, a variety of courts had considered the Seidel decision in multiple provinces across the country, under different statutes, and yielding different outcomes. The following review of post-Seidel jurisprudence validates many of the concerns raised immediately after the decision, and provides a window of insight for what lies ahead in the American search for contrary congressional command.

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130 It is not unusual for consumers to bring claims under multiple statutes. See e.g., Young v. Nat. Money Mart Co., 2013 ABCA 264 (Can. Alta.) (involving claims under both the Fair Trading Act (“FTA”), R.S.A. 2000, c. F-2, §§ 13, 16, and the Unconscionable Transactions Act, R.S.A. 2000, c. U-2.). Young also involved a change in legislative wording that led Money Mart to argue that loans prior to 2006 were not included in the former statutory definition of “consumer transaction” in the FTA. Id. paras. 11-12.


132 To combat this obvious drawback, the minority in Seidel shockingly suggested that an arbitrator could order the publication of the outcomes. Seidel, 2011 SCC 15, paras. 151, 160.
B. The Post Seidel Developments in Canada

In the years since its publication, the Seidel decision has been widely cited in support of liberally interpreting consumer protection laws; however, its impact on collective access to the judicial forum is less obvious. Seidel has been invoked as authority for both staying, and refusing to stay a court action, in favor of arbitration.

As forecast, provincial and judicial variation abounds and the distinction between consumer and non-consumer litigation is material. The consumer context remains more likely to retain access to the public forum, but not uniformly. Somewhat surprisingly, Seidel has not triggered new express provincial consumer protection measures as Ontario, Quebec, and Alberta remain the only three provinces with consumer protection laws expressly restricting arbitration. Not so surprising though, National Money Mart continues to be a prominent player in post-Seidel consumer arbitration jurisprudence, with stays denied in Alberta, British Columbia, and Manitoba, in 2013.

Decisions considering Seidel in the context of whether legislative intent to preserve a judicial forum is explicitly or implicitly demonstrated are much more rare; many of these decisions involve individual claims rather than class actions. Whether this low volume represents the predicted diversion of such

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137 A Quicklaw search undertaken on October 26, 2013 retrieving all decisions citing the Seidel decision revealed a total of 39 cases; only 12 cases referred to the Seidel decision in the context of statutory interpretation of arbitration clauses and preservation of court access. All 12 cases applicable to the arbitration context are referenced in this article. See infra notes 140, 142, 144, 145, 146, 148, 159, 163, 168, 173. The other cases typically cited Seidel for general principles of contract interpretation, particularly that of liberal interpretation of consumer contracts. See, e.g., supra note 133.
assessments to the arbitral forum, or exhaustion of the consumer protection bar, is unknown.

1. Provincial Decisions

Many of the pre-Seidel Supreme Court cases originated in Quebec, triggering the province’s particularly explicit legislative ban on consumer arbitration. As a result, Quebec’s post-Seidel environment has been much quieter and more predictable; consumers retain access to the judicial forum, and non-consumers do not. Ontario also maintains its pre-Seidel legislative ban on consumer arbitration clause enforcement. Ontario’s reported post-Seidel stay motions dealt with business disputes or parties not bound by arbitration clauses, and therefore, the central issue was claim splitting. The pre-Seidel case Griffin v. Dell Canada Inc., continues to be applied as Ontario authority for denying any stay, when some of the proposed class members’ claims are not subject to arbitration clauses, whether consumers or non-consumers. Avoiding multiplicity of actions is the rationale, and in Ontario, a court’s discretion to

139 Consumer Protection Act, R.S.Q., c. P-40.1, § 11.1 (Can. Que.).
140 Telus Mobilité v. Comtois, [2012] Q.J. No. 521, paras. 34-38 (Can. Que.) (considering roaming charges and the same arbitration clause considered in Seidel but the customer was a business not a consumer so the action was stayed and the matter was sent to arbitration). Only one other case even mentions Seidel: Fed. Corp. v. Triangle Tires Inc., 2011 QCCA 1760, para. 2 (Can. Que.).
143 [2010] O.J. No. 177 (Can. Ont.). Griffin was decided on the eve of Seidel and the Ontario Court of Appeal refused to separate claims and stay the actions of non-consumers when 70% of the class was made up of consumer claims that retained access to the judicial forum because of the statutory ban on arbitration clause enforcement. See Toronto Cmty. Hous. Corp., [2011] O.J. No. 3746 paras. 298-302.
144 Toronto Cmty. Hous. Corp., [2011] O.J. No. 3746, paras. 284-85, 294-309. In this case none of the class members were consumers but an undetermined small minority of class members were subject to an arbitration clause. It is important to note that the mandatory stay provisions of the act are only triggered when a party to an agreement commences an action. In this case, none of the representative plaintiffs who commenced the claim were parties to an agreement and Canada’s opt out class action protocol made it difficult to assess the status of other possible class members.
separate claims is qualified by a reasonableness criterion. Only sometimes have Ontario courts found it reasonable to divide parties or claims so that multiple proceedings progress through different forums.

The only other province with legislation expressly restricting consumer arbitration in favor of a judicial forum is Alberta, so rather expectedly, both of its post- Seidel consumer cases easily found the necessary legislative intent to exclude arbitration. The Fair Trading Act provides that, absent prior Ministerial approval of an arbitration clause harboured in a consumer adhesion contract, the clause is ineffective, and the court retains jurisdiction over the dispute. This explicit rather than implicit language in the statute, has resulted in less nuanced analysis of legislative intent. Still, there is uncertainty about its application; the Act fails to articulate criteria for the exercise of that Ministerial discretion, and is silent with respect to class action waivers. National Money Mart twice sought and was denied ministerial approval of various payday loan contract arbitration clauses.

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145 Arbitration Act, 1991, S.O. 1991, ch. 17, § 7 (Ont.). The mandatory stay provisions of the act are only triggered when a moving is a party to an arbitration agreement. Shaw Satellite G.P., [2011] O.J. No. 3303, paras. 31-32, 43 (Can. Ont.) (not a class action, but a case with multiple defendants, only some of which sought a stay).

146 Ontario. v. Imperial Tobacco Can. Ltd., [2012] O.J. No. 3392 (Can.). The Ontario Court of Appeal majority separated claims for plaintiff not a party to the agreement from parties, dissent would have remanded the decision for all claims to the arbitrator on competence-competence rule.


149 Fair Trading Act, R.S.A. 2000, c. F-2, § 16 (FTA); See also, e.g., Young v. Dollar Fin. Group, [2012] A.J. No. 1055, paras. 31-45 (Can. Alta.) (holding that § 16 of FTA rendered FTA causes of action incapable of being subject to arbitration unless approved by the Minister, similar to the reasoning in Ayton v. PRL Fin., 2004 ABQB 787 (Can. Alta.), noting Justice Binnie’s apparent agreement in Seidel, 2011SCC 15, para. 25). An even more explicit expression of legislative intent is included in Unconscionable Transactions Act, R.S.A. 2000, c. U-2, §§ 2, 3(b): “Neither an arbitration nor a mediation clause could preclude or prevent a debtor from accessing the Court.” Despite this express language, Money Mart still moved for a stay.


151 Young v. Nat’l Money Mart Co., 2013 ABCA 264, para. 8 (Can.) (denials on Aug. 12, 2009 and June 29, 2011 suggested the court would never approve a clause that removes all court options).
In *Young v. National Money Mart*,152 the Alberta Court of the Queen’s Bench characterized a payday loan, criminal interest rate class action, as litigation in the public interest, and denied a stay. Complicated facts separated plaintiffs and defendants into multiple categories. Each borrower entered into a variety of different contracts of adhesion, signing a new one each time they took another “Fast Cash Advance.” Different incarnations of alternative dispute resolution (ADR) clauses were present in various versions of the contracts, with multiple loans to the same borrower having different provisions, and individual borrowers having different contracts from each other.153 The resulting factual permutations, combined with multiple statutory and common law unjust enrichment claims, could spawn a huge number of separate actions.

The *Young* court separately assessed the legislative intent underlying the wording of the Fair Trading Act,154 as distinct from the implicit intent behind the provisions of the Unconscionable Transactions Act.155 It found either express, or implied legislative intent, to retain court jurisdiction over all of the statutory claims. As these claims were linked inextricably with common law claims, the court also refused to stay the common law claims.156 The Alberta Court of Appeal affirmed the “thoughtful and careful reasons” of the judge deciding the motion, and concluded that the legislature intended for the Arbitration Act to be subject to the Fair Trading Act.157 The Supreme Court of Canada refused leave to appeal.

National Money Mart was no more successful in British Columbia, despite the legislative wording being less explicit than Alberta’s. As *Seidel* decided which type of BCCPA consumer claims were exempt from arbitration,158 the contribution of *Robinson v. National Money Mart Co.*159 is not with respect to the “type of claim,” but rather the “type of party.” In a carefully crafted, criminal interest rate class action, borrowers joined section 172 BCCPA claims against the National Money Mart franchisee, with unjust enrichment and conspiracy claims against its directors, officers, and franchisor, who were not parties to the

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153 For example, there are clauses that opt for arbitration alone, other clauses that first require mediation. Other variations include prohibiting joinder or consolidation of claims or waiving participation in class actions.


156 *Young*, [2012] A.J. No. 1055, paras. 51-58. The enforcement of the class action waiver was separately assessed as the Fair Trading Act and does not address the enforceability of these clauses; arguments surrounding the procedural and substantive nature of class actions and contractual obligations were ignored and the clause was not a barrier to the hearing of a certification application. *Id.* paras. 51-57.


arbitration agreement. In the stay motion, the issue was whether to stay these alleged “derivative” actions against a non-party,\(^\text{160}\) even when no such derivative action was initiated against the contractual party. Rather than interpreting competing pieces of legislation, Justice Griffith, of the B.C. Supreme Court, examined the arbitration statute itself to determine the scope of legislative intent with respect to stays affecting non-parties and derivative claims. The express reference “party to the agreement” in section 15 of the Commercial Arbitration Act,\(^\text{161}\) and the implicit purpose of the legislation to respect contractual arbitration agreements, were factors in the court’s conclusion that non-parties, facing different claims from those of the contractual parties, were not subject to a stay.\(^\text{162}\)

Manitoba was the venue for \textit{Briones v. National Money Mart Co.},\(^\text{163}\) the third National Money Mart stay motion. As in \textit{Robinson} and \textit{Young}, the claim involved a criminal interest rate class action, with contractual parties and non-parties, common law claims,\(^\text{164}\) and multiple statutory causes of action under separate consumer protection statutes. The representative plaintiff was subject to two different ADR clauses. The issue, again, was whether the consumer protection and unconscionable transactions statutes evidenced the legislative intent to preserve access to the court. Unlike Alberta and British Columbia, the Manitoba consumer protection legislation had neither an express arbitration reference, nor a prior Supreme Court ruling interpreting it. Associate Chief Justice Perlmutter employed a blend of intent, purpose, and mandate analysis, together with the express language in the Acts, to find legislative intent. He found evidence of consumer activism in the standing of non-parties to advance a claim.\(^\text{165}\) He also found public interest remedies in the court’s authority to re-open any debtor’s account, during a creditor’s debt collection action.\(^\text{166}\) The court interpreted the general, non-waiver of rights section, to include access to the Court of the Queen’s Bench.

Upon finding the manifest legislative intent to override an arbitration agreement, the court took a familiar position on non-parties, and on common law claims outside the statutory causes of action. Dollar Financial was a co-defendant with loans not covered by an arbitration clause. Justice Perlmutter adopted

\(^{160}\) \textit{Id.} paras. 46-59. Derivative actions, although not covered by the arbitration clause, are derived from an action covered by the arbitration agreement.

\(^{161}\) \textit{Arbitration Act, R.S.B.C. 1996, c. 55 (B.C.).}

\(^{162}\) \textit{Robinson}, [2013] B.C.J. No. 1144, paras. 71-74, 80. This analysis is compatible with that in Shaw Satellite G.P. v. Pieckenhagen, [2011] O.J. No. 3303, paras. 29-37(Can. Ont.) (refusing a stay because the moving parties were not parties to the arbitration agreement and therefore lacked status to bring stay motion).


\(^{164}\) \textit{Id.} para. 2 (unjust enrichment, constructive trust, restitution, and conspiracy).

\(^{165}\) \textit{Id.} para. 45.

\(^{166}\) \textit{Id.} paras. 29-30. The legislation defined the word “court” to mean Court of Queen’s Bench and then used the word and the phrase “judge of the court” in conjunction with the right to seek relief. \textit{Id.} para. 39.
Ontario’s reasonableness standard, and held that “the arbitration must give way to litigation where there are overlapping matters that cannot be reasonably separated.”

Common facts inextricably link these claims; separating them would mean inefficiencies and the risk of inconsistent outcomes.

The Manitoba Court of Appeal dismissed National Money Mart’s appeal of Justice Permutter’s stay denial, paying particular attention to the forum identified in the Unconscionable Transactions Relief Act. The Court found that the words “court” and “judge of the court,” even without more specific designation, constituted a clear statement of legislative intent to give overriding jurisdiction to the Manitoba Court of Queen’s Bench, despite any arbitration agreement to the contrary.

Beyond the National Money Mart cases, outcomes are more varied. For example, in Zwack v. Pocha, the Saskatchewan Court of the Queen’s Bench found no legislative intent to preserve access to the public forum in that province’s Consumer Protection Act, distinguishing an Alberta case in the process. In Zwack, the court held that the individual claim before it focused on the damages of the specific plaintiff, served no broader public purpose, and access to the public interest statutory causes of action contained in the legislation, was under the control of the Minister. This was enough to distinguish it from the Seidel facts and the British Columbia legislation, and to deprive it of Seidel’s characterization of private enforcement in the public interest.

2. Federal Decisions

It is the Federal Court that considered the Canadian case most comparable to the American Express case that the U.S. Supreme Court recently decided. Murphy v. Amway involved a class action, initiated by a small British

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167 Id. para. 61.
169 C.C.S.M. c. U20, §§ 1, 4.
170 Briones, 2014 MBCA, paras. 32-36.
172 Id. paras. 36-42.
175 As consumer protection is a matter of provincial jurisdiction, federal court will see primarily non-consumer claims involving matters within exclusive federal jurisdiction.
Columbia merchant, against Amway, alleging pyramid selling in violation of the federal Competition Act. The independent operator contract choice of law provision designated Michigan law, while the umbrella agreement arbitration clause invoked the Ontario Arbitration Act. The appeal was heard in Quebec.

The representative plaintiff in *Murphy* was situated much like a consumer: an individual with a relatively small damage claim, a contract of adhesion, and unequal bargaining power. However, the business character of the relationship deprived the plaintiff of the ability to assert a consumer protection claim of unfair practices, and instead dictated a claim of anti-competitive behavior. In *Murphy*, both the Federal Court of Appeal, and the lower court, distinguished it from *Seidel* in that the anti-competitive behavior claim was more akin to a private claim for damages, than to a public interest enforcement. Section 36 of the Competition Act lacked the public interest character or remedies of section 172 of the BCCPA, considered in *Seidel*. In *Seidel*, the arbitration clause and class action waiver were treated as one, invalid or valid as a whole, while in *Murphy* they were treated as separate and independent from one another. After carefully describing the structural, contextual, and purpose based process of assessment followed in *Seidel*, Justice Nadon, writing for a unanimous court, confined his own analysis to the explicit language of the Competition Act, concluding that the statute did not reveal an express legislative intent to preserve a judicial forum or collective redress. Just as the U.S. Supreme Court in *American Express*, the federal court opined that there is nothing “sacrosanct about competition law” that justified special preservation of access to the public judicial forum.

### C. Summary of Canadian Insight

The post-*Seidel* cases demonstrate consistency in three key areas. First, applying the competence-competence principle, the cases characterize statutory interpretation as a matter of law alone, thereby giving the court jurisdiction to

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178 A consumer could have invoked the BPCPA and the provincial court forum by asserting §172 claim.
182 *Id.* para. 60.
183 *Id.* para. 64. In separate proceedings the stay was lifted after the plaintiff reduced the damage claim to $1,000, thereby taking the subject matter of the dispute outside the scope of the arbitration clause which expressly limited its application to disputes over $1,000. *Compagnie Amway Canada v. Murphy*, 2014 FCA 136 (Can.)
decide a stay motion in the first instance.\textsuperscript{184} By contrast, an arbitrator must first decide questions of fact alone, or of mixed fact and law, with only a limited right of review by the court.\textsuperscript{185} The continued court jurisdiction over matters of legislative intent is important because it allows a body of public law to form; were arbitrators making these decisions, confidentiality requirements would hinder the development of the law. Second, stay motions are determined separately from class action certification assessments.\textsuperscript{186} Finally, on the substantive merits of the motion, policy goals and benefits of class actions remain irrelevant to arbitration clause enforcement decisions.\textsuperscript{187}

On the substantive assessments of legislative intent to override arbitration policy, there is less uniformity, although public precedents are building, and patterns are emerging. The judicial reasoning crosses the entire spectrum, from those willing to consider all structure, policy, and theoretical underpinnings of the legislation, to those unwilling to go beyond the express language of the statute. In the business context, courts are more likely to grant stays and allow claim splitting than in the consumer context.\textsuperscript{188} On the other hand, in the consumer context, courts find common law claims inextricably linked to statutory claims; class actions tend to proceed in the judicial forum when the class includes non-parties. Factors demonstrating a public interest purpose are: the availability of statutory remedies, including injunctive or declaratory relief affecting interests beyond the parties to the action; identification of the court with jurisdiction; and the unfettered ability of individual plaintiffs to commence statutory actions, even plaintiffs without individual damage. Legislative intent to preserve court access is unlikely to be inferred unless the legislation specifically names the court with jurisdiction,\textsuperscript{189} refers to that court or judge in the relief granting section, and the legislation voids waivers of rights created in its language. Other criteria could develop as future litigation unfolds, but legislators should not depend on a court’s willingness to infer intent. As time passes, it becomes more


\textsuperscript{187} A distinction has been drawn between an arbitration clause and a class action waiver.\textit{Id.}

\textsuperscript{188} For a discussion of concurrent jurisdiction with respect to labor and human rights claims in Canada, see McGill & Tracey, \textit{supra} note 6, at 43-49.

\textsuperscript{189} But see Briones v. Nat’l Money Mart Co. 2014 MBCA 57 (Can. Man.) (finding exclusive jurisdiction in the court from only generic language).
and more likely that legislative inaction could be interpreted as an indication of an intention not to preserve access to the public judicial forum. Implicit legislative intent may have a limited shelf life.

V. THE WAY FORWARD—THE NEXT CHAPTER

The issue of effective vindication of statutory rights raises long-standing tensions about the social and public policy purposes behind statutory rights and the private, party controlled, contractual nature, of arbitration. Although the U.S. Supreme Court in American Express deemed arbitration an acceptable forum for determining statutory rights, it qualified the holding with caveats about effective vindication, and adherence to the broader social purposes behind the legislation.190 American Express provided a window of opportunity to expand these qualifications. Grappling with essentially the same issues as the Canadian highest court in Seidel, it took a divergent path and rejected the effective vindication principle, except in very narrow circumstances, and confined contrary congressional command to explicit language.

In Seidel, the Canadian Supreme Court recognized that the statutory consumer-based cause of action served both a general societal benefit, and individual interests, that went well beyond compensation for individual damage.191 In effect, the consumer protection legislation empowered a “host of self-appointed private enforcers.”192 This public purpose caused the Court to conclude that there was implicit legislative intent to preserve access to the judicial forum as a necessary component of fulfilling the law’s public purpose. The U.S. Supreme Court in American Express rejected the Seidel view that the enactment of laws with a public policy component, which enabled individuals to seek a judicial forum to enforce it, was sufficient to show legislative intent in the face of a national policy upholding arbitration agreements.

Retaining a judicial forum for enforcing statutory civil causes of action, or allowing consolidation in the arbitral forum, requires legislators in both Canada and the United States to take unambiguous action to divest the now presumptive forum of individual arbitration. It appears that American Express amounts to a near complete rejection of the effective vindication principle, and a limitation of contrary congressional command to express language only. In the United States, the only window open for consumers and businesses seeking to pursue claims collectively in arbitration, or in a judicial forum, is an express “contrary congressional command” that enshrines their right to do so, notwithstanding any

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arbitration agreement waiving this right. Unlike in Canada, in the United States it is improbable that the contrary command could be implicit. Gilmer enforced a waiver of statutory discrimination claims despite the statute expressly permitting court actions.\footnote{Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991). If the Court failed to consider this a contrary congressional command then fairly express language will be needed for application of that exception.} Even though originally enacted before the adoption of class actions, Justice Scalia, in American Express, scoured the anti-trust legislation for express mention of class claims. Finding none, he quickly concluded that “no legislation pursues its purpose at all cost.”\footnote{Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013). The reference to purpose could invite some implicit considerations.} Even in Canada, the possibility of finding implicit legislative intent may shrink over time if courts draw a negative inference from a legislature’s failure to amend non-express statutes. Ideally, lawmakers in both countries will expressly articulate legislative intent, to preserve a judicial forum, or a class action. Placement of statutory language will need to be optimal going forward.

For legislation pre-dating American Express, Congress will need to take remedial action. Whether it will do so, even in the face of legislative history suggesting it intended the availability of a judicial forum, remains to be seen. Apart from whether it is a priority, it would be a laborious task for legislators to approach laws on a statute-by-statute basis. “Catch-all” legislation is the most viable avenue. Amending the FAA to preserve the judicial forum, or to permit collective action in the arbitral forum in certain categories of statutory actions, such as those involving the public interest or in the consumer context, will be necessary to fully effectuate public policy goals, and protect the public. Whether proponents of such curative legislation could marshal the necessary votes is another matter.

Canadian legislators have not exercised this responsibility in the post-Seidel years, fueling litigation over imprecise statutory language. A single catch-all remedial legislative solution is not possible in Canada, given the shared provincial and federal jurisdiction with respect to arbitration policy. Expect Canadian courts to remain active in future years as they are called upon to interpret the new contractual directions and legislative initiatives.

Class action arbitration will likely become extinct in the United States if Congress fails to act, and businesses revise contracts of adhesion to include explicit waivers in the wake of the American Express decision. Absent legislative action, the authors of the next chapter in arbitration of statutory claims will be businesses. Recent cases in both countries will form the templates for drafting and amending new arbitration clauses, supplemented with burdensome confidentiality obligations. The Canadian National Money Mart cases highlighted the strategic use of derivative claims against non-parties as a means of preserving access to the court. Businesses will not let this strategy go unchallenged. The next wave of arbitration clauses will expressly address these contingencies, not
only capturing derivative claims, but also naming non-parties subject to the arbitration agreement, such as franchisors, employees, officers, and directors. \(^{195}\) Businesses will follow the *American Express* example with confidentiality clauses that preclude all sharing of information, experts, or costs, among similarly situated claimants. These provisions will preclude aggrieved parties from proceeding in any cost effective fashion, including sharing resources and expertise across multiple individual arbitrations. They will also suppress information about harmful or unfair business practices, further aggravating the conflict between the public interest and the policy in favor of arbitration.

Justice Kagan, in the *American Express* dissent, envisioned this very future. The majority decision, she suggested, would result in oppressively unfair arbitration clauses leading to less arbitration and less anti-trust law enforcement. In contrast, the minority opinion definition of effective vindication would force companies to draft reasonable cost provisions, resulting in more arbitration and more anti-trust law enforcement. This is an analysis steeped in policy rather than legal doctrine, evidenced by Justice Kagan’s question: “Which do you think Congress would [prefer]?” \(^{196}\) It is time for Congress to answer her question.

Finally, at this juncture, there is one more thing the Canadian *Seidel* decision offers the United States: its preservation of a continuing judicial role in assessing legislative intent, and the resulting creation of judicial precedent on the point. As noted, in Canada, legislative intent is a question of law over which the court retains jurisdiction to consider in the first instance. \(^{197}\) Determinations of legislative intent will not be decided first by an arbitrator, and lost behind the wall of confidentiality. When stay motions are brought before the courts, Canadian judges will decide questions of legislative intent. As a result, publicized precedents will build, and consistency may develop over time. Whether U.S. courts will vest in an arbitrator, the power to determine the existence of contrary congressional command, remains to be seen. Should they do so, and Congress fails to act, the profile of U.S. jurisprudence will surely erode.

The Canadian experience suggests that the next chapter in United States jurisprudence on arbitration clause enforcement will be no less active than in the previous decade. Each statute will require its own assessment of contrary congressional command, and outcomes could still vary across Circuits. Although *American Express* substantiated a strong preference for express language, courts


\(^{196}\) *Am. Exp. Co.*, 133 S. Ct. at 2315.

could succumb to the temptation to infer a public interest rationale to forgiving statutory language, fueling the next chapter in Supreme Court litigation.