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

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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."[1]

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

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[1] Alexander Graham Bell, BRAINYQUOTE.COM, http://www.brainyquote.com/quotes/quotes/a/alexanderg389638.html (last visited Oct. 12, 2014).

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;[2] 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.[3] 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*,[4] the U.S. Supreme Court weighed in on the controversy again in *American Express v. Italian Colors*.[5] This time the U.S. Supreme Court addressed the scope of federal policy in favor of arbitration[6] 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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[2] Arbitration Act, 1991, S.O. 1991, c. 17 (Ont.). The scenario proposed is drawn from Murphy v. Amway, [2011] F.C. 1341, *aff'd,* 2013 FCA 38, [2013] F.C.J. No. 154 (Can.).

[3] In Canada, see Bisaillon v. Concordia Univ., 2006 SCC 19, [2006] 1 S.C.R. 666 (Can.); Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, [2007] 2 S.C.R. 801 (Can.); Rogers Wireless Inc. v. Muroff, 2007 SCC 35, [2007] 2 S.C.R. 921(Can.); Seidel v. TELUS Commc'ns Inc., 2011 SCC 15, [2011] 1 S.C.R. 531(Can.). In the United States, see AT&T Mobility LLC v. Concepcion*,* 131 S. Ct. 1740 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

[4] 131 S. Ct. 1740 (2011).

[5] 133 S. Ct. 2304 (2013).

[6] This is expressed in the Fed. Arbitration Act, 9 U.S.C. §§ 1-16 (2006). For a discussion of this policy in the consumer context see Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer After the Supreme Court Disconnects Consumers in* AT&T v. Concepcion, 45 LOY. L.A. L. REV. 435, 463-68 (2012) [hereinafter Tracey & McGill]. For how it is applied in the labor context, see generally*,* Shelley McGill & Ann Marie Tracey, *Building A New Bridge Over Troubled Waters: Lessons Learned from Canadian and U.S. Arbitration of Human Rights and Discrimination Employment Claims*, 20 CARDOZO J. INT'L & COMP. L. 1, 12-29 (2011) [hereinafter McGill & Tracey].

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*.[7] 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.[8] It then found the necessary legislative intent to preserve said access in the text, structure, and context of the subject legislation.[9]

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,[10] and allow

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[7] *Seidel*, 2011 SCC 15 (Can.).

[8] *Id*. paras. 2, 36.

[9] *Id*. paras. 33-38.

[10] FED. R. CIV. P. 23. In Canada, class actions fall under provincial jurisdiction. *See, e.g.*, Class Proceedings Act, S.O. 1992, c. 6 (Ont.); Class Proceedings Act, R.S.B.C. 1996, c. 50 (B.C.). The United States has embraced a hybrid model of collective redress for arbitration known as class arbitration. Class arbitration has not developed in Canada. In Canada, collective redress remains a judicial forum issue. The Canadian Class Action regime is a relatively recent creation beginning in Quebec (1978) and rolled out across the common law provinces over the last 20 years first in Ontario (1993), and then in B.C. (1995). In 2013, Prince Edward Island is the only province without a class action statute. *See generally* Jasminka Kalajdzic, *Consumer (In)Justice: Reflections on Canadian Consumer Class Actions*, 50 CAN. BUS. L. J. 356, 357 (2010); Garry D. Watson, *Class Actions, The Canadian Experience*, 11 DUKE J. OF COMP. & INT'L L. 269, 272-78 (2001).

contingency fees.[11] Both jurisdictions have long upheld policies favoring arbitration. American arbitration policy found its origins in the 1925 adoption of the Federal Arbitration Act (FAA),[12] its national uniformity in the federal paramountcy principle,[13] and its wide impact in the expansive interpretation of the Commerce Clause.[14] The Canadian policy developed out of the United Nations' Model Law on international arbitration,[15] and expanded across the country as individual provinces adopted domestic legislation to conform to it.[16] 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.[17]

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).[18] 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."

[12] Fed. Arbitration Act, 9 U.S.C. §§ 1-16 (2006). For discussion of development of U.S. arbitration policy see Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L. J. 361, 366-69 (2010).

[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).

[14] U.S. CONST. art. I, § 8, cl. 3. The expanded interpretation of this clause included "affecting commerce:" Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 275-77 (1995); Southland, 465 U.S. at 18; Gibbons v. Ogden, 22 U.S. 1 (1824).

[15] UNCITRAL Model Law on International Commercial Arbitration, U.N. GAOR, 40th Sess., Annex I, U.N. Doc. A/40/17, Annex. I (1985).

[16] *See, e.g.*, Arbitration Act, 1991, S.O. 1991, c. 17 (Ont.); Arbitration Act, R.S.B.C. 1996, c. 55 (B.C.); Arbitration Act, R.S.A. 2000, c. A-43 (Alta.).

[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.

[18] *See, e.g.*, Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, [2007] 2 S.C.R. 801(Can.); Provencher v. Dell Inc., 409 F. Supp. 2d 1196 (C.D. Cal. 2006); Hubbert v. Dell Corp., 359 Ill. App. 3d 976 (2005); Am. Express v. Italian Colors Rest., 133 S. Ct. 2304 (2013); 9085-4886 Québec Inc. c. Amex Bank of Canada, 2012 QCCS 3200 (Can).

decision), and ultimately arbitration prevails over countervailing considerations the "underdogs" offer.

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

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[19] *See* AT&T Mobility v. Concepcion*,* 131 S. Ct. 1740 (2011); Rodriguez de Quijas v. Shearson/Am. Express, Inc*.,* 490 U. S. 477, 484 (1989).

[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.).

[23] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30-31 (1991).

[24] *See Mitsubishi Motors Corp*., 473 U.S at 634.

[25] *See 14 Penn Plaza,* 556 U.S. 247; *Gilmer,* 500 U.S. 20.

[26] Am. Express v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

[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).

[28] Seidel v. TELUS Commc'ns Inc., 2011 SCC 15, [2011] 1 S.C.R. 531, para. 3 (Can.).

the backdrop of statutory and public interest claims.[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.[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.[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.[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.

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[29] *Am. Exp. Co.*, 133 S. Ct. 2304.

[30] *See generally Seidel*, 2011 SCC 15, paras. 5-6, 32 (the Canadian Supreme Court noted that the public interest civil cause of action promotes adherence to consumer standards with a host of private enforcers). *See, e.g.*, addressing fair business practices: the British Columbia Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, §§ 149-70, 189-92 (regulatory offences), §§ 171-72 (private statutory causes of action); *see also* Federal Competition Act, R.S.C. 1985, c. C-34, § 74 (Can.) (regulatory offences and civil statutory causes of action). Similarly, Canadian human rights are enforced with civil remedies and tribunal oversight. *See, e.g.*, Ontario Human Rights Code, R.S.O. c. H-19, §§ 34, 35, 46.1. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 632 (1985), the U.S. Supreme Court noted that with respect to statutory enforcement of anti-trust laws, "private parties play a pivotal role in aiding governmental enforcement . . . by means of the private action for treble damages." In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991), the Court noted that the proscription against age discrimination found in § 623(a)(1) of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34, is enforceable both by private parties and the Equal Employment Opportunity Commission.

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 allows for both criminal prosecution, § 1963, and civil public and private enforcement, § 1964.

[31] *Seidel*, 2011 SCC 15, paras. 5-6.

[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*.[33] It recognized arbitration as an effective vehicle for vindicating statutory rights in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[34] subject to the caveat that the prospective litigant could "effectively vindicate its statutory cause of action in the arbitral forum."[35] 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,[36] bore "the burden of showing the likelihood of incurring such costs."[37] And, importantly, in *Gilmer v. Interstate/Johnson Lane Corp.*,[38] 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,[39] nor barriers to effective vindication.[40] 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*.[41] In 2010, it examined collective contractual claims of businesses in *Stolt-Nielson S.A. v. Animal Feeds Int'l Corp.*[42] Finally, in 2011, the Court tackled collective claims of consumers in *AT&T Mobility v. Concepcion*.[43] These three cases collectively direct the fate of class arbitration of statutory claims, even where public policy is

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[33] 417 U.S. 156, 161 (1974).

[34] *Mitsubishi Motors Corp*., 473 U.S. 614.

[35] *Id.* at 637 (acknowledging that all statutory claims may not be appropriate for arbitration).

[36] 531 U.S. 79 (2000).

[37] *Id.* at 92.

[38] 500 U.S. 20 (1991) (dealing with an age discrimination claim).

[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.

[41] 556 U.S. 247 (2009).

[42] 559 U.S. 662 (2009).

[43] AT&T Mobility v. Concepcion*,* 131 S. Ct. 1740 (2011).

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.[44] 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*,[45] 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.[46] Although the *14 Penn Plaza* majority gave an opinion on the suitability of the arbitral forum for resolution of statutory rights,[47] it did not address either cost as a barrier to effective vindication, or the value of taking collective action.[48]

Nor did the Court address questions of effective vindication or the benefits of class litigation in *Stolt-Nielson*;[49] 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.[50] 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.[51] Whether a class approach would address more effectively the claims of class members was not part of the analysis.

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[44] *Id*.

[45] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33-35 (1991) (considering Alexander v. Gardiner-Denver Company, 415 U.S. 36 (1974), which held a collective waiver did not block ADEA claims).

[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).

[49] Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

[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,[52] 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.[53] The Court held that this approach violated FAA policy and therefore was pre-empted.[54] 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.[55] The effectiveness and importance of collective redress seemed beside the point.[56]

B. Post *Concepcion* Developments: The *American Express* Saga

American Express v. Italian Colors brought together the facts and gaps of *14 Penn Plaza*, *Stolt-Nielson,* 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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[52] Previous decisions involving consumers include Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) and Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79 (2000).

[53] Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005). For a discussion of what has become known as the "Discover Bank Rule" and the Court's ruling in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), see Tracey & McGill, *supra* note 6, at 450-62.

[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.[57] 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.[58] The merchants filed suit, alleging that this required linkage was a "tie-in sale," violating anti-trust laws,[59] 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.[60] American Express moved to compel arbitration, a motion the district court granted.[61]

On appeal, the Second Circuit Court of Appeals reversed and held unenforceable the contract provision, which required arbitration and precluded class action (*Amex I*).[62] Not only did such a clause hamper the ability of private parties to supplement federal enforcement efforts,[63] it also conferred "de facto immunity from anti-trust liability by removing the plaintiffs' only reasonable feasible means of recovery."[64]

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*,[65] and then in light of the opinion in *Concepcion*.[66] 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.[67] Again certiorari was

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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.

[59] The Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1890) (amended by the Clayton Act, 15 U.S.C. §§ 12-27 (1914)). These provisions prohibit anti-competitive conduct in trade.

[60] *Amex III*, 667 F.3d at 207-08. The ensuing lawsuit alleged violations of the Sherman and Clayton Acts, 15 U.S.C. §§ 1-7.

[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.

granted,[68] and this third trip to the Supreme Court proved to be the charm for American Express.

C. The Supreme Court Nails the Door Shut

In *American Express*, the Supreme Court delivered another split decision with respect to mandatory arbitration.[69] The majority and concurring opinions protected the sanctity of the FAA policy, and rigorously enforced the contractual priority of arbitration at all cost. [70] 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."[71] That the Second Circuit had painstakingly distinguished both *Concepcion* and *Stolt-Nielse*n,[72] failed to impress the Supreme Court majority,[73] who swiftly, resoundingly, and unequivocally endorsed the priority of contractual arbitration, and the validity of class arbitration waivers.[74]

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,[75] 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,[76] contributed to *Concepcion*'s control of the outcome.[77] With respect to the *Concepcion*

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68 *Amex III*, 667 F.3d 204.

69 Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

70 *Id*. at 2313 (Thomas, J., concurring).

71 Transcript of Oral Argument at 3, Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (No. 12-133).

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.[78] 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*,[79] *Randolph*,[80] and *Mitsubishi*[81] 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*.[82] 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,[83] so

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[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").

[79] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[80] Green Tree Fin. Corp.-Alabama. v. Randolph, 531 U.S. 79 (2000).

[81] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[82] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273-74 (2009).

[83] Am. Express Co v. Italian Colors Rest., 133 S. Ct. 2304, 2310-11 (2013).

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."[84] 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."[85]

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.[86] The majority distinguished between a right precluded, and a right not worth the expense of pursuing.[87] 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.[88]

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."[89] 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

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[84] *Id.*

[85] *Id*. at 2311 (citing Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90 (2000)). This was part of the Second Circuit's reasoning in refusing to uphold the arbitration requirement in American Express. *See also* In re Am. Express Merchants' Litigation ("*Amex III*"), 667 F.3d 204, 216 (2d. Cir. 2012).

[86] *Id*. at 2310-11 (Justice Thomas makes this point even more emphatically at 2312-13).

[87] *Am. Exp. Co*., 133 S. Ct. at 2310-11.

[88] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[89] *Id.*

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

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[90] *Id*. at 627.

[91] Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 227 (1987).

[92] Compucredit Corp. v. Greenwood, 132 S. Ct. 665 (2011).

[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."[100] Much like the Canadian Supreme Court in *Seidel,* Justice Kagan described the statutory anti-trust cause of action as one in the "public interest."[101] As such, it preserved access to cost-effective (not necessarily collective) redress, and a full range of judicial remedies.[102] 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[103] and unduly narrow consideration, of both the effective vindication principle, and of the class action waiver.[104] 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.*[105]

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."[106]

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."[107]

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100 *Id.* at 2313-14.
101 *Am. Exp. Co.,* 133 S. Ct. at 2313.
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).
106 Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2319 (2013).
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.[108] Similarly, class actions were made available to advance statutory claims collectively.[109] However, the centerpiece of the U.S. struggle, effective vindication of claims, has no parallel in Canadian jurisprudence.[110] Although access to justice, benefits, and economies of scale associated with collective redress are recognized public policy goals of class actions,[111] they are irrelevant when raised in opposition to arbitration. These arguments are considered policy issues, more suited to the legislature than the courts.[112] The now consistent characterization of class actions as procedural vehicles,[113] incapable of trumping a substantive contractual right to arbitration,[114] locks the already closed courtroom door.[115]

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[108] Weber v. Ontario Hydro, [1995] 2 S.C.R. 929 (Can.); Parry Sound v. OPSEU 2003 SCC 42, [2003] 2 S.C.R. 157 (Can.); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Att'y Gen.), 2004 SCC 39, [2004] 2 S.C.R. 185 (Can.) (Morin). *See generally* McGill & Tracey, *supra* note 6, at 36-42.

[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.

[111] *See* Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534, paras. 28-44 (Can.) ("[W]ithout class actions the doors of justice remain closed for some plaintiffs."); Hollick v. Toronto (City), 2001 SCC 68, [2001] 3 S.C.R. 158 (Can.). *See also* Shelley McGill, *The Conflict Between Consumer Class Actions and Contractual Arbitration Clauses*, 43 CAN. BUS. L.J. 359 (2006); Shelley McGill, *Consumer Arbitration and Class Actions: The Impact of Dell Computer Corp. v. Union des Consommateurs*, 45 CAN. BUS. L.J. 334 (2007).

[112] Seidel v. TELUS Commc'ns Inc., 2011 SCC 15, [2011] 1 S.C.R. 531, para. 2 (Can.).

[113] Bisaillon v. Concordia Univ., 2006 SCC 19, [2006] S.C.R. 666, para. 17 (Can.).

[114] *Id*. para. 19; Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, paras. 105-06, 108, 224 (Can.); *Seidel*, 2011 SCC 15, paras. 7, 137, 138; Briones v. Nat'l Money Mart Co., [2013] 295 Man. R. (2d) 101, para. 2 (Can. Man. Q.B.).

[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.[116] To this point, most of the Canadian Supreme Court's decisions on arbitration clause enforcement have been based on statutory interpretation, not policy priorities.[117] Provincial and federal legislatures have the power to override the general policy in favor of arbitration,[118] and several provinces have used this power in the consumer context.[119] Establishing that the override power has been exercised typically involves analyzing the legislative intent behind the statute.[120] 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.*,[121] 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.[122] 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

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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).

[116] 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.

[117] *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.

[118] *See, e.g.*, Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, §§ 7, 8 (Ont.); Consumer Protection Act, R.S.Q., c. P-40.1, § 11.1 (Que.).

[119] Fair Trading Act, R.S.A. 2000, c. F-2, § 16 (Alta). *See also* Payday Loans Act, 2008, S.O. 2008, c. 9, §§ 39, 40 (Ont.).

[120] 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.

[121] *Seidel*, 2011 SCC 15.

[122] 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.[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 *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[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.[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[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."[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.[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

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[123] *Seidel*, 2011 SCC 15, paras. 2, 36; *see also* Shelley McGill, *Consumer Arbitration After Seidel v. TELUS,* 51(2) CAN. BUS. L. J. 187, 195 (2011).

[124] Business Practices and Consumer Protection Act ("BCPA"), S.B.C. 2004, c. 2, §§ 13, 171, 172 (B.C.).

[125] *Seidel*, 2011 SCC 15, paras. 6, 32, 36.

[126] *Id*. para. 37.

[127] *Id.* paras. 173-76 (relying upon Smith v. Co-operators Gen. Ins. Co., 2002 SCC 30, [2002] 2 S.C.R. 129, (Can.) and ACS Public Sector Solutions Inc. v. Courthouse Tech. Ltd., 2005 BCCA 605 (Can.)).

[128] Zwack v. Pocha, 2012 SKQB 371, para. 33 (interpreting *Seidel,* 2011 SCC 15, paras. 36, 40).

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.[129] Even within a jurisdiction, differing language in various pieces of legislation would lead to uncertainty of forum.[130] 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.[131] 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.[132]

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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[129] *Seidel*, 2011 SCC 15.

[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.

[131] Changing versions of dispute resolution clauses seem to be a common occurrence and complicates dispute resolution between repeat or long term parties. *See, e.g.*, Ontario First Nations Ltd. P'ship v. Ontario Lottery and Gaming Corp., [2013] O.J. No. 2800 (Ont. S.C.) (considering scope of two different arbitration clauses and finding second clause more clearly covers the dispute than does the first); Robinson v. Nat'l Money Mart Corp., [2013] B.C.J. No. 1144 (B.C.S.C.) (one version of the ADR clause applied to loans between 2001 and 2003, a second version of clause applied to loans between 2003 and 2005, and a third version of the clause applied to loans between 2005 and 2009). *See* pre-*Seidel* example of claims splitting in Frey v. Bell Mobility Inc., [2006] S.J. No 456 (Sask. Q.B.).

[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;[133] 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.[134]

As forecast, provincial and judicial variation abounds and the distinction between consumer and non-consumer litigation is material.[135] 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[136] 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.[137] Whether this low volume represents the predicted diversion of such

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[133] *See, e.g.*, Miller v. Merck Frosst Canada Ltd., [2013] B.C.J. No. 613, para. 79 (B.C.S.C.); Bryan v. Gill [2013] B.C.J. No. 456, para. 24 (B.C.S.C.); Ramdath v. George Brown Coll. of Applied Arts and Tech., [2012] O.J. No. 5389, para. 59 (Ont. S.C.); Consumer's Choice Home Improvement Corp. v. Ontario, [2013] O.J. No. 4526, para. 15 (Ont. S.C.).

[134] *See, e.g.*, Murphy v. Amway Can. Corp., [2013] F.C.J. No. 154, para. 16 (FCA) (both appellant and respondent relied upon *Seidel*). This liberal approach to interpretation consumer protection legislation is consistent with the general rules of statutory interpretation that include object, purpose and parliamentary intent. *See* Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 (Can.).

[135] *Murphy*, [2013] F.C.J. No. 154 (contrast Griffin v. Dell Canada Inc., [2010] O.J. No. 177 (Can. Ont.), where presence of some consumers preserved access for all plaintiffs).

[136] MacKinnon v. Nat'l Money Mart Co., 2004 BCCA 473 (Can. B.C.) set the protocol for combined certification hearings and stay motions in common law Canada; The process was followed in Ontario in Smith v. Nat'l Money Mart Co., (2005) 8 B.L.R. (4th) 159 (Can. Ont. S.C.J.) *appeal dismissed*, (2005) 258 D.L.R. (4th) 453 (Ont. C.A.), *leave to appeal to refused* [2006] S.C.C.A. No. 528. The protocol was reversed by MacKinnon v. Nat'l Money Mart Co., 2009 BCCA 103(Can. B.C.).

[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,[138] triggering the province's particularly explicit legislative ban on consumer arbitration.[139] 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.[140] Ontario also maintains its pre-*Seidel* legislative ban on consumer arbitration clause enforcement.[141] Ontario's reported post-*Seidel* stay motions dealt with business disputes or parties not bound by arbitration clauses,[142] and therefore, the central issue was claim splitting. The pre-*Seidel* case *Griffin v. Dell Canada Inc.*,[143] 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.[144] Avoiding multiplicity of actions is the rationale, and in Ontario, a court's discretion to

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[138] Bisaillon v. Concordia Univ., 2006 SCC 19, 1 S.C.R. 666 (Can.); Dell Computer Corp., 2007 SCC 34, [2007] 2 S.C.R. 801 (Can.); Rogers Wireless Inc. v. Muroff, 2007 SCC 35, [2007] 2 S.C.R. 921(Can.).

[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.).

[141] Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, §§ 7, 8 (Ont.) (rendering consumer arbitration clauses and class action waivers unenforceable).

[142] Toronto Cmty. Hous. Corp. v. Thyssenkrupp Elevator (Can.) Ltd. [2011] O.J. No. 3746, paras 284-85, 294-309 (Can. Ont.) (businesses and non-parties; stay refused); Shaw Satellite G.P. v. Pieckenhagen, [2011] O.J. No. 3303, paras. 29-37 (Can. Ont.) (stay refused as non-parties lacked status to bring stay motion; multiplicity of actions discouraged, parallel proceedings already underway).

[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.[145] Only sometimes have Ontario courts found it reasonable to divide parties or claims so that multiple proceedings progress through different forums.[146]

The only other province with legislation expressly restricting consumer arbitration in favor of a judicial forum is Alberta;[147] so rather expectedly, both of its post-*Seidel* consumer cases easily found the necessary legislative intent to exclude arbitration.[148] 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.[149] This explicit rather than implicit language in the statute, has resulted in less nuanced analysis of legislative intent.[150] 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.[151]

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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.

[147] Fair Trading Act, R.S.A. 2000, c. F-2, § 16 (Alta.); *See* Seidel v. TELUS Commc'ns Inc., 2011 SCC 15, [2011] 1 S.C.R. 531, para. 25 (referring to Alberta Fair Trading Act as demonstrating intention to intervene into consumer contracts).

[148] Kary v. 1147237 Alberta Ltd., 2011 ABPC 178 (Can. Alta Prov. Crt.) (although the consumer contract lacked an arbitration clause it invoked the New Home Warranty Program arbitration clause); Young v. Dollar Fin. Grp., [2012] A.J. No. 1055, aff'd *sub. nom*., Young v. Nat'l Money Mart Co., 2013 ABCA 264 (Can. Alta.).

[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.

[150] Zwack v. Pocha [2012] S.J. No. 587, para. 45 (Can. Sask. Q.B.) (criticizing the less than nuanced analysis of Alberta legislation and overly broad expression of the Seidel ratio in *Kary*, [2011] ABPC 178). Harsh criticism from Justice Schwann given his own court's less than nuanced analysis of Dell Computer Corp. v. Union des Consommateurs in Frey v. Bell Mobility Inc., [2008] S.J. No. 105, paras. 11-12 (Can. Sask. Q.B.).

[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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[152] Young v. Dollar Fin. Group, [2012] A.J. No. 1055, *aff'd sub. nom*. Young v. Nat'l Money Mart Co. 2013 ABCA 264, *leave denied* [2013] S.C.C.A. No. 400 (Can. Alta.).

[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.

[154] Fair Trading Act, R.S.A. 2000, c. F-2, §§ 13, 16.

[155] Unconscionable Transactions Act, R.S.A. 2000, c. U-2, §§ 2, 3(b).

[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.

[157] Young v. Nat'l Money Mart Co., 2013 ABCA 264, paras. 12-20 (Can. Alta.).

[158] Seidel v. TELUS Commc'ns Inc., 2011 SCC 15, [2011] 1 S.C.R. 531, para. 32 (Can.) (discussing the difference between § 171 and § 172 claims).

[159] Robinson v. Nat'l Money Mart Corp., [2013] B.C.J. No. 1144 (Can.).

arbitration agreement. In the stay motion, the issue was whether to stay these alleged "derivative" actions against a non-party, [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,[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.[162]

Manitoba was the venue for *Briones v. National Money Mart Co.*,[163] the third National Money Mart stay motion. As in *Robinson* and *Young*, the claim involved a criminal interest rate class action, with contractual parties and non-parties, common law claims,[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.[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.[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

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[160] *Id.* paras. 46-59. Derivative actions, although not covered by the arbitration clause, are derived from an action covered by the arbitration agreement.

[161] Arbitration Act, R.S.B.C. 1996, c. 55 (B.C.).

[162] *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).

[163] Briones v. Nat'l Money Mart Co., [2013] 295 Man. R. (2d) 101 (Can. Man. Q.B.).

[164] *Id.* para. 2 (unjust enrichment, constructive trust, restitution, and conspiracy).

[165] *Id.* para. 45.

[166] *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. *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."[167] 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,[168] paying particular attention to the forum identified in the Unconscionable Transactions Relief Act.[169] 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.[170]

Beyond the National Money Mart cases, outcomes are more varied. For example, in *Zwack v. Pocha,*[171] 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,[172] distinguishing an Alberta case[173] 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.[174]

2. Federal Decisions

It is the Federal Court[175] 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,[176] initiated by a small British

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[167] *Id.* para. 61.

[168] Briones v. Nat'l Money Mart Co., 2014 MBCA 57 (Can. Man.).

[169] C.C.S.M. c. U20, §§ 1, 4.

[170] *Briones,* 2014 MBCA, paras. 32-36.

[171] [2012] S.J. No. 587 (Can. Sask. Q. B.).

[172] *Id.* paras. 36-42.

[173] Kary v. 1147237 Alberta Ltd., 2011 ABPC 178(Can. Alta Prov. Crt.). In addition to distinguishing this case on the point that it considered the Alberta Fair Trading Act, R.SA 2000, c. F-2, the court also criticized the decision for an overstatement of the ratio in *Seidel* and a lack of detailed and nuanced analysis of the Alberta law. Zwack v. Pocha, [2012] S.J. No. 587, para. 45 (Can.).

[174] *Zwack*, [2012] S.J. No. 587, paras. 39-45. *See also* Briones v. Nat'l Money Mart Co., [2013] 295 Man. R. (2d) 101, paras. 44-45 (Can. Man. Q.B.) (distinguishing *Zwack* on the facts and its lack of consumer activism).

[175] As consumer protection is a matter of provincial jurisdiction, federal court will see primarily non-consumer claims involving matters within exclusive federal jurisdiction.

[176] [2011] F.C. 1341 *aff'd* 2013 FCA 38, [2013] F.C.J. No. 154 (Can.).

Columbia merchant, against Amway, alleging pyramid selling in violation of the federal Competition Act.[177] 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,[178] 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.[179] 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.[180] After carefully describing the structural, contextual, and purpose based process of assessment followed in *Seidel,*[181] 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.[182] 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.[183]

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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[177] Competition Act, R.S.C., 1985, c. C-34, §§ 36, 52, 55, 55(1), 55.1.

[178] A consumer could have invoked the BPCPA and the provincial court forum by asserting §172 claim.

[179] *Murphy*, [2013] F.C.J. No. 154, para 63.

[180] *See* Young v. Dollar Fin. Grp., [2012] A.J. No. 1055, paras. 51-57 (Can. Alta.) (also assessing the impact of class action waiver separately).

[181] *Murphy*, [2013] F.C.J. No. 154, paras 51-59.

[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.[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.[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.[186] Finally, on the substantive merits of the motion, policy goals and benefits of class actions remain irrelevant to arbitration clause enforcement decisions.[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.[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,[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

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[184] *See, e.g.*, Robinson v. Nat'l Money Mart Corp. [2013] B.C.J. No. 1144, para 20 (Can B.C.). Some difference in opinion exists about the application of the rule. *See, e.g.*, Ontario v. Imperial Tobacco Can. Ltd., [2012] O.J. No. 3392 (Can.) (majority and dissent differ on the application of the rule).

[185] *Dell Computer Corp.*, 2007 SCC 34 paras. 84-87 (Can.). "Arbitrator first" subject matter jurisdiction process is referred to as the competence-competence principle in Canada. Both the *Seidel* majority and dissent adopted *Dell's* view of the competence-competence principle. *See* McGill, *supra* note 111, at 344; Andrew Little, *Canadian Arbitration Law After Dell Computer Corp. v. Union des Consommateurs*, 45 CAN. BUS. L.J. 356, 362-66 (2007).

[186] *See, e.g.*, Young v. Dollar Fin. Grp., [2012] A.J. No. 1055, paras. 51-57 (Can.).

[187] A distinction has been drawn between an arbitration clause and a class action waiver. *Id.*

[188] For a discussion of concurrent jurisdiction with respect to labor and human rights claims in Canada, see McGill & Tracey, *supra* note 6, at 43-49.

[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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[190] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632 (1985).

[191] Seidel v. TELUS Commc'ns Inc., 2011 SCC 15, [2011] 1 S.C.R. 531, para. 32 (Can.) (referring to S.B.C. 2004, c. 2, § 172).

[192] *Id*. at ¶ 6 (this paragraph cited in Zwack v. Pocha, [2012] S.J. No. 587, ¶ 39 (Can.), as a means of distinguishing Saskatchewan legislation from B.C. legislation).

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.[193] 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."[194] 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

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[193] 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.

[194] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013). The reference to purpose could invite some implicit considerations.

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

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[195] No doubt spawning litigation similar to that when exemption clauses extended to cover agents, subcontractors and employees. Fraser River Pile & Dredge Ltd v. Can-Dive Servs. Ltd. [1999] 3 S.C.R.108 (Can.); London Drugs v. Kuehne & Nagel Int'l, [1992] 3 S.C.R. 299 (Can.).

[196] *Am. Exp. Co*., 133 S. Ct. at 2315.

[197] But not in conjunction with a certification hearing which had been the practice in British Columbia since MacKinnon v. Nat'l Money Mart Co., 2004 BCCA 473(Can. B.C.); *but see* MacKinnon v. Nat'l Money Mart Co., 2009 BCCA 103 (Can.); Seidel v. TELUS Commc'ns Inc., 2011 SCC 15, [2011] 1 S.C.R. 531, paras. 118-21 (Can.).

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