PRE-DISPUTE MANDATORY ARBITRATION CLAUSES – THE NOT SO SECRET WEAPON OF "CLASS" DESTRUCTION

By

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I. INTRODUCTION

After ten years of conflict between the goals of class actions and the policy in favor of arbitration, the Canadian consumer class action lies critically wounded, but not dead. This article chronicles the struggle to preserve consumer access to class actions in the face of a massive assault aimed at obliterating them from the litigation landscape. The key weapon in the corporate campaign is the mandatory pre-dispute arbitration clause.

Typically, an arbitration clause compels dispute resolution by individual arbitration only, waives judicial, and particularly, small claims court forums, and prohibits participation in collective redress of any type (joinder, consolidation, class, or cost sharing).[1] It is buried in the fine "print" of retail contracts of adhesion of all stripes, electronic and paper, including those of cell phone providers, payday lenders, computer manufacturers and credit card companies.[2] While the express language of the clause purports only to divert the dispute to an alternate forum, the underlying reality is that consumers abandon their claims rather than pursue individual arbitration – fulfilling the intended (not so secret) business objective of sheltering a class action waiver under the protective armor of the policy in favor of arbitration.[3]

With limited exceptions,[4] the policy in favor of arbitration, codified in provincial legislation, mandates enforcement of contractual arbitration clauses and requires a stay of any court action commenced in contravention of such a clause.[5] The policy was born out of the unique demands of international commercial transactions, and spread like a conquering army over the domestic business to business market before confronting the business to consumer context.[6] Consumer transactions share few of the characteristics of international commerce that made arbitration initially attractive. There is no negotiated process designed by equally sophisticated parties, no mutually chosen neutral forum; there is no cost savings over alternate consumer forums such as small claims court or class actions.[7] There is no party empowerment but rather domination resulting in one sided imposition of the adjudicator that the powerful repeat player[8] picks. In fact, rarely is an identified class more compatible with the acknowledged goals of class action than consumers.[9] Their disputes are usually small, similar, and not capable of cost effective individual prosecution. Consumers are frequent victims of the type of wrongful business behavior that class actions are meant to deter.

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Over the last decade courts have shown less and less willingness to consider class action policy rationale when making stay motion decisions, deferring policy questions to the legislature. Unfortunately, only a few provinces have responded to the call for legislative reinforcement.[10] This article traces the arbitration war waged against consumer class actions through the Canadian courts and legislatures beginning with the first strike in the 2002 Ontario case of *Kanitz v. Rogers Cable Inc.*[11] and continuing through the 2014 cases which interpret the Supreme Court of Canada's landmark decision of *Seidel v. TELUS Communications Inc.*[12]. Thereafter, it identifies two drafting strategies for improving the chances for survival of future consumer class actions. Unfortunately, survival is far from certain.

II. ONTARIO'S FIRST STRIKE – *KANITZ*

In 2002 the Ontario Superior Court delivered the first blow to consumer class actions in *Kanitz v. Rogers Cable Inc.*,[13] when arbitration policy was prioritized over class proceedings policy using principles of statutory interpretation. The defendant moved to stay the uncertified class proceeding commenced by customers who experienced frequent interruption in their Roger's high-speed internet service. The plaintiffs opposed the stay claiming that the arbitration agreement was both factually and inherently unconscionable, rendering it invalid and exempt from stay, an argument that had gained traction in
the United States.[14] Although there was inequality of bargaining power, the claim of factual unconscionability failed. The insertion of an arbitration clause with a class action waiver into Roger's contract of adhesion was not considered taking advantage of the consumer despite the fact that the clause was not contained in the original agreement but inserted later, on the Roger's website, under the authority of a general amendment clause. Nordheimer, J. found no evidence that consumers would be reluctant to individually arbitrate a dispute involving $240.00.[15]

As for the argument that the arbitration clause was inherently unconscionable because it undermined the goals of the Class Proceedings Act (CPA)[16], Nordheimer, J. applied a sequential approach to legislative interpretation in order to resolve the apparent conflict with arbitration policy. As the arbitration legislation preceded the CPA, the CPA's failure to expressly address arbitration was interpreted as confirmation of the priority of arbitration over all types of judicial proceedings.[17]

The Ontario legislature responded quickly to restore access to consumer class actions and correct Nordheimer's assessment of legislative intent. The Consumer Protection Act, 2002[18] provided that only post dispute arbitration agreements or waivers of class proceedings would be enforceable against a consumer. In 2008 the legislature clarified its position for those courts considering a class action waiver or arbitration clause independent from each other. This amendment suspended the application of the arbitration statute's mandatory stay when a consumer class action was in play and made it clear that neither prospective waivers of collective redress nor choice of individual arbitration could block consumer access to class actions in Ontario.[19] Unlike the section addressing enforcement of pre-dispute arbitration clauses, the class action section is not confined to statutory rights and remedies available under the Consumer Protection Act but extends to any dispute arising from a consumer agreement. Therefore, common law claims may retain collective court access while sacrificing individual access in favor of arbitration. The legislative victory in Ontario was a direct result of the *Kanitz* courtroom

defeat and Ontario remains the common law province with broadest consumer access to class action.

III. A BATTLE WON IN BRITISH COLUMBIA BUT NOT THE WAR – *MACKINNON*

In 2004, while *Kanitz* was still echoing across the country, the British Columbia Supreme Court considered a payday lenders' class action waiver and arbitration clause in *Mackinnon v. National Money Mart*.[20] At the initial stay motion, Madame Justice Brown disagreed with the sequential approach adopted in *Kanitz* and undertook her own policy analysis that prioritized class action goals over the contractual choice of arbitration. She found as a matter of law that when class actions were the preferable procedure an arbitration clause was rendered inoperative and therefore exempt from the mandatory stay provisions of the arbitration legislation.[21] On the facts, class action was the preferable forum in the Mackinnon scenario – hundreds if not thousands of borrowers were charged allegedly criminal interest rates on very short term loans; the real dollars involved were small on a per borrower basis and unlikely to spawn individual actions. No question the high interest rate was deliberate corporate conduct that allegedly violated the Criminal Code[22] – it would continue unchecked if the class action did not proceed. And so the stay motion was denied.

The Court of Appeal agreed in principle – if class proceedings were the preferable forum then the arbitration clause was inoperative and the stay should be refused, however, it disagreed on timing.[23] The determination of preferable forum should not be made prior to or outside of the certification hearing for the class action and so the appeal was allowed, and the stay motion returned to the Supreme Court to be decided in conjunction with certification. The result of the Court of Appeal's decision was formation of a new process that suspended the right to a separate early stay motion for class actions involving arbitration clauses. Shutting down a class action at this early point represented a significant savings in time, effort and money for a defendant over that spent on preparing for a certification hearing.[24] The Mackinnon process consolidated the two events – stay and certification – at the later point and eliminated a defendant's cost saving associated with the stay motion.

Not surprisingly, when Madam Justice Brown heard the certification hearing, she came to the same conclusion on preferable forum – it was class action.[25] The arbitration clause was rendered inoperative and the stay denied, a decision the Court of Appeal upheld.[26] The Mackinnon process united the common law provinces – in *Smith v. National Money Mart*,[27] the Ontario Court of Appeal incorporated the combined stay and certification process into Ontario class action protocol as did the Saskatchewan Court of Queen's Bench in *Frey v. Bell Mobility*[28]. When the Supreme Court of Canada denied National Money Mart's leave application in *Smith* it appeared that further legislative protection of consumer access to class actions was unnecessary.[29] This appearance would prove deceptive.

IV. MULTIPLE FRONTS – THE COURTS AND THE LEGISLATURE

Between 2002 and 2007 as courts across the country were struggling with consumer class actions facing mandatory arbitration stay motions, the conflict was also being addressed in the provincial legislatures – although on a much smaller scale. As already noted – Ontario reacted to

Kanitz with fairly comprehensive statutory protection of access to the judicial forum and class actions save and except for common law claims seeking individual access to the courts.

Long before *Kanitz*, the Alberta legislature had enacted statutory measures to control the use of consumer arbitration clauses. The Alberta Fair Trading Act took a unique approach to arbitration clause enforcement – requiring ministerial approval of its form as a condition precedent of enforcement.[30] Unfortunately, the FTA was and remains silent on the issue of class action waivers and lacks detail about the criteria relevant to approval of a clause. Only one clause has ever received approval in Alberta and this was an option clause allowing consumers to elect arbitration post dispute.[31] The ministry's position appears to be that prospective arbitration clauses will not receive approval.[32] As in Ontario, common law claims are not expressly protected in Alberta but this omission leaves Alberta class actions involving common law claims more susceptible to a stay because FTA lacks a separate class action provision as in Ontario.

Legislatures in the remaining provinces may have felt less pressure to act after *Mackinnon*. It appeared that the courts were in control and access to class actions could be preserved through the use of the Mackinnon process and a generous interpretation of the existing legislative exceptions to the mandatory stay for invalid, inoperative or void arbitration clauses.[33] This perspective changed, at least in Quebec, when the Supreme Court of Canada entered the fray by granting leave to two Quebec class actions: *Dell Computer Corp., v. Union des consommateurs*[34] and *Rogers Wireless Inc., v. Muroff*.[35] Even though the stay motions in each case had been denied at the appeal levels,[36] the successful leave applications[37] spurred the Quebec legislature to act in a direct and comprehensive manner. During the Supreme Court hearings (literally), Quebec passed the broadest protection of all the provinces. The new section in the Quebec Consumer Protection Act prohibited any clause that required a consumer to refer a dispute to arbitration or that prevented a consumer from bringing or joining a class action.[38] Importantly, the choice of the word "dispute" avoided the separation of common law and statutory claims, possible under other provincial provisions, and even extended beyond contractual claims to tort.

At the point when the *Dell* and *Rogers* appeals were being considered by the Supreme Court of Canada, three provinces had statutory exemptions from the policy in favor of arbitration, preserving court access for consumers; two of these provinces expressly addressed class actions. Most importantly, Quebec was one of the two with legislative overrides for class actions. Therefore, one might have hoped that the Supreme Court would use the *Dell/Rogers* opportunity to clarify the situation for the remaining provinces lacking express legislative intervention – not to be.

V. SHOCK AND AWE – THE SUPREME COURT DELIVERS A NEAR FATAL BLOW IN *DELL*

Dell and *Rogers* were unlikely candidates to resolve the conflict between arbitration and class action policy on a national level. *Dell* involved allegations of misrepresentation and breach of contract based on erroneous pricing of a computer on Dell's website. The terms and conditions of the purchase included an arbitration clause and class action waiver. Unlike the payday borrowers in *Smith* and *Mackinnon* – there were relatively few *Dell* class members, and they were not innocent victims of deliberate wrongful conduct of the defendant but willing participants who had circumvented blocks to continue to access the artificially low price after Dell had withdrawn it.[39] This fact scenario did not align well with recognized goals of class

actions such as deterring wrongful defendant conduct. As well, the reasoning underlying the decision was Quebec specific; the majority opinion qualified the issue as determining the "place of arbitration in Quebec's civil justice system."[40] The interpretation and application of specific consumer protection clauses in the Quebec Civil Code (CCQ) was determined using principles of civil code construction and placement, again, not widely applicable across the country.

The majority allowed the appeal and stayed the action, offering a lesson in civil code construction and re-defining arbitrator subject matter jurisdiction in Quebec.[41] Judges were required to stay court actions so that the arbitrator could first decide questions of fact or mixed fact and law.[42] Validity of the arbitration clause was a question of mixed fact and law so it should have gone first to the arbitrator. The majority's reasons, written by Madam Justice Deschamps, analyzed Article 1435 Quebec Civil Code which purported to nullify external clauses lacking notice and Article 4139 which voided clauses that ousted Quebec authority and concluded that neither article was applicable to the consumer arbitration clause at hand.

Class actions were discussed for a few short paragraphs and dismissed as procedural vehicles incapable of displacing arbitration.[43] No mention was made of the Mackinnon process, the experience in common law provinces or any inherent power in the court to determine if a class action should proceed, as was recognized by the Court in *Western Shopping Center v. Dutton*.[44] In contrast, the dissent placed class actions at the heart of the matter (although still Quebec specific) and described the issue as "whether an arbitration clause in an internet consumer contract bars access to a class procedure in the province of Quebec."[45] Justice LeBel found Article 3149 applicable to the arbitration clause – the arbitrator drew authority from contract not Quebec law and this displaced the Quebec courts.[46] In this context, arbitration was a foreign element ousting Quebec authority. Therefore the dissent would have denied the appeal and refused the stay.

Rogers had more typical facts: consumer complaints over excessive roaming charges from their cellphone provider, with an arbitration clause and class action waiver in the contract of adhesion It also hinged on interpretation on the Quebec Civil Code, in particular the word "abusive." Article 1437 CCQ nullified abusive clauses and defined the word[47] to cover one sided clauses that are "unreasonably detrimental" to consumers. Chief Justice McLachlin held that the presence of an arbitration clause in a consumer contract alone was not sufficient to render it abusive but stopped short of detailing what other characteristics might render it so. This was also not very portable reasoning given that she was working from an articulated statutory definition in the CCQ.

At the end of the day, *Dell* and *Rogers* had questionable impact outside of Quebec and even less impact in Quebec, as the new statutory protection rendered them moot. The common law provinces lacking express statutory provisions were left with many questions, chief among them – to what extent (if any) did *Dell* and *Rogers* apply to them? Answering required a new round of litigation for *Mackinnon*, *Smith* and *Frey*.

The Saskatchewan Court of Queen's Bench felt bound by *Dell* and, with limited reasoning, granted Bell Mobility's new stay application in *Frey*.[48] However, only those claims governed by contractual arbitration clauses were stayed and severed from the action; the court class action continued for the remaining class members whose consumer contracts were silent as to arbitration.

National Money Mart launched another round of stay motions in British Columbia and Ontario. In *Mackinnon II*, Madame Justice Brown felt that British Columbia arbitration law was

materially distinguishable from Quebec law and after a detailed comparison of the two, refused to apply *Dell* and dismissed the stay motion.[49] The Court of Appeal disagreed and embarked on its own comparative analysis finding compatibility not distinction; it held that *Dell's* subject matter jurisdiction rule applied in British Columbia but not to *Mackinnon II*.[50] Issue estoppel prevented its application to the case at hand; however future cases could not follow the Mackinnon process without violating the arbitrator's right to first decide questions of mixed fact and law. Finally, when refusing National Money Mart's new stay motion in *Smith*,[51] the Ontario Court of Appeal confined its reasons to issue estoppel without ruling on *Dell's* application in that province. Leave to appeal to the Supreme Court of Canada was denied.[52]

Shockingly, the post-*Dell* confusion did not generate new statutory provisions in common law provinces lacking express legislative override of the policy in favor of arbitration.[53] Commentators called for legislative action,[54] advisory bodies proposed model laws[55] but provincial legislatures remained idle. It would be the Supreme Court of Canada that would try again to end the hostilities.

VI. HUMANITARIAN AID – STATUTORY CLAIMS AND *SEIDEL V. TELUS*

The Supreme Court of Canada came to the aid of the confused when it heard the *Seidel v. TELUS Communications Inc.*[56] appeal in 2011. This was a British Columbia class action between TELUS and its cell phone customers over alleged improper billing for the time it took to form a connection with another phone. The contract of adhesion had a particularly one sided arbitration clause that forced the consumer into individual arbitration while preserving TELUS's right to use the court for collection of outstanding consumer accounts.[57] The plaintiff's claim included common law breach of contract causes of action and statutory claims of deceptive and unconscionable practices under the British Columbia Business Practices and Consumer Protection Act (BCCPA).[58]

TELUS's stay motion worked its way through the British Columbia courts during the tumultuous flip flop of *Mackinnon II*. The first stay motion followed the protocol in the Mackinnon process and was deferred to the certification hearing but the appeal was heard after the appeal in *Mackinnon II* so the Court of Appeal ruled on the motion and granted the stay.[59] Leave to the Supreme Court of Canada was sought and obtained.[60]

The resulting Supreme Court decision clarified the range and limits of *Dell*. The majority held that *Dell* did not direct blind enforcement of all consumer arbitration clauses contained in contracts of adhesion across the country, there could be exceptions depending upon provincially specific legislative intervention.[61] Where the relevant provincial arbitration legislation adopted the competence-competence principle, which most provinces including British Columbia have done,[62] then the subject matter jurisdiction rule as articulated in *Dell* applied[63]. On this both the majority and dissent agreed, effectively overruling the Mackinnon process. There was also agreement on the need for legislative intervention to displace the policy in favor of arbitration – however, the majority and dissent disagreed over what form that legislative intervention should take and the courts role when dealing with the arbitration policy.

Justice Binnie, writing for the majority, saw the Court's job as neither promoting nor discouraging arbitration[64] but rather as the interpreter of legislative intent underlying the subject provisions. The desirability of arbitration was not the issue. The minority, by contrast, endorsed the legitimacy of arbitration and saw the courts as leaders in a campaign to end hostility to

arbitration.[65] These differing perspectives led to different assessments of legislative intent behind the statutory causes of action of the BCCPA.[66] The majority interpreted sections 171 and 172 textually, contextually and purposively – giving the consumer protection legislation generous interpretation in favor of the consumer.[67] The purpose of section 172 was determined to be private litigation in the public interest which required a well-publicized court action and equitable remedies - neither of which goals could be achieved in the private and confidential arbitral forum. This was not true of s. 171 which confined itself to compensating the damages of the specific plaintiff. Therefore, the reference to the British Columbia Supreme Court as the forum for section 172 claims and the general non-waiver of rights and benefits clause[68] combined to demonstrate an implicit intention to preserve access to the public judicial forum for s. 172 claims only.[69] The arbitration clause applied to the common law and s. 171 claims which were stayed in favor of arbitration, while the s. 172 claims, deemed public interest causes of action, were allowed to proceed to a certification hearing. Although the minority hammers the point that class actions are procedural vehicles only while arbitration is a substantive right, the majority ignores the distinction by extending the protection of the non-waiver clause to both substantive and procedural rights.[70]

Seidel is a life line to the floundering consumer class action. In addition to Ontario, Quebec and Alberta, it adds British Columbia to the list of provincial legislatures who have intervened to preserve access to consumer class actions.[71] By accepting that implicit legislative intention reflected in the context and purpose of the statute could override the policy in favor of arbitration without express statutory language specifically using the word "arbitration,"[72] Justice Binnie leaves room for public interest causes of action to be advanced as class action despite any contractual arbitration clause. Unfortunately, the private common law and statutory causes of action were severed and stayed without considering the risks and reasonableness of separate forums for inextricably linked claims.[73] The post-*Seidel* cases would explore this issue.

VII. RE-BUILDING THE CONSUMER CLASS ACTION IN THE POST – *SEIDEL* ENVIRONMENT

Not surprisingly, in the post-Seidel environment, stay motions focus on the "public interest' character of any statutory causes of action and their link or connection with other common law or statutory claims advanced in the consumer class action. It has become common place to join statutory and common law claims, and non-parties to the arbitration agreement in one class action with parties to it. Consumer class actions are experiencing new life as courts in Alberta, British Columbia, and Manitoba have refused to stay payday loan criminal interest rate class actions involving statutory and common law causes of action, parties and non-parties, and derivative actions.

Statutory causes of action under the Alberta's Fair Trading Act[74] (FTA) and Unconscionable Transactions Act[75] were at issue in *Young v. National Money Mart*.[76] Young alleged that criminal interest rates charged in various payday loans amounted to unfair trading practices as defined under the FTA and unconscionable transactions under the UTA and class members were entitled to statutory remedies. Justice Macleod relied on Justice Binnie's assessment in *Seidel* to find that the express language of the FTA provision requiring ministerial approval of arbitration clauses demonstrated legislative intent to override the policy in favor of arbitration and preserve court access for FTA claims. Justice Binnie pointed to this provision as

an example of legislative intent in the *Seidel* reasons.[77] No further examination of public interest character was necessary.

The less explicit Unconscionable Transactions Act was given a more contextual and purposeful analysis. The criminal interest rate claims were found to be within the "public interest" purpose of the UTA to control excessive loan costs and it offered extraordinary remedies and powers to the "court" in s. 2 – such as re-opening settled debts and altering security. As well, it included a general non-waiver of rights and benefits clause and identified the court for dispute resolution purposes. Taken together, these measures revealed implicit legislative intent to preserve court access and these statutory causes of action were not eligible for a stay. Therefore, only the common claims of unjust enrichment, restitution and conspiracy remained subject to the arbitration clause. In a departure from *Seidel,* Justice Macleod refused to separate common law and statutory claims, holding they were inextricably linked, and the entire class action would continue to certification. Independent consideration of the effect of the no class action clause was postponed to the certification hearing. The Court of Appeal affirmed the decision[78] and the Supreme Court of Canada refused National Money Mart's leave application.[79]

A stay was also refused in the Manitoba payday loan class action of *Briones v. National Money Mart Co.*[80] Briones joined common law claims of unjust enrichment, conspiracy, constructive trust and restitution to statutory causes of action under the Consumer Protection Act (MCPA)[81] and the Unconscionable Transactions Relief Act (UTRA).[82] All these claims were advanced against National Money Mart, whose borrowers were subject to arbitration clauses and against Dollar Financial, whose borrowers were not subject to arbitration agreements. Manitoba's consumer protection statute lacked any express mention of priority of arbitration or class action but both statutes contained general non-waiver of rights and benefits clause, authorized court actions for enforcement and defined court as the "Court of Queen's Bench".[83] Associate Chief Justice Perlmutter highlighted the repeated use of the words "judge" and "court" throughout the relevant sections and held they must have meaning and function.[84] He adopted *Young's* reasoning on remedies and powers to re-open[85] finding that the implicit legislative intent of both the MCPA and UTRA was to override the Arbitration Act.[86]

Like most other provinces, the Manitoba Arbitration Act contemplates the severance of arbitrable claims from no-arbitrable ones, allowing each to proceed in its own forum. However, such a partial stay is granted only when is reasonable to do so.[87] The *Brione's* statutory claims against National Money Mart and all claims (common law and statutory) of the Dollar borrowers, as class members not subject to an arbitration clause, were entitled to proceed in the class action. Only the common law claims were left to be pursued by individual arbitration. All claims shared common facts and issues. In the circumstances, Justice Perlmutter considered them overlapping matters that could not reasonably be separated.[88] The inefficiencies of multiple forums and risk of inconsistent results made severance undesirable. The stay was refused and the entire action proceeded to certification hearing.

When the British Columbia Supreme Court heard the stay motion for the payday loan criminal interest rate class action in *Robinson v. National Money Mart*,[89] the focus was on the linking of non-parties and derivative actions rather than the legislative intent for particular causes of action. *Seidel* had already established that section 172 BCCPA causes of action retained access to the courts; the necessary legislative intent to override the Arbitration Act was evident from the text, context and purpose of that section. The issue before the court was which (if any) of the claims brought against non-parties should be stayed. The *Robinson* defendants included

the franchisee, whose contract included an arbitration clause, the franchisor and the individual directors and officers of both companies. Neither the franchisor nor the personal defendants were parties to an arbitration agreement. At first glance, it might be logical to expect that these defendants would retain their right to access the courts; however the contractual arbitration clause included claims derived from those claims subject to arbitration. Justice Griffin had to decide if the claims against non-parties were derivative of a matter subject to arbitration and therefore eligible for a stay under the arbitration legislation.

Each cause of action alleged in the *Robinson* class action was carefully matched to a specific defendant. The same claims were not advanced against party and non-party defendants. According to *Seidel*, section 172 BCCPA claims were not subject to the arbitration agreement or a mandatory stay and so this was the only claim advanced against the party to the arbitration agreement, the franchisee. The non-parties faced common law claims of unjust enrichment and conspiracy arising from the same or similar facts which if brought against the franchisee would have been subject to arbitration. It was alleged against the officers and directors they were jointly and severally liable for the s. 172 statutory breach, this was the only possible overlapping claim. The franchisee sought a stay of all claims, saying that they were all derived from claims that *could have been* advanced against the arbitration party and therefore, fell within the definition of derivative claims.

Justice Griffin held that the common law claims were not derivative of a proceeding against a party to an arbitration agreement because s. 172 claims were not capable of sheltering derivative claims – when they themselves were not subject arbitration.[90] The mandatory stay provisions of the BC arbitration legislation applied only to parties to an arbitration agreement in respect of a matter subject to arbitration – both "party" and "dispute subject matter" required a connection to an arbitration agreement to be eligible for a stay.[91] None of the claims against the franchisee, franchisor or personal defendants met all three criteria of parties to an agreement (both plaintiff and defendant) and matters subject to arbitration. The stay motion was dismissed.

Robinson presents an alternate approach to preserving court access for consumer class actions – rather than closely connecting all arbitral and nob-arbitral claims into one unseverable package, as was done in *Young* and *Briones*; the *Robinson* class action omits arbitral claims completely and thereby insolates non-arbitral claims from the reach of the arbitration legislation's mandatory stay. The strategy is still dependent on the existence of a public interest statutory cause of action retaining court access for without one, no claim could be sustained against a party to the arbitration agreement. British Columbia was a good place to test this strategy as the Supreme Court of Canada had already designated s. 172 BCCPA claims as litigation in the public interest retaining court access. The strategy may be riskier in Saskatchewan, Manitoba or any of the Maritime Provinces which lack prior approval.[92]

In contrast to consumer class actions, individual and non-consumer actions have received little help from *Seidel*. The Saskatchewan Consumer Protection Act[93] was held not to demonstrate the legislative intent to preserve access to the courts for a consumer seeking redress in *Zwack v. Pocha*.[94] Importantly, this was not a class action and involved an individual residential construction dispute between a builder and the cottage owner where the owner claimed damages for her losses in the aborted construction project. Justice Schwann of the Saskatchewan Court of Queen's Bench did not find the necessary legislative intent to preserve court access primarily because of the limited definition of those authorized to commence an action – it was not open to any person affected by a consumer transaction and the "public

interest" prosecution of actions was to be done by the director on behalf of the consumer.[95] Although equitable remedies were contemplated in the legislation and sought by the consumer, Justice Schwan found that the claim before him focused on individual damages and served no broader public purpose. The action was stayed.[96]

Similarly, *Seidel* has had little impact on the non-consumer class even when arguably public interest litigation is involved. In *Murphy v. Amway*[97] the Federal Court of Appeal considered the stay of a putative class action brought on behalf of a class of small business "distributors" against Amway Canada alleging breach of the Competition Act[98] including claims of false advertising and illegal pyramid selling. The distribution agreement contained an arbitration clause with a class action waiver. The circumstances mirrored those of typical consumer disputes yet technically fell into the business context. The contract was prepared in advance and presented to the distributor on a "take it or leave it" basis. There was an imbalance of power in the relationship and the individual damage claim was small ($15,000). As to context and purpose, Murphy argued that statutory claims under s. 36 and 55 of the Competition Act were in the public interest and fairness and competition in the Canadian market was of public importance. Unfortunately, Murphy, the representative plaintiff, was the only possible class member identified.[99] Justice Nadon considered only the express language in the Act – erroneously concluding that "The Supreme Court has made it clear that express legislative language in a statute is required before the courts will refuse to give effect to the terms of an arbitration agreement."[100] Finding none, the lower court's stay[101] was upheld. There was nothing sacrosanct about competition law.[102]

In sum, the assessment of legislative intent is susceptible to wide variation, although less so in the consumer class action context. The interpretation of the text, context and purpose of particular legislation may be difficult to predict and capable of manipulation. The willingness of a court to accept the existence of public interest causes of action that retain court access without express language overriding arbitration may decrease over time, even in the consumer class action context. In *Kanitz*, a negative inference was drawn from a failure of post arbitration legislation to expressly subordinate arbitration policy[103] – over time courts may return to this position. Legislative complacency is dangerous as ill placed faith in the Mackinnon process revealed; over time implicit legislative intention may be tougher and tougher to make out. To secure long term access, express legislative language overriding the policy in favor of arbitration may be necessary. Obviously individual remedial amendments would be a cumbersome activity if undertaken on a statute by statute basis; an omnibus approach would be preferable.[104] In the short term, plaintiffs should take a strategic approach to the drafting of consumer class actions in order maximize their chances of surviving defendants' stay motions and retaining access to the courts.

VIII. THE POST WAR CONSUMER CLASS ACTION

Preparing the modern consumer class action presents a more complicated drafting exercise than in the past in order to avoid the application of a mandatory stay in favor of arbitration. The 2013 – 14 cases demonstrate two possible strategies – under the first, the plaintiff attempts to preserve access to the judicial forum for at least one of the claims made and then factually links all other claims to it so that it is unreasonable to separate them. The second

strategy involves preserving access for the entire class action, as plead, by omitting arbitrable claims entirely and framing each claim outside the application of the mandatory stay provisions.

Under the first strategy, a dispute between parties to an arbitration agreement must qualify for a legislative override to retain access to the judicial forum. The pleading should invoke a statutory cause of action with a public interest, protection or safety character. Ideally, the statute expressly subordinates arbitration agreements. Alternatively, the statute will designate a named court for resolution of disputes, authorize equitable remedies, allow a broad range of persons to initiate an action and include a non-waiver of rights and benefits clause in order to fit into the *Seidel* exemption for public interest causes of action. The behavior of the defendant should be assessed against the most general statutory protection available for unfair business practices and unconscionable transactions, as well as the more industry specific legislation regulating behavior such as pay day lending legislation. Under this strategy context and purpose of the legislation can be as important as the express language.

To this statutory claim the plaintiff may join the typical common law contract, tort and equitable claims (such as unjust enrichment and restitution) available on the same facts and request a broad range of equitable relief extending beyond compensation for individual damage. If the statutory cause of action causes at least some part of the class action to proceed to certification hearing the next step involves establishing that severance of other claims and proceeding in multiple forms would be unreasonable. Preventing severance requires connecting or linking arbitral claims with those that retain access to the judicial forum. This can be done through parties or subject matter, overlapping facts and issues. Eligible class members may include plaintiffs not subject to arbitration clauses or some defendants may not have arbitration clauses in their contracts of adhesion.[105] It is incumbent on the plaintiff to establish significant overlap between the facts and issues of the claims and parties which might otherwise be subject to arbitration with those that would not. The goal is presenting all claims and defendants as inextricably linked and unreasonable to sever. Overlapping connections are the key to the first strategy.

In contrast to the first strategy, avoiding overlap and isolating claims from each other is the key to the second strategy. The second strategy focuses on the legislative pre-conditions that must be met to qualify for a mandatory stay. Typically under all provincial arbitration legislation, stays apply only to actions commenced by a party to an arbitration agreement against another party to the agreement, over a matter subject to an arbitration agreement.[106] As demonstrated in *Robinson*, all elements must be present on the facts or the action does not qualify for consideration of a stay. If the litigation is not between parties to an arbitration agreement or the dispute is not a matter subject to arbitration, then a stay is not available. The second strategy uses a combination of non-parties and matters not subject to arbitration to avoid the satisfying all qualifying elements of a stay. In this approach, plaintiffs do not advance all causes of action against all defendants. Parties to arbitration agreements are only sued with respect to matters not subject to arbitration (such as public interest statutory causes of action) and matters subject to arbitration (such as common law claims) are only advanced against non-parties to the arbitration agreement. In this way there is no cross over between claims that could invite a finding that one claim is derivative of another and therefore a matter subject to arbitration under the contractual language. Non-parties are not eligible to seek a stay under arbitration legislation[107] and parties must be sued with respect to a matter subject to arbitration to retain eligibility. One caution to this strategy, as noted by Justice Griffin in *Robinson*, it may be effective at avoiding the

mandatory stay but the viability of individual claims may not survive a motion to strike and may not justify certification or ultimate success in the action.[108]

IX. CONCLUSION

The pre-dispute arbitration clause has proven an effective weapon against consumer class actions over the last decade; the policy in favor of arbitration has been enforced to shut down most class actions involving common law causes of action. Although the Mackinnon process offered a temporary cease fire in the common law provinces allowing decisions about preferable forum to determine enforcement of the arbitration clause, chaos returned following the Supreme Court of Canada's decisions in *Dell Computers v. Union des consommateurs*.

In 2011, an exception for public interest statutory causes of action recognized in *Seidel v. TELUS Communications Inc*. extended a life line to the struggling consumer class action which has been welcomed in most provinces considering post-*Seidel* cases. Under this exception, legislative intent to preserve unfettered access to the judicial forum for public interest statutory causes of action may be revealed through the text, context or purpose of the subject statute. For the most part, courts have found that provincial consumer protection statutes demonstrate the necessary implicit legislative intent to preserve consumer access to the judicial forum, even where explicit reference to arbitration clauses is lacking. Still express language may be necessary to ensure continued access going forward.

In the meantime, consumers can influence the fate of their class actions with strategic approaches. The post-*Seidel* cases of *Young*, *Briones* and *Robinson*, present two alternatives – one emphasizing and relying upon the connections and links between arbitrable and non-arbitrable claims, and the other, isolating arbitrable claims and proceeding with only non-arbitrable claims. Key to both strategies is the characterization of public interest statutory causes of action as matters *not* subject to arbitration and intended to retain access to the judicial forum, even for parties to an arbitration agreement. Even with strategic drafting and the legislative exception for public interest statutory causes of action, the continued survival of consumer class actions is far from certain in this volatile arbitration environment.

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[1] *See e.g.* Young v. National Money Mart [2012] 356 D.L.R. (4h) 346, 2012 ABQB 601, ¶¶ 7-12 (Can.) (describing various versions of the National Money Mart arbitration clause).

[2] *See e.g.* Stephanie Storm, *General Mills Reverses Itself on Consumers' Right to Sue*, N. Y. TIMES, April 20, 2014, http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html?_r=0 (last visited May 12, 2014). General Mills considered changing its terms and conditions to extract agreement to arbitration when downloading coupons or simply visiting websites.

[3] *Id.* The strong public backlash against the General Mills proposal caused it to reverse the position. This is an obvious example of the importance of aggregation and publicity in the consumer environment. Both of which are denied by enforcement of prospective individual arbitration clauses.

[4] Under Canadian provincial arbitration legislation, the court may refuse a stay request if the clause is invalid, void, inoperative or the matter in dispute is not subject to arbitration – specific language varies by province. Arbitration Act, R.S.B.C. 1996, c. 55 (B.C.); Arbitration Act, R.S.A. 2000, c. A-43(Alta.); Arbitration Act, 1992, S.S. 1992, c. A-24.1(Sask.); Arbitration Act, C.C.S.M. c. A-120 (Man.); Arbitration Act, R.S.Y. 2002, c. 8 (Yukon); Arbitration Act, R.S.N.W.T. 1988, c. A-5 (N.W.T.); Arbitration Act,1991, S.O. 1992, c. 17 (ON.); Arbitration Act, S.N.B. 1992, c. A-10.1 (N.B.); Arbitration Act, R.S.N.S. 1989, c.19 (N.S.); Arbitration Act, R.S.P.E.I., 1988, c. A-16 (PEI);

Arbitration Act, R.S.N.L. 1990, c.A-14 (N.L.); Quebec Code of Civil Procedure, R.S.Q. c. C-25, art. 940 – 951.2 (Que.). (provincial arbitration legislation)

[5] *See e.g.* Arbitration Act, 1991, *supra* note 4, § 7(2) (Ont.).

[6] The roots of arbitration policy can be traced to the international commercial context and the UNCITRAL Model Law on International Commercial Arbitration, 1985, *Report of United Nations Commission on International Trade Law on the Work of its Eighteenth Session,* June 3-21, 1985, 40 U.N. GAOR Supp. (No. 17) at 82 to 94, U.N. Doc. A/40/17 (1985); it was embraced for domestic dispute resolution in the 1990's by provincial arbitration legislation, *supra,* note 4. The Supreme Court of Canada confirmed the policy in favor of arbitration in many cases both inside and outside the consumer context including Bisaillon v. Concordia University [2006] 1 S.C.R. 666, 2006 SCC 19 (Can.); Seidel v. TELUS Communications Inc., [2011] 1 S.C.R. 531, 2011 SCC 15; in contrast class actions are considered a procedural vehicle that cannot displace the substantive right to arbitration: *Bisaillon,* ¶¶ 15- 22.

[7] *See e.g.* British Columbia fee waiver: Small Claims Court Rules B.C. Reg. 261/93, r. 20(1); Ontario 15% cost cap: Courts of Justice Act, R.S.O. 1990, c. C43, § 29.

[8] Repeat player refers to the party who uses the arbitrator or arbitration often as opposed to a "one shot" user who uses it only once – some research has found that repeat parties win more often than one-shot users: *See generally* Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RIGHTS & EMPL. POLICY J. 189 (1997); Joshua M. Frank, STACKED DECK: A STATISTICAL ANALYSIS OF FORCED ARBITRATION, Center For Responsible Lending, (May, 2009); *but see* Christopher Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO STATE J. DISP. RESOLUTION 843 (2010) (disputing the impact of the repeat player effect); Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court,* 7 HASTINGS BUS. L. J. 77, 82 (2011) (suggesting that the business dominated aspects of arbitration are no different than those of small claims court).

[9] Goals of class action are economic access to justice for plaintiffs with small claims, behavior modification of defendants and economy of judicial resources by avoiding duplication. *See* Western Canadian Shopping Centres Inc. v. Dutton [2001] 2 S.C.R. 532 at para 28 (Can.); Hollick v. Toronto (City) [2001] 3 S.C.R. 158, 2001 SCC 68 ¶ 15 (Can.). Consumers are frequent users of class actions: Jasminka Kalajdzic, *Consumer (In)Justice: Reflections on Canadian Consumer Class Actions,* 50 CAN. BUS. L.J. 356, 361 (2010), (reporting 219 of 332 class actions outstanding in 2009 were consumer class actions); Gary Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269 , 270-71. 278 (describing policy objectives and early consumer class actions); CRAIG JONES, THE THEORY OF CLASS ACTIONS, 114-16 (2004); RACHAEL MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS A COMPARATIVE PERSPECTIVE, 47-66 (Oxford, 2004).

[10] Ontario, Alberta, Quebec. *See e.g.* Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, §§ 7, 8.

[11] Kanitz v. Rogers Cable Inc. (2002), 58 O.R. (3d) 299, [2002] O.J. No. 665 (Can.).

[12] [2011] 1 S.C.R. 531, 2011 SCC 15 (Can.). Content on the evolution of the law up to and including *Seidel* consolidated from earlier works: Shelley McGill, *The Conflict between Consumer Class Actions and Contractual Arbitration Clauses*, 43(3) 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); Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 36 (2010); Shelley McGill, *Consumer Arbitration after Seidel v. TELUS*, 51 CAN. BUS. L.J. 187 (2014). More detailed discussion of 2013 – 14 National Money Mart cases is forthcoming in Shelley McGill, *This is the Law that National Money Mart Built: One Company's Role in Constructing Canadian Consumer Arbitration Law*, 55 CAN. BUS. L.J. *forthcoming* (2014).

[13] Kanitz v. Rogers Cable Inc. (2002), 58 O.R. (3d) 299, [2002] O.J. No. 665 (Can.).

[14] At the time California cases applied unconscionability to void arbitration clauses, *see e.g.* Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002); Discover Bank v. Superior Court, 30 Cal. Rptr.3d 76 (2005); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir., 2004) . One early Canadian (Ontario) case applied the unconscionability doctrine to nullify an arbitration clause in an employment contract: Huras v. Primerica Financial Services Ltd. (2001) 55 O.R. (3d) 449 (C.A.) (Can.).

[15] *Kanitz,* 58 O.R. at ¶¶ 47-48; McGill (2006) *supra*, note 12.

[16] Ontario, *supra* note 10 (hereinafter OCPA).

[17] *Kanitz,* 58 O.R. at ¶¶ 51-52.

[18] *Supra* note 10, § 8 (proclaimed in force 2005).

[19] *Id.*
[20] 2004 BCSC 136, ¶¶ 22-26.
[21] *Id.;* Arbitration Act, RSBC 1996, c. 55, § 15 (B.C. stay exception applies if arbitration clause is void, inoperative or incapable of being performed).
[22] R.S.C. 1985, c. C-46, § 347.1 (usury offence for interest over 60% per annum).
[23] 2004 BCCA 473, ¶¶ 4, 57 (Mackinnon I).
[24] Sankar v. Bell Mobility 2013 ONSC 6886, ¶¶ 1, 5, 16 (concluding that for costs "excess seems to be the norm in certification hearings" and finding historical average certification cost awards range between $163,000 to $388,728 representing between 59% and 46% of costs sought).
[25] 2007 BCSC 348 (Can.). The first certification hearing was denied based upon lack of common issues among class members without addressing the arbitration stay issue; leave to amend was allowed and a second certification hearing was held during which class proceedings were found to be preferable.
[26] 2009 BCCA 103 (Mackinnon II).
[27] (2005) B.L.R. (4th) 159 (Can.).
[28] (2006) 282 Sask. R. 35(Can.).
[29] Leave denials National Money Mart v. Smith [2006] S.C.C.A. No. 31233 and No. 31538.
[30] R.S.A. 2000, c. F-2, § 16 (Alta.).
[31] Canadian Motor Vehicle Arbitration Plan (CAMVAP), http://www.camvap.ca/arbitration/agreement/ (accessed February 24, 2014).
[32] Darren Thomas, Director of Fair Trading, Service Alberta, Email, February 24, 2014 (on file with author).
[33] Language varies by province: Ontario Arbitration Act 1991, S.O. 1991, c. 17, § 7(2) (exception for arbitration clauses that are invalid).
[34] [2007] 2 SCR 801, 2007 SCC 34 (Can.).
[35] [2007] 2 SCR 921, 2007 SCC 35 (Can.).
[36] Dell Computer Corp. v. Union des consommateurs, 2005 QCCA 570 (Can.); Muroff v. Rogers Wireless Inc., 2006 QCCA196 (Can.).
[37] Dell Computer Corp., v. Union des consommateurs 2006 CanLII 113 (SCC)(Can.); Rogers Wireless Inc. v. Muroff, 2006 CanLII 28123 (SCC)(Can.).
[38] Quebec Consumer Protection Act, c. P.-40.1, § 11.1, in force December 14, 2006; *Dell* argued December 13, 2006, *Rogers* argued December 14, 2006.
[39] *Dell*, SCC 34 at ¶ 4. This created a less sympathetic plaintiff: *McGill (2007), supra* note 12, at 335.
[40] *Id.*, ¶ 48.
[41] Split decision with Madame Justice Deschamps writing the majority on behalf of herself, C.J. McLachlin, Justices Abella, Binnie, Charron and Rothstein. The minority opinion was written by Justice LeBel on behalf of himself and Justices Fish and Bastarache (all three of which were civil law judges disagreeing with the majority common law judges on civil code construction and interpretation).
[42] *Dell*, SCC 34 at ¶¶ 69-75, 84.
[43] *Id.*, ¶ 81. In 2006 the Supreme Court labeled class actions as procedural vehicles incapable of creating a substantive right in Bisaillon v. Concordia University [2006] 1 S.C.R. 666 (Can.). Initially, it had appeared that *Bisaillon* could be distinguished by its labour context and statutory arbitration regime.
[44] *Supra* note 9.
[45] Dell Computer Corp. v. Union des consommateurs 2007 SCC 34, ¶ 122 (Can.) (dissenting opinion).
[46] *Id.*, ¶¶ 205-206; *McGill (2007), supra* note 12, at 346-47.
[47] An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or adhering party and is therefore not in good faith; in particular a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract.
[48] 2008 S.J. No 105, *aff'd* 2010 SKCA 30 (Can.).
[49] 2008 BCSC 710 (Can.).
[50] 2009 BCCA 103(Can.).
[51] 2008 ONCA 746, ¶ 28 (Can.).
[52] [2008] S.C.C.A. No. 535, 302D.L.R. (4h) vii, [2009] 1 S.C.R. xi (Can.).
[53] Ontario Payday Loan Act, 2008, S.O. 2008, c. 9, § 40 (Ont.).

[54] Genevieve Saumier, *Consumer Arbitration in the Evolving Canadian Landscape*, 113 PENN. STATE L. REV. 1203 (2009); Jonnette Watson Hamilton –Watson, *Pre-dispute Consumer Arbitration Clauses: Denying Access to Justice*, 51MCGILL L. J. 693 (2006); McGill (2007), McGill, (2010), *supra* note 12; Myriam Gilles, *Opting Out of Liability: The Forthcoming Near Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).
[55] Manitoba Law Reform Commission, Report #115 (Winnipeg, The Commission, 2008).
[56] [2011] 1 S.C.R. 531, 2011 SCC 15 (Can.).
[57] *Id.*, ¶ 58.
[58] S.B.C. 2004, c. 2 (B.C.).
[59] Seidel v. TELUS Communications Inc., 2009 BCCA 104 (Can.).
[60] Seidel v. TELUS Communications Inc., 2009 CanLII 61381 (Can.).
[61] *Seidel*, SCC 15 at ¶¶ 2, 36.
[62] Zwack v. Pocha, 2012 SKQB 371, ¶¶ 9-12 (*Dell* applies in Saskatchewan).
[63] *Seidel*, SCC 15 at ¶¶ 28, 29.
[64] *Id.*, ¶ 3.
[65] *Id.*, ¶¶ 100 -101.
[66] Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, §§ 171, 172.
[67] *Seidel*, SCC 15 at ¶ 37.
[68] BCCPA, *supra* note 49, § 3.
[69] The minority confined its assessment to the express language of §§ 171,172; a designation of the particular court was insufficient to override the policy in favor of arbitration.
[70] *Seidel*, SCC 15 at ¶ 33.
[71] *Id.*, ¶¶ 25-26.
[72] Both the *Seidel* minority and the U.S. Supreme Court require express wording in the legislative override: *Seidel*, SCC 15 at ¶¶ 140-44; American Express v. Italian Colors 133 S. Ct. 2304 (2013).
[73] *Seidel*, SCC 15 at ¶ 50 (acknowledging the risk of bifurcated proceedings but concluding this is the intention of the B.C. legislature).
[74] R.S.A. 2000, c. F-2, § 13 (Alta.).
[75] R.S.A. 2000, c. U-2, §§ 2, 3 (Alta.).
[76] Young v. National Money Mart Co., 2012 ABQB 601, [2012] 7 B.L.R. (5h) 266 *aff'd* 2013 ABCA 264 (CanLII) *leave to S.C.C. denied* [2014] S.C.C.A. No. 35564, 2014 CanLII 3513(SCC).
[77] Justice Binnie pointed to this provision as an example of legislative intent contemplated *Seidel*, SCC 15 at ¶ 25.
[78] 2013 ABCA 264 (CanLII)
[79] [2014] S.C.C.A. No. 35564, 2014 CanLII 3513 (SCC).
[80] Briones v. National Money Mart Co. [2013] 295 Man. R. (2d) 101, 2013 MBQB 168 (Can.). This case was another criminal interest rate class action.
[81] C.C.S.M. c. C200 (Man.).
[82] C.C.S.M. c. U20 (Man.).
[83] *Briones*, MBQB 168 at ¶¶ 12-15.
[84] *Id.*, ¶ 35.
[85] *Id.*, ¶¶ 40-41.
[86] Arbitration Act, C.C.S.M. c. 120 (Man.).
[87] *Id.*, § 7(5).
[88] *Briones*, MBQB 168 at ¶¶ 62.
[89] Robinson v. National Money Mart Co. [2013] B.C.J. No 1144, 2013 BCSC 967 (Can.).
[90] *Id.*, ¶¶ 58, 68.
[91] *Robinson*, BCSC 967 at ¶¶ 74, 99; Shaw Satellite G.P. v. Pieckenhagen [2011] 337 D.L.R. (4th) 369, 2011 ONSC 4360 ¶ 31(Can.) (a party to an action who is not a party to an arbitration agreement cannot seek a mandatory stay under Ontario arbitration legislation).
[92] Ontario, Quebec and Alberta would also be good hosts to such a strategy as they too have received Supreme Court recognition of statutory public interest causes of action: *Seidel*, SCC 15 at ¶ 25.
[93] S.S. 1996, c. C-30.1 (Sask.).
[94] 2012 SKQB 587 (Can.).

[95] *Id.*, ¶¶ 39-42.
[96] *But see* Kary v. 1147237 Alberta Ltd., 2011 ABPC 178 (refusing to stay a consumer's individual statutory claims of unfair business practices arising in a condominium construction dispute).
[97] [2013] 356 D.L.R. (4th) 738, 2013 FCA 38 (Can/). *See also* TELUS Mobilité v. Comtois, [2012] Q.J. No. 521.
[98] R.S.C. 1985, c. C-34 (Can.).
[99] *Murphy*, ,FCA 38 at ¶¶ 6.
[100] *Id.*, ¶ 60.
[101] Amway v. Murphy, 2011 FC 1341 (Can.).
[102] *Murphy*, FCA 38 at ¶¶ 64 - 66.
[103] *Kanitz*, 58 O.R. at ¶¶ 51-52.
[104] *See* Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361 (2010) (proposing a legislative template).
[105] Shaw Satellite G.P. v. Pieckenhagen [2011] 337 D.L.R. (4th) 369, 2011 ONSC 4360, ¶¶ 44-46 (Can.) (it is reasonable to refuse a partial stay when non-parties are involved).
[106] *Robinson*, BCSC 967at ¶ 99; *see also* Arbitration Act 1991, S.O. 1991, c. 17, § 7 (Ont.).
[107] Shaw Satellite G.P. v. Pieckenhagen [2011] 337 D.L.R. (4th) 369, 2011 ONSC 4360 ¶ 31 (Can.) (citing Smith v. National Money Mart [2008] O. J. No. 2248, ¶¶ 94-95).
[108] *Robinson*, BCSC 967 at ¶¶ 60-62.